



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 375 OF 2008

IN THE MATTER OF THE ESTATE OF BATHELMUMAYO ODALI WATIABILA (DECEASED)

JUDGMENT

1. A letter from the Chief of West Maragoli Location, dated 25th July 2007, indicates that the deceased herein, Bathelumayo Watiabala died in 1967. He was said to have been survived by only one son called Joash Atiavira.
2. Representation to the estate was sought in this cause by Joash Watiara, in his capacity as son of the deceased, through a petition lodged in Kakamega HCSC No. 613 of 2007 on 31st October 2007. He listed the survivors of the deceased as himself and two daughters-in-law, being Elisi Sagala Odali and Ezina Buluku Odali (deceased). He expressed the deceased to have had died possessed of a property known as North Maragoli/Kisatiru/690. The grant was published in the *Kenya Gazette* of 21st September 2007 as Gazette Notice No. 9082. Letters of administration intestate were made to the petitioner on 5th February 2008 and a grant was issued to him on 24th April 2008. The administrator died on 17th October 2007, and he was substituted by his son, Francis Asutsa Sagala, as administrator, by orders made on 29th September 2010, and a grant was issued to the son on 14th November 2012.
3. Other proceedings were initiated in Kakamega HCSC No. 375 of 2008. These were based on a letter from the Chief of West Maragoli Location, dated 2nd December 2008, which identified the deceased as Bathelumayo Odali Watiabali. He was expressed to have owned a property known as North Maragoli/Kisatiru/690, which after a land dispute had been awarded, Alima Mmochi Amisii. The Chief does not mention the relationship between the two, but he indicates that the said Alima Mmochi Amisi had since died. The two are said to have been survived by three sons, being Mohamed Amisi Tabwa, Kombo Hamisi Tabwa and Yakhaya Hamisi Tabwa., it is proposed that representation be sought by Mohamed Amisi Twabwa.
4. Representation was sought in the cause by the said Mohamed Amisi Tabwa, through a petition lodged at the registry on 11th August 2008. He expressed the deceased to have had died in 1976. He describes himself as a grandson of the deceased. he listed eight individuals as the survivors of the deceased, namely Joah Atiabala (son, deceased), Ezina Buluku Odali (daughter-in-law, deceased), Elisi Sagalala Odali (daughter-in-law), Alima Mmochi Amisi (niece, deceased), Ayub Agala Vulugu (grandson), Mohamed Hamisi Tabwa (grandson), Kombo Hamisi Tabwa (grandson) and Yakhaya Hamisi Tabwa (grandson). The deceased was also said to have had died possessed of North Maragoli/Kisatiru/680. letters of administration intestate were made to the petitioner on 11th June 2009, and a grant was duly issued dated 12th June 2009.
5. The administrator thereafter brought a summons dated 18th December 2008 seeking confirmation of his grant. he stated that the deceased had been survived by a child known as Alima Mmochi Amisi who was also deceased. her children were identified as Mohamed Amisi Tabwa, Kombo Hamisi Tabwa and Yakhaya Hamisi Tabwa. It was proposed that North Maragoli/Kisatiru/680, be shared out equally between the three. The grant was confirmed on 17th February 2010 in the terms proposed and a certificate of confirmation in those terms issued on 3rd March 2010. A certificate of official search on record dated 23rd March 2010 indicates that the land was subsequently registered in the names of Mohamed Amisi Tabwa and Kombo Hamisi Tabwa in equal shares.
6. On 24th March 2010 a summons was lodged in this cause, dated 24th March 2010, seeking revocation of the grant made to Mohamed Amisi Tabwa. It was brought at the instance of Francis Asutsa Sagala, the administrator in Kakamega HCSC No. 613 of 2007, and Elisi Kinavodoli Sagala. He described himself as a grandson of the deceased on account of being a child of a son of the deceased, the late Joash Atiavira. He described his co-applicant, Elisi, as a daughter-in-law of the deceased on account her being a widow of one of the sons of the deceased. He said that they were surprised when the administrator herein came to the property, North Maragoli/Kisatiru/690, accompanied by a surveyor and government functionaries with a view to have it subdivided. He described the administrator as unrelated to the deceased, and not a grandson of the deceased as he had alleged. He asserted that for that reason the administrator was not entitled to apply for representation, given that Kakamega HCSC No. 613 of 2007 had already been filed. He described it a fraud. He averred that after that his mother, Elisi, lodged a caution against the title on 23rd March 2010. He urged that the registration of the administrator and his brothers as proprietors of the subject property be cancelled and the property reverted to its original owner, the deceased.

