



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 189 OF 2016**

**IN THE MATTER OF THE ESTATE OF DISMAS OCHIENG MUHOLO alias OMUHOLO WAMUKOYA (DECEASED)**

**RULING**

1. The application for determination is dated 17<sup>th</sup> April 2019. It seeks that the grant of letters of administration herein be revoked, and a fresh grant be made to the applicant. It also seeks inhibitions with respect to dealings with a property described as Marama/Shibembe/998 pending confirmation, and all consequential orders made after the grant was issued be varied or set aside.
2. The application is brought at the instance of Jackline Auma Oduor and Petro Kusimba Ochieng, who I shall refer to hereafter as the applicants. They aver that the cause as brought related to the estate of two persons, being Dismas Ochieng Muholo and Omuholo Wamukoya, who are son and father, respectively. They aver that Omuholo Wamukoya died on 16<sup>th</sup> June 1966, while Dismas Ochieng Muholo died on 17<sup>th</sup> May 2001. They aver that although the letter from the Chief started the correct position, the administratrix, Rosemary Awino Ochieng, chose to mislead the court in her petition, by creating the impression that Dismas Ochieng Muholo and Omuholo Wamukoya were one and the same person. They state that the late Omuholo Wamukoya was survived by two sons, Dismas Ochieng Muholo and Amwayi Muholo. The applicants are grandchildren of the late Omuholo Wamukoya, who is the registered proprietor of Marama/Shibembe/998, being children of the late Amwayi Muholo and the late Dismas Ochieng Muholo, respectively. They protest that the administratrix had neglected to list them as survivors of the deceased, Omuholo Wamukoya. They accuse the administrator of having obtained the grant on the basis of false statements and of concealing matter from the court.
3. They have attached to their application, a certificate of death for Muholo Wamukoya and that for Dismas Ochieng Muholo. There is also the letter from the Chief of Marama South Location, dated 3<sup>rd</sup> March 2016, showing that Omuholo Wamukoya, the owner of Marama/Shibembe/998, died intestate, and was survived by Dismas Ochieng Muholo and Omuholo Wamukoya. A certificate of official search, dated 31<sup>st</sup> January 2013, shows that Marama/Shibembe/998 was registered in the name of Omuholo Wamukoya on 30<sup>th</sup> September 1966. A letter from the Chief of Marama South Location, dated 26<sup>th</sup> March 2019, indicates that the applicants herein were left out of the succession process.
4. The administratrix has responded to the revocation vide her affidavit sworn on 8<sup>th</sup> June 2021. She avers that the applicants had provided a false postal address, and that the certificate of death for Muholo Wamukoya was suspect, as the issuance of burial permits had not started when that person died, and there were no written family records. She avers that it was the Chief who advised that she should refer to Dismas Ochieng Muholo and Muholo Wamukoya as one person. She avers that Muholo Wamukoya died intestate and left two sons: Dismas Ochieng Wamukoya and Mika Wamwayi Muholo. She further points out some things that she says are errors on the affidavit of the applicants. One, that the two applicants were not grandchildren of Muholo Wamukoya, since one was an uncle to the other. Two, that Jackline Auma Oduor could not be a granddaughter of both Muholo Wamukoya and Wamwayi Muholo. She further avers that Wamwayi Muholo had been survived by other individuals, apart from Jackline Auma Oduor, that is two daughters, Mary Adhiambo and Phylis Akinyi, and Emilly Asiko, a granddaughter. She asserts that she followed the right procedure in obtaining representation to the estate of the deceased. She says that the two applicants were catered for as beneficiaries, through other beneficiaries, that is to say Petro Okusimba through Benjamin Yamo, and Jackline Auma through William Oduor Ratolo. She asserts that registration of the assets of the estate in her name as administrator did not lead to intermeddling with the estate. She avers that the 5.5 acres of Marama/Shibembe/998 ought to be shared out between two beneficiaries, being Dismas Ochieng Muholo and Mika Wamwayi Muholo, taking 3 acres and 2.5 acres, respectively. She goes on to aver that Dismas Ochieng Muholo was entitled to other pieces of land, being Marama/Shibembe/890 and Marama/Shibembe/1005, where he should have 2.6 acres and 1 acre, respectively, so that his overall entitlement ought to be 6.6 acres. She further avers that Dismas Ochieng Muholo had married three wives, and he had six sons, including Petro Okusimba. She further avers that Petro Okusimba had already sold portions of Marama/Shibembe/890, 998 and 1005 to individuals that she has named.
5. The application was disposed of by way of oral evidence. The first to testify was Petro Okusimba Ochieng. He stated that Omuholo Wamukoya and Dismas Ochieng Muholo were two different persons, one was his father and the other his grandfather. He stated that the cause ought to be in the estate of Omuholo Wamukoya. He said that Omuholo Wamukoya was the owner of the land, and not Dismas Muholo. He asserted that his name had been removed from the names of the beneficiaries. He asserted that it was the estate of his grandfather that he wanted to be shared out. He denied selling any portion of the estate. He said his grandfather had shared out the land, and after his father died the land was shared out again. He stated that his name was not in the certificate of confirmation of grant.

