In re Estate of Manase Otieno Eshitubi (Deceased) (Succession Cause 105 of 2003) [2025] KEHC 478 (KLR) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE 105 OF 2003

S MBUNGI, J

JANUARY 27, 2025

IN THE MATTER OF THE ESTATE OF MANASE OTIENO ESHITUBI (DECEASED)

IN THE MATTER OF

WYCLIFFE W. OTIENO ..... 1ST ADMINISTRATOR

FESTO A. OTIENO ..... 2ND ADMINISTRATOR

ISMAEL O. OTIENO ..... 3RD ADMINISTRATOR

JOHNSTONE N. OTIENO ..... 4TH ADMINISTRATOR

JOHN NAMAI OTIENO ..... 5TH ADMINISTRATOR

RULING

1. The applicants filed a motion dated 16.09.2024 under Certificate of urgency seeking the following orders:

    i. Spent.

    ii. Spent.

    iii. That the honorable court be pleased to set aside, discharge and /or review the orders issued on the 30.07.2024 in its entirety.

    iv. That costs be provided for.

2. The application was supported by an affidavit sworn by the 4th administrator and premised on the following grounds:

    a. That the 2nd and 5th administrators have obtained an ex-parte order dated 30th July 2024 seeking to compel the land registrar and Kakamega land surveyor to revisit the parcel of land known as Marama/Lunza/247 to re-survey the said land parcel.

b. That the said Court order was obtained in a clandestine manner without the involvement and/or participation of the 1st, 3rd and 4th administrators herein.

c. That a survey of the land in question being Marama/Lunza/247 was already conducted sometime on the 25/07/2018 and a report compiled in that regard.

d. That the Court order issued by this Honourable Court on the 30/07/2024 was obtained in an irregular manner and in a bid to alter the already established position on the ground with respect to land parcel Marama/Lunza/247.

e. That there is also a real and imminent risk that if the Court orders issued on 30/07/2024 are implemented, then there stands to be a breach of peace among the administrators herein and their families seeing that the 2nd and 5th administrators are using judicial process to alter the status quo currently on the ground.

f. That the 1st, 3rd and 4th administrators will essentially be condemned unheard seeing that they were never granted a chance to put in their response with respect to the purported application giving rise to the impugned Order.

3. The respondents filed a replying affidavit stating that the application was frivolous and vexatious and designed to delay justice in this matter.

4. The respondents averred that despite being ordered by the court to complete transmission within 6 months after confirmation, the applicants herein became extremely hostile to have the estate partitioned, claiming that they had filed an appeal which they came to realize was untrue.

5. The respondent states that after obtaining consent from the beneficiaries, he engaged his co-administrators for purposes of engaging a surveyor, which request was again turned down and he had to bear the costs of the exercise. It was then that the court orders were obtained and The court directed that the OCS Butere police station provide security during the survey exercise.

6. The respondent states that the applicants chased away the surveyors and he has had to incur survey costs thrice due to the blatant disobedience of court orders by the applicants and prays that he be reimbursed the costs of Kshs. 122,000/- by the applicants, which has been spent on the exercise so far.

7. The respondent further stated that the estate was distributed by the court to 23 beneficiaries. Out of the 23, only 13 are in occupation of the land. The rest are landless and living as squatters because the applicants are reluctant on letting go of the big chunks that they currently hold which ought to be distributed to the other beneficiaries.

8. The court directed that the application be canvassed by way of written submissions. At the time of writing this ruling, no submissions by the respondents are on record. The court will rely on the replying affidavit.

1st, 3rd and 4th Administrators' Submissions.

9. Through their learned counsel, the 1st, 3rd, and 4th administrators isolated two key issues for determination.

10. On whether the respondents (2nd and 5th administrators) were actively abusing the court process in view of the court order dated 30.07.2024, the applicants submitted positively, stating that the orders obtained by the respondents sought a re-survey of the suit land despite the fact that a survey had already been conducted and the shares of each beneficiary established. Furthermore, the applicants stated that

the 5th administrator had already moved the court for a re-survey, which survey report corroborated the initial findings of the initial report.

