



**In re Estate of Caleb Opuka Oluchina (Deceased) (Succession Cause 899 of 2011) [2024] KEHC 833 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 833 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 899 OF 2011**

**SC CHIRCHIR, J**

**JANUARY 31, 2024**

**IN THE MATTER OF THE ESTATE OF CALEB OPUKA OLUCHINA  
(DECEASED)**

**BETWEEN**

**FILISI OWENDI OMBIMA ..... PETITIONER**

**AND**

**JANE OPUKA ..... 1<sup>ST</sup> PROTESTOR**

**EDITH AFISI ..... 2<sup>ND</sup> PROTESTOR**

**RULING**

1. This court, in its ruling dated 2<sup>nd</sup> July 2021( Justice Musyoka ) postponed its determination on the summons for confirmation of the grant dated 15<sup>th</sup> September 2016 filed by the petitioner. This was to give time to the petitioner and the 1<sup>st</sup> protestor to ascertain, and submit to the court, further particulars of the Assets and beneficiaries of the deceased.
2. For clarity, it is necessary to reproduce the said orders of 2<sup>nd</sup> July 2022. The Judge ordered as follows:
  - a). That since the deceased left two households, both houses ought to be represented in the Administration of the Estate.
  - b). That as a consequence to (a), above, I do hereby appoint Jane Nyakoa Opuka, as Administratrix, to co- Administer with Filisi Owendi Ombima, and a grant of letters of Administration Intestate shall issue to them.
  - c). That I find there are several issues that need sorting out , with regard to the assets , especially Isuka/ Lubao/2347 and 2348, and South Kabras/ chesero/3009, and, therefore , I shall not distribute any of the Assets of the Estate to allow the new Adminstratrices to address all the



issues that I have addressed in the body of the Ruling . concerning all the Assets that have been disclosed before me, relevant to these proceedings , whether registered in the name of the deceased or not.

- d). That ascertainment of persons beneficially entitled to a share in the Estate of the deceased , whether as survivors or creditors , can only be properly done after the issues referred to ( c ) above are addressed.
  - e) That the Estate shall be distributed only after all these issues have been duly addressed, and, where necessary, regularized or perfected, and , therefore the summons for confirmation of Grant dated 15<sup>th</sup> September 2015 is hereby postponed.
  - f). That the new Administratrices have leave to file further Affidavits , whether jointly or severally , to depose on the outcome of whatever they will have done on the said issues;
  - g) .....
  - h) .....
  - i) .....”
3. The 1<sup>st</sup> protestor , in compliance with the above orders, swore a further affidavit dated 6<sup>th</sup> September 2021 . She sates as follows:
- a). That in compliance with the court directives she carried out a search at the Land’s Registry on the various Titles that have been mentioned in these proceedings and established that that parcel No. Isukha/ Lubao/2347 was registered in the name of the deceased . The registration was done on 2.6.2004
  - b). parcel no. Isukha/ Lubao/ 2348 is registered in favour of Amina Sagina Abdallah. The registration was done on 21.8.2007.
  - c). Parcel No. South kabras/ chesero/ 3009 was registered in the name of Filisi Owendi Ombima, Phoebe Ongachi (minor) and Dennis Buluku ( minor).
4. She has attached certificates in respect of the searches carried out.
5. She has further stated that parcel Nos. Isukha/ lubao/2349, south kabras/ shamberere/ 3654 and Isukha/ Lubao/ 2347 are all in the name of the deceased and she has attached Register for the said parcels of land.
6. The 1<sup>st</sup> protestor further states that the Register for parcel No. Isukha/ Lubao/ 2348 indicate that the land was transferred directly from the deceased to Amina Sagina.
7. It is further her observation that while registering South kabras/ Chesero/3009, the petitioner misrepresented the deceased’s daughter -in- law and grandson as minors ,and the said registration was done on 5.9.2013, two years after the demise of the deceased.
8. The protestor asserts that the registration of the deceased’s daughter in – law Phoebe Ongachi and and Grandson Dennis Buluku , which was done without their knowledge was aimed at denying them inheritance over parcel No.Isukha/ Lubao/ 2347.
9. The petitioner swore a further affidavit on 30<sup>th</sup> September 2021. she corroborated the 1<sup>st</sup> protestor’s evidence that from the official search Isukha/ Lubao/2347 was in the name of the deceased, while Isukha/Lubao/2348 was registered in the name of Amina Sagina Abdalla



