



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Okisai Kiroge (Deceased) (Probate & Administration
153 of 1998) [2024] KEHC 784 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 153 OF 1998**

DK KEMEL, J

JANUARY 31, 2024

IN THE MATTER OF THE ESTATE OF OKISAI KIROGE (DECEASED)

BETWEEN

WYCLIFFE KIROGE ONYAMASI PETITIONER

AND

WEPUKHULU NAKITARE OBJECTOR

RULING

1. This application dated 9th May 2023, is brought under section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* seeking for orders that the Succession Cause No 510 of 2017 filed at Chief Magistrate's Court at Bungoma be transferred to the High Court at Bungoma for determination, and that the costs of the application be provided for in the cause.
2. The application is premised on the grounds on the face of the application and supporting affidavit sworn by Wycliffe Kiroge Onyamasi. According to him, this cause relates to the estate of the deceased herein which comprised of land parcel No S. Malakisi/Mwaliye/4 and that on 25th January 2000 he was issued with a Certificate of Confirmation of Grant in respect to the estate herein. He averred that the Objector initiated a Succession Cause No 510 of 2017 on the estate of Nakitare Fwamba Lulutere in which he obtained a Certificate of Confirmation of Grant in which land parcel No S. Malakisi/Mwaliye/4 was distributed. He averred that both estates lay claim over the same parcel of land. He alleged that he is unable to proceed with distribution of land parcel No S. Malakisi/Mwaliye/4 and that both of them filed objection proceedings within the respective Courts. He averred that it is imperative that Bungoma Chief Magistrate' Court Succession Cause No 510 of 2017- in the estate of Nakitare Fwamba Lulutere be transferred to Bungoma High Court and that the same be heard together for expediency.



3. Opposing the application, the Objector filed his grounds of opposition dated 26th June 2023, stating that this Court ought to dismiss the application as it lacked merit and was intended to delay the administration of the estate of the deceased.
4. I have carefully considered the application herein, grounds and supporting affidavit as well as grounds of opposition as tendered in by the Objector.
5. The main issue for determination is whether this application has any merit.
6. The motion is brought under section 47 of the [Law of Succession Act](#) and Rule 73 of the *Probate and Administration Rules*.
7. What is not in dispute is that the Petitioner and the Objector are both administrators to the estates of their respective deceased fathers but the respective estates comprise of the asset land parcel No S. Malakisi/Mwaliye/4 as one of its assets.
8. It is also not in dispute that both the parties herein have a Certificate of Confirmation of Grant but the only challenge arises on the aspect of distribution of the respective land parcel No S. Malakisi/Mwaliye/4.
9. From the foregoing, the issue of Jurisdiction comes to play as it seems the crux of the matter is the ownership of land parcel No S. Malakisi/Mwaliye/4. Jurisdiction is a preliminary issue, that should be tackled at the earliest opportunity since a Court should entertain a matter only where it has jurisdiction and where it has none it should down its tools. To the extent that it raises an issue of jurisdiction, it is a proper preliminary objection. See the [Lillian Case. Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Limited](#) (1989) eKLR (Nyarangi, Masime & Kwach JJA).
10. The Probate Court is constituted for one sole purpose, distribution of the property of a dead person. The law which governs this area of distribution of assets of a dead person is the [Law of Succession Act](#), CAP 160, Laws of Kenya. The preamble says it is "An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons, and for purpose connected therewith and incidental thereto."
11. The central areas of concern, in Probate and Administration, are the dead person and his property. With regard to the dead person, what is of importance would be, whether there is proof of his death; and, once that is established, the next consideration will be determination of the individuals entitled to the property. With respect to property, there is only one critical consideration, whether he owned any property. Modern property is subject to registration, and whether a person owns a piece of property is evidenced by documents of registration or ownership. What is in dispute here is land, what would evidence ownership of the subject property would be evidence of registration of the same in the name of the deceased. The Probate Court only distributes assets that are undisputedly owned by the deceased. Assets that are subject of ownership disputes are not undisputedly owned by the deceased, and are not available for distribution by the Court until the encumbrances are removed or the ownership disputes resolved. Property available for distribution is defined in Section 3 of [Law of Succession Act](#) as the free propriety of the deceased.
12. The design of the [Law of Succession Act](#) is that the mandate of the Probate Court is limited to distribution of the assets, and where a dispute arises on ownership of any asset, then the same should



be placed in another forum, and not the succession cause, for litigation and determination. That is the spirit of Rule 41(3) of the *Probate and Administration Rules*, which states as follows; -

