



**Adome v Ogutu (Succession Appeal 24 of 2021)
[2024] KEHC 7682 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION APPEAL 24 OF 2021**

WM MUSYOKA, J

JUNE 28, 2024

BETWEEN

DAVID ADOME APPELLANT

AND

MONICA OGUTU RESPONDENT

(An appeal arising from orders made in the ruling of Hon. L Ambasi, Chief Magistrate, CM, in Busia CM CSC No. 38 of 1993, of 29th June 2021)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CM CSC No. 38 of 1993, of 29th June 2021. The grounds of appeal revolve around the trial court erring in its application of the Law of Succession Act, Cap 160, Laws of Kenya; reinforcing a conveyance which was by operation of the law voidable, and which had been rendered unenforceable under the Limitation of Actions Act, Cap 22, Laws of Kenya; the trial court failing to find that the objectors were not involved in the administration of the estate of their father; awarding a beneficiary status to a stranger to the estate; and failing to consider that the claim by the respondent could not succeed in light of the provisions of the Physical and Land Use Planning Act, Cap 303, Laws of Kenya.
2. The orders, made on 29th June 2021, which form the basis of the appeal, were made on an application dated 27th July 2020, for revocation of grant. There were other prayers: that the registration of David Adome and Eric Adome, as proprietors of Plot No. 135 Busia Township, be cancelled, and the property reverted to the estate, for fresh distribution, and that restrictions be registered against that title. The applicant, in the revocation application, the respondent herein, was the administrator of the estate of Peter Ogutu Ong’or, deceased, who was alleged to have had bought half of the property from the deceased herein. She argued that that made the estate of Peter Ogutu Ong’or a beneficiary in the estate herein, and the property sold had ceased to form part of the estate of the deceased herein. The complaint was that that fact was not brought to the attention of the court at confirmation, and that



- the portion sold was devolved to the appellant herein and Eric Adome, making them proprietors of the entire parcel. The said new proprietors then began to threaten to evict the estate of Peter Ogutu Ong'or from the plot. It is averred that the grant was obtained by way of making an untrue statement, to effect that Plot No. 135 Busia Township entirely belonged to the estate herein, and the fact that the estate of Peter Ogutu Ong'or had an interest in that property was concealed, making the entire process defective. A copy of a sale agreement, dated 19th January 1989, between the deceased herein and Peter Ogutu Ong'or, was attached.
3. The appellant herein filed a reply, by an affidavit sworn on 15th February 2021. He averred that the respondent herein was not entitled to apply for representation to the estate of the deceased herein, as she was not a beneficiary of the said estate. He argued that the proper approach was for the respondent to file civil proceedings against the estate, which she had already done in Busia CMC ELC No. E55 of 2020. A copy of the plaint in that suit was attached.
 4. The said application was canvassed by way of viva voce evidence, following directions given on 16th December 2020. In the ruling of 29th June 2021, the trial court considered that there was evidence that the late Peter Ogutu Ong'or had bought a portion of that property from the father of the appellant, in 1989, and that his family had been in possession ever since. The court found that the appellant had admitted in writing, that his father had sold a portion of that plot to the husband of the respondent. It was concluded that that sale constituted the estate of the late husband of the respondent a liability to the estate of the father of the appellant, and that it was not up to the appellant to determine whether or not the respondent was entitled to that property or not. The trial court was persuaded that a case for revocation of the grant had been made, and proceeded to revoke the grant made on 21st June 1993, to appoint the appellant and the respondent joint administrators of the estate of the father of the appellant, and to order that Plot No. 135 Busia Township be transferred from the name of the appellant and his brother to the name of the deceased.
 5. The appellant was aggrieved; hence he filed this appeal, vide a memorandum of appeal, dated 13th July 2022, lodged herein on even date.
 6. Directions were given on 29th April 2024, for canvassing of the appeal, by way of written submissions. I have seen written submissions by the appellant, dated 16th May 2024. I have not seen, from the record, written submissions by the respondent.
 7. The appellant argues 2 points. The first is that the respondent fronts a purchaser's interest, and that does not put her at par with the children of the deceased, and in terms of the hierarchy, set out in section 66 of the *Law of Succession Act*, on entitlement to representation of the estate, the respondent featured way down that list. He submits that the sale transaction, that the respondent is fronting, was an incomplete conveyance. The second argument is that the said transaction had become voidable by operation of the law of contracts, by virtue of lapse of time, through limitation of the action. He also submits that section 41(1) of the *Physical and Land Use Planning Act* was of relevance, for it should have been complied with, as it controlled the alleged sale and subdivision of the said parcel of land, for it was situate within a municipality. It is asserted that the respondent was a stranger to the estate, who ought not have been made an administrator.
 8. In my understanding, the only issue for me to determine, is whether the trial court was justified, to appoint the respondent an administratrix of the estate herein. The appellant does not appear to generally have an issue with the revocation of the grant, but largely with that appointment. In his sense, she did not qualify for nor merit the appointment.



