



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 77 OF 2013
IN THE MATTER OF THE ESTATE OF
OBED ABURILI OTENYO (DECEASED)
AND IN THE MATTER OF APPLICATION BY
BETWEEN
JOSEPH ACHICHI ABURILI.....APPLICANT
AND
GEORGE OCHOLA ABURILI.....PROTESTOR/ RESPONDENT
RULING

1. The matter concerns the estate of Obed Aburili Otenyo (“the deceased”) who died on 6th May 2005. According to the schedule of assets (Form P & A 5), the deceased left behind the following properties: W. BUNYORE/EBUSIKHALE/203, 204, 2253 and 2287 (Plots 203, 204, 2253 and 2287”).

2. The application before the court is a summons for confirmation dated 26th July 2013 in which the applicant, Joseph Achichi Aburili (“Achichi”) seeks to confirm the grant issued to both parties on 14th September 2007. He proposed that the deceased property be distributed as follows:

- Joseph Anchichi –Plots 204, 2253 and 2257
- Joel Ngala –Plot 203
- George Ochola - Nil

3. George Ochola Aburili (“Ochola”) filed an affidavit in protest to the confirmation. His contention was that he was entitled to benefit from the deceased’s estate as a son to the deceased’s 1st born daughter, Sarah Aburili, who is deceased. He proposed that the estate be shared as follows:

- Joseph Anjichi Aburili and Joel Ngala Aburili –Plot 203 in equal shares.
- George Ochola Aburili and Joel Ngala Aburili –Plot 2253 in equal shares.
- Joseph Achichi Aburili –Plot 204

- Joseph Achichi Aburili –Plot 2287

4. The parties filed affidavits which they adopted in their oral testimony. A total of four witnesses testified; Ochola (PW 1), Readon Okila (PW 2), Joseph (PW 3) and Leonard Indiasi Ojango (PW 4). It is common ground that Joseph is the only surviving son of the deceased. The deceased had a daughter called Sarah Aburili (“Sarah”) who begot two children; Joel Ngala (“Ngala”) and Ochola. It is also not in dispute that Ngala and Ochola were born out of wedlock and that the deceased, who was their grandfather took care of them and raised them.

5. Ochola testified that his mother never married and that the deceased took care of them during his lifetime. He told the court that he married before the deceased passed away and that he had built his home on Plot 203 before the deceased told him to move Plot 2253. He also told the court that the deceased’s homestead was on Plot 204. He denied that he had disagreed or had a bad relationship with the deceased.

6. PW 2 supported the Ochola’s case and added that the matter of the deceased’s estate was placed before the clan elders for arbitration and it was decided that Joel and Ochola should inherit Plot 2253 and 203 while Achichi would remain with Plot 204 and 2287 which was in accordance with the deceased’s wishes.

7. Achichi’s position was that Ngala and Ochola were not children of the deceased but grandchildren as they were children of his sister Sarah. He testified that Ochola’s father was known and was from Ng’iya in Siaya and that is where she was married, died and was buried. His position was that since Ochola’s had property in Ng’iya, he should move there and take it up. He explained that Ngala’s father was not known and since she gave birth to him before she moved to Ng’iya, he was entitled to Plot 203. He dismissed the clan arbitration meetings as these were held in his absence.

8. DW 2, a clan elder, testified that he attended the clan meeting called to discuss inheritance of the deceased property. He told the court that after the initial decision was made to include Ochola in the estate, they heard Achichi’s complaints that Ochola had his family in Ng’iya. In a further meeting, they decided to set aside the earlier decision as it was not in order for grandchildren to come and disturb their uncle. He further testified that under Kinyore Customary law, a grandfather will normally take care of the children of his deceased daughter who has remarried but the issue of inheritance of the children will be at the discretion of the uncle.

9. The deceased died on 6th May 2005 hence the **Law of Succession Act (Chapter 160 Laws of Kenya)** (“the **Act**”) is the law applicable by virtue of **section 2 (1)** of the said thereof which states:

Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

10. It is clear therefore that distribution of the deceased’s estate is governed by the **Act** and not by customary law. Unless the parties consented to the arbitration by the clan elders, distribution of the deceased’s estate must now be determined by application of statutory provisions.

11. Counsel for the applicant submitted that the deceased having died intestate, the distribution of his estate was to be distributed in accordance with **section 38** of the **Act** which provides that where an intestate has left a surviving child or children, but no spouse, the net estate shall subject to the provisions of **sections 41** and **42**, devolve upon the surviving child if there be only one or equally divided among the surviving children. He submitted that **sections 41** and **42** deal with property devolving upon a child to be held in trust and previous benefits to be brought into account in distributing the estate.

12. Counsel further submitted that on the basis of the law, since the applicant was the only surviving child of the deceased, all the deceased’s properties go to him in accordance with **section 38** of the **Act** and as for distribution to the grandchildren of the deceased, this is left to the discretion of the surviving child. In

this case, the deceased's surviving child, Achichi, has explained the reasons for denying Ochola any property.

13. The applicant's position, in my view, is not supported by the law and while I agree that grandchildren are not direct beneficiaries of the deceased that is not the end of the matter. In **Re Veronica Njoki Wakagoto NRB Succession Cause No. 1974 of 2008[2013]eKLR**, Musyoka J., had this to say.

Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

14. A grandchild will therefore take the share due to his or her deceased parent in the estate under the principle of representation stated in **section 41** of the **Act**. On this issue that Court of Appeal in **Christine Wangari Gachigi v Elizabeth Wanjira Evans and 11 Others NKU CA Civil Appeal No. 221 of 2007 [2014]eKLR** stated as follows:

Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death.

The Court went further and held that:

We affirm the learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceaseds' children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court

15. Since the parties do not dispute that Sarah is the deceased's daughter, Ngala and Ochola step into her shoes and are entitled to inherit her share. The **Act**, as I have set out, leaves no room for the surviving son of the deceased to decide on the inheritance of his sister's children. I would also add that the principle of equality that treats sons and daughters, whether married or unmarried, equally is now firmly established in our legal system and is anchored by **Article 27** of the Constitution (see also **Rono v Rono & another [2008] 1 KLR (G&F), [2005] 1 KLR 538** on equality). Thus Ngala and Ochola are entitled to inherit their mother's share on the same footing as Achichi. It matters not that Sarah got the children out of wedlock or that she went to live in Ng'iya. The net result of my finding is that the estate of the deceased is to be shared equally between Joseph Achichi Aburili and the children of Sarah Ahono Aburili, that is, Joel Ngala Aburili and George Ochola Aburili.

16. Having so found, I now turn to actual distribution. For the reasons I have stated above, I reject the proposal by Achichi as it does not accord with the law. The proposal by Ochola satisfied the principle of equality as both him and his brother, Ngala share what would have been their sister's share of the deceased's property.

17. I accordingly confirm the grant which shall now issue on the following terms:

(a) Joseph Anjichi Aburili and Joel Ngala Aburili – WEST BUNYORE/EBUSIKHALE/203 & 2253 in equal shares.

(b) Joseph Achichi Aburili – WEST BUNYORE/EBUSIKHALE/204 & 2287

18. As this is a family matter, each party shall bear their own costs.

DATED and DELIVERED at KISUMU this 19th day of October 2017

D. S. MAJANJA

JUDGE

Mr Odeny instructed by Bruce Odeny and Company Advocates for the applicant.

Mr Okeyo instructed by Bogonko, Otanga and Company Advocates for the respondent.