



In re Estate of Timoteyo Odongo Chitayi (Deceased) (Succession Cause 568 of 2006) [2023] KEHC 3503 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 568 OF 2006**

WM MUSYOKA, J

APRIL 28, 2023

IN THE MATTER OF THE ESTATE OF TIMOTEYO ODONGO CHITAYI (DECEASED)

JUDGMENT

1. I am determining an application, dated 10th December 2015.
2. The deceased herein died on 19th June 1988. A letter from the Chief of Marama Central Location, dated 9th September 2006, indicates that he was survived by 3 individuals, being Joab Chitayi Odongo, Joseph Amuyeka Odongo and Jared Chitayi Odongo, being sons of the deceased. It is indicated that the widows were also dead.
3. The petition for representation was filed in the cause on 13th September 1988, by Joseph Amuyeka Odongo, in his capacity as a son of the deceased. He listed the 3 sons listed in the Chief's letter as survivors of the deceased. Marama/Shinamwenyuli/1113 is the property that the deceased is said to have died possessed of. Letters of administration intestate were duly made on 11th May 2010, and a grant was duly issued, dated 30th August 2010. The grant was confirmed on 17th March 2012, on an application dated 26th September 2011. The estate was shared out unevenly between the 3 sons, so that Joab Chitayi Odongo got 10 acres, Joseph Amuyeka Odongo 9 acres and Jared Chitayi Odongo 5.5 acres. A certificate of confirmation of grant was duly issued, in those terms, dated 17th March 2012. I shall refer to Joseph Amuyeka Odongo hereafter as the administrator.
4. The summons for revocation of grant, is at the instance of Philemon Nyongesa Mukani, Philis Chuma Chitayi and Mildred Auma Kafwa Chitayi. I shall refer to the 3 of them as the applicants.
5. The 3 have sworn affidavits in support, on 10th December 2015. In his affidavit, Philemon Nyongesa Mukani, it is averred that Marama/Shinamwenyuli/1113 is ancestral land, which belonged to their grandfather, Omurebe. His cousin, Chitayi Atsieno, disagreed with his brothers, and Omurebe invited him to go and live with him on Marama/Shinamwenyuli/1113. The said Chitayi Atsieno had 3 sons, namely Robert Mukani Chitayi, Timoteyo Odongo Chitayi and Philip Matsabe Chitayi. Philemon Nyongesa Mukani was a son of Robert Mukani Chitayi; Joab Chitayi Odongo, Joseph Amuyeka Odongo and Jared Chitayi Odongo were the children of Timoteyo Odongo Chitayi; and the late



Gilbert Chitayi and Erick Omukani were the children of Philip Matsabe Chitayi. The late Gilbert Chitayi was survived by his widow, Mildred Auma Kafwa Chitayi. Omurebe was survived by 1 son, Jeremiah Makokha Omurebe, who died, and was survived by silah C. Makokha, who also died, and was survived by a widow, Philis Chuma Chitayi and a son, James Osacho Chitayi. It is averred that at land adjudication Marama/Shinamwenyuli/1113 was registered in the name of Timoteyo Odongo Chitayi to hold in trust for himself and other family members. It is averred that the land id demarcated on the ground amongst members of the larger family, so that Philis Chuma Chitayi and James Osacho Chitayi occupy 4.5 acres; Philemon Nyongesa Mukani occupies 1.5 acres; Mildred Auma Kafwa Chitayi occupies 1.0 acre; and Joab Chitayi Odongo, Joseph Amuyeka Odongo and Jared Chitayi Odongo occupies 16.0 acres. It is stated that Robert Mukani Chitayi and Philip Matsabe Chitayi were given portions of land as gifts by a cousin, and some of the family members reside on those portions. He states that he is now 76 years old, and has always lived on Marama/Shinamwenyuli/1113 uninterrupted, and so have Philis Chuma Chitayi, James Osacho Chitayi and Mildred Auma Kafwa Chitayi, and other families. He avers that they had also contracted 1.5 acres to Mumias Sugar Company Limited, and the account was in the name of Fridah Anyangu Shibeka, the wife of James Robert Mukani, and had nominated Justus A. Chitayi, a son of Joab Chitayi Odongo, as their agent for the sugarcane contract. Before succession, the extended family had sat and agreed that succession would be done, where everyone would be listed, so that they can get what they were entitled to, but they were surprised that succession was initiated, and proceeded without them. When they learned of what the administrator and his siblings had done, they got a surveyor to come to the ground, to demarcate the land.

6. The affidavits by Philis Chuma Chitayi and Mildred Auma Kafwa Chitayi make similar averments.
7. The application attracted a response from the administrator, vide an affidavit sworn on 6th April 2016. He avers that the deceased herein was his biological father, and the registered proprietor of Marama/Shinamwenyuli/1113. He avers that he was survived by the 3 sons named in the petition. He said that there was no fraud, and he did not conceal anything from the court, for he disclosed everyone who was entitled to a share in the estate. He identifies the 1st applicant, Philemon Nyongesa Mukani, as his cousin, as his father was a brother of his own father. He said that his said uncle, Robert Mukani Chitayi, owned Marama/Shinamwenyuli/1212, but died before land adjudication, and the property was registered, after adjudication, in the name of his eldest son, Zedekiah Malala. He avers that the 2nd applicant, Philis Chuma Chitayi, was the widow of his late cousin, silah Chitayi Makokha, the son of his uncle, Jeremiah Makokha Omurebe. He avers that the late Jeremiah Makokha Omurebe, was a cousin of his late father, the deceased herein, and he had his own land, being Marama/Shinamwenyuli/1107, where the 2nd applicant lives with her family. He avers that the 3rd applicant, Mildred Auma Kafwa Chitayi, was also a widow of a cousin, Gilbert Chitayi Matsabe, and they have their own land, Marama/Shinamwenyuli/1114, and succession had been done to the property, and that is what the 3rd applicant is entitled to. He says that Chitayi Atsieno had not been invited to Marama/Shinamwenyuli/1113 by Omurebe, for each had their own land. He avers that Robert Mukani Chitayi and Philip Matsabe Chitayi were not gifted the land they occupy, but what they were entitled, and allocated during land adjudication. On the acreage that they had contracted with Mumias Sugar Company Limited, it is averred that they were only allowed to use it as close relatives, and not because they were entitled to it. It is asserted that during confirmation of the grant, all the rightful heirs of the deceased were involved in the matter.
8. The replying affidavit by the administrator elicited responses, by way of further affidavits by the applicants, reiterating their claims.
9. Directions were given on 1st December 2016, for disposal of the application by way of oral evidence.