9. The basis for her appointment, from the ruling, appears to be that her late husband had contracted with the deceased person, the subject of these proceedings, to buy from him a portion of the subject plot. An agreement, drawn by an Advocate, way back in 1989, was exhibited. The trial court was persuaded that there was a valid sale, which the appellant, as administrator, should have reckoned. It was noted that prior to the transaction the deceased husband of the respondent was a tenant in that property, and that his family remained in occupation of that plot up to the date of the ruling. There was a transaction and there was occupation. The conclusion was that the appellant was not ignorant of that, and should have reckoned the respondent in the administration process, and more particularly at confirmation. As the facts of that sale transaction and of the occupation were not reckoned, then there was non-disclosure of an interest, and concealment of the same. That non-disclosure and concealment of that matter or interest meant that the process of obtaining the grant was defective.
10. The appellant does not appear to have issues at all with the transaction having happened, and the occupation, for he has not denied them. His case appears to be that the transaction lapsed, on the basis of the law relating to contracts, urban planning and limitation of actions. His case appears to be that that interest either lapsed or was extinguished on those grounds, hence the respondent had no interest anymore in the estate, to elevate her to the level of a beneficiary, upon which she could be appointed administratrix of the estate.
11. Let me start with pointing out that the role of a probate and administration court is to share out the estate of a dead person. The law is clear that the property that such a court divides is that which is free. See *In re Estate of M'Ikiugu M'Mkindia (Deceased)* [2019] eKLR (Sitati, J) and *In Re Estate of Stephen Nzau Koka (Deceased)* [2019] eKLR (Odunga, J). Property is free, if it is registered in the name of the deceased, is unencumbered and is uncontested. See *Gulzar Abdul Wais vs. Yasmin Rashid Ganatra & another* [2014] eKLR (Lesiit, J) and *Ellen Nyatetu Mugweru & another vs. Danson Weru & 7 others* [2017] eKLR (Ngaah, J). Property that the deceased has an interest in, by way of having bought it, but which had not been transferred to his name, by the date of his death, would not be an asset in his estate. See *In the Estate of Job Ndunda Muthike (Deceased)* [2018] eKLR (Odunga, J), *In re Estate of Francis Waita Mbaki (Deceased)* [2018] eKLR (Muriithi, J), *In re Estate of M'Ikiugu M'Mkindia (Deceased)* [2019] eKLR (Sitati, J) and *In re Estate of the Late Nzioka Wambua (Deceased)* [2020] eKLR (Odunga, J). It would not be available for distribution. Such a property would have to be brought into the estate first, by way of the administrators completing the sale transaction, by either completing payment of the purchase price, or completing the transfer and registration process, if that be the only issue outstanding. See *In re Estate of Samson Mwangangi Nzioka* [2015] eKLR (Ougo, J), *In re Estate of Francis Waita Mbaki (Deceased)* [2018] eKLR (Muriithi, J) and *In re Estate of Sananga Okonda (Deceased)* [2020] eKLR (Musyoka, J).
12. Property that the deceased had entered into a sale transaction over with another, but died before he transferred it or caused it to be registered in the name of the other, would still be estate property, available for distribution. The way to deal with such property would be to either have it devolved upon the buyer, upon treating him as a liability of the estate; or to devolve it to the administrator, who should thereafter transfer or convey it to the buyer. Good faith and honesty require disclosure that such a property, although still registered in the name of the deceased, the deceased had sold it to another, and that that sale ought to be honoured.
13. Where the property is encumbered, in terms of specific encumbrances being registered against the title, either taking the form of charges, mortgages, inhibitions, prohibitions, restrictions, caveats or cautions, the said property would not be free, and it would not be available for distribution until after the encumbrances are cleared or removed. The probate court should not make any orders on distribution of such property, until satisfied, through relevant documentation, that the encumbrances had been