11. They further submitted that the affidavit sworn by the 4th administrator showed that the distribution and issuance of the certificate of confirmation of grant was done after the survey exercise as per the court's ruling hence it was illogical for the 5th administrator to allege that a certificate of confirmation of grant could have been issued prior to a survey report being tabled in court.

12. It was their submission that impugned orders are substantive in nature and ought to have been issued after full participation and in the presence of all parties involved. To add on this, the applicants submitted that the respondents never served them with the application, neither were they served with the impugned order.

13. On whether prayer (3) of the application is merited, the applicants submitted that this Honorable court has the discretionary power to set aside/review the orders granted if sufficient cause is shown to warrant the same. They referred the court to the case of Nova Holdings Limited & Another vs County Governments of Mombasa & 2 others.

Analysis and Determination.

14. I have looked at the application, the supporting affidavit and the submissions by the applicants.

15. The main issues for determination are:

    i. Whether the orders issued by this court on 30.07.2024 were lawfully issued.

    ii. Whether there is need for re-surveying the land in order to implement the Certificate of Confirmed Grant issued by this court.

    iii. Whether the applicants have met the threshold required for this court to review its orders of 30.07.2024.

16. The application was brought under Section 47 of the *Law of Succession Act*, Rule 63 of the *Probate and Administration Rules*.

17. Section 47 of the *Law of Succession Act* states as follows:

> "Jurisdiction of High Court
>
> The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice."

18. Rule 63 of the *Probate and Administration Rules* states:

> "(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
>
> (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation

to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules."

19. The relevant order of the *Civil Procedure* is Order 45 Rule 1 which provides:

> " Application for review of decree or order [Order 45, rule 1.]
>
> (1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. "

20. Upon perusal of the application, the applicants have not alluded to the first two requirements. So the question would be whether there is sufficient reason proffered by the applicants to warrant this court to review and set aside its orders issued on 30.07.2024.

21. On 30.07.2024, The court ordered that the Kakamega Land Registrar and the Kakamega Land Surveyor do revisit the parcel of land No Marama/Lunza/247 and do the surveying as per the certificate of confirmed grant, and that the officer Commanding Station Kakamega Police Station to provide security.

22. The applicants have challenged the orders, based on the fact that they were obtained ex-parte and that two surveys had already been carried out and filed in this court and this court presided by Hon. Justice Musyoka issued the certificate of grant and ordered distribution of the land as per the two surveys.

23. Upon perusal of the court record, I note that the issue of the survey prior to the confirmation of the grant was comprehensively addressed by Hon. Justice Musyoka in his judgment dated 27.02.2020 In the following paragraphs:

Paragraph *4* states in part:

> " The distribution proposed in the application dated 25.04.2028 is based on the acreages actually occupied by the respective survivors. The survey work, which led up to those said figures, was ordered by the court on diverse dates, on the application by some of the parties"

In Paragraph *5* the Hon. judge stated:

> " The issue of a survey first came up in court on 14th February 2018, when Johnstone O. Otieno informed the court that they were yet to do survey on the subject property. They asked the court for more time, which was granted. On 7th May 2018, it was directed that the cost of the survey be borne by Johnstone Nandwa OtieNo An order was made on 20th June

2018, to facilitate a visit on the subject property by a surveyor, to confirm the actual acreage on the ground occupied by the survivors."

In Paragraphs 62 - 65 of the judgment, the Hon. Judge held as follows:

"62. The issue of the land, the subject of distribution, being subjected to survey works to determine occupation on the ground, was raised. Indeed, the second application is founded on the notion of the actual occupation on the ground being the basis for the distribution that the court should adopt. This is linked to the argument that the deceased had distributed his property before he died.

