



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

In re Estate of Simeon Arodi Ochuka (Deceased) (Succession Cause 558 of 2012) [2024] KEHC 6669 (KLR) (29 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 558 OF 2012
MS SHARIFF, J
MAY 29, 2024**

IN THE MATTER OF THE ESTATE OF SIMEON ARODI OCHUKA (DECEASED)

BETWEEN

LORNA AKUMU OBONYO 1ST PETITIONER

JANE AKINYI ORIWA 2ND PETITIONER

AND

OLIK OMUNDO AKA OLIK OMUDO OBJECTOR

RULING

1. The Applicant prays for orders;
 - i. That grant of administration issued to the Petitioners herein on 5th December 2012 be confirmed.
 - ii. That costs of this application be in the cause.

Supporting Affidavit dated 17th February, 2021

The Petitioners state that;

2. Grant of letters of administration for the estate of Simeon Arodi Ochuka-deceased was issued to the Petitioners on 5th December 2012 and an objection was raised by one Olik Omundo-deceased, concerning the said grant of letters of administration and the court ordered that his share be included in the application for confirmation of grant.
3. The deceased left behind Land Parcel No. Kisumu/Kabodho West/2624 And Kisumu/kabodho West/2452 and Jane Akinyi Oriwa, Lorna Akumu Obonyo and Olik Omundo are the beneficiaries of his estate.



Further Affidavit dated 16th February, 2022

4. The Petitioners state that the said objector should be given the 2 acres he claims which comprises his homestead as pleaded in the protest to the mode of distribution. However, he should not encroach on other properties.

Protest dated 1st November, 2021

5. The Objector Olik Omundo protests against the confirmation of the Summons for Confirmation of grant dated 17th February 2021, on the following grounds;
 - a. That the deceased Simeon Arodi Ochuka had several parcels of land in Nyalunya Location including Land Parcel Number Kisumu/ Kabodho West/223 and the petitioners herein have sold off all the parcels of land originally owned by the deceased to third parties.
 - b. Land Parcel Number Kisumu/kabodho West/223 measured approximately 3.81 Hectares (about 12 acres) and currently about only 2 acres of Land Parcel Number Kabodho West/223 remain unoccupied.
 - c. That the portion of Land Parcel Number Kisumu/kabodho WEST/223 currently being occupied by the objector was given to him by the deceased Simeon Arodi Ochuka in the year 1982 and by then neither of the petitioners had been married in that family.
 - d. That the Petitioners having utilized their portion of the deceased's estate and land parcel number Kisumu/kabodho West/2624 and 2625 which the Petitioners intend to distribute and transfer to their names and that of the objector, have already been transferred to third parties. The unlawful sub-division done prior to the confirmation of the grant should therefore be cancelled and/or revoked and this court be pleased to distribute the estate afresh.

Petitioners' Written Submissions

The Petitioners submit that;

6. The petitioners are the daughters-in-law of the deceased while the objector is the nephew of the deceased and therefore not a direct dependant and /or beneficiary of the deceased and is only entitled to the portion given to him by the deceased. They placed reliance on the case of Chuka High Court Succession Cause No. 9 Of 2018 In Re Estate of The *Late M'tbigai Muchangi (Deceased)* [2020] eKLR where the court stated as follows:

“The law requires that a person claiming to be entitled to the estate be related to the deceased from one common relative starting from the parents to the particular relative who is traced from the parent of that deceased. This will inform the court of the degree of consanguinity and affinity the claimant has to the deceased.”

7. They further cited the case of *Re-Estate of James Kiani Kiranga (deceased)* 2020 eKLR where the court rendered itself thus:
 - i. “that the deceased's grandchildren ought to be in priority to the deceased's daughter-in-law. It follows that grandchildren are entitled to share equally the portion which their parents would have received. The applicant who is a daughter-in-law ranks equally with the grandchildren in consanguinity and affinity. A daughter-in-law is a beneficiary of the estate of the deceased father-in-law in a situation where she has survived her deceased.”



8. Also, in the case of Succession Cause No.34/2013 *in Re-Estate of Karauri Magu (deceased)* 2016 eKLR cited by the applicant, the court recognized a daughter-In-law as a child of the deceased by virtue of being married to a son of the deceased.
9. In the further affidavit filed by the petitioners, they depose that they have no objection to the objector being given the 2 acres of parcel Kisumu/Kabondo West/ 223 where his homestead stands on, but they are opposed to his further encroachment on the suit land parcel. The petitioners filed a revised mode of distribution. The petitioners maintain that objector/ protestors had further encroached on 1.5 acres of the land that was not given to him by the deceased.

Objector's Written Submissions on the Protest Dated 15t November, 2021

The Objector submits that;