- removed. The removal of encumbrances could involve payment of moneys due, or the effecting of transfers, litigation, or similar action. Indeed, in some cases there may be no need for the matter to be brought to the attention of the probate court, for it may be resolved away from the probate proceedings.
14. The registration of caveats, cautions, restrictions, prohibitions, and the like, could be a signal that the ownership of an asset is contested. The pendency of litigation over the property could be another. Some contests could be independent of registration of any encumbrances, or the initiation of litigation, and may only manifest themselves upon the filing of the succession cause or the confirmation application. It may take the form of claimants indicating to the administrators, or orally to the court, that they have an interest of one sort or other in the property. See *George Kamau Ruria & another vs. Michael Waweru M'Wandia* [2021] eKLR (Njuguna, J), *Jibril Gollo Duba vs. Asli Gollo Duba* [2021] eKLR (Muriithi, J) and *Board of Management, Symbios Kabeiyo Primary School & 2 others vs. Elizabeth Jelagat Chepsiror* [2021] eKLR (Odeny, J). Such claimants may file protests, or may avail themselves in court, and inform the court of that orally. Whatever the case, once it is made clear, that a third person claims an interest in the property, that property ought to be considered as contested, making it unavailable for distribution, until the contest is resolved. See also *Elizabeth Wanjiku Njoka vs. Joseph Njuguna & 3 others* [2016] eKLR (Ndung'u, J), *In re Estate of Chege Muikaria (Deceased)* [2016] eKLR (Musyoka, J), *In re Estate of Mwangi Kiondo (Deceased)* [2018] eKLR (Muchemi, J), *In re Estate of M'Ikiugu M'Mkindia (Deceased)* [2019] eKLR (Sitati, J), *In re Estate of Alfayo Ambalwa Musungu (Deceased)* [2020] eKLR (Musyoka, J), *In re Estate of the Late Nzioka Wambua (Deceased)* [2020] eKLR (Odunga, J) and *In re Estate of Obedi Ndwiga Rubarita (Deceased)* [2021] eKLR (Njuguna, J).
 15. Rule 41(3) of the Probate and Administration Rules is a pointer on what ought to happen. See *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo, J). The contested asset is set aside, to allow the claimants, or even the administrator, to initiate separate proceedings, to have the issue of ownership or other, resolved in those separate proceedings. I would like to emphasise that the role of the probate court is to divide or share out the estate of a dead person. That is why it shares out only assets that are not contested. That role does not involve delving into contests on ownership of the assets that are to be shared out. That is the spirit of Rule 41(3) of the Probate and Administration Rules. See *In Re the Estate of Kipyego Chepsiror Kolil* [2007] eKLR (Ibrahim, J), *Ruth Munyutha Kimonongi & another vs. Grace Waithera Mutitu* [2015] eKLR (Ngaah, J) and *In re Estate of Henry Njau Ngotho (Deceased)* [2020] eKLR (Machelule, J). The courts have also said that the probate and administration process is not designed for the handling of highly contested matters, and that resolution of such lies outside of the probate process, even if the disputes arise from the probate process, by filing a full-fledged suit or claim, in a separate cause, where the issues are thrashed out in a full-fledged hearing. See *Everline Atiang' Wanyama vs. William Osayo Siroko & another* [2014] eKLR (F Tuiyott, J). Proceedings for confirmation or revocation of grant have been declared unsuitable for determination on such contests as ownership of property. See *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J) and *In re Estate of Mwangi Gikonyo* [2017] eKLR (Waweru, J).
 16. The High Court has no jurisdiction to address issues around ownership of property, by dint of Articles 162(2) and 165(5) of *the Constitution*. That would include where issues of ownership arise in probate and administration proceedings. It would mean that where an issue around ownership arises in probate proceedings conducted before the High Court, the probate proceedings before that court would not be the appropriate forum to resolve the issues, and the same ought to be placed before the court with jurisdiction. The magistrate's court is enabled, through the *Land Act*, Cap 280, Laws of Kenya, and the *Land Registration Act*, Cap 300, Laws of Kenya. It can determine issues around use, title and occupation of land. However, the magistrate's court ought not determine contested questions around



those issues, within the context of probate and administration causes, for the reasons discussed in such cases as *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J), *Jidraph Kamero Njuguna & 3 others vs. Hilda Njeri Kamero* [2012] eKLR (L. Njagi, J), *In re Estate of Julius Wachira (Deceased)* [2013] eKLR (Musyoka, J), *In re Estate of Stone Kathuli Muinde (Deceased)* [2016] (Musyoka, J), *In re Estate of the Late Jonathan Kinyua Waititu (Deceased)* [2017] eKLR (Ndung'u, J) and *In re Estate of Mwangi Gikonyo* [2017] eKLR (Waweru, J).

