



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.132 OF 2016

FORMERLY KISUMU HIGH COURT SUCC. NO.244 OF 1997

IN THE MATTER OF THE ESTATE OF:

HEMRESIANA OMOLO OCHOGO.....DECEASED

BETWEEN

GILBERT OTIENO OKITE.....PETITIONER

AND

MOSES ODERO ONDITI

DALMAS OCHOGO ONDITI

ROBERT ONYANGO ONDITI..... OBJECTORS

RULING

1. **HEMRESIANA OMOLO OCHOGO** aged 70 years, died on 5th October 1992 without leaving behind any biological child. She owned parcel **NO. KANYADA/KOTIENO-KATUMA/145** and **146** upon which stands commercial and residential properties.
2. She had three brothers and two sisters, among them being **ALFAYO ONDITI OCHOGO** who was the father of **MOSES ODERO ONDITI**, **DALMAS OCHOGO ONDITI** and **ROBERT ONYANGO ONDITI**.
3. She also had been married to **WILSON OKITE** whose son is **GILBERT OTIENO OKITE**. Upon her death **GILBERT** applied for and obtained grant of letters of administration for her estate in his capacity as her step-son. The grant was issued to him in 1995 and confirmed in 1998. However in the year 2001, **ALFAYO ONDITI OCHOGO** (who claimed to be her brother filed an objection to the grant saying it was obtained fraudulently and that lawful beneficiaries to the estate had been excluded from the affairs of the estate.
4. Unfortunately **ALFAYO** died before prosecuting the objection, so his three sons named above filed another objection in the year 2002. The grant was subsequently revoked and issued to the three sons of her brother.
5. **GILBERT OTIENO OKITE** appealed and the Court of Appeal set aside the orders and directed that both **GILBERT** and the three sons of **ALFAYO** were to be jointly granted letters of administration to the deceased's estate.
6. The matter was then remitted to the High Court for purposes of completing the distribution of the estate.
7. **GILBERT** stated in an affidavit sworn on 24th May 2017, that he had taken care of the deceased until her death, so all the property she had ought to devolve to him. He explained that his several attempts to gain access to the property have been thwarted by **MOSES**, **DALMAS** and **ROBERT** who threatened him with murder. This had made it impossible for him to take over the management of the deceased's estate or at least enjoy the benefits of his share. Meanwhile the Onditi sons were, by a court order allowed to continue collecting rent from the two named parcels until the appeal I referred to in the earlier part of the ruling was heard.
8. Upon the appeal being heard and **GILBERT** and the **ONDITI** sons being formally issued with the grant, a consent was recorded on 29/11/14 to the effect that the rent be deposited in a joint account. The Onditi brothers were also directed to render accounts for the rents they have collected from 1992 to date (save for the period between June 2003 to May 2004 when Gilbert collected the rent). Gilbert explained that for the one year period when he collected rent the properties were fetching a sum of Kshs.18,000/= per month – in total he collected

Kshs.216,000/= (for just a little under a year).

9. He further stated that the Objectors have collected rent for 305 months as at May 2017 and even assuming that the rent was never revised upwards then it means they have so far collected Kshs.5,490,000/=.

10. He urges the court to be guided by the provisions of **Section 39** of the **Law of Succession act** regarding the mode of distribution, and find that he has priority over the Onditi brothers.

11. Mr. Onyango on behalf of Gilbert urged the court to find that since the Onditi brothers were unable to render accounts, yet they have been collecting rents for the last 24 years, then the only inference the court can reasonably draw is that they have been using the money for their own benefit.

12. Mr. G.S. Okoth, on behalf of the Onditi brothers urged this court to take into account that the land is within their homesteads when ordering distribution.

13. **Section 38** of the **Law of Succession Act** provides as follows:-

“39(1) Where an intestate has left no surviving spouse or children, the net estate shall devolve upon the kindred of the intestate in the following order of priority:-

a) Father; or if dead

b) Mother; or if dead

c) Brothers and sisters, and any child or children of the deceased brothers and sisters, in equal share; or if none

d) Half brothers and half sisters, and any child or children of deceased’s half brothers and half sisters in equal share; or if none

e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

14. Whereas the Onditis would be entitled to an equal share with Gilbert, I think to do so in strict compliance with **Section 39 (b)** would be unjust and inequitable as the Onditis have enjoyed exclusive financial benefit for almost 24 years. They have refused, failed and ignored all attempts and indulgences given to them to render accounts so as to assist the court in determining the most equitable mode of distribution. The rendering of accounts could have assisted the court in appreciating the value of the estate and how to distribute it equitably.

15. **MOSES ODERO ONDITI** swore an affidavit dated 14/10/2014 saying the deceased had left old dilapidated semi permanent buildings on the said parcels (he annexed photocopies). After obtaining grant he built new semi-permanent GCI sheet premises between 2009 and 2013. It was his contention that prior to him erecting new houses, Alfayo had written to the tenants not to pay rent, and they were not able to pay rent for the premises until Moses built new structures.

16. So which assets accrue to Gilbert and which ones accrue to the Respondent? The Onditi brothers have deliberately withheld crucial information which could have assisted this court in arriving at a fair and equitable distribution. The only information available to guide me is that the Onditi brothers have enjoyed proceeds from the estate for 24 years during which they have received over Kshs.5 million. That averment by Gilbert has not been controverted. They claim to have made improvements on the asset but do not present anything like a bill of quantity to assist the court in appreciating the costs they may have incurred.

17. Mr. Okoth urged the court that in ordering the distribution regard should be had to the fact that their homesteads are within the asset herein. But which part of the land are their homesteads located at? That is part of the information they have withheld. Their entire conduct communicates contempt both for their co-administrator and the court. They cannot now have their cake then also eat it. They have benefitted from the estate almost exclusively for 24 years, and the only fair manner to now give Gilbert an equal share as contemplated by **Section 39 (b)** of the **Law of Succession Act** is to order **KOTIENO-KATUMA 145 and 146** devolve exclusively in favour of **GILBERT OTIENO OKITE**.

Delivered and dated this 16th day of October, 2017 at Homa Bay

H.A. OMONDI

JUDGE