10. She avers that South/kabras/Chesero/3009 was registered in her name since the phoebe Ongachi and Dennis Buluku had refused to sign the documents. She states that she was holding the property in trust for them; that her intention was to safeguard their interest. That the property now belonged to the Deceased's grandson Dennis Buluku whose mother , phoebe ongachi has since died. She further states that it is the Land's Registrar who failed to indicate the fact that the property was being held in trust.
11. She further states in any event, the deceased grandson had accepted to have parcel No. south kabras/chesero/ 3009 and he did so through a consent which was filed in Kakamega CMCC NO. 160 of 2007. The proceedings of the said suit are attached to the affidavit. She further states that she has since signed all transfer documents in favour of Dennis.
12. On the distribution of the property, the Applicant had , through the Affidavit in support of confirmation of Grant proposed distribution as follows:
  - a). Title No. Isukha/Lubao/2347- to Amina Sagina Abdallah wholly
  - b). Isukha/Lubao/2349-to Filisi Owendi Ombima ( herself) wholly
  - c). South Kabras/ Shamberrere/3654- to Shirleyne Ongachi Opuka- wholly
13. On the other hand the Respondent, in her Affidavit of protests sworn on 3.1.2020 proposes the distribution as follows:
  - a). Title No. Isukha/ Lubao/2349 and South Kabras / shamberere / 3654 to be shared equally between Filisi Owendi Ombima, Jane Opuka, Ruth Mildred Mbaya, Rose Opuka and Edith Episi
  - b). Isukha/ Lubao/2347- wholly to Dennis BulukuProtestor's further submissions
14. The protestor submits that there is no evidence showing that the decision of the provincial Land disputes committee was ever adopted as an order of the court
15. She further submits that in respect to parcel No. Isukha/ Lubao / 2348 ,there is no evidence that the land had been registered in the names of the deceased's daughters, before being transferred to Amina Abdallah. Therefore , the protestor contends, there was no evidence of any gift *intervivos* to the daughters before the demise of the deceased.
16. It is the protestor's further submission that parcel No. south kabras/ chesero /3009 was not registered in the name of the deceased and therefore did not form part of the Estate.
17. The protestor lists parcel Nos ; Isukha/Lubao/2349, south kabras/shamberrere/ 3654 and Isukha/Lubao/2347 as being available for distribution. She further list the rightful beneficiaries as consisting of the 4 daughters, grandson of the deceased from the first house and the petitioner as the only one from the first house.
18. It is the protestor's contention that the deceased was a polygamist and the Estate should be distributed in accordance with section 40 of the [law of succession Act](#) . she then goes ahead and proposes the mode of distribution, in which she proposes equal sharing of parcel nos. 2349 and 3654 by the four daughters of the deceased, , parcel no. 2347 to the deceased's grandson and a life interest over the Estate by the petitioner in her capacity as the widow of the deceased.
19. The petitioner did not file any further submissions.