6. The administratrix testified next. She said Omuholo Wamukoya was the father of Dismas Ochieng Muholo, and that Petro Okusimba was a son of Dismas Ochieng Muholo. She said that Jackline Auma was not closely related to them. She asserted that she stood by what was contained in her papers. She stated that Petro had been allocated land which he had sold to Benjamin. During cross-examination, she clarified that she was a widow of Dismas Ochieng Muholo, the son of Omuholo Wamukoya. She stated that Marama/Shibembe/998 was registered in the name of Omuholo Wamukoya. She explained that she obtained representation to the estate after she presented a death certificate for Dismas Ochieng Muholo, and that the court accepted the certificate. She conceded that she brought the certificate in the cause in the matter of the estate of Omuholo Wamukoya. She said that the persons that she listed in her petition were herself, Moses and William, and she did not include Petro Okusimba. He protested, and he was included, and when he came to court he consented to the distribution. At confirmation, Benjamin Yamo Ademba was allocated what should have gone to Petro, having bought the same from him.

7. From the material that has been placed on record, it is not in dispute that the property that was placed for distribution as comprising the estate of the deceased was Marama/Shibembe/998. The certificate of official search on Marama/Shibembe/998, dated 31<sup>st</sup> January 2013, shows that that property was registered on 30<sup>th</sup> September 1966, in the name of Omuholo Wamukoya. That would then mean that as at 2013 the property was still in the name of Omuholo Wamukoya.

8. The cause herein was initiated in the estate of Dismas Ochieng Muholo alias Omuholo Wamukoya. An “alias” refers to another or alternative or false or assumed name of a person. See *Concise Oxford English Dictionary*, Twelfth Edition, Oxford University Press, 2011. It is now more conventional to use “also known as” instead of “alias.” It has emerged from these proceedings that Omuholo Wamukoya and Dismas Ochieng Muholo were in fact two different persons, in fact a father and a son, the father being Omuholo Wamukoya and the son Dismas Ochieng Muholo. Clearly Omuholo Wamukoya was not the alias or other name for Dismas Ochieng Wamukoya. The cause, therefore, was initiated in the names of two different individuals.

9. The first name in the titulement is that of Dismas Ochieng Wamukoya, and it was initiated in this cause by his widow, the administratrix herein, who should be the daughter-in-law of Omuholo Wamukoya. That would suggest that she was bringing the matter with a view to distribute the estate of her late husband. However, she describes herself as bringing matter as daughter-in-law. She was not the daughter-in-law of Dismas Ochieng Muholo, but of Omuholo Wamukoya, for Dismas Ochieng Muholo was her husband, being the son of Omuholo Wamukoya.

10. The property in question, Marama/Shibembe/998, is in the name of Omuholo Wamukoya, and, therefore, the cause should have been brought in the name of Omuholo Wamukoya, and the name of Dismas Ochieng Muholo should not have been featured in the matter purporting to be the other name of Omuholo Wamukoya. Marama/Shibembe/998 does not belong to the estate of Dismas Ochieng Muholo, for as long it is still registered in the name of Omuholo Wamukoya. It forms part of the estate of Omuholo Wamukoya, and it cannot be distributed in the estate of Dismas Ochieng Muholo, before the estate of Omuholo Wamukoya is administered and distributed, and the share due to the estate of Dismas Ochieng Muholo devolved and transmitted to that estate.

11. It has emerged that the late Omuholo Wamukoya had another son, apart from Dismas Ochieng Muholo, known as Mika Amwayi Muholo. Mika Amwayi Muholo had children. The administratrix identified them as Mary Adhiambo and Philis Akinyi. Jackline Auma Oduor and Emily Asiko are identified as his grandchildren, but their fathers or mothers are not identified. Dismas Ochieng Muholo had a large family, of three wives, who begat him six sons, the daughters were not disclosed. When the administratrix sought representation, she only disclosed herself and a grandson, Moses Ochieng Omburo, and did not reveal the existence of the other survivors of Omuholo Wamukoya. The confirmation process featured just the two, the administratrix and Moses Ochieng Omburo, the other survivors were not disclosed. It would appear that Mika Amwayi did not have male survivors, and it would appear that the cause herein was initiated in a crafty manner in a scheme to exclude the family of the said Mika Amwayi Muholo, by pretending that Omuholo Wamukoya was also the person known as Dismas Ochieng Muholo, because there were no male heirs in the house of Mika Amwayi Muholo.

