



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 214 of 2008**

**IN THE MATTER OF THE ESTATE OF MANASSE OLANG ORIEWO (DECEASED)**

**BETWEEN**

**POLYCARP ONYANGO MIDURI**

**(ON BEHALF OF ALBERT MIDURA OLANG).....OBJECTOR**

**AND**

**ELLY MUNDU OLANG.....PETITIONER/RESPONDENT**

**JUDGMENT**

**Introduction**

1. **ALBERT MIDURA OLANG (Objector)** and **ELLY MUNDU OLANG (Petitioner)** are sons of **MANASSE OLANG ORIEWO (Deceased)** who died sometimes on 15<sup>th</sup> May, 1996. Deceased's estate comprised of:

- 1) **Land Parcel No. KISUMU/CHIGA/428**
- 2) **Land Parcel No. KISUMU/CHIGA/2130**
- 3) **Land Parcel No. KISUMU/MUHORONI/863**
- 4) **Land Parcel No. KISUMU/MUHORONI/918**

2. Letters of Administration Intestate to administer the deceased's estate were issued to **ELLY MUNDU OLANG (Petitioner)** on 11.07.08.

3. A Certificate of Confirmation was issued exclusively in favor of the Petitioner on 11.12.09.

4. The Objector who is partially challenged appointed his son **POLYCARP ONYANGO MIDURI** to represent him as the Objector in this matter. By summons dated 02<sup>nd</sup> August, 2018, the Objector prayed for revocation of the grant of Letters of Administration and the Certificate of Confirmation.

5. By a consent recorded on 11<sup>th</sup> February, 2019, Letters of Administration and the Certificate of Confirmation issued in favour of the Petitioner were revoked and fresh Letters of Administration were issued jointly to the Petitioner and the Objector on 11<sup>th</sup> February, 2019.

6. The parties failed to agree on the issue of distribution and each filed its separate mode of proposed distribution. The Petitioner made the following proposal:

- 1) Land Parcel No. KISUMU/CHIGA/428 wholly to Petitioner
- 2) Land Parcel No. KISUMU/CHIGA/2130 wholly to Petitioner

3) Land Parcel No. KISUMU/MUHORONI/863 wholly to Petitioner

4) Land Parcel No. KISUMU/MUHORONI/918 - and 70% to Petitioner and 30% to the objector.

7. The Objector on the other hand made the following proposal:

1) Land Parcel No. KISUMU/CHIGA/428 be shared equally between Petitioner and Objector

2) Land Parcel No. KISUMU/CHIGA/2130 wholly to Petitioner

3) Land Parcel No. KISUMU/MUHORONI/863 be shared equally between Petitioner and Objector

4) Land Parcel No. KISUMU/MUHORONI/918 – portions ‘A’ and ‘B’ to Petitioner and Portion “C” to the objector.

8. When the cause came up for hearing on 22<sup>nd</sup> July, 2019, I ruled that the Petitioner whose proposal was not in consonance with Section 38 of Law of Succession Act (*the Act*) had the burden of proof and directed that the case proceeds by way of the Petitioner’s evidence only.

9. Petitioner testified that prior to his death, the deceased had caused registration of Land Parcel No. KISUMU/CHIGA/423 in favour of Objector and Land Parcel No. KISUMU/CHIGA/761 in favor of the Petitioner. He stated that being the last born, he was under Luo Customary Law wholly entitled to Land Parcel No. KISUMU/CHIGA/428 where the family home is situated. Petitioner further stated that he was claiming the whole of Land Parcel No. KISUMU/CHIGA/863 which he bought and caused it to be registered in the name of the deceased. Without giving any reason, he proposed that Land Parcel No. KISUMU/MUHORONI/2130 devolves wholly to him. He also proposed that 70% of Land Parcel No. KISUMU/MUHORONI/918 devolves to him for the reason that out of Kshs. 1,000/- government charge for the said land, he paid Kshs. 700/- and the Objector Kshs. 160/-. The Petitioner additionally stated that distribution of Land Parcel No. KISUMU/MUHORONI/918 had been discussed in the presence of the chief and it was agreed that the Objector would get 3 acres therefrom.

10. In cross-examination by Mr. Oguso, advocate for the Objector, the Petitioner confirmed that he had no objection to the mode of distribution proposed by the Objector in respect of Land Parcel No. KISUMU/MUHORONI/918 that he gets portions ‘A’ and ‘B’ and the objector gets Portion “C”. He similarly conceded that other than his word, he did not have any other evidence to prove that he bought Land Parcel No. KISUMU/MUHORONI/863 and caused it to be registered in the name of the deceased and further that the chief’s meeting of 04.05.11 did not resolve that Land Parcel No. KISUMU/MUHORONI/863 and Land Parcel No. KISUMU/MUHORONI/918 devolves to him to the exclusion of the Objector.

