



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO 635 OF 2012**

**IN THE MATTER OF THE ESTATE OF AMOS ODUNDO GOMBE alias ODUNDO GOMBE**

**AND**

**JULIUS GOMBE ODUNDO.....1<sup>ST</sup> PETITIONER**

**MARSELA ODONGO.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**JAELE YAMO ODUNDO.....2<sup>ND</sup> PETITIONER**

**RULING**

**INTRODUCTION**

1. In their Summons for Confirmation of Grant dated 15<sup>th</sup> December 2017 and filed on 7<sup>th</sup> February 2018, the Petitioners herein sought for orders that the Grant of Letters of Administration intestate issued to them be confirmed.
2. The said application was supported by an Affidavit the 2<sup>nd</sup> Petitioner swore on 15<sup>th</sup> December 2017. They averred that there had been no objection to the said Grant and thus urged this court to confirm the same as per the Schedule of Distribution that had been annexed to the said application.
3. On 28<sup>th</sup> February 2018, the 1<sup>st</sup> Petitioner filed a Mode of Distribution dated 27<sup>th</sup> February 2018 proposing a different mode of distribution which he stated was done as per the Written Will of the deceased. He alluded to meetings that were held and surveying of the deceased's parcels of land. He contended that the 2<sup>nd</sup> Petitioner and her children had rejected his proposed Mode of Distribution.
4. In opposition to the 1<sup>st</sup> Petitioner's said Mode of Distribution dated 27<sup>th</sup> February 2018, on 16<sup>th</sup> April 2018, the 2<sup>nd</sup> Petitioner herein filed a Mode of Distribution dated 13<sup>th</sup> April 2018. On the same date, she also filed an Amended List of Dependents.
5. She was emphatic that she disagreed with the 1<sup>st</sup> Petitioner's Mode of Distribution. She stated that she was a widow of the deceased and asserted that no will was left behind by the deceased and neither were there any meetings held on the dates stated by the 1<sup>st</sup> Petitioner. She opined that the three (3) commercial buildings ought to have been sold and the proceeds shared equally among the widows of the deceased.
6. She added that the three (3) parcels of land namely Sakwa/Abom/1262, Sakwa/Abom/1462 and South Sakwa/Migwena/782 ought to be shared equally between her and her co-wives.
7. She pointed out that the details of the purported meeting that was held by the 2<sup>nd</sup> house on 27<sup>th</sup> February 2018 was explained to her but the same was imbalanced and/or wanting because parcels/portions distributed in the said Schedule were 16.4Ha yet the actual Certificates of Official Search on the subject parcels indicated the average as 20.6Ha. She pointed out that discrepancy raised questions on the fate of the remaining excess of 4.11Ha which had not been accounted for.
8. On 16<sup>th</sup> May 2019, the 1<sup>st</sup> Petitioner herein filed a Protest Affidavit and a Further Affidavit that he swore on 15<sup>th</sup> May 2018. He objected the sale of the three (3) commercial buildings and added that it was his wish that the same be distributed as per the deceased's will. He outlined his mode of distribution and contended that the allegation that 4.01 Ha of land had not been accounted for was false since there was a survey error of 4.1Ha which had been corrected.
9. He also pointed out that other beneficiaries' names of Pauline Atieno Odundo, Anna Akinyi Odundo and Robert Ouko were missing on

the list of deceased's sons and daughters.

10. He asserted that all the boundaries that were allocated to the family by the deceased ought to remain intact. He was apprehensive that the members of the 3<sup>rd</sup> house were not agreeable to work with other family members to ensure that both the mother and the sons got shares in all parcels. In his Further Affidavit, he outlined his mode of distribution of Land parcels Nos North Sakwa/Abom/1262 3.0Ha, North Sakwa/Abom/1462 9.2Ha and South Sakwa/Migwena/782 8.4Ha.

11. He also filed a Consent to Confirmation of Grant and to the Mode of Distribution of the Deceased Estate dated 15<sup>th</sup> May 2018. The said Consent was signed by Charles Nyadola Odundo (son), Henry Onyango Odundo(son), Benard Gombe Odundo(son), Syprosa Obiero Odundo(widow), Marsela Odongo Odundo (widow).