## Determination

20. In his Ruling dated 2<sup>nd</sup> July 2021, Justice Musyoka did an elaborate investigation into the Rightful beneficiaries in this cause and concluded that the persons entitled to benefit were the Applicant as the widow of the deceased, the four daughters of the deceased, being Jane Opuka, Ruth Mildred Mabilia, Rose Opuka, and Edith Apisi and the Deceased's grandson Dennis Buluku.
21. From the initial Affidavits, further Affidavits and submissions, my finding is that parcel No. Isukha/Luba/ 2347 had been sold to one Amina Sagina Abdallah. The search dated 12.8.2021 attached to the Applicant's further Affidavit clearly show that she became the registered owner on 21.8.2007, long before the deceased died. At the time of the deceased demise therefore this parcel of land did not belong to him and hence does not form part of his Estate.
22. Further parcel No. South kabras/ Chesero/3009 was never registered in the name of the deceased. There is further no evidence showing that the said property was given to Dennis muluki as a gift by the deceased so as to be considered as a gift *inter vivos*. In a nutshell the said parcel did not form part of the Assets of the deceased. I have had the chance to peruse the proceedings in Kakamega CMCC NO. 160 OF 2017 and found that the subject matter of the said suit was a burial dispute. It was eventually compromised by consent in which it was agreed that Dennis Buluku would bury his sister in parcel No. 3009 and that the land was to be transferred to the said Dennis. However the circumstances surrounding the decision to have the property transferred to Dennis are not coming out in the proceedings. It is not possible therefore for this court to determine whether indeed parcel No. 3009 had been given to Dennis in exchange for abandoning his claim to the Estate.
23. I have taken note of the proceedings in provincial Land Disputes Tribunal's case No. 108 of 2010. There is no evidence however that the proceedings were ever adopted as an order of the court. This court therefore can not rely on such proceedings. The onus was on the Applicant to prove that the proceedings were adopted. She has not made any effort to submit such proof.
24. I have also noted that Dennis is not the only registered owner of the parcel 3009. The Applicant, Phoebe Ogachi and Dennis are all co- owners of the property. The Applicant has given varied reasons as to why the property was registered as such. She represented the other two owners as minors during registration, a fact which was not true. She also states that she was holding the property in trust, yet the fact of trusteeship is not reflected on the search certificate provided. Obviously, the Applicant has not been candid on the circumstances surrounding parcel No. South kabras/ Chesero/ 3009. But whatever the circumstances are, the property does not form part of the Estate.
25. Thus the only property of the Estate, which are available for distribution are: Isukha/Lubao/2349 ( 0.33 HA,) Isukha/Lubao/2347( 1.20 ha) and South /Kabras/Shambere 3654 ( 0.80 HA).
26. The deceased was survived by a spouse and children and therefore the relevant provision is Section 35 of the [Law of Succession Act](#). Section 35(1) provides as follows:-
  - a. " ... where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
    - a. The personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person."



27. In *Tau Kakungi v Margrethe Thorning Katungi & Another* [2014] eKLR, Musyoka J. was of the view that the purpose of Section 35 of *the Act* was to prevent a spouse of the deceased from being impoverished after the demise of the other by distributing the entire estate to the children.
28. However, I have considered the fact that the children of the deceased are not the Applicant's biological children. It is also obvious that the relationship between them is strained. Therefore, Putting the entire net residue of the Estate under life interest of the Applicant may improvise the Deceased's children in the interim.
29. Consequently, I hereby proceed to make the following orders on distribution:
- a). Isukha/ Lubao/ 2349: The Applicant will have a life interest and upon her demise or remarriage the property will devolve upon:
    - (i). Jane Opuka
    - (ii). Ruth Mbaya
    - (iii). Edith Apisi
    - (iv). Rose Opuka
    - (v). Dennis Buluku -In equal shares.
  - b). Isukha/Lubao/2347 :
    - (i). Jane Opuka
    - (ii). Ruth Mbaya
    - (iii). Edith Apisi
    - (iv). Rose Opuka
    - (v). Dennis Buluku- In Equal shares.
  - c). South kabras/ shamberere/ 3654- to be shared equally between:
    - (i) Jane Opuka
    - (ii). Ruth Mbaya
    - (iii). Edith Apisi
    - (iv). Rose Opuka
    - (v). Dennis Buluku
  - d). Each party to meet their own costs.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Rono- Court Assistant

No appearance by the parties.

