



In re Estate of Eliazaro Odhiambo Odongo (Deceased) (Succession Cause 949 of 1990) [2022] KEHC 12193 (KLR) (Family) (27 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 949 OF 1990

MA ODERO, J

MAY 27, 2022

IN THE MATTER OF THE ESTATE OF ELIAZARO ODHIAMBO ODONGO (DECEASED)

BETWEEN

GEORGE JACKONIAH ODHIAMBO (IN HIS CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE ELIZARO ODHIAMBO ODONGO) 1ST APPLICANT

GRACE WANJIRU ODHIAMBO 2ND APPLICANT

AND

SARAH ANYANGO OKOTH 1ST RESPONDENT

JIMLY PROPERTIES LIMITED 2ND RESPONDENT

RULING

1. Before this Court for determination is the chamber summons dated 1st October 2020 by which the Applicants George Jacksoniah Odhiambo (as personal Representative of the Estate of the late Eliazaro Odhiambo Odongo) and Grace Wanjiru Odhiambo seek the following orders:-

1. Spent.
2. Spent
3. Spent
4. Spent



5. Pending the hearing and determination of this Application, the 2nd Respondent be ordered to deposit into this Honourable court all rental proceeds collected in respect of LR No. 36/1/778 net of such reasonable monthly expenses as this Honourable court may approve.
6. In the alternative to prayer No. 5 above, the 2nd Respondent whether by itself or its agents, servants or any other person(s) acting on its behalf, be ordered to deposit all such rent collections from LR No. 36/1/778 in a Bank Account to be opened and held in the names of Kimamo Kuria Advocates and such Advocate as the 1st Respondent may appoint to represent her.
7. In the alternative to prayers Number 5 and 6 above, the Respondents be ordered to pay or cause to be paid to the Applicants every month, their rightful two third share of the monthly rent collection in respect of LR No. 36/1/778 net of such reasonable monthly expenses as this Honourable court may approve.
8. The 1st Respondent in her capacity as the legal representative of the Estate of her late husband Bob Robert Okoth (who was the Administrator from 1989 to 2015 when he died) be ordered to give a full account of all rental collection received by him in respect of LR No. 36/1/778 with effect from 1st February 1989 being the first rent collection month after the death of the said Eliazaro Odhiambo Odongo on 13th January 1989 up to 20th January 2015 when her said husband died.
9. The 1st Respondent be ordered to give a full account of all rental collection received in respect of LR No. 36/1/778 with effect from 1st February 2015 being the first rent collection month after the death of her said husband Bob Robert Okoth (who was the Administrator of the Estate of the deceased from 1989 to 2015 when he died on 20th January 2015) and her commencement of rent collection up to the date that the Applicants start receiving their share of the monthly rental collection.
10. The 2nd Respondent be ordered to give a statement of account with respect to all rental proceeds collected by them in respect of LR No. 36/1/778.
11. The 1st Respondent be ordered to co-operate with the Applicants in the process of:
 - a) Transferring by way of Vesting Assent, the said property to the three beneficiaries named in the Rectified certificate of Grant dated 3rd June 2019.
 - b) Marketing and selling the said property known as LR No. 36/1/778 and in sharing the net sale proceeds in the ratio of one third each as between the Applicants and the 1st Respondent subject to the 1st Respondent's entitlement being proportionally reduced to provide for reimbursement to the Applicants of such amounts found due to them after the accounts referred to in prayer numbers 8,9 and 10 above.
12. In default of the 1st Respondent complying with any order granted under Prayer No 11 above the Deputy Registrar of this Honourable court be authorized to sign all necessary documents for the process of vesting the suit property LR No. 36/1/778 to the beneficiaries and selling and transferring the same and accounting for the sale proceeds to the beneficiaries including the 1st Respondent.
13. Such other or further orders as this Honourable court may consider fit and just to grant in the circumstances, be granted.



14. The costs of this application be awarded to the Applicants.”
2. The application was premised upon sections 2,45, 47 and 82 of the *Law of Succession Act* and Rules 73 and 49 of the *Probate and Administration Rules* and all other enabling provisions of the law and powers of the court and was supported by the Affidavit of even date and the Further Affidavit dated 14th October 2021 sworn by the 1st Applicant.
3. The Respondents Sarah Anyango Okoth And Jimly Properties Limited opposed the application through the Replying Affidavit dated 5th October 2021 and the Further Affidavit dated 14th October 2021 both sworn by the 1st Respondent.
4. The application was canvassed by way of written submissions. The Applicants filed the written submissions dated 1st February 2022, whilst the Respondents relied upon their written submissions dated 14th February 2022.

