



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Richard Ochana (Deceased) (Succession Cause
E002 of 2023) [2024] KEHC 5956 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE E002 OF 2023
WM MUSYOKA, J
MAY 27, 2024**

RULING

1. I am invited to determine a Motion, dated 2nd February 2024, brought at the instance of Moses Emongole, seeking cancellation of certain titles, an injunction to restrain intermeddling with the estate by certain individuals, and an order directed at a bank to enable access to a bank account previously operated by the deceased.
2. The applicant says that he is the administrator of the estate of the deceased, while the persons he has named as respondents are his uncles, being brothers of the deceased. His case is that the respondents had distributed the estate of the deceased without involving him or his siblings. He complains that they are mismanaging the property of the estate. He avers that they have subdivided the same, and have had the sub-titles registered under their names. He avers that these acts are fraudulent, and are detrimental to the estate. He asks that the sub-titles created be cancelled, and the respondents enjoined from interfering with respect to those sub-titles. It is argued that the respondents are likely to dispose of the assets.
3. Copies of the green cards and certificates of the sub-titles are attached. The green card for South Teso/Kocholia/976 shows that it was initially in the name of Zablun Emongole Emagar, before it was transferred to the deceased as a gift in 1985, and then to Evans Madua Emadali in 2012. Its register was subsequently closed in 2012, upon subdivision into South Teso/Kocholia/3747 and 3748. There are certificates of official search for North Teso/Kocholia/3747 registered in the name of Evans Madua Emadali, and North Teso/Kocholia/6156 registered in the name of Daniel Emongole Kapule. A green card for North Teso/Kamuruai/374 shows that it was originally registered in favour of Aggrey Emojong in 1975, before transfer to Gaius John Manyang in 1981, Richard Ochana in 1986, and finally to Haggai Laban Enagai Emongole and Edukata Engole in 2012. A green card for North Teso/Kocholia/911 shows that it was initially registered to Omusee Sirari in 1982, before transfer to Livingstone Otee Marago the same year 1982, to Richard Ochana in 2000, and Daniel Emongole Kapule in 2012. The title register was closed on 7th February 2012 upon subdivision into North Teso/Kocholia/6156, 6157, 6158 and 6159.



4. Upon being served, the respondents filed grounds of opposition, dated 27th February 2024. They aver that cancellation of titles, transferred directly to the respondents, was the preserve of the Environment and Land Court. It is further averred that there is in fact a land case, in that respect, which was still pending, being Busia CMC ELC No. 132 of 2018, between Moses Emongole and another against Evans Emadau and 3 others. It is asserted that those assets do not form part of the estate of the deceased, having been acquired by third parties, who had then transferred them to their names. It is stated that the succession cause herein was filed secretly, without the knowledge of the respondents, and that the respondents were never served with the citations in Busia CMC Citation Cause No. E127 of 2021. It is asserted that the applicant ought to have sought representation only in respect of South Teso/Kamuruai/374.
5. Evans Emadau swore an affidavit on 27th February 2024. He avers that the deceased was his elder brother, who was resident in the United Kingdom. He avers that the applicant administrator was his nephew, being a son of his sister, Dorika Amoding. He states that prior to the demise of the deceased, he, the deceased, and his siblings, including the mother of the applicant, sat and agreed on distribution of their assets, in accordance with family customs. He states further that, prior to his demise, the deceased had transferred certain assets to the respondents and the applicant administrator, being North Teso/Kocholia/374, 911 and 976. He adds that North Teso/Kocholia/3747 and 6156 were registered in his name, upon a valid transfer at the lands office. He submits that the said transfers were directly from the deceased, rather than through succession. He argues that a direct transfer, such as those, could only be cancelled through the Environment and Land Court. He says that the said assets were subject to litigation in Busia CMC ELC No. 132 of 2018, between the applicant and the respondents. He asserts that the said assets do not form part of the estate of the deceased.
6. He has attached copies of the same green cards and certificates of official searches as those attached by the applicant, whose details are the same as narrated above. In addition, he has attached the filings in Busia CMC ELC No. 132 of 2018. There is a copy of an amended plaint filed in Busia CMC ELC No. 132 of 2018, relating to North Teso/Kocholia/981. There are also witness statements by Haggai Laban Enarachi Emong'ole and Daniel Emong'ole Kapule, which turn on North Teso/Kocholia/981 and 3825.
7. The applicant swore a further affidavit, on 11th March 2024. He avers that the subject property belonged to the deceased, and if he intended to distribute it, he would have distributed it to his children. He avers that the deceased died in 2011, while the transfers were done in 2012. The land was further subdivided in 2020, without being taken through succession. He avers that the transfers in 2012 were not effected under the name of the deceased, but that of Daniel Kapule. He argues that the court has jurisdiction to cancel the titles as they were obtained fraudulently. He states that the land case cited by the respondents related to a piece of land that was not subject to the succession cause. He avers that he served the citation through diplomatic channels, and through WhatsApp.
8. Evans Emadau swore a further affidavit on 9th April 2024. He states that the deceased had held a meeting with his siblings, sometime in August 2010, when he signed transfer forms with them, for registration at the lands office, and that by the time he departed for the United Kingdom, the said transfer forms were already signed, and the transfer processing was happening at the lands office. He avers that the applicant was beneficiary of one of those properties whose transfer forms the deceased had signed, and that property, North Teso/Kamuruai/374, was in fact registered in the name of the applicant. He further avers that the deceased had sanctioned all those transfers before he left for the United Kingdom, where he died. He states that the deceased had, while still in the United Kingdom, permitted them to carry out certain transactions on his behalf, and at one time he had written expressing frustration with the manner the applicant was causing mayhem within the family, with regard to the property.



