



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 474 OF 2013**

**IN THE MATTER OF THE ESTATE OF EDWARD NEONDO OMUKUYIA (DECEASED)**

**LUKE OLUMASAI NEONDO.....PETITIONER**

**VERSUS**

**DIBORA AMWIRU.....PROTESTOR**

**JUDGMENT**

1. The matter herein relates to the estate of the late Edward Neondo Omukuyia (herein referred to as the deceased) who was the father to the petitioner in this succession cause and also father to the late Aggrey Kusimba who was husband to the protestor herein. The deceased left behind land parcel No. Kisa/Mundeku/402. The protestor has filed an affidavit of protest against confirmation of grant dated 14<sup>th</sup> June, 2017 opposing the petitioner's summons for confirmation of grant dated 28<sup>th</sup> November, 2016. In the said summons for confirmation of grant the petitioner proposes to give the protestor 3 acres being her late husband's share of the estate of the deceased herein. The petitioner contends that the late husband to the protestor had three wives. That he left behind a daughter, Joyce Okunda Kusimba by his late first wife and another daughter, Susan Ayuma by his late second wife. That the protestor was the third wife. That she and her two biological children should share the 3 acres that he is offering her with the two daughters of her late husband, **Joyce Okunda Kusimba** and **Susan Ayuma Kusimba**.

2. The protestor on the other hand states that her late husband was entitled to 4 acres of the estate. She contends that her late husband did not have any daughter by name Joyce Okunda Kusimba through his first wife. She admits that Susan Ayuma was a daughter to her deceased husband but contends that her mother was not married to her late husband. She is all the same ready to share her 4 acres with Susan Ayuma.

3. The protest proceedings proceeded by way of *viva voce* evidence. The protestor testified as the plaintiff and did not call any witness. The petitioner testified as the defendant and called one witness, Joyce Awinja Omondi (purportedly Joyce Okunda Kusimba). Subsequently, the advocates for the parties, Mr. Nyikuli for the protestor and Mr. Nyegenye for the petitioner, made written submissions.

4. In her evidence the protestor stated that she has two biological children with her late husband, Sheila and Olivia Kusimba who live with her. That her deceased husband had a daughter out of wedlock, Susan Ayuma. That Susan is now married. That when she was married she did not find Joyce Awinja at the home of her husband. She came to know her when this succession cause was going on in court.

5. In cross-examination the protestor stated that her husband had 3 wives – Mary Andika, Akinyi Adhiambo and herself. That Joyce was a daughter to Mary Andika but not daughter to her husband. That it is her husband who used to tell her that his share to the land was 4 acres. That she does not know whether what she occupies on the ground measures to 4 acres. That she is not aware that the land has been surveyed by a government surveyor as she was not invited to attend the surveying. Further that the petitioner and her brothers chased her away after the death of her husband. However that she would be willing to take 3 acres if she is not going to share her allotment with Joyce Kusimba.

6. The petitioner in his evidence stated that the protestor's husband was his younger brother. That he had 3 wives – Mary Andika (deceased), Akinyi and the protestor. That Mary was the first wife and the mother to Joyce Awinja. That Akinyi was the second wife and mother to Susan Ayuma. That Akinyi lives with her parents in Wang'a. That his proposal is to give the family of his late brother 3 acres for his three houses to share with their children. That each wife and her children is to get one acre. That Joyce will get the share of her mother. The witness stated that he called a surveyor who surveyed the land. He denied that he chased away the protestor from the land. He produced a report by a surveyor as exhibit.

7. In cross-examination the petitioner stated that their father did not sub-divide the land among the brothers but that he showed each of them where to settle. In re-examination he stated that his father put boundaries on the portion he showed them. He further said that Joyce Awinja was born at their home.

8. Joyce Awinja Omondi DW2 testified that she is a daughter to the late Aggrey Kusimba from his first wife, Mary. That her maiden name was Joyce Okunda Kusimba. That she got married to a person called Omondi. That when she applied for a national identity card she adopted the name Awinja. She was issued with an identity card in the name of Joyce Awinja Omondi. That her father's share to the estate is 3 acres. That each of her father's houses should get one acre.

9. The witness, Joyce Awinja Omondi, filed a copy of her primary school leaving certificate in the name of Joyce Okunda Okusimba that indicates that she attended Ikomero Primary School in Butere between 1988 and 1995. She also filed a baptism card in the name of Joice Akunda Okusimba that indicated her parents as Aggrey Okusimba Neondo and Mary Andika Okusimba. The date of birth therein was indicated as 27/8/1980. She also filed a copy of her national identity card in the name of Joyce Awinja Omondi. The same shows her date of birth as 26/7/1982 and the district of birth as Siaya. She also produced a copy of her birth certificate issued on 16/10/1980 in the name of Joice Okunda. The same indicated her date of birth as 27/8/1980 and place of birth as Mundeku Sub-location in Kakamega District. Her parents are therein indicated as Aggrey Okusimba Nehondo and Mary Nyanguka Andika.

#### Submissions -

10. The advocates for the protestor, **Nyikuli, Shifwoka & Co. Advocates**, submitted that the contention by the protestor that Joyce Kusimba is not a daughter to the deceased is proved by the fact that she, Joyce Kusimba, filed different documents that contradicted her actual name and her date of birth. That the petitioner should be the one to give Joyce Kusimba one acre that he claims from his share as he is one fronting her as a daughter to Aggrey Kusimba.