Background

5. This Succession Cause relates to the estate of Eliazaro Odhiambo Odongo (hereinafter ‘the Deceased’) who died intestate on 30th January 1989. A copy of the Death Certificate (Exhibit ‘GJO1’) is annexed to the supporting Affidavit dated 1st October 2020.
6. The Deceased was survived by two widows namely ASKA Achuro (1st wife) who had five (5) children as follows:- Mary Aoko Orlale (Deceased) Bob Roberts Okoth (Deceased) Frank Otieno Odhiambo (Deceased) George Jackoniah Odhiambo Joyce Akinyi
7. The 2nd wife of the Deceased Dona Rimba had three children as follows: - JOOPWOGO
8. Following the demise of the Deceased his youngest son Bob Robert Okoth (hereinafter referred to as ‘Bob Robert’) applied for and obtained Grant of letters of Administration Intestate which were issued on 2nd September 1991. That Grant was confirmed on 3rd July 1992 and the beneficiaries all agreed on the mode of distribution of the estate which was to be as follows:-



No.	Name	Description of Property	Share of heirs
1.	Bob Robert Okoth (son – Adult) Frank Otieno Odhiambo (son - Adult) George Odhiambo (son - Adult)	L.R. 36/1/778	1/3 1/3 1/3
2.	JO (son-Minor) PW (son-minor) GO (son-minor)	L.R. 209/5389/45	1/5 2/5 2/5
3.	Aska Achuro (wife) Dona Rimba (wife)	Credit Finance Corporation Account No. xxxxxx	½ ½
4.	Aska Achuro Dona Rimba	Post Office Savings Account No. xxx/xx,x	½ ½
5.	Aska Achuro Dona Rimba	Barclays Bank (Homa Bay) Savings A/C xxxx	½ ½

9. The parties proceeded to have the estate distributed as indicated. The house of the 2nd widow Dona Rimba distributed their share of the estate amongst themselves and there are no issues concerning distribution to the 2nd House.
10. This suit concerns a dispute over distribution of the estate to the 1st House of the widow Aska Achuro. The Applicants allege that LR No. 36/1/778 situated in Eastleigh Nairobi (hereinafter the ‘suit property’) was to devolve to Bob Robert, Frank Otieno and George Odhiambo whereby each was to receive a one third share of the property. The Applicants alleged that instead Bob Robert began to collect rent for the suit property which rent he utilized alone without sharing or accounting for said rental income to his brothers. That the said point Bob Robert appointed Messrs Jimly Properties Ltd (the 2nd Respondent) to manage the suit property.
11. The said Bob Robert passed away on 20th February 2015. A copy of his Death Certificate Serial Number xxxxx is annexed to the supporting Affidavit, upon his demise his widow, Sarah Onyango Okoth (the 1st Respondent herein) took over the suit property and continued to collect the rent and utilize the same herself.
12. Meanwhile Frank Otieno Odhiambo also passed away on 24th June 2003. A copy of his Death Certificate Serial No. xxxxx is annexed. He was survived by his widow Grace Wanjiru Onyango who is



- the 2nd Applicant herein. The widow and her son David Frank Otieno applied for and obtained Grant of letters of Administration which Grant was confirmed on 7th July 2010 (Annexure 'GO6').
13. Following the demise of 'Bob Robert' who was the Administrator of the estate of the Deceased the 1st Applicant George Jackson Odhiambo sought orders to allow him replace his brother as Administrator. The court allowed this request and the Grant was re-issued on 4th June 2019 in the name of the 1st Applicant (see Page 10 of the Annexure to the Supporting Affidavit). The confirmed Grant previously issued to 'Bob Robert' was also rectified and re-issued to the 1st Applicant (page 11 of the supporting Affidavit). Therefore, the 1st Applicant has filed this suit in his capacity as Administrator and representative of the estate of the Deceased. In the re-issued Grant Frank Otieno Odhiambo was substituted as a beneficiary to the estate by his widow Grace Wanjiru Odhiambo and Bob Robert Okoth was also substituted as a beneficiary by his widow Sarah Onyango Okoth.
 14. The 1st and 2nd Applicants complain that the 1st Respondent has refused to have the suit property distributed as per the schedule of Distribution in the confirmed Grant. That the 1st Respondent continues to collect rent from the suit property and to utilize the same to her own benefit excluding the 1st and 2nd Applicants who are lawfully entitled to a one-third share of said property. That despite demand having been made the 1st Respondent has been unwilling to settle the matter amicably. Accordingly, the Applicants now demand from the Respondent the following:-
 - a. A full account of rent collection and reimbursement of our two thirds net share wrongfully withheld from us.
 - b. The immediate transfer by way of vesting assent of the subject property to us the two Applicants jointly with the 1st Respondent in accordance with the Rectified Certificate of Confirmation rectified on 3rd June 2019.
 - c. The sale of LR No. 36/1/778 and sharing of the sale proceeds there way subject to reimbursement of such amounts found due to us after a full account of all rental collection received by the 1st Respondent and Bob Robert Okoth in respect of LR No. 36/1/778 with effect from 1st February 1989 to date."
 15. On her part the 1st Respondent in her Replying Affidavit opposed the application. The 1st Respondent confirmed that she was the widow of Bob Robert Okoth who was the original Administrator of the estate of the Deceased. She alleges that all the children of the Deceased had received their share of the estate by the early 1990's.
 16. According to the 1st Respondent the property known as LR No. 36/1/778 Eastleigh had been bequeathed to her late husband alone. She claims that purely out of goodwill her late husband invited his brothers to contribute towards the development of the suit property into a commercial building on the understanding that they would all three benefit from the rental income derived therefrom.
 17. That however at a meeting held to discuss the issue the two brothers of her late husband declined to contribute any money towards the development of the suit property saying that the venture would be too costly.
 18. The 1st Respondent and her late husband then took a loan which they used to develop the suit property and eventually put in new tenants. That the Applicants since 1988 have never bothered to visit the suit property and that all the taxes and rates that had accumulated on the property were paid off by the 1st Respondent and her children.