That led the deceased to write a will, where he distributed other assets, apart from those the subject of these proceedings, amongst his siblings as per the family agreement. As at the date of his death, he avers, the deceased had only 1 known property, being North Teso/Kocholia/2014. He avers that the deceased left children, who rank higher than the applicant, and who have since raised issue with the appointment of the applicant as administrator. He avers further that other family members had also expressed frustration with his administratorship.

9. He has attached 2 letters from the deceased, dated 21st March 2003 and 19th August 2009, in relation to the administration of the estate of their late father, nominating Evans Emadau Emangole and Daniel Kapule, as his agents, for the purposes of proceedings or dealings at the Amagoro Land Control Board. There is also a copy of a blurry letter, dated 19th April 2002, from an address in England, addressed to Moses Okouti. There are several other such handwritten letters from the same London address, to Daniel and Moses. There is a copy of a last will and testament, purported to be that of the deceased, dated 27th May 2008. There is a letter from the Chief of Amagoro Location, dated 11th April 2024, detailing the individuals who had survived the deceased. Finally, there is a letter from Simon Ochana, a son of the deceased, dated 29th March 2024, addressed to the applicant, urging him to stop all his activities with regard to the estate of the deceased herein.
10. Directions were given on 29th February 2024, for canvassing of the subject application, by way of written submissions. Both sides have complied by way of filing their respective written submissions, which I have read through and noted the arguments made.
11. The applicant was appointed administrator of the estate herein on 18th January 2024, and a grant of letters of administration was duly issued to him, dated 23rd January 2024. That appointment came on the back of a petition for letters of administration intestate, filed herein on 1st November 2023, by the applicant, in his capacity as a nephew of the deceased. He listed himself in that petition as a liability of the estate, on the basis of a will. He listed the survivors of the deceased as 2 sons and 3 daughters. The cause was published in the Kenya Gazette of 15th December 2023, as notice number 17202, and subsequently the grant was issued, after the 30 days expired without an objection being filed. Prior to that, the court, in Busia CMC Citation Cause No. E127 of 2021, had allowed him to file for grant of letters of administration in respect of the estate herein, vide a ruling that was delivered on 4th August 2023, by Hon. PA Olengo, Senior Principal Magistrate.
12. Should I grant the orders sought in the application? I do not think I should. There are several reasons. I will start with what I consider to be the most important. The applicant is a nephew of the deceased, yet the children of the deceased are alive and well. There are 5 of them. When he moved the court in Busia CMC Citation Cause No. E127 of 2021, I note that he cited only 1 of them, Simon Ochana. It could be that that Simon Ochana is the eldest child or the first son of the deceased, but that does not give him any prior right over the other children. The *Law of Succession Act*, Cap 160, Laws of Kenya, does not give any preference to any child of the deceased, over the other, whether based on gender or the order of birth. All are treated equally. They have equal entitlement to administration of the estate, and they have equal entitlement to shares in the assets. The citation to Simon Ochana alone, to the exclusion of his brother and their 3 sisters, was discriminatory, and by virtue of Article 2(4) of *the Constitution*, any act done in contravention of *the Constitution* is null and void.
13. The said 6 children have a prior right to administration of the estate of the deceased herein over the applicant, and they have a prior right over that property over him. It does not matter that he obtained a citation, which enabled him to get authority to administer the estate. He could only properly be appointed to administer the estate with either the concurrence of all the 6 children, or upon citations issued to all the 6, and not just 1, Simon Ochana. The property of their father cannot possibly be



subjected to distribution by their cousin, who they have not authorised to represent them, without their involvement. It is unlawful and immoral.