10. There are a lot of discrepancies concerning the existence of Land Parcel Number Kisumu/kabodho West/2624 measuring approximately 3.81 hectares.
11. The Honourable Justice Cherere ordered the District Surveyor Nyando District to visit the said parcel of land to ascertain the area occupied by the objector. From his visit to the lands office, the objector learned that land parcel number Kisumu/kubodho West/2624 was a sub-division of land parcel number Kisumu/kibodho/west/223. He was informed that the sub-division of land parcel number Kisumu/kubodho West/223 had resulted in two parcels i.e Nos.2624 and 2625.
12. Upon conducting a search, the objector was informed that Land Parcel Number Kisumu/kobodho West/2624 and 2625 had been transferred into the names of third parties.
13. When the surveyor went to get the map from the survey office he was informed that the sub-division of the original parcel of land parcel number 223 was not reflected in the records at the survey office and further that the parcel of land was still intact as per the records at the survey office. The surveyor was therefore forced to use the map to carry out the survey and he prepared a report dated 17th day of January, 2023.
14. In the revised mode of distribution, the Petitioners proposed to give the objector 2 acres of Land Parcel Number Kisumu/kabodho West/2624 while the surveyor's report filed in court on the 27th day of January, 2022 indicates that the total area of the land parcel number Kisumu/kabodho West/223 occupied by the objector is 4 1/2 acres which include 3 acres for his homestead and 1 1/2 acres for the farm.
15. The Petitioners have denied any knowledge of Land Parcel Number Kisumu/ Kabodho West/223 yet a letter dated 4th November, 2015 by the Assistant County Commissioner Lower Nyakach Sub-county which letter states that land parcel number Kisumu/kabodho West/2624 emanated from land parcel number Kisumu/kabodho West/223. Further, the survey report filed in court by the petitioners on 27th January 2022, shows that the area of land occupied by the objector falls within land parcel number Kisumu/kabodho West/223.
16. A certificate of official search dated 7th December, 2010 that was supplied by the petitioners to the court indicates that Land Parcel Number Kisumu/kabodho West/2624 measures approximately 3.81 Hectares, however the certificate of official search dated 24th August, 2021 obtained and filed in court by the objector indicates that the parcel of land measures approximately 1.2 Hectares.

Analysis and determination

17. The issue for determination is whether the protest to the mode of distribution should be allowed.



Sec 66 of the *Law of Succession Act* provides that

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors:

18. Section 42 of the *Act* provides that

Where-

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

19. In the case of *In re Estate of the Late M'thigai Muchangi (Deceased)* [2020] eKLR, the case of *Re Estate of Karuri Magu (deceased)* (2016) eKLR was quoted, where the court stated that the daughter-in-law can be recognized as a child of the deceased, by virtue of being married to a son of the deceased.

20. *In Re Estate of the Late M'thigai Muchangi (supra)*, the court noted that:

‘the applicant claims to be a daughter-in-law of the deceased while the protestor claims that he is a nephew of the deceased and a dependant.’

21. The deceased had in the above case, died intestate and was not survived by a wife or children. The court had to determine the question as to who between the disputing parties is the closest to the deceased in terms of the degree of consanguinity and affinity. The court disallowed the protest and distributed the land the estate to the applicant to hold in trust for herself and her children.

22. The Objector states that Land Parcel Number Kabodho West/223 that he currently occupies was given to him by the deceased Simeon Arodi Ochuka in the year 1982. *In the case of Re Estate of Godana*



Songoro Guyo (Deceased) [2020] eKLR the court was called upon to determine the distribution of the estate of the deceased who had during his life time *gifts inter vivos* made held that:

‘What is the requirement of law as far as a gift inter vivos is concerned. I find useful guidance in Nyamweya J in her decision in the case of *Re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR, where she stated as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death;

“..for gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. *Gifts inter vivos* must be complete for the same to be valid.”

23. *In Re Estate of John Gitbinji Ruga* [2022] eKLR, the court relied on the case of *Trust Bank Ltd v Paramount Universal Bank Limited & 2 Others* (2009) eKLR where the court held as follows:-

“where a party fails to call evidence in support of its case, that party’s pleading remains a mere statement of fact since in so doing the party fails to substantiate the pleading.”

24. In the case of *Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others* [2021] eKLR the court held that:

‘It is evident that where there is an imperfect gift having regard to the requirements, of the necessity for the same must be by way of written memorandum, registered transfer and or declaration of trust in writing, the gift may nonetheless be perfected by the conduct of the parties’.

25. In regard to the matter at hand, there is consensus among family members who happened to have been gifted property inter vivos; and the beneficiaries seem to all agree on the same....From the foregoing I find that some of the beneficiaries had benefited from gifts inter-vivos. This however does not disqualify them from getting a share of the net intestate estate of the deceased but the gifts must be taken into account when distributing the net estate.’

26. In this case, even the Petitioners state that it is not in dispute that the deceased gifted the Objector the parcel of land that he built his house on (Land Parcel Number Kisumu/kabodho West/223) save that they dispute the acreage.

27. The surveyor’s report filed in court on 27th day of January, 2022 indicates that the total area of the land parcel number Kisumu/kabodho West/223 occupied by the objector is 4 1/2 acres which comprise of 3 acres covered by his homestead and 1 1/2 acres of farm land.

28. In light of the above finding I do hereby allow the protest to the mode of distribution and I make the following orders :-

a. The petitioners are hereby ordered to file fresh summons of confirmation of grant be filed within 60 days from the date hereof and allocate the objector an acreage of 4 and a half acres on parcel No Kisumu /Kabodho West / 2624 if the same is still in the name of the deceased and in the event that the same has changed ownership to a third party, then I hereby revoke



and cancel any subsequent title to such third party and I order the that title Kisumu/Kabodho West/2624 to revert back to the name of the deceased Simeon Arodi Ochuka.

- b. In light of the confusion over the existence or otherwise of parcel Kisumu/Kabodho/West /223 I order that the land registrar Nyando land registry to file a report on the status of parcel Nos Kisumu/Kabodho West / 223, 2624 and 2625 within 30 days from the date hereof.
- c. This being a family matter each party shall bear its own costs.
- d. Mention on 29th July 2024 to confirm compliance.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 29TH MAY 2024.

MWANAISHA S SHARIFF

JUDGE

In the presence Bagada for the Petitioners.

N/A by Anyumba & Associates for the Objector.

Succession Cause 558/2012

Mwanaisha. S. Shariff J

