



IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE NO. 492 OF 2013

**IN THE MATTER OF THE ESTATE OF LEONARD AYUNGO OYU alias LANARD AYUNGO
aliad AYUNGO OYU (DECEASED)**

AND IN THE MATTER OF APPLICATION BY

BETWEEN

ODECK ALOYS ALEX AYUNGO.....PETITIONER/APPLICANT

AND

MICHAEL OYUU AYUNGU.....PROTESTOR/ RESPONDENT

RULING

1. This matter concerns the estate of Leonard Ayungo Oyu alias Lanard Ayungo alias Lenard Ayungo (“the deceased”) who died on 29th September 1987 at Kobong Sub-location, Bondo District, Siaya County. His son Odeck Aloys Alex Ayungo (“Odeck”) filed the petition for grant of letters of administration. In the petition, he named the deceased’s children as survivors and listed three properties as part of the deceased’s estate; SIAYA/KOBONG’/211, 220 and 595 (“Plots 211, 220 and 595 respectively”). In due course, the court issued him with a grant of letters of administration dated 24th March 2014.

2. Odeck has now moved the court for confirmation of the grant issued to him by the summons dated 9th May 2017. In his deposition in support of the summons, he sought to confirm the grant and distribute the property as follows;

- Plot 211 measuring 0.34Ha – Odeck and Nicholas Abonyo Ayungo in equal shares.
- Plot 220 measuring 1.6Ha – Odeck, Nicholas Abonyo Ayungo, Vincent Osuo Ngunre, Lilian Apondi Osen, Peter Owenje, Regina Otieno, Mary Tiga, Beatrice Ogongo, Michael Oyoo Oyuu, Mary Mito, Benter Obota, Benter Ayungo and Pauline Omuyo in equal shares.
- Plot 595 measuring 0.44Ha – Michael Oyoo Oyuu, Sarah Chepkoech Ogunde, Evans Ayungo Ngunre, Mary Mito, Benter Ayungo and Paulina Omuoyo in equal shares.

3. The application for confirmation was opposed by the protestor, Michael Oyuu Ayungo (“Michael”) who, in his deposition dated 16th May 2017, raised the following grounds;

- That the mode of distribution excluded him and his siblings.
- The proposed mode of distribution sought to include a stranger Vincent Asuo Ngunre as a beneficiary of the estate of the deceased.
- That all the deceased’s properties should be distributed to all members of the estate in equal shares.

4. In order to resolve the issues raised by the protestor, I have considered the depositions filed by the parties and the oral testimony of family members; Michael (PW 1), Paulina Omuoyo Ayungo (PW 2), Odeck (DW 1), Benta Otieno (DW 2), Vincent Osuo Ngure (DW 3) and Tobias Owuor Osuo (DW 4).

5. From the depositions and evidence, there is common ground regarding the direct heirs of the deceased. He had three wives and the following children;

(a) The first wife, Magdalena Aoko Oyungo had three sons; Christopher Owenje Ayungo (deceased), Odeck and Nicholas Abonyo Ayungo. Christopher Owenje Ayungo is survived by Philip Ayungo, John Owenje and Peter Ayungo.

(b) The second wife, Anastasia Oyier Ayungo had only one daughter Lilian Apondi Osen.

(c) The third wife, Maria Misula Ayungo had the following children; Maurice Ngure Ayungo (deceased), Vincent Ogude Ayungo (deceased) and Michael. The daughters are Paulina Omwoyo Midunde, Benter Obota Otieno, Benter Achieng' Anyango and Mary Mito. Maurice Ngure Ayungo is survived by Evans Ayungo Ngure while Vincent Ogude Ayungo is survived by his widow Sarah Chepkoech Ogude.

6. Apart from reiterating the grounds in support of the protest, Michael (PW 1) complained that Odeck had fenced off his property and blocked his access to his own parcel. In cross-examination, he conceded that Plot 211 was given to the first house and Plot 595 given to his mother, the third house. He told the court that the second house had another property, referred to as "*Pap Owimbi*" which is not subject of these proceedings. He told the court that Plot 220 was the family home where all brothers had built their homes. He contended that Vincent Osuo was not entitled to any property though he had built his home on Plot 220. He also denied any knowledge of the fact that the deceased had acquired land in Nyalunya in exchange for the parcel occupied by Vincent Osuo.

7. Michael's brother, Paulina Omuoyo Ayungo (PW 2), told the court that she from the third house. She testified that each son of the deceased had been given part of Plot 220 to build his house and they did so. She told the court that Michael's problem was with Vincent and as far as she could recall, the deceased was given another parcel of land in exchange for Plot 220. She insisted that everyone in the family had been provided for and that there was no need to interfere with the distribution proposed by Michael.

8. In his testimony, Odeck (DW 1) testified that the proposed distribution was in accordance with the wishes of the deceased. The first house had been given Plot 211, the second house had a piece of land known as "*Pap Owimbi*" whose registration details were unknown but was nevertheless being cultivated by Vincent Osen and Joseph Akal from that house. Plot 220 was the deceased's homestead and included all members of the family from the first and third house who had all constructed their homes thereon.

9. As regards the position of Vincent, DW 1 testified that Vincent had exchanged a piece of land in Nyalunya with the deceased and that it was Michael's mother was cultivating it. DW 1 told the court that in the event the agreement with the deceased was honoured, that land would be for the benefit of the third house which was also entitled to Plot 595.

10. Benta Otieno (DW 2) from the third house told that court that she was satisfied with the proposed distribution. As regards Vincent, she told the court that her mother had told her that deceased had exchanged land with Vincent in Nyalunya and that it is her mother who used to cultivate it in her lifetime.