19. According to the 1st Respondent the Applicants having already received their share of the estate have no valid claim over the suit property. That having taken up together with her late husband the burden of the financial risk in developing the suit property the 1st Respondent is fully entitled to the entire rental income derived therefrom.
20. The 1st Respondent accuses the 2nd Applicant of false misrepresenting herself to be the wife of Frank Odhiambo Otieno when in actual fact she was divorced from the said Frank Otieno. That the present application is nothing but an attempt to harass and oppresses the 1st Respondent with the ultimate aim of disinheriting her and her children. The 1st Respondent insists that the Applicants have no legal claim to the suit property and urges the court to dismiss their application in its entirety.

Analysis and Determination

21. I have carefully considered the application before the court as well as the Affidavit filed by the Applicants, the Replying Affidavits filed by the 1st Respondent as well as the written submissions filed by both parties.
22. The point of dispute between the parties is the property known as LR No. 36/1/778, which property is located in the Eastleigh area of Nairobi. The Applicants position is that the said property which belonged to the Deceased was bequeathed to the three (3) sons of the 1st wife of the Deceased in equal shares of one-third each. The Applicants state that despite this joint bequest to all three (3) sons the property has not been distributed to date. That instead the Respondents have treated the property as their own and have collected and utilized all the rental income derived therefrom to the exclusion of the other two (2) brothers.
23. On her part the 1st Respondent's case is that prior to his demise the Deceased Mzee Eliazaro Odhiambo held a meeting with her late husband and his two brothers. That at said meeting, the Deceased bequeathed a property in Makadara to Frank Otieno, a property in Bahati to James Oluoch whilst the Eastleigh property (the suit property herein) was to go to her late husband Bob Robert Okoth. Therefore, the position of the 1st Respondent is that the Applicants have no share in the suit property and that their claim to said property is misplaced.
24. The 1st Respondent further states that with the agreement of the entire family, her late husband applied for and obtained a confirmed Grant of letters of Administration in respect of the estate of the Deceased. She insists that all the property left by the Deceased was distributed to the beneficiaries in the 1990's. She therefore asserts that there is no distribution of the estate pending.
25. The 1st Respondent has claimed that the suit property was bequeathed solely to her late husband. However, this allegation is not borne out by the facts and evidence. It is not disputed that the suit property is still vested in the name of the Deceased Eliazaro Odhiambo Odongo. It is also not disputed that Bob Robert Okoth who was the Administrator of the estate passed away on February 2015 a full twenty years after the demise of the Deceased. If the property had been bequeathed to Bob Robert as alleged then why did he fail to take any steps, during the twenty (20) year period when he was the sole Administrator to have the said property transferred into his own name.
26. The 1st Respondent has averred in her Replying Affidavit that during an informal meeting at the family home in Rusinga Island, the Deceased bequeathed the suit property solely to her late husband Bob Robert Okoth. If this was the case then why did the said Bob Robert obtain a Grant in his name indicating otherwise.