7. It is not clear from the record whether the administrator filed any response to the application, as my perusal of the record before me has not yielded any replying affidavit nor grounds of opposition by him.
8. When the revocation application came up for hearing on 29th March 2010, the parties recorded a consent, whereby this cause and that in Kakamega HCSC No. 613 of 2007 were put together, the grant made on 12th June 2009 in the instant cause was revoked and the certificate of confirmation of grant dated 17th February 2010 recalled and revoked and the ownership of North Maragoli/Kisatiru/690 restored to its original owner the deceased herein.
9. Directions were given on 18th May 2011 that the issue relating to who the actual survivors of the deceased were to be determined by way of *viva voce* evidence. To facilitate that hearing, the parties herein filed various witness statements of the persons that they proposed to call as witnesses at the revocation hearing.
10. The oral hearing commenced on 19th March 2015. The first on the stand was Mohamed Amisi Tabwa. He stated that he knew the deceased. The deceased had been registered as proprietor of North Maragoli/Kisatiru/690 which previously, before land adjudication belonged to a person he described as Lomera. When the adjudication exercise began, the deceased had the property adjudicated in his name. He stated that the deceased had been given his own land by his own father elsewhere. He testified that the late Lomera and some of his people were buried on North Maragoli/Kisatiru/690 because it belonged to them. He said that the late Lomera had three parcels of land, being North Maragoli/Kisatiru/690 and two others at Madegwa. The said late Lomera had five daughters, which the witness named as Susan Kiberenge, Leba Gunyani, Rebecca Kavita, Alima Moji and Rebecca Lukhayi. He testified that Susan was given a plot at Madegwa, while his mother, Alima Moji was given North Maragoli/Kisatiru/690. He stated that North Maragoli/Kisatiru/690 was occupied by the children of the deceased forcefully. He said that the land did not belong to the estate even though it was in his name, he said that the children of the deceased had land elsewhere. He said that Lena Buluku, a widow of one of the late sons of the deceased known as Andrea Buluku, had inherited a piece of land known as North Maragoli/Kisatiru/116. Zebedayo Sagala Odari, a son of the deceased who was also deceased, was said to own North Maragoli/Kisatiru/585. He was said to be buried on the said parcel of land. Another son of the deceased, Joash Atiavira, was said to own North Maragoli/Kisatiru/586, and was buried there. He testified that although he had given the three sons each a parcel of land, he left North Maragoli/Kisatiru/690 unallocated. He asserted that the land belonged to his mother because it had been her father, Lomera, his grandfather, who owned it. He said that his family sued that of the deceased in in Land Case No. 7 of 2005 at the land tribunal at Vihiga, and the tribunal ruled in his family's favour. He stated that there were judicial review proceedings on the decision of the tribunal but he did not what the outcome of those proceedings was.
11. During cross-examination, he mentioned that his grandfather Lomera and his mother were buried on North Maragoli/Kisatiru/690. He stated that when he petitioned for representation he did not attach a copy of death certificate as he had none, but he had a letter from the Chief. He stated that he was alive when the land adjudication exercise was being undertaken in 1970. He said that the deceased's children were Andrea Buluku, Sagala, Joash Otiago, Govi and a daughter whose name he could not remember. He mentioned that the deceased died in the 1940s, while he was born in 1953. He said that the deceased North Maragoli/Kisatiru/690 to be registered in his name instead of being registered in the name of his mother. He said his mother trusted the deceased and did not think that she could be defrauded. He