



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 268 OF 2010**

**MONICA ELIZABETH DONDE OCHIENG.....1ST APPLICANT**

**TRUPHOSA ODONGO OKONG'O.....2ND APPLICANT**

**GRACE AKINYI ONYANGO.....3RD APPLICANT**

**ZILPHA ATIENO RAO.....4TH APPLICANT**

**VERSUS**

**STEPHEN MIRUKA OKUMU.....1ST RESPONDENT**

**PHANUEL ONYANGO OKUMU.....2ND RESPONDENT**

**JACOB OTIENO JOBUNGA.....3RD RESPONDENT**

**FREDRICK ODHIAMBO JAGERO.....4TH RESPONDENT**

**RULING**

The deceased to whose estate these proceedings relate is Edward Jobunga Okumu. Grant of Letters of Administration intestate in respect of this estate were issued to Stephen Miruka Okumu, Phaniel Onyango Okumu, Jacob Otieno Jobunga and Fredrick Odhiambo Jagero now the Respondents. However before the grant could be confirmed Monica Elizabeth Donde Ochieng filed an application (**Notice of Motion dated 29th April 2015**) in which she sought inter alia to be included in the petition as a beneficiary and that she be granted access to her mother's homestead situate in the asset **Kisumu/Dago/65**. Three months later she appointed the firm of Abande & Company Advocates who on 28th July 2015 filed another Notice of Motion which seeks similar orders but now including her three sisters as applicants. The gist of the application is that this asset was the property of their father Okumu Osir yet they were left out in the succession proceedings.

In his replying affidavit sworn in opposition to the application Jacob Otieno Jobunga deposes that he is the eldest son of the deceased in this case and disputes that the mother of the applicants owned any part of that land. He also deposes that they do not have a right over the estate of Edward Jobunga who is their brother and further denies that they have been denied access to their mother's homestead stating that as a matter of fact they have rented out the house thereon and they have been receiving the rent.

This Court having heard the application by way of viva voce evidence and having considered submissions of Learned Counsel for the parties makes the following findings and determination:-

**1. That the asset Kisumu/Dago/65 originally belonged to Okumu Osir who died on 13th February**

1979.

2. That the late Okumu Osir was married to four wives Nerea Mbaja Okumu, Mary Owuor Okumu, Owade Okumu and Priscilla Aloo Okumu who are all deceased.

3. That Edward Jobunga to whose estate these proceedings relate and the four applicants were all children of Okumu Osir, deceased and the administrators/Respondents are their offspring.

4. That upon his death Nerea Okumu applied for a grant of letters of administration in Kisumu HCC SUCCESSION NO. 331 OF 1996 and the same was granted but was not confirmed as a protest was raised by Edward Jobunga which resulted in the Court referring the matter to the Chief of the area, where the deceased was domiciled, for arbitration.

5. That the chief heard the matter and filed his determination in Court and the same was adopted by the Court on 16th October 1997. According to the Judge the assets of the deceased were to be distributed in accordance with the Chief's award. The record (Succession No. 331 of 1996) shows that on that same day Nerea Mbaja Okumu objected to the award but the Court nevertheless upheld it.

6. That it is not clear what transpired thereafter but from the record of Kisumu High Court Succession Cause No. 7 of 1997 High Court Succession Cause No. 331 of 1996 went missing and that fresh letters of administration were on 1st March 1998 issued to Edward Jabunga Okumu. This was pursuant to a petition he had filed on 9th January 1997 apparently with the blessings of Nerea and her co-wife Mary Owuor but while Nerea's own petition was still pending.

7. That on 8th September 1998 Edward Jobunga Okumu, the deceased in these proceedings applied for confirmation of the grant in Succession Cause No. 7 of 1997 However on 10th December 1997 the Judge declined to confirm the grant and stated -

**“COURT**

*In view of the order which was made on the 16th October 1997 I cannot confirm the grant.”*

8. That however on 29th September 1998 the above order which was referring to the order made in Succession Cause No. 331 of 1996 was vacated and the grant was confirmed as prayed in the Chamber Summons dated 8th September 1998. That culminated in the entire estate being vested to Edward Jobunga Okumu.

9. That this estate devolved to Edward Jobunga Okumu as the eldest son of Okumu Osir and not otherwise.

10. That the above was in total contradiction of the Chief's “award” and also what the parties herein referred to as the deceased's “will”.

11. That whereas Edward Jobunga, deceased, ended up being the registered proprietor these assets did not belong to him but to his father, Okumu Osir and he could not have inherited them to the exclusion of all the other beneficiaries who include his sisters the applicants in this case.

12. That the late Okumu Osir died intestate as what is referred to as his will does not meet the requirements set out in Section 11 of the Law of Succession Act. The same was not attested at all let alone by two competent witnesses. Instead the same is stamped by a Chief and copied to three people which is not what is required by the law. Moreover that “will” was never proved in court and only a photocopy was availed. It is also instructive that it was totally ignored in the distribution of the estate.

13. That as the daughters of the deceased the names of the applicants should have made their way

**in these proceedings and indeed in all the previous proceedings because as I have stated these proceedings strictly speaking are not for the benefit of the estate of Edward Jobunga Okumu but of his father Okumu Osir, a fact which even the administrators herein admit. This position is also demonstrated by the fact that the four administrators are representatives of the four houses of Okumu Osir, deceased, the representative of Nerea's house being a nephew of the applicants – a son of their late brother.**

**14. That as children of Okumu Osir the applicants stood in equal standing to Edward Obunga Okumu who was their brother and still rank higher in priority to the administrators now before this Court notwithstanding their sex or gender.**

**15. That it is only fair and just that their right to the portion they claim be considered albeit at the appropriate time which is at the time of confirmation of the grant.**

**16. That the grant of letters of administration having been issued on 17th September 2010 the same is long overdue for confirmation and the administrators shall apply for confirmation within sixty days of this ruling.**

**17. That pending confirmation of the grant the applicants shall have unrestrained access to their mother's homestead and house but this does not mean that they have liberty to waste the estate.**

**18. That parties shall bear their own costs of the application.**

It is so ordered.

**Signed, dated and delivered at Kisumu this 23rd day of March 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Otieno D. for Mr. Sala for the Applicants

Mr. K'Opot for Mr. Nyanga for the Administrators

Serah Sidera: Interpreter