27. It is common ground that following the demise of the Deceased it was this Bob Robert who on 22nd September 1991 obtained letters of Administration to the estate. That Grant was duly confirmed on 3rd July 1992. In the confirmed Grant it is clearly indicated that the property known as LR No. 36/1/778 Nairobi was to devolve equally to Bob Robert Okoth, Frank Otieno Odhiambo and George Odhiambo with each son receiving one-third share of the property.
28. If Bob Robert knew that the suit property had been bequeathed to him alone then why did he proceed to indicate in the Grant that the property was to devolve to the three brothers in equal shares. The fact that the confirmed Grant obtained by Bob Robert himself indicates that the suit property was to devolve to all the three brothers belies the assertion of the 1st Respondent that the property was to devolve to her late husband alone.
29. The duty of a Probate court is to supervise and oversee the distribution of the estate of the Deceased to the genuine beneficiaries. From the material available, it is clear that the suit property which is still registered in the name of the Deceased forms part of the estate of the Deceased. The mode of distribution of this asset is clearly set out in the confirmed Grant. No party not even the 1st Respondent as filed a summons seeking to review and/or revoke that Grant.
30. It is pertinent to note that in Succession Cause No. 6124 of 2020 Estate of Bob Robert Okoth the 1st Respondent did attempt to include the suit property as an asset belonging to the estate of her late husband. She also sought for an injunction to prevent the Applicants from pursuing the sharing out of the suit land on the basis of one-third each.
31. In his Ruling dated 21st July 2021 Hon Justice Muchelule in declining to make any orders in respect of the suit land observed as follows:-
- “When one looks at the certificate of confirmation in the estate of Eliazaro Odhiambo Odongo the Respondents are each entitled to one-third of LR No. 36/1/778. If that is true, then it would be difficult at this stage to issue a temporary injunction against the Respondents over the Property.”
32. From the evidence availed to this court, I find and hold that the suit land being LR No. 36/1/778 Eastleigh forms part of the estate of the Deceased. The mode of distribution of said asset is clearly set out in the confirmed Grant being one-third to each of the three sons, as named in the Grant.
33. In light of my finding above, it is manifest that the only person who can legitimately deal with the suit property is the 1st Applicant who is now the Administrator of the estate. Any attempt to interfere with the suit land amount to intermeddling with the estate of the Deceased. The 1st Respondent in her Replying Affidavit concedes that she is currently collecting and utilizing the rental income derived from the suit property. She has instructed the 2nd Respondent to collect rent on her behalf vide the letter dated 31st October 2019 (see page 130, Supporting Affidavit.
34. In that letter dated 31st October 2019 written to Jimly Properties Ltd (the 2nd Respondent) by the Advocates of the 1st Respondent it is stated –
- “Please note that from our records as well as the court records there is no order that the High court of Kenya issued substituting or appointing George Jackoniah Odhiambo instead of the deceased Bob Robert Okoth over the subject property.....”
35. The above is in fact a false statement. On 4th June 2019 the High Court had already issued rectified Grant in which the 1st Applicant replaced Bob Robert Okoth as Administrator of the estate of the



Deceased. (See page 7 of supporting Affidavit). If the Advocates for the 1st Respondent had conducted due diligence they would have been aware of this. It is manifest that before October 2019 when the letter was being written to the 2nd Respondent there already existed a rectified Grant vesting the suit property in the 1st Applicant as Administrator of the estate.

36. Section 45 (1) (a) of the *Law of Succession Act* Cap 160 Laws of Kenya provides as follows:-

“No intermeddling with property of a Deceased person.

(i) Except so far as expressly authorized by the Act, or by any other written law, or by a grant of representation under this Act, no persons shall, for any purpose take possession or dispose of or otherwise intermeddle with, any free property of a deceased person.”

37. It has been demonstrated that the Applicant and her late husband took over the suit property developed the same and have been collecting and utilizing the rental income derived therefrom. This is not denied, indeed in her Replying Affidavit the 1st Respondent admits that she and her late husband took out a loan and developed the suit property. She further admits that they have been collecting and utilizing the rental income alone.

38. The 1st Respondent stated that her late husband invited his brothers to join hands and contribute money to develop the plot but they declined to do so. The fact that the 1st Respondent and her late husband borrowed money to develop the plot does not convert the suit property to become their sole property. The property remains bequeathed to the three brothers jointly. As things now stand there exists a confirmed Grant appointing the 1st Applicant as Administrator of the estate of the Deceased. The suit property forms part of the estate of the Deceased. *In Estate Of Prisca Ong’yo Nande* [2013] eKLR Hon Justice William Musyoka observed as follows: -

“the purpose of a confirmed grant is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distribute it in accordance with the distribution schedule approved (Own emphasis).

