



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1872 OF 2012**

**IN THE MATTER OF THE ESTATE OF GODWIN GUYA OTIENO (DECEASED)**

**FLORENCE JANET ACHIENG OTIENO.....APPLICANT**

**VERSUS**

**KATH ANYANGO OTIENO.....RESPONDENT**

**RULING**

1. The deceased Godwin Guya Otieno died intestate on 14<sup>th</sup> September 2008. He was polygamous. His first wife Florence Janet Achieng Otieno (the applicant) had four children. His second wife Kath Anyango Otieno (the respondent) got him three children. On 4<sup>th</sup> December 2012 a joint grant was issued to the two widows. On 3<sup>rd</sup> February 2017 Justice W. Musyoka confirmed the grant in the following terms:-

(a) the applicant gets Kisumu/Kadongo/4040 and 4280, and plot No. 68 Holo Market;

(b) the respondent gets Kisumu/Kadongo/3940, 4143 and 4245;

(c) debts and liabilities to be settled from the proceeds of sale of LR No. 15428 Nairobi, with the balance of the purchase price being shared between the two houses at the ratio of 5:4;

(d) upon the transfer of Kisumu/Kadongo/4150 into the name of the deceased, the same be sold and the proceeds of the sale be shared out between the houses at the ratio of 5:4;

(e) any other assets that have not been distributed as above, or have not been identified, shall be sold and the proceeds of the sale shared in the ratio of 5:4; and

(f) the property in each house shall devolve to the widows during life interest and shall pass to the children in equal shares.

2. On 20<sup>th</sup> February 2017 the applicant applied under **rules 59(3)(3) and 73** of the **Probate and Administration Rules** for leave to appeal the decision on distribution which she said had aggrieved her. In particular, she was aggrieved by the decision that Kisumu/Kadongo/4150 be sold and the proceeds shared in the ratio 5:4. This was because, she stated, on this parcel of land was her maternal home and that was where the deceased had been buried.

3. The respondent opposed the application which she termed irregular and an abuse of the process of the court. She stated that the reasons she gave could not form the basis of the appeal.

4. The application was filed about 17 days following the confirmation. It was therefore bought without delay. Secondly, it is not for this court to determine the merits of the intended appeal.

5. The jurisprudence before the new Constitution was that an aggrieved litigant in a succession matter required leave to appeal (**Rhoda Wairimu Karanja –v- Mary Wangui Karanja and Salome Njeri Karanja, Court of Appeal Civil Application No. Nai 69 of 2004**). Under **Article 164** of the Constitution, however, the Court of Appeal has jurisdiction to hear appeals from the High Court. Further, the right to appeal is so fundamental to our jurisprudence and rule of law that a party should not be denied the right, and where leave is required to access the right the same should not be denied unless in very exceptional circumstances.

6. In short, I allow the application. I allow 14 days leave for the applicant to appeal the decision of this court regarding the confirmation of the grant of the estate of the deceased Godwin Guya Otieno.

7. I make no orders regarding costs.

**DATED and DELIVERED at NAIROBI this 24<sup>TH</sup> day of SEPTEMBER, 2019.**

**A.O. MUCHELULE**

**JUDGE**