



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 852 OF 2005**

**IN THE MATTER OF THE ESTATE OF JOSEPH ABONGO ODIPO (DECEASED)**

**SHARON ATIENO ABONGO.....APPLICANT**

**VERSUS**

**BETH NYAWIRA GATHONI.....RESPONDENT**

**RULING**

1. What is not in dispute is that the deceased Joseph Abongo Odipo died intestate on 28<sup>th</sup> August 2004. During his life he married Beatrice Adhiambo Atieno Abongo with whom he got a daughter Sharon Atieno Abongo (the applicant). Beatrice died on 7<sup>th</sup> March 1998. The deceased then married the respondent Beth Nyawira Gathoni with whom he lived for six years before he died. He did not get any child with her. There is no dispute that the deceased left his mother Jane Sewe Odipo. The applicant, the respondent and Jane Sewe Odipo are beneficiaries of the deceased's estate. The estate comprises a house on LR No. [...] in Donholm Phase 5 (where the deceased lived with his late wife and where he left the respondent); Plot No. [...] that has a three storey building with 29 rental rooms; and Standard Chartered Bank A/C No. [...].

2. The joint administrators of the estate of the deceased are the respondent, the deceased's cousin Charles Oduor Kado and the applicant.

3. There is a pending application dated 9<sup>th</sup> July 2019 by the respondent (which is supported by Charles Oduor Kado) that sought that the joint grant of letters of administration intestate be confirmed. In the application, she asked that she be given the Donholm house and that the proceeds of the bank account be given to Jane Sewe Odipo. As for the Kayole building, she asked that it be given to Jane Sewe Odipo to hold in trust for the applicant, with 1/3 of the rental income going to Jane Sewe Odipo and 2/3 of rental income going to the applicant. The applicant and Jane Sewe Odipo each opposed the application. The respondent had stated in her application that the basis for claiming the Donholm house was that she had considerably contributed to its development, from the time she met the deceased and even after his demise. The applicant claimed that the respondent had not made a full and frank disclosure about the alleged contribution. The other claim she made was that the respondent had not disclosed the entire estate of the deceased, and had not indicated the liabilities. Jane Sewe Odipo stated in her response that the bank account had only Kshs.5,000/= which she was given, and therefore there was no money left in it. She asked that the Kayole building be given to the applicant absolutely. As for the Donholm house, she asked that, first of all, the respondent gives up all the household goods and assets that belonged to the deceased's first wife so that they go to the applicant. Thereafter, she stated, the house goes to the respondent for use during her lifetime after which it goes to the applicant.

4. The instant application by the applicant was dated 2<sup>nd</sup> March 2020 and filed on the same date. It sought that the court nominates a firm of valuers to establish – **“the current value and any liabilities”** of the Donholm house and the Kayole building. This valuation would then form the basis for the distribution of the estate to the beneficiaries. The respondent opposed the applicant. In her replying affidavit she stated that when she married the deceased the Donholm house was incomplete. She subsequently expended a lot of resources to complete it. Secondly, the applicant has solely been in charge of the Kayole building whose rental income she has used. The respondent stated that the application for valuation was an abuse of the process of the court and intended to delay the distribution of the estate of the deceased. This was because there was no information that she had withheld.

5. I have considered the written submissions by Mr. Kamau for the respondent and Mr. Luseno for the applicant on the application for valuation. It has to be stated outrightly that, if the applicant claims that the estate of the deceased had more assets than what the respondent indicated when filing the petition, and that the estate had liabilities, she was under obligation to lead evidence to confirm these. Under **section 107 of the Evidence Act (Cap. 80) -**

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

6. When the petition was filed the respondent indicated the value of the estate to be Kshs.3,000,000/=. This was on 17<sup>th</sup> March 2005. I do not want to say that the value was grossly understated. It is reasonable to indicate that 16 years later the value of the two properties should be a lot higher.

7. It is certain that valuation will be an expense on the estate of the deceased. I consider that the respondent offered the Kayole building to the applicant. She asked for the Donholm house. When the applicant swore the “Affidavit objecting to proposed distribution” she did not say that she was opposed to being given the Kayole building and the respondent getting the Donholm house. What she was interested in was

knowing how much the respondent had spent on the Donholm house. She then proposed that the properties be valued before distribution. Is it that she thought the Donholm house was more valuable than the Kayole building that she was being offered? Is it that she wanted equal sharing, which could only be realised if the valuers of the two properties were known? Is it that she wanted the estate valued and sold, and the proceeds shared?

8. I consider that Jane Sewe Odipo asked that the applicant gets the Kayole building absolutely. She did not want a stake in it as had been suggested by the respondent. She asked that the respondent gets the life interest only in the Donholm house, and upon her death it goes to the applicant.

9. During the hearing of the application for the confirmation of the joint grant, the court will receive evidence on the respective shares of the beneficiaries and make a determination. At this stage, however, I don't find that a basis has been laid by the applicant to cause the court to order the valuation of the two properties of the deceased. I consequently dismiss the application. I make no order on costs. Further, I direct that the parties do immediately take directions on the hearing of the application for the confirmation of the joint grant.

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2021.**

**A.O. MUCHELULE**

**JUDGE**