12. The law relating to initiation of succession causes requires disclosure of all members of the household of the deceased, whether spouses, sons, daughters, grandsons and granddaughters. That comes out very clearly in section 51 of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 7 of the Probate and Administration Rules. The property sought to be distributed, Marama/Shibembe/998, was in the estate of Omuholo Wamukoya, and the persons to be disclosed should have been his wives, if they were still alive, and his children, if they were alive. In the event of both his wives and children being dead, then the survivors of the children, the grandchildren should have been disclosed. Omuholo Wamukoya was said to have had two sons, Dismas Ochieng Muholo and Mika Amwayi Muholo. It would appear that they were all dead, as at the time the cause was initiated, it was not disclosed when they died. Since they were both dead, then the persons who should have been disclosed should have been their survivors, that is to say their children, and if their children were dead then the children of their children. Dismas Ochieng Muholo had six sons, none of them were disclosed. His widow only disclosed herself and a grandson. I believe that Dismas Ochieng Muholo must have had daughters from his three wives, none of them were disclosed. The administratrix admits that two daughters of Mika Amwayi Muholo survived him, and there were also granddaughters, none of them were disclosed as survivors of Omuholo Wamukoya from his son, Mika Amwayi Muholo.

13. At confirmation of grant, the proviso to section 71 of the Law of Succession Act, and Rule 40(4) of the Probate and Administration Rules require that all the persons beneficially entitled to a share of the estate ought to be ascertained and their shares ascertained also. That entails setting out all the members of the household of the deceased owner of the property sought to be distributed, and other persons who may be beneficially interested in the estate, such as creditors; and it also entails showing how each one of these persons would benefit from the estate. If some of them would not be taking a share in the estate, it ought to be explained why, and they ought, themselves, to execute documents to show that they have consented not to take shares, or, alternatively, they should come to court and state that before the Judge. That did not happen. The administratrix listed herself and Moses Omburo as the sole survivors of the deceased, and listed individuals who were described as liabilities. Survivors of the deceased from both houses were suppressed.

14. I need not dwell too much on this matter, for it is very clear that the cause was initiated in a fraudulent and deceitful manner, and distribution was done in an equally opaque and fraudulent manner. The court was misled. Material was concealed from the court. Information was deliberately distorted to hoodwink the court into believing that the owner of the property and his son were one and the same person, so that the property of the deceased father would pass to the survivors of the son as the property of the son, in order to disinherit the family of the other son. Secondly, only a section of the family of the son, who was to benefit, was disclosed and involved in the process.

15. A grant of representation is revoked on the grounds set out in section 76 of the Law of Succession Act. One, where the process of obtaining the grant was defective or done in a fraudulent manner. Two, where the administration of the estate failed, due to neglect to obtain confirmation of the grant or to exercise diligence in administration of the estate or to render accounts. Three, where the grant has become useless or inoperative, either because the sole administrator has died or has become infirm or has been adjudged bankrupt. The grounds upon which the applicants seek revocation appears to be the first one, that the process of obtaining representation was defective or fraudulent. There was deceit and fraud in this case.

16. The orders that I shall, therefore, make, to dispose of the application, dated 17<sup>th</sup> April 2021, are as follows:

- (a) That I hereby revoke the grant that was made to the administratrix herein on the 28<sup>th</sup> June 2016;**
- (b) That as a consequence of (a), above, I hereby set aside the orders that were made on 17<sup>th</sup> October 2017, confirming the grant revoked above, and I cancel the certificate of confirmation of grant generated from the orders of 17<sup>th</sup> October 2017 on 8<sup>th</sup> November 2017;**
- (c) That as a consequence of (b), above, all or any transactions that might have been carried out on the basis of the grant revoked in (a), above, or the certificate of confirmation of grant cancelled in (b), above, are hereby nullified, and the Land Registrar is hereby directed to cancel registrations, transfers or entries made on the basis of the said two documents;**
- (d) That I declare that the property that is sought to be distributed through this succession cause, Marama/Shibembe/998, is registered in the name of Omuholo Wamukoya, and this cause shall, henceforth be in the matter of and limited to the estate of the late Omuholo Wamukoya;**
- (e) That from now henceforth, the titulement of the cause herein shall exclude the name of Dismas Ochieng Muholo;**
- (f) That fresh administrators, two in number, excluding Rosemary Awino Ochieng, shall be appointed from the survivors of the late Omuholo Wamukoya from the families of his late sons, Dismas Ochieng Muholo and Mika Amwayi Muholo, one to represent the family of each son;**
- (g) That the matter shall be mentioned, on a date to be given at the delivery of the ruling, for appointment of administrators;**
- (h) That each party shall bear their own costs; and**
- (i) That any party aggrieved by these orders has twenty-eight days to move the Court of Appeal appropriately.**

17. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4<sup>th</sup> DAY OF February 2022**

**W. MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Mr. Wangatia, instructed by K. Wangatia Advocates, for the applicants.**

**Rosemary Awino Ochieng, in person.**