14. When the applicant moved the court, in Busia CMC Citation Cause No. E127 of 2021, his concern was with North Teso/Kamuruai/374. He would like me to give orders that would entitle him to access a bank account of the deceased. If his interest was limited to the land, North Teso/Kamuruai/374, why is he pursuing the money? What is his interest in the money of the estate. I believe that the prayer that the bank be compelled to let him have access to the money, displays his hand, an intent to exploit the estate, taking advantage of the absence of the children of the deceased, given that they reside abroad.
15. On the titles that he asks me to cancel, I note that they were all registered after the deceased died in 2011. The background to these assets has not been given, save that some green cards have been placed on records, but those documents do not speak for themselves. Someone would need to bespeak them, and that person ought to be an officer from the lands office, where the documents were generated from. More crucially, whether these assets previously belonged to the deceased, were fraudulently transferred, and the applicant would like to have them re-conveyed to the estate, is a matter that I would have no jurisdiction to address. I do not think that the High Court would be the proper forum to pursue such a cancellation. That would be a land matter and a land dispute, in respect of which the High Court would have no jurisdiction, by dint of Articles 162(2) and 165(5) of *the Constitution*. This court would have only interfered if the transfers were done during the pendency of this cause, as the said assets would then have been subject to succession, and the assets would have been transferred despite a succession cause pending. However, this cause was initiated in 2023, while the transfers, relevant to these proceedings, happened in 2012. By the time the subdivisions happened, the assets were no longer in the name of the deceased. Moreover, the probate court is mandated only to distribute assets that are not disputed, and not to determine disputes on title.
16. The parties are better off before the Environment and Land Court, and the enabled or empowered subordinate courts. I was informed that there is a pending suit between the parties, on the same assets, being Busia CMC ELC No. 132 of 2018. However, that suit relates to a property known or described as North Teso/Kocholia/981, yet this cause is about North Teso/Kocholia/911, 976 and North Teso/Kamuruai/374, going by the petition filed herein, and, therefore, I see no linkage between that suit and the assets the subject of these proceedings.
17. I believe I have said enough, to demonstrate that the orders sought by the applicant herein are not available for granting.
18. I need to say more though. The applicant is a nephew of the deceased. The deceased was survived by his own children, the 6. The citations, issued prior to the grant being made, were only directed to 1 child. The other 5 children had no idea that a succession cause was being mooted by their cousin, in the estate of their father. The applicant was, therefore, not justified to obtain representation to this estate, without notice to the 5 children, yet the 5 had prior right to appointment as administrators over him. Rule 26 of the Probate and Administration Rules requires that any person with a lesser right to administration must obtain the written consents of those with a prior right. I have not seen any written consent duly signed by the 5, authorising the applicant to apply for appointment. In lieu of such consents, Rule 26 also permits the person with a lesser right to get those with prior right to renounce their right to be appointed as administrators. I have seen no renunciations duly executed by the 5 and filed herein. The Rule also envisages an affidavit being filed, where the 5 have declined to consent or renounce their right or to apply for representation, by the petitioner, to explain to the court why he, of lesser right, had to apply, when those with a superior right were alive and well. There is no such affidavit.



19. Section 76 of the *Law of Succession Act* empowers the court to revoke a grant on its own motion, what is often described as suo moto, where it is satisfied that such a grant ought to be revoked for any of the 4 grounds set out in that provision. The grant herein was obtained through a defective process, to the extent that citations, or renunciations, or consents were not sought and obtained from the 1 son and 3 daughters who had not been cited. To that extent, the said grant was improperly obtained, and should not stand.
20. In the end, the final orders that I shall make are as follows:
- a. That I hereby dismiss the application, by way of the Motion, dated 2nd February 2024;
 - b. That the grant made on 18th January 2024, and issued on 23rd January 2024, to Moses Emongole, is hereby revoked;
 - c. That fresh administrators shall be appointed on 22nd July 2024; and
 - d. That other or further directions, on how to progress this matter, shall be made thereafter.
21. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 27TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Moses Emongole, the applicant/administrator, in person.

Advocates

Mr. Okeyo, instructed by Okeyo Ochiel & Company, Advocates for the respondents.