12. His Written Submissions were dated 14<sup>th</sup> December 2021 and filed on 20<sup>th</sup> December 2021. However, the 2<sup>nd</sup> Petitioner herein did not file any Written Submissions.

13. This Ruling is based on the parties' Modes of Distribution and the 1<sup>st</sup> Petitioner's Protest and Further Affidavits and Written Submissions.

### **LEGAL ANALYSIS**

14. The 1<sup>st</sup> Petitioner submitted that this court appointed an arbitrator but due to the Covid-19 challenges he did not appear for the arbitration as he was not served with a date. He contended that he only learnt that the arbitration had taken place and notified the court vide his letter dated 4<sup>th</sup> February, 2021.

15. He urged the court to order the arbitrator to give both parties the chance to be heard. He asserted that the main question herein was whether or not his mode of distribution was according to the interest of the entire family and how many family members consented to it. He pointed out that the 2<sup>nd</sup> Petitioner's objection to his mode of distribution was a waste of court's time hence his application under the Protest Affidavit and the Further Affidavit ought to be allowed with costs.

16. Notably, on 4<sup>th</sup> November 2019, this court noted that parties could not agree on the mode of distribution and ordered that the matter be referred to a mediator. On 2<sup>nd</sup> November 2020, the Mediator filed a Certificate of Non-compliance on the ground that she was not able to reach all parties. This matter was therefore referred back to court for directions. Thus, it was not correct that the matter was referred to an arbitrator as the Petitioner claimed. Indeed, as a mediator and an arbitrator practiced different disciplines of alternative dispute resolution methods but because he may not have been well versed with the different modes of settlement, he could be excused for that.

17. Further, it was also not true that there was any mediation meeting that was held to the exclusion of the 1<sup>st</sup> Petitioner herein as none was convened because the appointed mediator was unable to reach all parties to the suit.

18. Having said so, this court perused both modes of distribution to ascertain the reasons behind the parties' contention. A consent was attached to the 1<sup>st</sup> Petitioner's Mode of Distribution. However, only five (5) beneficiaries had signed the same. This was against twenty five (25) beneficiaries who had been indicated in the aforesaid Amended List of Dependants dated 13<sup>th</sup> April 2018 and filed on 16<sup>th</sup> April 2018. The 2<sup>nd</sup> Petitioner did not attach any consent to her proposed Mode of Distribution. Further, the 1<sup>st</sup> Petitioner submitted that some of the beneficiaries' names were missing on the Amended List of Dependants.

19. Section 71 of the Law of Succession Act Cap 160(Laws of Kenya) provides that:-

**(1) "After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets...."**

**Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares...."** (emphasis court)

20. Notably, none of the proposed modes of distribution met the threshold of Section 71 of the Law of Succession Act as some dependants appeared to be missing in the list of dependants. None of the dependants had signed Form 38 as required under Rule 26(2) of the Probate and Administration Rules at the time of filing of the Summons for Confirmation of Grant. In addition, there were no representatives of the deceased's children who had died which meant that both proposed Modes of Distribution were likely to disinherit some dependants. In a nutshell, this court was not satisfied that the respective identities and shares of all persons beneficially entitled had been identified herein.

21. It did appear to this court that there was need for the beneficiaries and acreage to be determined before this court could make a determination. As the Court-Annexed Mediation did not appear to have borne any fruit because the Mediator was unable to reach both parties, this court took the view that the parties ought to be given an opportunity to see if their differences could be resolved by way of mediation.

### **DISPOSITION**

22. For the foregoing reasons, the upshot of this court's decision was that the Summons for Confirmation of Grant dated 15<sup>th</sup> December 2017

and filed on 7<sup>th</sup> February 2018 be and is hereby held in abeyance as the matter is referred to mediation for resolution. It is hereby directed that this matter be mentioned on 11<sup>th</sup> May 2022 before the Deputy Registrar High Court Kisumu with a view to appointing a Mediator to assist the parties herein arrive at an amicable settlement out of court.

23. This matter will be mentioned on 26<sup>th</sup> September 2022 to establish if a settlement will have been arrived at and/or for further orders and/or directions.

24. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2022**

**J. KAMAU**

**JUDGE**