11. Vincent Asuo Ngure (DW 4) testified that he was 82 years old and that the deceased was his cousin. He recalled that in 1977, he exchanged part of his land, SIAYA/ KOBONG/210 ("Plot 210") for part of Plot 220 where he son Tobias was now residing. He told the court he transferred the parcel to his son and was willing to ensure that it is subdivided and given to the deceased's family in accordance with his agreement with the deceased. He also confirmed that the land was being cultivated by the deceased's third wife. Vincent's son, Tobias Owuor (PW 5), confirmed that he was residing on Plot 220 where he had built his house. He told the court that Plot 210 was registered in his name and he was ready and willing to

subdivide it and give a portion to the deceased's family. He also confirmed that the deceased's third wife was the one cultivating the property.

12. From the evidence, the issues for determination are whether the deceased's properties should be divided equally amongst all the heirs and whether provision should be made for Vincent Asuo Nguni.

13. Since the deceased died on the 29th September 1987, the **Law of Succession Act (Chapter 160 Laws of Kenya)** is the law applicable in determining the issues I have set out by virtue of **section 2 (1)** thereof which states as follows:

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.

14. Since the deceased was a polygamous man and he left behind, three wives and children, the distribution of his estate is governed by **section 40** of the **Act** which stipulates as follows:

40.(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.

15. **Section 3** of the **Act** defines the "house" as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. The law does not permit discrimination of the children on grounds of their sex and all the deceased's wives and their children are entitled to a share of his net intestate estate as equally as provided for by **section 40** of the **Act** unless one or more of them renounce their right to inherit.

16. **Section 40** of the **Act** does not take away the discretion of the court to distribute the estate fairly or equitably. It is now recognised that the court has discretion to provide for dependents or beneficiaries, a point succinctly put forward by Omollo JA., in **Rono v Rono & another [2008] 1 KLR (G&F), [2005] 1 KLR 538, 553** as follows-

I had the advantage of reading in draft form the judgment prepared by Waki, JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act".

The learned judge proceeded to quote **section 40(1)** of the **Act** and held that:

My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an

equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

17. In ***Elizabeth Chepkoech Salat v Josephine Chesang Salat*** CA NRB Civil Appeal No. 211 of 2012 [2015]eKLR, the Court of Appeal stated that

[30] Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust.

18. It is clear from the decisions of the Court of Appeal that the court may depart from the equality principle set out in **section 40** of the **Act** on account of fairness by taking into account various factors including whether the deceased during his lifetime had settled the property to each house and the ages of the respective children. In this case, the overwhelming consensus of the family is that prior to his death, the deceased had given land to each of his wives. Each son had been shown where to build on Plot 220 and except for the applicant, all other members of the family were comfortable with this arrangement. In my view, the protestor has not shown that distribution proposed by the petitioner is unfair to him or any of the other beneficiaries. Further, it has been 30 years since the deceased passed away. The family has since settled on the arrangement made by the deceased and to do away with it at this stage would be unworkable and create undue hardship within the family. I therefore reject his argument that all the beneficiaries of the deceased’s estate should be treated equally.

19. I am also satisfied that the deceased during his lifetime exchanged his land by giving Vincent Osuo part of Plot 220 for Plot No. 201. Although the land is registered in the name of Tobias, he undertook before this court to facilitate a transfer of the land to the deceased’s family in accordance with the agreement. The fact of the exchange is confirmed by the whole family except the protestor who, in my view, feigns ignorance of the transaction. Tobias built on the deceased’s land in 2005 without any hindrance or any opposition from the protestor or any other member of his family. Further, Michael’s own sister (PW 2) and the other witnesses testified that his mother is the one who was cultivating the land. In my view, for all intents and purposes Vincent share is a liability to the estate and he is entitled to a share.

20. For the reasons I have set out above, I dismiss the protests and confirm the grant on the following terms;

(a) SIAYA/KOBONG’/211 measuring 0.34Ha – Odeck Aloys Alex Ayungo, Nicholas Abonyo Ayungo and the family of Christopher Owenje (deceased) represented by Philip Ayungo, John Owenje and Peter Ayungo in equal shares.

(b) SIAYA/KOBONG’/220 measuring 1.6Ha – Odeck Aloys Alex Ayungo, Nicholas Abonyo Ayungo, Vincent Osuo Ngure, Lilian Apondi Osen, Peter Owenje, Regina Otieno, Mary Tiga, Beatrice Ogongo, Michael Oyoo Oyuu, Mary Mito, Benter Obota, Benter Ayungo and Pauline Omuyo in equal shares.

(c) SIAYA/KOBONG’/595 measuring 0.44Ha – Michael Oyoo Oyuu, Sarah Chepkoech Ogunde, Evans Ayungo Ngure, Mary Mito, Benter Ayungo and Paulina Omuoyo in equal shares.

21. From the evidence it is clear the Nyalunya plot was given by the deceased to the third house. In view of the undertaking given by Tobias Owuor Asuo and Vincent Asuo Ngure, they shall within 21 days of

this order, transfer part of SIAYA/KOBONG/210 to Michael Oyoo Oyuu, Sarah Chepkoech Ogunde, Evans Ayungo Ngure, Mary Mito, Benter Ayungo and Paulina Omuoyo in equal shares. The beneficiaries shall bear the costs of the transfer to themselves.

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

DATED and DELIVERED at KISUMU this 16th day of October 2017

D. S. MAJANJA

JUDGE

Mr Orengo, Advocate for the applicant.

Respondent in person.