10. The oral hearings commenced on 18th March 2021. The 2nd applicant was the first to take to the witness stand. She stated that her family was entitled to a share in the estate, as the land was ancestral. She said that her family had its own land, where their grandfather was buried. He said that they had not obtained representation to the estate of their grandfather. She said that she was utilizing Marama/Shinamwenyuli/1107, which was unrelated to Marama/Shinamwenyuli/1113. The 1st applicant followed. He said that his own father had land, which he gave to them. The land was Marama/Shinamwenyuli/1212, registered in the name of his elder brother, Zedekiah Malala. He said that Marama/Shinamwenyuli/1212 was his father's land, and Marama/Shinamwenyuli/1113 was his grandfather's land. He said that the family of the 3rd applicant had Marama/Shinamwenyuli/1114, and she was entitled to land there. The 3rd applicant testified last. She said that her late husband was a nephew of the deceased. She said that her late father-in-law, Philip Masava Chitayi, was a brother of the deceased, and had his own land, being Marama/Shinamwenyuli/1114. She said succession was done on Marama/Shinamwenyuli/1114. She asserted that Marama/Shinamwenyuli/1113 was ancestral land. She said that she used to live on Marama/Shinamwenyuli/1114, but the family of the deceased brought her into Marama/Shinamwenyuli/1113, where she lived for 20 years, while working on Marama/Shinamwenyuli/1114. The applicants called a village elder, Daniel Omunyenye Wanga. He said that the applicants were entitled to Marama/Shinamwenyuli/1113.
11. The administrator testified on 26th April 2022. He stated that Marama/Shinamwenyuli/1113 was registered in the name of his father, and after his death they did succession. They disclosed everyone who needed to be disclosed. He said that the 1st applicant was entitled to Marama/Shinamwenyuli/1212; while the 2nd applicant was entitled to Marama/Shinamwenyuli/1107, and the 3rd applicant to Marama/Shinamwenyuli/1114. He said that Marama/Shinamwenyuli/1113 was not distributed after confirmation, due to a caution on it lodged by the applicants. He said that the applicants were not entitled to Marama/Shinamwenyuli/1113 as they had inherited the lands due to them from their predecessors. He said that when the Mumias Sugar Company Limited was alive, they had allowed the applicants to grow cane on Marama/Shinamwenyuli/1113, but that stopped. He stated that their grandfather had settled all the relatives on their respective parcels of land. The husband of the 3rd applicant was on Marama/Shinamwenyuli/1114, and when he died he was buried there, and that was where the 3rd applicant still lived. He said that the 1st applicant had his own land, being Marama/Shinamwenyuli/1212, which was in the name of his brother. He asserted that the deceased was not holding Marama/Shinamwenyuli/1113 in trust.
12. The record indicates that Marama/Shinamwenyuli/1113 was registered in the name of the deceased on 27th October 1987. Representation was sought in the cause by his children. The applicants are relatives, cousins of the administrator, who claim that Marama/Shinamwenyuli/1113 is ancestral land, that the deceased held in trust for them. In the petition, the administrator disclosed the 3 sons who survived the deceased. There was no obligation to disclose anyone else.
13. The applicants claim Marama/Shinamwenyuli/1113, not in succession, but in trust. The issue of declaration of trusts is outside the jurisdiction of a probate court. It was said, in *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J), *In re Estate of Julius Wachira (Deceased)* [2013] eKLR (Musyoka J) and *In re Estate of Mwangi Gikonyo* [2017] eKLR (Waweru, J), that there is no jurisdiction in succession proceedings, whether for revocation of grant or otherwise, for declaration of trusts or determination of ownership of contested estate assets. In *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J), it was stated that succession proceedings are not appropriate to challenge title of the deceased to estate assets, or to assert that such assets were subject to a trust in favour of the claimant. It was stated that such claims ought to be subjected to separate proceedings, for the probate court would have no jurisdiction to determine a claim of trust or to grant relief related to it. See also *Gichobi*



Mwangi v Simon Irungu Jobua [2016] eKLR (Waweru, J) and *In re Estate of Muriithi Minyati Ngunu (Deceased)* [2017] eKLR (Mshila, J).

14. I need not say more on the matter, save to add that following the coming into force of *Constitution* of Kenya, 2010, the High Court no longer has jurisdiction to determine issues around title to land, and the entitlement to use or occupy land. Declaration of trust turns on title or ownership of land. Whether a trust ought to be declared, is a matter that ought to be placed before the court empowered under Article 162(2) of the *Constitution*, for the High Court has no jurisdiction whatsoever over those issues, by virtue of Article 165(5) of the *Constitution*.
15. There is no merit in the application dated 10th December 2015, and I hereby dismiss the same. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 28TH DAY OF APRIL .2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Aligula, instructed by Akwala & Company, Advocates for the applicant.

Mr. Getanda, instructed by Onsando Getanda & Company, Advocates for the administrator.

