



**In re Estate of Charles Okoth Apamo (Deceased) (Succession Cause  
360 of 2011) [2023] KEHC 27156 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27156 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 360 OF 2011  
RE ABURILI, J  
DECEMBER 20, 2023**

**IN THE MATTER OF THE ESTATE OF CHARLES OKOTH APAMO (DECEASED)**

**BETWEEN**

**NEREAH NYAOKE AKOTH ..... 1<sup>ST</sup> ADMINISTRATOR**

**MARY OWAGA AKOTH ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**BENTA ACHIENG AKOTH ..... ADMINISTRATOR**

**JUDGMENT**

1. The applicants herein vide Summons dated 1<sup>st</sup> August 2021 moved this court seeking orders that the court be pleased to order that land parcel no. Kisumu/Manyatta 'A'/1012 be sold and the proceeds be distributed amongst all the beneficiaries of the deceased herein and that costs of the application be in the cause.
2. The summons was anchored on the grounds therein as well as the supporting affidavit sworn by the 2nd applicant Mary Owaga Akoth on the 1<sup>st</sup> August 2022.
3. It was the applicants' case that a grant of letters of administration intestate was issued to the three administrators herein on the 2<sup>nd</sup> December 2011 and a Certificate of Confirmation of Grant issued on the 30<sup>th</sup> December 2011 following which the properties and assets forming part of the deceased's estate were sub-divided amongst all beneficiaries save for the suit property herein land parcel no. Kisumu/Manyatta 'A'/1012.
4. The applicants averred that majority of the deceased's beneficiaries agreed as a family that the suit property be valued and sold with the proceeds of the sale being shared equally amongst all beneficiaries and that the valuation was done by Chrisca Real Estates at Kshs. 11,022,500.



5. It is the applicants case that the respondent opposed the sale of the suit property and moved into the existing house therein in a bid to disinherit and disadvantage the rest of the deceased's beneficiaries and thus it was only fair to have the suit property sold and the proceeds of the sale distributed equally amongst the beneficiaries.
6. In response, the respondent filed a replying affidavit sworn on the 3<sup>rd</sup> December 2021 in which she stated that the estate suit property was distributed equally amongst herself, the applicants and one Maurice Onyango Akoth as per the confirmed grant dated 31<sup>st</sup> December 2013 and thus each party was to get a ¼ share of the same.
7. The respondent deposed that she was the deceased's youngest widow and that she had her matrimonial home in the suit property where she resided with her family and where she had resided since the year 1995 and further that it was where she was staying at the time of the deceased's death and as such, she did not have any other home in Kisumu.
8. She further deposed that following confirmation of the grant, the 1<sup>st</sup> applicant sold 0.04HA of the suit property to one Fredrick Odhiambo Ogonga vide an agreement dated 31.5.2013 whereas the 2<sup>nd</sup> applicant sold a portion of the suit property to one Silas Aguko vide an agreement dated 21.9.2000. The respondent further deposed that prior to his death, the deceased had sold a portion measuring 0.03HA to one Noah Onyango Adhanja and subsequently the purchasers had acquired titles Kisumu/Manyatta 'A'/3334, 5050 and 5051 despite the fact that the property had not been subdivided.
9. It was the respondent's case that the applicants had effectively sold their interest in the suit property and wanted to bully her to vacate her matrimonial home and/or take a less share which was not logical and that all illegal titles created out of the suit parcel ought to be cancelled and the property divided into 4 equal portions.
10. The parties gave oral testimony in support of their respective cases.

### **The Applicants' Case**

11. The 1<sup>st</sup> applicant testified as PW1 stating that together with the 2<sup>nd</sup> applicant and the respondent, they were all widows of the deceased who passed on in 2008, that she lived in Kano Kapondo Ochogo, that the 2<sup>nd</sup> applicant lived in Kano Kachogo while the respondent lived in Kisumu.
12. It was her testimony that they were all administrators of the deceased's estate and that they all agreed on the mode of distribution of the deceased's estate after which the grant issued to them was confirmed on the 21<sup>st</sup> May 2013.
13. It was her testimony that the deceased left behind a house belonging to everybody that they wanted to sell and distribute the proceeds equally but that the respondent had refused to vacate.
14. In cross-examination, PW1 admitted that the respondent lived on the house in the suit property and that the respondent got married and found her staying in that house with the deceased and that the respondent was the one residing in the house on the suit property when the deceased passed on.
15. PW1 admitted that she sold a portion of the suit property to Fredrick Odhiambo Ngonga and that the 2<sup>nd</sup> applicant similarly sold a portion of the suit property to Silas Aguko though she was not aware that the deceased sold a portion of the suit property to Noah Onyango. She stated that the house they wanted sold was where the respondent lived.
16. PW2, the 2<sup>nd</sup> applicant testified that she and the deceased bought the suit property and constructed the house on the said plot when the deceased's first wife died. She testified that prior to the respondent



arriving on the scene, she organized for all the deceased's wives to spend separate few nights in the house on the suit property. It was her testimony that the respondent, who was her step sister, initially came to the house to help her with house chores but refused to go back home.

17. PW2 testified that after the deceased's death, the family sat and agreed to relocate back to the rural home and allowed the respondent to live in the house as she had young school going children and that after the children finished school, their advocate informed them to sell the suit property and share the proceeds. She further testified that the respondent had put up other houses on the suit property other than the contentious house.
18. In cross-examination, PW2 stated that during confirmation of grant, nothing was left out for distribution and that the suit property was to be distributed equally. She further stated that she could not recall when the family agreed to sell the suit property and distribute the proceeds therein nor did she have evidence of the said meeting. PW2 admitted that since the deceased died, the respondent had been staying in the house on the suit property.