testified that it was Joash Atiavira who had initiated the judicial review proceedings in Kakamega HCJR No. 81 of 2005, as well as the succession cause in Kakamega HCSC No. 613 of 2007. He said that he was not aware of the outcome of the judicial review proceedings. He stated that his mother never utilized North Maragoli/Kisatiru/690, but knew that the deceased was taking care of it. He said that the petitioner in HCSC No. 613 of 2007 never informed him that he had initiated the cause, even though he had already won the case at the tribunal against him. He said that he was not aware of the other lands registered in the names of the Lomera children, and that he did not know their registration details.
12. The next at the witness stand was Haggai Asena Liroyo. He was retired Chief for west Maragoli Location. He said he knew both parties as they all came from within the area where he formerly exercised jurisdiction as a Chief. He also knew about the disputed land, North Maragoli/Kisatiru/690, which he said was registered in the name of the deceased. He confirmed that he was the one who had given a letter to Mohamed Amisi Tabwa to imitate the succession proceedings. That was after the tribunal case was resolved in favour of his mother, Alima. He stated that according to the tribunal proceedings North Maragoli/Kisatiru/690 was held by the deceased in trust for the father of Alima. He confirmed that he wrote another letter to confirm that Joash Atiavira was the only surviving child of the deceased. He stated that there were structures on the ground on North Maragoli/Kisatiru/690. He said Joash had land at Madegwa, within the vicinity, where he was buried. He said he knew that Joash had two wives. He said that he also knew Elisi Sagara Odari and Francs, both of whom resided within Madegwa village.
13. At cross-examination, he stated that he was not aware that the decision of the Vihiga land tribunal on North Maragoli/Kisatiru/690 had been annulled. When shown a copy of the judgement in Kakamega HCJR No. 81 of 2005, he confirmed that the High Court had annulled the decision in Land Case No. 7 of 2005. When shown the adjudication documents he confirmed that the property North Maragoli/Kisatiru/690 had been demarcated and registered in the name of the deceased, without any endorsement that he held the same for anybody else. He said that he knew that the deceased had three sons, known as Joash, Sagara and Buluku. He said that he knew that the deceased and Mohamed Tabwa's mother were related but he could not tell the exact nature of the relationship. He confirmed that it was the families of Joash, Sagara and Buluku, who were on hand, litigating with the family of Mohamed Tabwa's mother. He could not say whether or not Alima used the land in question.
14. The next on the witness stand was Simon Masia Endahi. He said Atiavira was his neighbour. He also used to hear of the deceased. He said that he knew the disputed land. It was not built, but it was under cultivation. He said that Lomera had two parcels of land, and not three,. He said that one parcel was being utilized by his elder daughter, while the other parcel was being utilized by another of his daughters.
15. The case for Francis Asutsa Sagala opened on 1st November 2016. He said that the deceased was his grandfather. He listed the children of the deceased as Andrew Buluku, Leba Irinyi, Zebedayo Sagala, Sarah Mwenesi, Esther, Norah Andaye and Joash. He testified that all the children of the deceased were themselves dead. He said that the deceased was the registered proprietor of North Maragoli/Kisatiru/690 since 1970. He explained that the deceased had four parcels of land. He gave land to his three sons Andrew, Zebedayo and Joash. He said that the three parcels given to the three were different from North Maragoli/Kisatiru/690. He described himself as a son of Zebedayo, and said that the widow of Joash, Dorica Kaleha, was still alive. He said that he did not know Mohamed Amisi, adding that he was not related to the

