



**In re Estate of Osundwa Chitechi (Deceased) (Succession Cause
357 of 1989) [2022] KEHC 14568 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 357 OF 1989**

PJO OTIENO, J

OCTOBER 31, 2022

IN THE MATTER OF THE ESTATE OF OSUNDWA CHITECHI (DECEASED)

BETWEEN

FRANCIS MUKOLWE OSHUNDWA 1ST PETITIONER

NATHAN MUMIA 2ND PETITIONER

PATRICK OCHIENG 3RD PETITIONER

AND

JOSHUA OMULAMA OBJECTOR

RULING

1. The summons premised on Section 74 of the *Law of Succession Act* and dated March 31, 2021 seeks an order that the orders in the ruling dated November 10, 2016 be reviewed so that those people the court found to have been settled *inter vivos* by the deceased be excluded from the scheme of sharing and distribution of the estate property known as North Wanga/Koyonzo/534.
2. The basis for seeking that order is on the ruling itself by which the court found that the deceased had settled in favour of his elder sons landed property in his lifetime and that the only property that was never transferred be shared equally among those sons who never got any gifts *inter vivos*. On that basis the Applicants consider the decision that the property be shared equally among the sons including children of those sons who had benefited to present an error on the face of the record which if left uncorrected will have inflicted an injustice and portend bloodshed and anarchy due to the facts that the sons who live in that property each has less than two (2) acres each.
3. The application was opposed by the affidavit of Nathan Mumia Shiundu sworn on the May 26, 2021. The gist of the affidavit is that he was deponing to the facts on his own behalf and on behalf of the 3rd Petitioner. The Affidavit accuses the Applicant of being used by the 1st Petitioner to mount an



unmeritorious application too late yet he has participated in the matter since 1989 without raising any objection. It was then asserted that the court has become *functus officio* after the ruling sought to be reviewed was delivered in that the Applicant is listed as number 7 in the Certificate of Confirmation arising from the said decision and that no other beneficiary has objected to the said distribution and lastly that the sole purpose of the application is to defeat the implementation of the Certificate of Confirmation of Grant. The court was urged to dismiss the application so that this long outstanding dispute is brought to an end.

4. Parties did file written submissions as ordered by the court and urged the court to make a determination based on the papers filed without any highlighting.
5. On appraisal of the application and the Replying Affidavit, the court takes the view that the only issue for determination is whether there is a basis to review the ruling so as to exclude some of the beneficiaries from the equal sharing of the estate on the basis that they had been given gifts by the deceased in his life time.
6. That the gifts given to a beneficiary by the deceased during the deceased life must be taken into account is not in doubt for Section 42 of the Act stipulates:-

“Where-

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

7. Taking into account demanded by the provision must be seen to further the principle of equal sharing. What a heir has got during the life of the deceased cannot be ignored but must be taken into account.
8. I have read the ruling by my brother C. K. Kariuki, J. and I note that there was no taking into account the benefits found to have been vested upon the persons named at paragraph 9 of the ruling. The court appreciates the rationale of Section 42 to be the principle of equal sharing in intestates. For the reasons that admitted gifts inter vivos were not taken into account, there is a clear error present on the face of the record which merits and calls for review.
9. However, there is a group of four people who were held to have been apportioned land without specifics on which land and how much of it they were apportioned.
10. In order that the spirit of equal sharing is achieved, I do review the ruling. However, because none of the parties has told the court in details what the four said to have been apportioned land got, it is directed that both sides file Affidavits limited to the question how much of which land was apportioned to Maurice Chitechi Osundwa, John Mulama Osundwa, Musungu Osundwa and Dickson Osundwa. That be done within thirty (30) days from today for the matter to be mentioned on December 6, 2022.
11. I make no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 31ST DAY OF OCTOBER 2022.

PATRICK J. O. OTIENO

JUDGE



In the presence of:

Mr. Osango for the Petitioners

Mr. Sichangi for the Objector

Court Assistant: Polycap Mukabwa