11. The advocate for the petitioner, **Mr. Nyegenye**, submitted that the protestor has not tendered evidence to support her claim that she is entitled to 4 acres from the estate of the deceased. That the petitioner did prove that the deceased shared his land to his sons and demarcated the various portions. That the report by the surveyor shows the protestor's parcel as demarcated on the ground to be 3 acres. That her advocate was invited to attend the determination of the acreage by a surveyor but did not turn up.

12. The petitioner's advocate further submitted that the birth certificate of Joyce Kusimba proved that she was a daughter of Aggrey Kusimba.

#### Analysis and Determination –

13. The questions before the court are:-

(1) Whether Joyce Awinja Omondi is a daughter to Aggrey Kusimba.

(2) Whether the protestor is entitled to 3 or 4 acres from the estate of the deceased herein.

14. On the first issue the details in the national identity card of Joyce Awinja Omondi do not in the least correspond with the details in the records of Joice Okunda Kusimba contained in the birth certificate, baptism card and school leaving certificate. Going by the identity card and the birth certificate produced in court, Joyce Awinja Omondi was born in Siaya while Joice Okunda Kusimba was born in Mundeku in Kakamega District. If the evidence of Joyce Awinja Omondi is to be believed she has not explained why she lied that her middle name was Awinja when she applied for a national identity card. She has not explained why she lied on her date of birth. This creates doubt whether Joyce Awinja Omondi and Joice Okunda Kusimba are one and the same person. The petitioner has not proved that Joyce Awinja Omondi is a daughter to Aggrey Kusimba. Her claim on the estate of the deceased has no basis. It is my finding that Joyce Awinja Omondi has no entitlement to the estate of the deceased herein.

15. On the second issue the subject land measures 7.6 hectares i.e. 18.78 acres. It is registered in the names of three brothers who are now deceased and who owned the land in common – Omuranda Lisunu, Nandwa Omukuya and Neondo Omukuya. The latter is the father to the petitioner and protestor's husband.

16. The petitioner proposes in paragraph 5 of his supporting affidavit to distribute the estate as follows:-

Luke Olumasai Neondo	-	4 ½ acres
Emmanuel Kelly Kusimba	-	7 acres
Stephen Omukuyia Ambatia	-	1 ¼ acres
Joyce Kusimba		
Debora Amiru (Protestor)	-	3 acres
Adikinyi Kusimba		
Richard Moi	-	3 acres

17. The petitioner's proposed mode of distribution is supported by consent for confirmation of grant form that is signed by all the beneficiaries except the protestor. It is apparent from the said consent that the estate of the father of both the petitioner and the protestor's

husband is getting 7 ½ acres. That is therefore the acreage that the petitioner and the protestor should share. The rest of the land is going to the other beneficiaries of the brothers who owned the land in common. The petitioner and the protestor should therefore be fighting on how to share the 7 ½ acres.

18. The petitioner says that his father had demarcated the parcels of land to his sons. The petitioner's father died in 1992. Apart from the mere assertion that the petitioner's father had demarcated the land to them, there is nothing tangible to prove so. It is possible that boundaries have been interfered with since the death of the petitioner's father.

19. The protestor on the other hand says that it is her late husband who used to tell her that his share of the land was 4 acres. She admitted that she did not know the exact acreage that she occupies on the ground. There is thereby nothing to prove that the entitlement of the protestor's husband was 4 acres. The protestor was not invited to have the land surveyed. The petitioner alleged that the protestor's advocate was notified but there is nothing to prove so. The court cannot rely on a survey report that the protestor did not witness its making. There is thereby no proof that the land is demarcated on the ground and that the protestor's portion measures 3 acres.

20. The protestor did however state in cross-examination that she will be willing to take 3 acres if she will not be sharing her share with Joyce Kusimba. Since I have found that Joyce Kusimba is not entitled to share the deceased's property, I will grant the protestor 3 acres, one acre of which will go to Susan Ayuma. As Susan Ayuma is married I order for her share of one acre to be registered in her name and the protestor to remain with two acres to hold in trust of her children, Sheila and Olivia Kusimba.

21. In the foregoing the protest is dismissed. The summons for confirmation of grant dated 14<sup>th</sup> June, 2017 are confirmed and the estate is to be distributed as follows:-

Luke Olumasai Neondo	-	4 ½ acres
Emmanuel Kelly Kusimba	-	7 acres
Stephen Omukuyia Ambatia	-	1 ¼ acres
Debora Amiru (to hold in trust of <b>Sheila Kusimba</b> and <b>Olivia Kusimba</b> )	-	2 acres
Susan Ayuma	-	1 acre
Richard Moi	-	3 acres

23. It is further ordered that the parties make arrangements to take a surveyor to the land to demarcate the land for the beneficiaries as confirmed herein.

Orders accordingly. Each party to bear its own costs.

Delivered, dated and signed in open court at Kakamega this 30<sup>th</sup> day of January, 2020.

**J. NJAGI**

**JUDGE**

**In the presence of:**

No appearance for Protestor

No appearance for Petitioner

Protestors - present

Petitioner - absent

Court Assistant - Polycap

30 days right of appeal.