



REPUBLIC OF KENYA



In re Estate of Benard Peter Odipo (Deceased) (Succession Cause E008 of 2021) [2024] KEHC 2877 (KLR) (22 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE E008 OF 2021
WM MUSYOKA, J
MARCH 22, 2024**

IN THE MATTER OF THE ESTATE OF BENARD PETER ODIPO (DECEASED)

RULING

1. This succession cause was initiated recently, in 2021, but it has seen some very heavy duty litigation, no doubt reflecting the fiercely competing rival interests involved.
2. On 7th December 2022, Karanjah J delivered a ruling where it was pronounced that Fridah Eunice Odipo and Anne Christine Adongo are both widows of the deceased, they were appointed joint administratrices of the estate of the deceased, and they were directed to file for confirmation of their grant within 6 months, and a grant was duly issued, dated 31st January 2023.
3. In compliance with the directions of 7th December 2022, a summons for confirmation of grant was duly filed by Anne Christine Adongo, dated 21st February 2023. Fridah Eunice Odipo filed a protest affidavit to it, sworn on 6th April 2023. A trial was conducted, on the summons dated 21st February 2023, where both administratrices gave oral evidence. An opportunity was extended to the children of the deceased to testify, and only one of them took to the stand. At the end of the oral hearings, the parties filed written submissions, and the matter was allocated 20th December 2023, as the date for delivery of a ruling on that application.
4. That ruling has not been delivered to date, for on the eve of the ruling date, 19th December 2023, a Motion was lodged herein, dated 18th December 2023, seeking, in principal, stay of the proceedings herein to enable Fridah Irene Odipo prosecute her Originating Summons, filed in Busia HCMC No E006 of 2023 (OS), seeking division of matrimonial property between her and the estate of the deceased. That Originating Summons is dated 18th December 2023, and was apparently lodged in court simultaneously with the Motion herein, dated 19th December 2023.
5. The Motion, dated 18th December 2023, was placed before me, on 19th December 2023. I directed that it be served, for inter partes hearing on 16th January 2024. I also directed that delivery of the ruling herein, scheduled for 20th December 2023, be held in abeyance until further orders.



6. Anne Christine Odongo responded to the Motion, vide an affidavit sworn on 12th January 2024. She essentially avers that Fridah Eunice Odipo had filed documents in this case, where she disclosed the assets of the estate of the deceased, and that she testified at the oral hearing of the confirmation application, and did not, at any stage, raise the issue of the said assets being matrimonial property, in which she had a stake, having allegedly contributed to their acquisition. She asserts that the Originating Summons is diversionary.
7. I gave directions, on 16th January 2024, for disposal of the motion of 18th December 2023, by way of written submissions. Parties have filed detailed written submissions, citing diverse authorities, and I have read through them, and noted the arguments that they have advanced.
8. I shall not delve into whether the Originating Summons is filed within or without jurisdiction, or is appropriate or not, or otherwise, to obviate any prejudice to any of the parties. It suffices that the Originating Summons has been filed, it is pending and the court is seized of it. Let the issues, as to its propriety, be raised at the hearing of the Originating Summons, to be determined in that cause.
9. The Originating Summons raises a unique issue, or poses a peculiar question. Litigation on division of matrimonial property is usually conducted during the lifetime of the persons party to the marriage or matrimony. It is rare to have the same litigated over after the demise of one of the spouses. The instant Originating Summons could be a test case, where jurisprudence could be developed.
10. A succession or probate cause, such as the instant one, is limited in scope, to division of the “free property” of the deceased. “Free property,” by dint of Section 3 of the *Law of Succession Act*, Cap 160, Laws of Kenya, is property that the deceased would be free to dispose of during his lifetime. Property that is subject to an encumbrance of one form or other would not be free for distribution by the probate court. If it is charged or mortgaged to a lending institution, or the title carries a caution, prohibition, inhibition, restriction or similar devices, it would not be free for distribution. Property that is also contested by individuals, claiming some interest of one sort or other in it, would also not be free and available for distribution.
11. Fridah Eunice Odipo stakes a claim, by her Originating Summons, to some of the assets registered in the name of the deceased, on the basis that she was entitled to a portion of them, on account of contribution. I guess that such a claim would mean that those assets, in schedule B of the Originating Summons, would not be free for distribution at confirmation, and I should not distribute them before the Originating Summons is fully determined.
12. Rule 41 (3) of the *Probate and Administration Rules* spells out the procedure where, at confirmation, some of the assets placed before the court for distribution are contested. Such assets are set aside or appropriated, to allow the parties move the court, whether the High Court or any other court, in separate proceedings, under Order XXXVI (now Order 37) of the *Civil Procedure Rules*. At the hearing of the summons for confirmation of grant, Fridah Eunice Odipo did not raise that issue, that is having the assets she contested appropriated, to allow her file a separate suit to determine the question of her contribution to their acquisition. She has raised it after the hearing closed, and in separate proceedings. But, no matter, I have not determined the summons for confirmation of grant. I can still invoke Rule 41(3), and set aside the said assets, to enable her prosecute her Originating Summons.
13. Rule 41(3) allows the probate court to go ahead and distribute the assets that are not contested. Should I then go ahead to confirm the grant on the assets that are not the subject of the Originating Summons? I think I should not. Perhaps, I would have, if this issue was raised at the trial, for the parties would have had an opportunity then to navigate around how the same would affect the distribution. Justice would require that everything be held in abeyance.



14. The final orders are that I will go by Rule 41 (3), and set aside and appropriate the assets in Schedule B of the Originating Summons, to abide the outcome of that Originating Summons. Subsequently, I shall postpone determination of the summons for confirmation of grant, dated 21st February 2023, in terms of section 71(2)(d) of the *Law of Succession Act*. This matter shall be mentioned, after 6 months, to monitor progress, on the disposal of the Originating Summons. The mention date shall be allocated at the delivery of this ruling. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA THIS 22ND DAY OF MARCH 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Were, instructed by Mr. Gabriel Fwaya, Advocate for Anne Christine Odongo.

Mr. Kuchio and Mr. Shihemi, instructed by Kuchio Tindi & Company and Maloba & Company, Advocates for Fridah Eunice Odipo.

Mr. Sala, instructed by Sala & Mudany, Advocates for Irene Delilah Okoyo Odipo.