63. Let me deal first with the question as to whether the deceased had distributed his property before he died. It was said that that distribution only benefited three of the sons. No documents were produced, yet disposal of land, in whatever circumstances, ought to be founded on a memorandum in writing. That is the spirit of section 3(3) of the *Law of Contract Act*, Cap 23, Laws of Kenya. I am alive to the fact that that statute refers to sale of land, but the spirit that emerges from that provision is that any person who urges that land had been disposed of to them, ought to provide a memorandum in writing to support that allegation. If the deceased really intended to dispose of his land to some of his sons, in the manner that was claimed by the applicant in the second application, then he would have caused the property to be transferred to the names of the said sons during his lifetime. That would mean that the process of subdivision would have started with consents under the *Land Control Act*, Cap 302, Laws of Kenya, being obtained leading up to survey work being done, mutations and finally registration. None of that was done. There is, therefore, no evidence that the deceased distributed his property to the sons as alleged. He might have shown them when genera to put up houses and till the land, but that alone is not enough, it does not amount to inter vivos transfer. I am, therefore, not satisfied that there ware any such inter vivos transfers. That then would mean that there is no basis for distributing the property as occupied by the sons.

64. The matter of land being surveyed before distribution is undertaken appears to be a popular approach to distribution in intestacy here at Kakamega. Such an arrangement usually would favor the older members of the family as against the younger members of the family. That is so as the older members of the family would have ventured out their parents' homestead earlier, and would have, over time, tilled a large part of the land before the deceased passes on. The younger family members would lag behind given their place at birth, and many tend to be school children at the time of death. Such young persons would be disadvantaged as by the time the property is being shared out, as per occupation on the ground, most of the land would have been taken by their older siblings. That arrangement is not fair or just. The law is about equity, and there is none in that approach, and it is something that should be frowned upon. Being older, within the order of birth, does not accord the older children any superior rights or claims on the land over the rest of the children. The argument about distribution being based on actual occupation of the land is selfish and should be dismissed. Even equal distribution of the estate amongst all the children is still regarded as not good enough for the younger

members of the family. The perceived unfairness of the succession process to the younger children of the deceased has exercised the minds of the courts over time. In *Rono v Rono and another* (2005) 1 EA 363, for example, Omolo JA expressed the opinion, with regard to equal distribution, that the same still worked injustice for the younger children who still need to be maintained, educated and generally seen through life.

65. The deceased herein died intestate after the *Law of Succession Act* had come into force. Part V of the Act provides for equal distribution of the property amongst the children. All the children are to be treated equally at distribution, regardless of whether they are old or young, male or female, married or unmarried, with one child or one hundred children. The law makes no reference at all to the order of birth being taken into account at distribution, neither does it mention actual occupation on the ground as a factor in determining the acreage or share to which each of the children should be entitled to. The relevant provisions are in section 35(5) and 38 of the *Law of Succession Act*, and I have set them out verbatim at paragraph 56 of this judgement."

24. From the above excerpts of the judgment, it clearly shows that the judge discarded the two surveys done prior to the confirmation of grant. The two surveys were meant to show the total acreage of the land and the sizes of land occupied by the survivors named in the applications. From the record, the administrators wanted the distribution of the land to be according to the occupation of the land by the respective beneficiaries but the judge declined. No appeal has been proffered against the judgment.

25. From the ruling dated 18.02.2022 the land was to be subdivided into 23 units as opposed to 13 units which the previous two surveys indicated. Therefore, logically it follows that a fresh survey to subdivide the land into 23 units as per the court's ruling has to be done for the certificate of the grant to be fully implemented.

26. To me, any administrator or a beneficiary has a right to implement the certificate of confirmed grant. Meaning that either an administrator or a beneficiary can apply to the court for any necessary facilitative order, just like the 2nd and 5th administrators did and the court has powers to issue such orders ex-parte upon being satisfied that there is no need of service to other administrators or all the beneficiaries. In this case, the orders sought were not meant to alter the orders given in the ruling dated 18.02.2022. They were purely facilitative. So, to me they were lawfully and justly prayed for and issued by this court for there is a need for closure in this matter which was brought to this court approximately twenty-two years ago.

27. Consequently, from the above, I find there is no sufficient cause/reason advanced by the applicants to warrant this court to review and set aside the orders issued on 30.07.2024. If the applicants are not satisfied with the court's judgment on distribution of the estate they should proffer an appeal instead of stalling the implementation of the certificate of confirmed grant.

28. The application is dismissed.

29. This being a family matter, each party shall bear its own costs.

30. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF JANUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Ms. Mburu holding brief for Ms. Rauto for the applicants present online

Respondents – absent

Court assistant – Elizabeth Angong'a