deceased. He said that the deceased had only one brother, called Khavai, but was unaware whether he had a sister. He also said that he did not know about Elina Mmochi Amisi, although he was aware that she was party to the case they had at the land tribunal at Vihiga. He said that the decision by the land tribunal at Vihiga was nullified by the High Court.

16. At cross-examination, he stated the late Joash was his uncle. He said his mother was called Elisi Sagala. He confirmed that his mother was party to the tribunal proceedings. He said he did not know why his mother did not testify at the tribunal. He asserted that he did not know Lomera, and that the Lomera was not related to the deceased. He stated that the deceased had four parcels of land, he gave out three to his sons and retained North Maragoli/Kisatiru/690 to himself. He said that the deceased lived on North Maragoli/Kisatiru/690 before he moved elsewhere. He said that he died in 1967 before the land was registered in his name in 1970.

17. Seth Ambemo Kanyanyi followed. He said that he knew the deceased, adding that he had one brother called Govedi. He also stated that the deceased had three sons. He said he did not know about Lomera, asserting that he was not a brother of the deceased. He said North Maragoli/Kisatiru/690, was being utilized by the grandchildren of the deceased. He said that he knew Mohamed Amisi Tabwa, who he described as a sheikh at a mosque at Chavakali. He said that Mohamed was not related to the deceased, saying that he had no relatives in the area. He said that he did not know the woman said to be the mother of Mohamed. During cross-examination, he said that he knew the deceased well, saying that he had three sons, whose names he gave, and four daughters. He said he was aware that the deceased had other parcels of land which he gave to his sons and retained North Maragoli/Kisatiru/690. He said that no one had built on North Maragoli/Kisatiru/690 but the deceased's grandchildren were utilizing the land. He said that Lomera was not buried on North Maragoli/Kisatiru/690. He said that he did not testify at the tribunal, and he did not know what transpired there. He said he did not know Mohamed's family but added that Mohamed had land near the mosque. He said he did not know how he got the land.

18. Dorica Kaleha Atiavira testified next. She testified that the deceased was her father-in-law, being the father of her late husband Joash. She was married into the family in 1965 that was before the deceased passed on in 1967. She said that the deceased had seven children being three sons and four daughters. She testified that the deceased was buried on the land belonging to his last born son. She asserted that North Maragoli/Kisatiru/690 belonged to the deceased. She said that she did not know Mohamed's mother. She said that the deceased's brother was called Govedi. She added that the land was utilized by the deceased's grandchildren. She said that she did not know Lomera, nor Alima. She said it was not true that Lomera was buried on North Maragoli/Kisatiru/690. She said the land was not built on.

19. At the close of the oral hearing, the parties were directed to file written submissions. There has been compliance. Francis Asutsa Sagala's written submissions are dated 0th December 2018, and were filed in court on 10th December 2018. Mohamed Amisi Tabwa's written submissions are dated 17th December 2018 and were filed in court on even date. I have perused through them and noted the arguments advanced in them.

20. There is one issue for determination, which was framed by Kimaru J when he gave directions on 18th May 2011 in the following terms:

“Directions are hereby issued that the issue regarding who the beneficiaries of the estate of the deceased shall be determined by the parties adducing viva voce evidence ...”

21. The only matter for me to determine is who the survivors of the deceased person are, and not who is entitled to North Maragoli/Kisatiru/690. The evidence was led by both parties was largely geared to demonstrating who was entitled to the land in question, nevertheless some evidence did come as to who the survivors of the deceased were.

22. The deceased herein died before the Law of Succession Act, Cap 160, Laws of Kenya, came into force in 1981. The family of the deceased say he died in 1967, while Mohamed claims he died in 1976. I would go by the family of the deceased and take it that he died in 1967. According to section 2(1) of the Law of Succession Act, the dispositive provisions of the statute do not apply to the estate of a person who died before the Act came into force on 1st July 1981. That would mean that it should govern distribution of the estate of the deceased herein. However, section 2(2) applies Part VII of the Law of Succession Act, which governs administration of estates, to all estates whether the deceased died before or after 1st July 1981.

23. The deceased died intestate. Where intestacy occurs section 51(2) of the Law of Succession Act sets out the process for applying for simple administration regardless of whether the deceased died before or after 1st July 1981. The provision states:

“51. Application for grant (1) every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner. (2) Every application shall include information as to— (a) the full names of the deceased; (b) the date and place of his death; (c) his last known place of residence; (d) the relationship (if any) of the applicant to the deceased; (e) whether or not the deceased left a valid will; (f) the present addresses of any executors appointed by any such valid will; (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased; (h) a full inventory of all the assets and liabilities of the deceased; and (i) such other matters as may be prescribed.”

24. The language of the provision is quite clear, especially at paragraph (g) the persons to be disclosed in the application are the immediate survivors of the decease, that is to say surviving spouses, children, parents, siblings and children of any siblings who are dead. That would mean that the person entitled should be immediate family members. Section 66 of the Law of Succession Act is also relevant, the persons with priority to administration would also be immediate family members as listed in section 51(2)(g), in that order.

