



**In re Estate of Joseph Otuchi Libakwa (Deceased) (Succession Cause  
178 of 2010) [2024] KEHC 6470 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6470 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 178 OF 2010**

**SC CHIRCHIR, J**

**MAY 30, 2024**

**IN THE MATTER OF THE ESTATE OF JOSEPH OTUCHI  
LIBAKWA (DECEASED)**

**BETWEEN**

**ROSELIDA OKISA OTUCHI ..... PETITIONER**

**AND**

**BERNARD SORE AMALEMBA ..... 1<sup>ST</sup> INTERESTED PARTY**

**JOSEPH MUKIVAH OMBIMA ..... 2<sup>ND</sup> INTERESTED PARTY**

**AND**

**ANTHONNATTEE SALIMA SHITOSHE ..... OBJECTOR**

**ENOCK MUKUNZI SKEM ..... OBJECTOR**

**RULING**

1. On 17th May 2022, A grant of administration Intestate was issued in respect of the Estate of Joseph Otuchi Zibakwa to Rosalinda Okiso Otuchi and David Onyina Otuchi (Administrators). The court then directed the Administrators to apply for confirmation of grant within 30 days from the that date.
2. Rosalinda Okisa Otuchi (the 1st Administration) filed the summons for confirmation of Grant on 10/6/2022. The application attracted an objection by one Antoinnatee Zahime Shitose, who claimed in a beneficial interest as a purchaser, of a portion of land parcel no. Kakamega/Chekalani/492. There was also a protest by one Enock Mukunzi skem, claiming a purchaser's interest in the same property.
3. There were 2 others who describe themselves as interested parties. That is Bernard Sore Amalemba and Joseph Mukira Ombima.



4. On 29/ Nov 2022 a consent was filed. The consent is hereby reproduced: “ By consent of the parties , that is to say the petitioner, the objector and protestor and interested parties have agreed:
  1. That the affidavit of protest by the protestor Enock Nukunzi on 17. 10.2022 and filed the same day be and is hereby withdrawn.
  2. That the objection to confirmation of grant dated 28/6/2022 lodged by Anthnnatee Salima Shitoye be and is hereby withdrawn
  3. That the parties hereto hereby consent to the grant of representation in the estate of Joseph Otuchi Lukwaba be made to the petitioner Roselinda Okisa Otuchi
  4. That the objector’s and protestor’s interest raised in the objection and affidavit of protest respectively shall be accommodated in the mode of distribution during confirmation of grant
  5. That the interested parties interest are unaffected by this consent
  6. That the parties shall bear their own costs”
5. The consent was signed by the 1st Administrator, the objector and the protestor and presented The consent was presented to court on 14/02/2024 in the presence of the 1st Administrator and Mr.Were advocate for the objector. The consent was adopted as an order of the court.
6. The parties thereafter filed another consent on distribution . This was dated 9<sup>th</sup> march 2024 . in the said consent the distribution was agreed as follows:
  1. Roselinda Okisa Otuch- 4.96 ha
  2. Bernard Sore Amalemba – 0.28 ha
  3. Joseph Mikiva Ombimba
  4. Enock mukunzi skem- 0.6 ha
  5. Anthnnatee Salima Shitoshe- 0.93 ha
7. On 11.3.2024 the parties sought to have the court adopt this consent, but the court opted to reserve its ruling.

### **Determination**

8. I have reviewed the consent dated 26<sup>th</sup> November 2022 and filed on 29<sup>th</sup> June 2023, and I have noted that paragraph 3 thereof effectively removes the 2nd Administrator David Onyimo Otuchi from the administration of the Estate yet the said David has no signed the said consent.
9. It is trite saw that a consent can only be set aside with the consent of the parties who entered it or on grounds of fraud or non-disclosure of material facts. However Rule 73 of the *Probate And Administration* provides as follows: “ nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court
10. I consider it an act of injustice to the 2nd administrator to be excluded from administration of the Estate without his express consent. Admittedly I adopted the consent without paying close attention to paragraph 3 , but parties and Advocates in particular have the duty not to mislead the court. To reverse this injustice and prevent misuse of the court process, hereby expunged paragraph 3 of the consent dated 26/11/2022, and filed on 29/2/2023.



11. I have looked at the consent on distribution 9th march 2024 and filed on 11<sup>th</sup> march 2024. The property in question is not indicated but I assume is in respect of parcel no. Kakamega/Chekalini/492 as it is apparent that the property is the one under contest. The proposed distribution is between the 1st administration the two interested parties the protestor and objector, and a portion of 0.32 hectares was allocated to the road.
12. When the 1<sup>st</sup> administrator filed for grant of letters of administration, she had listed herself as the widow, together with 5 children of the Deceased. In the summons for confirmation, she is silent about these other dependents or their allocated shares. There is also no consent signed by the said dependent denouncing their share in the Estate.
13. Under Section 71(2) of the *Law of succession Act*, the court is empowered to defer confirmation of grant for non-disclosure of material facts by the Administrator(s)
14. For the above reasons, the confirmation of grant is hereby deferred until such time that the Administrators make full disclosure in respect to the dependants and all the properties of the deceased. of grant is hereby deferred until the Administrators make full disclosure.
15. In conclusion I hereby proceed to make the following orders:
  - a). David Onyino Otuchi is hereby reinstated as a co- Administrator of the deceased's Estate.
  - b). The confirmation of the Grant is hereby deferred.
  - c). The Administrators to file further Affidavits for purposes of disclosing all the dependants and properties of the Deceased's Estate, and / or evidence of denunciation , where Applicable.
  - d). This Matter shall be mentioned on a date to be given during the delivery of this Ruling for purposes of confirming compliance with the aforesaid directions.

**DATED SIGNED DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 30<sup>TH</sup> DAY OF 2024**

**S.CHIRCHIR**

**JUDGE.**

In the presence of:

Godwin – court Assistant.