11. **PW2 JASON OTIENO ALAL** chief Muhoroni Location stated that he chaired a meeting to discuss the distribution of Land Parcel No. KISUMU/MUHORONI/918 and Land Parcel No. KISUMU/MUHORONI/863 and that it was agreed that Petitioner would get portions ‘A’ and ‘B’ and the objector Portion “C” whereas Land Parcel No. KISUMU/MUHORONI/863 would be disposed off.

12. **PW3 JOSEPH OCHOLLA OMOLLO**, a priest stated that his efforts to reconcile the parties did not bear any fruits.

### **Analysis and Determination**

13. I have carefully considered the evidence on record, the proposed modes of distribution and submissions filed on behalf of both parties.

14. Section 38 of *the Act* deals with instances where intestate has left a surviving child or children but no spouse as in this case and provides that:

**Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.**

15. Evidence on record has disclosed that the Petitioner and the Objector are the children of the deceased and are *prima facie* entitled to equality of inheritance of their father’s estate and any exception as proposed by the Petitioner must have a basis. (See **In re Estate of Francis Mwangi Mbaria (Deceased) [2018] eKLR**).

16. The parties are in agreement that portions ‘A’ and ‘B’ of Land Parcel No. KISUMU/MUHORONI/918 devolves to the Petitioner and Portion “C” to the objector.

17. The parties are similarly in agreement that prior to his death, the deceased caused registration of Land Parcel No. KISUMU/CHIGA/423 measuring 1.4 HA in favour of Objector and Land Parcel No. KISUMU/CHIGA/761 measuring 0.15 HA in favor of the Petitioner.

18. The objector has no objection to Land Parcel No. KISUMU/CHIGA/2130 measuring 1.0 HA devolving wholly to the Petitioner and under the provisions of Section 42 of *the Act* which requires the court to take into account properties previously settled for the parties herein in determining the distribution of deceased’s estate, I find that Land Parcel No. KISUMU/CHIGA/761 measuring 0.15 HA and Land Parcel No. KISUMU/CHIGA/2130 measuring 1.0 HA will entitle the Petitioner to a total of 1.15 HA which is 0.25 HA short of the Objector’s entitlement to Land Parcel No. KISUMU/CHIGA/423 measuring 1.4 HA. I do not think that the intention of the legislature in enacting the provisions of Section 42 of *the Act* meant that the estate be broken into bits and pieces to ensure that parties have equal shares but that parties have an equitable share of the estate. The Petitioner’s entitlement to 1.15 HA from two assets as compared to the Objector’s share of 1.4 HA

from one asset is in my considered view just.

19. The Petitioner has not demonstrated that it was the deceased's intention to have him exclusively inherit the Land Parcel No. KISUMU/CHIGA/428 where deceased's homestead had been established. The fact that the Petitioner is the deceased's last born does not, in law entitle him to the deceased's homestead to the exclusion of the Objector.

20. Consequently, I find that it would be in the interest of justice that Land Parcel No. KISUMU/CHIGA/428 and Land Parcel No. KISUMU/MUHORONI/863 be shared equally between the Petitioner and the Objector for to hold otherwise would disinherit the Objector without any justifiable cause and the invitation to do so is accordingly rejected.

### **Disposition**

21. In the result, and from the foregoing analysis, the court finds that the objection has merit and it is allowed in the following terms.

**1. (a) The Land Registrar Kisumu County is directed to cancel title deed issued to the Petitioner in respect of Land Parcel No. KISUMU/MUHORONI/863 and all resultant titles KISUMU/MUHORONI/1314; 1315 and 1316 and revert its ownership to MANASSE OLANG ORIEWO (deceased).**

**(b) The Land Registrar Kisumu County is also directed to cancel title deed issued to the Petitioner in respect of Land Parcel No. KISUMU/MUHORONI/918 and revert its ownership to MANASSE OLANG ORIEWO (deceased).**

**2. The grant is confirmed in the following terms:**

**(a) Land Parcel No. KISUMU/CHIGA/2130 shall devolve wholly to Petitioner.**

**(b) Land Parcel No. KISUMU/CHIGA/428 shall devolve to the Petitioner and Objector in equal shares**

**(c) Land Parcel No. KISUMU/MUHORONI/863 shall devolve to the Petitioner and Objector in equal shares**

**(d) Portions 'A' and 'B' of Land Parcel No. KISUMU/MUHORONI/918 shall devolve to the Petitioner and Portion "C" to the objector.**

**(e) Each party shall bear its own costs of these objection proceedings**

**DELIVERED AND SIGNED AT KISUMU THIS 31<sup>st</sup> DAY OF *October* 2019**

**T. W. CHERERE**

**JUDGE**

**READ IN OPEN COURT IN THE PRESENCE OF-**

**Court Assistant - Amondi/Okodoi**

**For Petitioner/Respondent - Ms. Onyango**

**For Objectors/Applicants - Mr. Ariho/Mr. Oguso**