25. The evidence that has come out is that the deceased was related to Francis Asutsa Sagala, and that he was not related in any way to Mohamed Amisi Tabwa. Going by the provisions of section 51(2) (g) of the Law of Succession Act, it is the members of the family of Francis Asutsa Sagala who ought to have been listed in the petition as they are the immediate family of the deceased. The family of Mohamed was a stranger to the estate and ought not have been listed as survivors. The person entitled to administer the estate would also be

the persons from the family of Francis as per the priority listed in section 66 of the Law of Succession Act or as the family itself may choose. Members of the family of Mohamed would have no entitlement at all to administration of the estate of the deceased. The contest therefore on administration of the estate of the deceased as between the family of Francis and that of Mohamed should not arise at all.

26. There is no doubt at all that the deceased is the registered proprietor of North Maragoli/Kisatiru/690. The family of Mohamed claim the land. They say it is ancestral land that the deceased held in trust for them. Their claim to the land is not on the basis that they are entitled to it by inheritance, but rather that it accrues to them on account of the alleged trust. Their claim does not elevate to the status of survivors of the deceased person, it does not entitle them to seek representation of the estate over the immediate family of the deceased, neither does it give them a claim to the estate greater than that of the survivors of the deceased. They can only claim as creditors. Under section 66 of the Law of Succession Act, creditors rank at the bottom in terms of priority to administration or representation.

27. It should be made clear that non-survivors of a deceased person or non-members of the family of a deceased person who claim a stake in land registered in the name of a deceased ought not turn the succession into a suit for determination of a land dispute between them and the family of the deceased. The proper forum for that is that the Environment and Land Court. The Constitution has divested the High Court of that jurisdiction and vested it in the Environment and Land Court, by virtue of Articles 162(2) and 165(5) of the Constitution. Mohamed and his family are better off litigating ---over their rights over North Maragoli/Kisatiru/690 as against the estate in a suit properly commenced under the Environment and Land Court.

28. I have digress. I am tasked with determining who the survivors of the deceased were. The deceased is said to have had seven children, three sons and four daughters. The sons were named as Andrew Buluku, Zebedayo Sagala and Joash Atiavira. The daughters were identified as Leba Irinyi, Sarah Mwenesi, Norah Andayu and Esther. All the sons are dead. The status of the daughters was not clearly brought out, save that they did not appear to stake a claim in the estate. The survivors of the deceased should the children or families of the three late sons of the deceased. I am mindful of the fact that the deceased died before the Law of Succession Act came into force in 1981 and the law on distribution to apply to his estate is customary law and not the provisions of the Act. It would appear that the family as settled on Francis as administrator.

29. The orders that I am persuaded to make in the circumstances are as follows-

- (a) That I hereby declare that the survivors of the deceased herein are the surviving family members of his three sons - Andrew Buluku, Zebedayo Sagala and Joash Atiavira;**
- (b) That I hereby declare that these are the persons entitled to a share in North Maragoli/Kisatiru/690 and any other asset that shall be proved to belong to the deceased;**
- (c) That to move this matter forward I order that this cause and that in Kakamega HCSC No. 613 of 2007 are hereby consolidated, with the instant cause being the lead file;**
- (d) That I hereby appoint Francis Asutsa Sagala administrator of the estate of the deceased herein;**
- (e) That that a grant of letters of administration intestate shall issue to him accordingly;**
- (f) That the administrator appointed in (d) above shall move within thirty (30) days to obtain confirmation to his grant wherein he shall propose distribution of the estate herein to all the persons referred to in (a) above;**
- (g) That any person not satisfied with the distribution proposed in the application filed under (f) above shall be at liberty to file and serve an affidavit of protest, stating their case and proposing an alternative distribution;**
- (h) That the matter shall be mentioned after thirty (30) days to confirm filing of the confirmation application;**
- (i) That the mention date shall be given in open court at the delivery of this ruling;**
- (j) That in the meantime *status quo* shall be maintained until after confirmation of the grant herein, or further or other orders of the court;**
- (k) That each party shall bear their own costs; and**
- (l) That any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th. DAY OF June 2019

W. MUSYOKA

JUDGE