### **The Respondent's Case**

19. The respondent testified that the suit property was distributed equally amongst the deceased's beneficiaries during confirmation of grant and that each party was thus to get a  $\frac{1}{4}$  share. She further testified that she lived in the house on the suit property where the deceased left her after his death. She denied awareness of a meeting wherein the deceased's family agreed to sell the suit property and divide the proceeds of the sale equally.
20. The respondent testified that she did not have a house in their rural home as it was destroyed following the deceased's passing and she was told by one Maurice and Tom, to go and remarry and thus she did not have any other home.
21. It was her testimony that all those people who bought part of the suit property had titles though the property had not been sub-divided. She testified that she had built some houses on the portion of the suit property where she occupied.
22. In cross-examination, the respondent reiterated that she did not have a house in the rural home and thus had no house to go back to as the one she had was demolished and that the house on the suit property was where she was married into and stayed and had lived there for the past 38 years.
23. In re-examination, the respondent reiterated her testimony in chief.

### **Analysis & Determination**

24. I have considered the pleadings herein as well as the oral testimonies of all the parties that appeared before me.
25. In the instant suit, the applicants herein seek an order that the suit property, Kisumu/Manyatta 'A' be sold and the proceeds be distributed amongst all of the deceased's beneficiaries. The parties herein are all administrators of the deceased's estate and had obtained grant of letters of administration on the 2<sup>nd</sup> December 2011 that were subsequently confirmed vide a Certificate of Confirmation of Grant issued on the 30<sup>th</sup> December 2011. The aforementioned Certificate of Confirmation of grant provided that the suit property was to be sub-divided equally amongst the four beneficiaries of the deceased.
26. The applicants herein allege that the deceased family met and agreed that the suit property should be valued, sold and the proceeds divided equally amongst the four beneficiaries provided in the Certificate of Confirmation of grant.



27. In response, the respondent argues that she has a house on the suit property which is the only home she has known for the past 38 years as her rural home was destroyed, and that by selling the suit property, she will be rendered homeless. It is her case that she and the deceased stayed on the suit property prior to his death and that she continued to stay there after his death. This was similarly echoed in the testimonies of both applicants.
28. The applicants both admit that the respondent continues to occupy the house on the suit property as she did with the deceased prior to his death. Further, It is also admitted by all parties herein that prior to his death, the deceased had sold a portion measuring 0.03HA to one Noah Onyango Adhanja; that following the confirmation of grant, the 1<sup>st</sup> applicant sold 0.04HA of the suit property to one Fredrick Odhiambo Ogonga vide an agreement dated 31.5.2013 whereas the 2<sup>nd</sup> applicant sold a portion of the suit property to one Silas Aguko vide an agreement dated 21.9.2000 and that all the said parties had acquired title deeds for their portions.
29. The respondent argues that it would be unjust for the court to proceed and order sale of the suit property and divide the proceeds equally amongst the deceased's four beneficiaries identified in the Certificate of Confirmation of Grant.
30. It is an established rule of evidence that he who alleges must prove. The applicants herein alleged that the deceased's family members met and agreed that the suit property be sold and proceeds of the sale be divided equally amongst the beneficiaries. However, there was no evidence of the said meeting having taken place or the agreement having been arrived at. This was paramount for the applicants if they wanted to prove concurrence of the family on the sale and subsequent division of the proceeds especially in light of the denial by the respondent that the aforementioned meeting and agreement took place.
31. Further, it is worth noting that as per the Certificate of Confirmation of Grant dated 21<sup>st</sup> December 2013, the suit property was to be shared equally between the parties herein and one Maurice Onyango Okoth and not all the beneficiaries of the deceased's estate and thus there was no need for concurrence of other members of the family but only that of the parties herein and one Maurice Onyango Okoth.
32. It would thus be unjust in my view to proceed with the sale of the suit property as the same would render the respondent homeless in light of her uncontroverted testimony that her rural home had been destroyed.
33. Accordingly, this court holds the view that the applicants failed to prove their case to warrant grant of the orders sought.
34. How then should the court proceed to distribute the suit property? The property was already distributed between the four beneficiaries as per the Certificate of Confirmation of grant issued to the administrators herein. The beneficiaries in issue were to share the property in equal shares. that is still the position as there is no review or setting aside of that order confirming the grant.
35. However, as the parties are unable to agree on the subdivision of the property in issue so that each one of them gets the equal share as ordered by the Court on confirming the grant, this this court has inherent powers under Rule 73 of the *Probate and Administration Rules* which Rule 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.’



36. As stated above, this court had already expressed itself on the mode of distribution of the suit property, with each of the named beneficiaries, Maurice Onyango Okoth, Nereah Nyaoke Akoth, Mary Owaga Akoth and Benta Achieng Akoth getting an equal share of the suit property.
37. Having failed to satisfy this court as to why it ought to order that the suit property be sold and the proceeds shared equally between the beneficiaries and some of the beneficiaries having conceded that they have already sold portions of the suit property to third parties, the suit property shall now be distributed as follows:
- a. The suit property shall be surveyed and the actual acreage established upon which it shall be divided into four quarters taking into consideration provisions for access roads with the share of the applicants being less the size they each respectively sold, i.e. for the 1<sup>st</sup> applicant her share will be less 0.04HA while that for the 2<sup>nd</sup> applicant shall be less the size sold to one Silas Aguko.
  - b. The respondent's share shall be calculated taking into account the location of the matrimonial house that she resides in.
  - c. All parties are free to dispose of their respective shares only after sub-division of the suit property has been undertaken and the four respective beneficiaries issued with their respective title deeds.
38. As this is a family matter, each party shall bear their own costs.
39. This file is closed.
40. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023**

**R.E. ABURILI**

**JUDGE**