17. The trial court adopted a mixed approach to that issue. It appeared to be alive to the fact that the ownership of Plot No. 135 Busia Township was contested, as between the estate herein and the respondent, hence it revoked the grant, to allow that issue to be finalised in Busia CMC ELC No. E55 of 2020. What could be a little unsettling is the suggestion that that transaction was valid. I understand that the appellant is ferociously contesting that in these proceedings on that account. Since the matter was alive in Busia CMC ELC No. E55 of 2020, the trial court should not have used language suggesting that it was persuaded that there had been a valid transaction. That transaction is contested in these proceedings, and these proceedings are not the proper place to resolve that issue. The issue was pending in Busia CMC ELC No. E55 of 2020, making it sub judice for the probate court to venture into the ownership issue.
18. I will not, for the same reasons, discuss the issues raised by the appellant, that the transaction had lapsed, or had been overtaken by lapse of the limitation period, or had breached contract and physical planning law. That is a story to be told in Busia CMC ELC No. E55 of 2020, and for the court seized of that matter to consider.
19. My role is limited to considering whether the trial court went wrong in appointing the respondent a co-administratrix of the estate of the deceased herein, when, in fact she was not a survivor of the deceased, and when the transaction she was lurching on had not been established to be valid.
20. So, was the trial court wrong in doing so? It is true, that the respondent was not a survivor of the deceased. She was not one of the survivors that Part V of the *Law of Succession Act* talks about, in sections 35, 36, 38, 39, 40 and 41, for she was neither a spouse, child, parent, sibling or grandchild of the deceased. She had no prior right or entitlement to administration, in the terms of section 66 of the *Law of Succession Act*. So, looked at from that perspective, she did not merit appointment as administratrix.
21. However, the trial court did not make the appointment on the basis of survivorship, but on grounds that it appeared as if the estate that she was administering, of her late husband, had an interest in the estate the subject herein. Under section 66 of the *Law of Succession Act*, creditors, or individuals with similar interest in an estate, qualify for appointment. The respondent could be viewed in that light, as a creditor. Was the transaction valid, to make her qualify for appointment on that score? That transaction is subject to active litigation, and the validity issue is yet to be determined. Strictly speaking, therefore, she does not pass as a creditor, to the extent that the validity of that transaction is still pending determination. However, she still had an interest in the estate, worth securing, in the event the other court found that the transaction was valid. See *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo, J). Her appointment was meant to secure that interest. The necessity to secure or protect that interest arose from the fact that the interest was threatened, for when the appellant herein obtained confirmation of the grant in 1993, that interest was not reckoned, the respondent was not involved in the proceedings, and the appellant never sought a determination, in terms of Rule 41(3) of the Probate and Administration Rules, on the validity of that transaction. Was the appellant aware of the alleged transaction, as at the confirmation of the grant? That did not matter, there was a suit on it, and the trial court saw documents, which, prima facie, demonstrated some interest. It was only proper, to protect that interest, in the interim, pending determination of Busia CMC ELC No. E55 of 2020, and fresh confirmation of the grant. The appellant could not be relied on to protect it, in view



of his previous conduct, of causing confirmation of his grant, without factoring that interest, hence the respondent had to be brought in as co-administratrix.

22. The courts have repeatedly held that the list of preference in section 66 of the *Law of Succession Act*, with regard to appointment of administrators, is not binding on the courts, nor cast in stone. It is only a guide. The court retains discretion, on who to appoint as administrator, and it may pass over a person with prior right, and appoint someone down the list, with a lesser entitlement to administration, where good reasons exist. See *In re Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR (JA Makau, J), *In re Estate of SWM (Deceased)* [2018] eKLR (Muigai, J), *In re Estate of Janet Eliud Timothy Mwamunga (Deceased)* [2019] eKLR (F. Amin, J), *In re Estate of Gurdial Kaur Sihra (Deceased)* [2020] eKLR (Onyiego, J and *In re Estate of Elizabeth Wanjiru Maina (Deceased)* [2020] eKLR (Kimondo, J). That is what happened here. The respondent had a lesser interest, as a creditor or presumed creditor. She was way down the list of preference or entitlement to administration, but the court had discretion to appoint her. There was good reason for that appointment, as discussed in paragraph 21 hereabove.
23. Overall, I find no merit in the appeal herein, for the reasons given. I shall, as I hereby do, dismiss it. As this appeal arises from a succession cause, each party shall bear their own costs. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 28TH DAY OF JUNE 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ipapu, instructed by Ipapu P. Jackah & Company, Advocates for the appellant.

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