39. Therefore the action of the 1st Applicant in adamantly insisting on collecting the rental property derived from the suit property amounts to intermeddling with the estate of the Deceased person. In the *Estate Of Makokha Idris Khasabuli* (Deceased [2019] eKLR the court stated that-

“The law takes a serious or dim view of intermeddling. Under section 45 of the Act, it is a criminal offence and a person found guilty of handling estate property without authority can be fined or even sent to jail or subjected to both fine and imprisonment. Under the same provision, such a person should account to the person who is ultimately appointed administrator”. (Own emphasis)

40. The late Bob Robert as Administrator of the estate of the Deceased and the 1st Respondent as Administrator of the estate of her late husband are accountable to the other beneficiaries for all rental income derived from the suit property. I therefore do grant prayers (8) and (9) of this chamber summons.

41. Likewise in order to prevent any further intermeddling with the estate pending the transmission of this asset to the lawful beneficiaries, I do direct that henceforth any and all rental income derived from LR No. 36/1/778 is to be deposited in a joint income earning bank account to be opened in the names of the Advocates for the two parties.



42. As pointed out earlier it is now twenty six (26) years since the death of the Deceased. Section 94 of the Law of Succession Act obliges an Administrator to get in and distribute all assets comprising the estate which he/she is administering. Failure to do this amounts to an offence and the said Administrator will be liable to make good any loss and/or damage occasioned to the estate. The late Bob Robert failed in his duty as Administrator as he failed and/or declined to ensure that this asset was transmitted to the rightful heirs. Accordingly, the late Bob Robert (and following his demise the Administrator of his estate) are liable to make good the loss occasioned to the estate of the Deceased by such failure. Section 45(2)(b) of the Law of Succession Act provides that any person who has intermeddled with an estate shall-

“be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

43. Accordingly, the 1st Respondent has a duty under the law to give an account to the lawful Administrator of the estate of the amounts she has collected in rental income from the suit property.

44. Following the substitution and rectification of the Grant the current Administrator of the estate of the Deceased is the 1st Applicant. Under Section 83(a) of the Law of Succession Act a personal representative has a duty to complete the administration of an estate within six (6) months. As such, the 1st Applicant has the obligation to ensure the transmission of the suit property to the beneficiaries named in the Grant. Due to the demise of the original beneficiaries the property will devolve to those who were named to substitute those beneficiaries in the grant issued on 3rd June 2019 namely –Grace Wanjiru Odhiambo Sarah Onyango Okoth.

45. The 1st Respondent claims that Grace Wanjiru Odhiambo was fraudulently inserted as the personal representative to Frank Otieno Odhiambo as she is no longer his wife. She claims that Frank Otieno divorced the 2nd Applicant in 1978 and re-married one Bona Awino at a ceremony conducted in Kibera in 1980. That therefore Grace Wanjiru is no longer the lawful wife of Frank Otieno Odhiambo. These remain mere allegations. No Divorce Cause was cited by the 1st Respondent and no Decree Absolute was availed to the court. No evidence has been available to show that Frank Otieno ever married 3rd party.

46. Accordingly, I find that the suit land belongs to the 1st and 2nd Applicants and the 1st Respondent jointly. This cause was filed way back in 1990. Litigation it is said must come to an end. In order to finalize this Succession Cause it is necessary that the suit property immediately be transferred and vested to the three beneficiaries named in the rectified Grant dated 3rd June 2019. I therefore grant prayer 11 (a) of this applications.

Conclusion

47. Finally, based on the foregoing this court makes the following orders-

- (1) That from the date of this judgment, all the rental income derived from LR No. 36/1/778 is to be deposited into a Bank Account to be opened and held in the name of the Advocates for the two parties.
- (2) That Sarah Anyango Okoth in her capacity as legal representative of the estate of her late husband BOB Robert Okoth (who was the Administrator of the estate of the Deceased herein from 1989 to 2015) be and is hereby ordered to give a full account of all rental income derived from LR No 36/1/778 w.e.f 1st February 1989 to 20th January 2015.



- (3) That Sarah Anyango Okoth be and is hereby ordered to give a full account of all rental income received in respect of LR. No. 36/1/778 w.e.f 1st February 2015 up to the date of this Ruling.
- (4) That Jimly Properties Limited be and are hereby ordered to give a statement of Account of all rental proceeds collected by them in respect of LR No. 36/1/778.
- (5) That the 1st Respondent Sarah Anyango Okoth be and is hereby ordered to co-operate with the Applicants in transferring by way of Vesting Assent the property known as LR No. 36/1/778 to the three (3) beneficiaries named in the Rectified Certificate of Grant dated 3rd June 2019.
- (6) That this being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 27TH DAY OF MAY 2022.

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MAUREEN A. ODERO

JUDGE