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the *Civil Procedure Rules* and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

13. There is ample case law to the effect that succession proceedings are not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution. One such case is *In re estate of Kimani Kimithia* [2008] eKLR (Ibrahim J)(as he then was) where it was stated that succession proceedings were not the appropriate way to challenge the title of the deceased to assets said to comprise his estate, on claims that such assets were subject to a trust in favour of the claimant. It was stated that such claims ought to be subjected to separate proceedings, where the claimants have to prove the trust, and thereafter seek revocation of the title or partition, which requires declaratory orders on the existence of the trust. It was asserted that that was not the function of the succession cause, where the claimant was neither a beneficiary nor dependant of the deceased, and that succession proceedings were not appropriate for resolution of seriously contested claims against the estate by third parties. The court then held that It had no jurisdiction to determine the claim of trust or to grant relief related to it.
14. Besides the provisions of the [Law of Succession Act](#) and the [Probate and Administration Rules](#), the Applicant has also to contend with the [Constitution](#), so far as the jurisdiction of the High Court is concerned, with respect to disputes over title to land and trusts over land related to title to the land. Article 162(2) of the [Constitution](#) envisages a Court with jurisdiction to handle disputes relating to title or ownership of land. Under article 165(5) of the [Constitution](#), it is asserted, in no uncertain terms, that the High Court shall exercise no jurisdiction over the matters to be placed under the Court contemplated by article, 162(2). The Court envisaged in Article 162(2) was subsequently established under the [Environment and Land Court Act](#), No 9 of 2011, to handle the disputes stated in article 162(2) The [Land Registration Act](#) No 3 of 2012 and the [Land Act](#) No 6 of 2012 identify the Environment and Land Court as the Court for the purposes of disputes relating to matters touching on land.
15. Section 47 of [Law of Succession Act](#) does not more than state that the High Court is the Court for the purposes of [Law of Succession Act](#), and it exercises all the powers conferred upon the Court by the [Law of Succession Act](#). There is no power conferred on High Court, as a Probate Court, by Section 47 to entertain disputes other than those provided for under the [Law of Succession Act](#). So, if the provisions of the [Law of Succession Act](#) do not confer jurisdiction over a certain dispute, or state that there is no jurisdiction, then Section 47 cannot provide refuge. Reference to provisions of the Law of Succession Acts includes, the rules made under the Probate and Administration Rules, by virtue of Section 97 of the [Law of Succession Act](#).
16. This application does not meet the essential ingredients that this Court ought to focus on for purposes of transferring of a matter and even hearing of the Objections by the respective parties together.
17. It is my view that the parties approach the relevant forum which is the Environment and Land Court to determine ownership of land parcel S. Malakisi/Mwaliye/4 then proceed with the distribution process



of their respective late fathers' estates. Further, the petitioner herein already has a confirmed grant and that he should proceed to distribute the estate of the deceased and if there are challenges relating to ownership of certain properties, then he can move to the relevant court for redress. This also applies to the Objector. They should arrange to meet at the proper arena namely the Environment and Land Court (ELC).

18. In the result, it is my finding that the application dated 9th May 2023 lacks merit. The same is dismissed. Each party shall bear their own costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024.

D. KEMEI

JUDGE

In the presence of:

Olonyi for Maloba for Petitioner/Applicant

No appearance for Ashioya for Objector/Respondent

Kizito Court Assistant

