



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 6 OF 2017

(SUCCESSION)

(CORAM: J.A. MAKAU – J.)

DORSILA AKELO OKOTH.....APPELLANT

VERSUS

JENIFA ACHIENG OKOTH.....RESPONDENT

(Being an appeal against the Ruling dated 3.4.2017, in PM SUCC. C. No. 114/2016 in Bondo by M.O. Obiero – P.M.)

JUDGMENT

1. The Respondent/Petitioner **JENIFA ACHIENG OKOTH** petitioned for grant of letters of administration intestate in respect of the estate of **JAMES OUMA OKOTH**, her deceased son, who was survived by herself. The Petition for grant was gazetted as per Gazette Notice issued on 24th June, 2016.
2. The Appellant filed an objection on 13th July, 2016 urging the Petitioner filed a succession cause without involving her as the 1st wife, as the land is a family property and that she is entitled to share the estate of the deceased. She further sought the grant be set aside and the whole family members who are bonifide beneficiaries of the estate be involved and enlisted.
3. After hearing of the objection and party's witnesses the trial Court dismissed the objection and ordered letters of administration do issue to Respondent.
4. The Objector being aggrieved by the trial Court's judgment preferred this appeal setting out several grounds of appeal being as follows:-

“1. That the honourable trial Magistrate erred in law and in fact in failing to appreciate the fact that the Objector and the Petitioner in the estate of the late JAMES OUMA OKOTH had equal rights by virtue of the fact that the deceased held the estate in Trust for the family.

2. That the honourable trial Magistrate erred in law and in fact in disregarding the Objector/Appellant's submissions on her rights to the estate under reference.

3. That the honourable trial Magistrate erred in law and in fact in failing to appreciate the fact that the Appellant resides and depends on the parcel of land/asset namely NORTH SAKWA/AJIGO/470, 480 and 526 for her livelihood.

4. That the honourable trial Magistrate erred in law and in fact in assisting the Respondent to disinherit the Appellant, namely NORTH/SAKWA/AJIGO/470.

5. That the honourable trial Magistrate erred in law and in fact in failing to realize that the parcels of land under dispute are an ancestral land and hence the Appellant has a successive hereditary rights in place of the deceased.

6. That the honourable trial Magistrate failed to appreciate the complexity of the matter and the bad blood that would suffice.

7. That the honourable trial Magistrate made an order favouring the Respondent and yet they had not canvassed the same.’

5. Mr. Oduor learned Advocate, appeared for the Appellant whereas Mr. Simiyu holding brief for M/s. Dola, Magani & Co. Advocates appeared for the Respondents. The Appellants filed written submissions dated 31st April 2018, whereas the Respondent filed their submissions dated 4th April, 2018, I have perused the pleadings the evidence adduced and opposing submissions and shall base my decision on the same.

6. The issue raised in the Appellant's Objection was simple and specific, this to whom the grant of letters of administration of the estate of the deceased **JAMES OUMA OKOTH** was to be issued but not to who is entitled to the disputed parcel of land known as **SOUTH SAKWA/AJIGO/470** no application had been filed and was pending on the distribution of the deceased estate. The trial Court should not have moved itself on the issue of distribution at that stage but should have dealt with the issue raised in the objection as to whether the Petitioner was entitled to be the Petitioner of the estate of the deceased.

7. **Section 29 (a), (b) of the Law of Succession Act** gives the definition of the “**dependant**” as follows:-

“(29) “**dependant**” means:-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parent, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to the date of her death.”

8. The **Succession Act** further sets out the preference to be given to certain parties to administer deceased estate. The Section specifically provides **the Court has the final discretion as to the person or to whom a grant of letters** of administration, shall in the best interest of all concerned, be made, without prejudice to that discretion accept as a general guide the order of preference as follows:-

“(66) when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-

(a) surviving spouse or spouses, with or without association of other beneficiaries:

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

9. **Rule 26(1) of the Probate and Administration Rules** provides:-

“26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

10. In view of the above and the fact that the deceased was real son to the Respondent and step-son to the Appellant, and he had died without leaving behind a spouse or children but the Respondent herein, I find the trial Court was not in error in finding and holding the Respondent did violate the law in seeking the grant alone. The Respondent was not under any obligation to issue notice to the Appellant as she is not entitled in the same degree as or in priority to the Respondent. I find the Court made no error in appointing the Respondent as the sole Administrator of the deceased's estate and in ordering her to be granted letters of administration of the deceased's estate intestate.

11. The Appellant in her appeal has raised several issues running from the Registration of **North Sakwa/Ajigo/470**, to being a land subject to customary trust in favour of all family members, and to the land held under trust, to lack of prior succession or will bequeathing the subject property to **JAMES OUMA OKOTH**, to there being no grant of representation in relation to the estate of Elijah and Harbat Okoth Bonyo in the instant case and on allegation of there being no property bonafide passed to any of the sons of Harbat Okoth Bonyo including the deceased James Ouma Okoth and that **Section 39(1) of the Law of Succession Act** cannot and do not apply in relations to property acquired by the deceased without grant of probate or letters of administration and without regard to trusteeship that was obtaining with regards to the property. I find though these issues were brought to the attention of the trial Court, they were not only brought prematurely but were not conclusively determined then, at a time of hearing an objection as to who the administrator should be. There was no application on the mode of distribution of the deceased's estate nor was there any protest on mode of distribution none. The Appellant had not filed a protest to the distribution nor her mode of scheme of distribution hence the court could not decide on issue of distribution.

12. In view of the above I find the issues raised by the Appellant are serious and touching on the fibre of the family value and the law regarding distribution of an estate, but nevertheless the same are premature. Let the Respondents file an application for mode of distribution so that the Appellant raise up and file her protest or counter-scheme on mode of distribution for consideration by Court as the deceased's estate is pending distribution.

13. The Upshot is that the Appeal partially succeeds and I proceed to make the following orders:

(a) The Respondent to remain the only Administrator to the deceased's estate.

(b) The Respondent to file and serve upon the Appellant her scheme of mode of distribution within 60 days from today for her response.

(c) The matter is remitted back to trial Court for hearing and determining the issue on the mode of distribution.

(d) As the parties are co-wives each party to bear her own costs.

DATED at SIAYA this 20th day of April, 2018.

J. A. MAKAU

JUDGE

Delivered in Open Court

In the presence of:

Mr. Oduor for Appellant

Mr. Simiyu for Respondent

Court Assistant:

1. Laban Odhiambo

2. Leonidah Atika

J. A. MAKAU

JUDGE