



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO.109 OF 1987
IN THE MATTER OF THE ESTATE OF
JOHN MAGANGA OKWARO (DECEASED)
AND IN THE MATTER OF APPLICATION
FOR CONFIRMATION OF GRANT
BY DORCAS OKWARO

RULING

Introduction

1. It is now 36 years since the John Makanga Okwaro of Esiandumba, South Bunyore died. His estate has neither been administered nor settled. I am now called upon to finally distribute his property. The petition for grant of letters of administration for the deceased's estate was taken out by his sons, Hallon Okwaro ("Hallon") and Henry Oyungu Okwaro ("Henry"). In due course the grant of letters of administration was issued to them on 1st February 1988. The administrators died and the estate was thrown into flux with accusations and counter accusations regarding mismanagement of the estate. The beneficiaries filed various applications seeking injunctive relief and other orders. These applications were neither heard nor determined.

2. The deceased was a wealthy man. He owned several posho mills in several trading centres in Kisumu, Siaya and Vihiga Counties. He also owned a metal engineering company; Nyanza Engineering which fabricated these posho mills and provided maintenance services to other companies including cotton ginneries in the region. During his life time he acquired other properties which are now subject of dispute. I note that when the petition was filed, the petitioners only disclosed two properties; MUR/NGIYA/1133 and EAST GEM/URANGA/214. When the initial grant was confirmed on terms that Hallon took the two properties. According to Johnstone Ombima Okwaro ("Johnstone"), these two properties were sold by Sophia Amisi and Grace Anyone Kinyuru who are now deceased.

The 2004 Consent

3. In due course, family members had fruitful discussions and a consent letter dated 15th June 2004 was filed on 13th July 2004 ("the 2004 consent"). The consent was endorsed by the court on 14th July 2004. The consent provided as follows;

A. The beneficiaries of the estate of John Maganga Okwaro are the following.

1. Dorcas Okwaro
2. Estate of Henry Oyungu Okwaro
3. Estate of Jackton Nyawiri Okwaro.
4. Johnston Okwaro
5. Benard Amunga Okwaro
6. Estate of Joshua Okwaro
7. Barrack Okwaro.

B. The immovable assets of the estate are herewith agreed to be distributed amongst the beneficiaries as follows:

(i) Kisumu Municipality Block 7/34 by transmission be registered in the names of the estate of Jackton Nyawiri Okwaro and the estate of Joshua Mwenje Okwaro as proprietors in common as provided for in section 103 of the Registered Land Act.

(ii) Kisumu Municipality Block 6/156 by transmission be registered in the names of Julia Sihore as trustee for Tony Okwaro, Nicholas Okwaro, Teddy Okwaro, Timothy Okwaro on the one part and Andrew Okwaro wherefore Julia Sihore and Andrew Okwaro shall be proprietors in common each being entitled to an undivided share in the whole.

(iii) Kisumu Municipality Block 6/271 by transmission from the estate of Henry Oyungu to Julia Sihore as trustee for Tony Okwaro, Nicholas Okwaro Tedy Okwaro, Timothy Okwaro.

(iv) All other properties of the estate shall remain in the proprietary status obtaining at the date hereof save that the register of title to Kisumu Municipality Block 7/34 shall be rectified by the deletion of the names of Julia Sihore thereof and substituted by the names of the estate of Joshua Mwenje Okwaro and the estate of Jacton Nyawiri Okwaro, as proprietors in common as trustees for their children in perpetuity.

(v) Johnstone Ombina Okwaro shall pay the sum of shillings 100,000 to Julia Sihore as settlement of any claim she has against him and Johnston Ombina Okwaro shall be tenant and the estate of Joshua Okwaro and the estate of Jackton Nyawiri shall be landlord in respect of Kisumu Municipality Block 7/34 paying therefore rent as agreed between them.

(vi) Save as provided above all other claims by each and every beneficiary to the estate of John Maganga Okwaro are hereby withdrawn, waived and settled and each beneficiary or party shall bear their respective costs.

4. Although counsel for Johnstone contended that the consent was invalid as the consent of Mary Asiko and Anna Ongonga Okwaro was not obtained, when both parties testified they did not have a problem with it and were keen to finalise the matter.

The grant of letters of administration

5. It appears that the consent led to an interregnum until 3rd February 2016 when Johnstone, Anna Ongonga (“Anna”), Mary Asiko Okisa (“Mary”), Julia Sihore Okwaro (“Julia”) and Timothy Okwaro (“Timothy”) all applied to revoke the grant issued to Henry and Hallon since they were both dead. Following the application, I issued a grant of letters of administration intestate on 30th September 2016 to Mary, Elizabeth Amunga Okwaro and Dorcas Okwaro (“Dorcas”). Once again Johnstone applied to

revoke the grant I had issued by a summons dated 9th December 2016. On 19th January 2017, I revoked the grant and re-issued it to Johnstone, Mary and Dorcas. In order to resolve the matter, I directed the parties to agree on and file an inventory of assets and a list of beneficiaries.

Beneficiaries and Assets

6. After the inventory of assets and list of beneficiaries was filed, I directed the administrators or any of them to file an application for confirmation. The 2nd and 3rd administrators filed a list of assets. From that list, it appears that several plots and posho mills were distributed to family members and subsequently sold. I also note that the administrators did not provide proof ownership for the properties that were distributed by Henry and Hallon to the family members. Nevertheless, there was no contest regarding these plots and posho mills as the family had already distributed them.

7. Since many of the direct beneficiaries had died, their descendants also had problems with the 2004 consent, I decided to hear all the parties and settle all the issues regarding the estate once and for all.

8. The survivors and beneficiaries of the deceased are as follows;

House One – Florence Okwaro (widow) – deceased

- Mary Asiko Okisa
- Hallon Okwaro (deceased) left behind two widows; Dorsila and Martha Okwaro
- Tabitha Okwaro

House Two – Esther Okwaro (widow) – deceased

- Grace Anyona Kinyuru (deceased) left behind a son, Peter Okwaro.
- Henry Oyungo Okwaro (deceased) left behind a widow, Julia Shihore Okwaro.
- Jackton Nyawiri (deceased) left behind a widow Mary Nyawiri who is also deceased and children.
- Sofia Amisi Okwaro (deceased) left behind children; Omondi and Carole.
- Nashon Okwaro (deceased) left behind sons Kevin, Richard and Moses.
- Johnstone Ombima Okwaro.
- Bernard Amunga Okwaro (deceased) left behind widow Elizabeth Odindo
- Anna Ongonga Okwaro.
- Joshua Mwenje Okwaro (deceased) left behind children Elijah, Wilfred and Melisa
- Barrack Ngota Okwaro (deceased) left behind Grace Okwaro.

House Three – Dorcas Akeyo Okwaro

- Joseck Onguti Okwaro
- John Mark Okwaro

Fourth House – A N (divorced)

- Andrew Nyambwa Okwaro (deceased)

9. The family had already agreed on a mode of distribution of some of the properties in terms of the 2004 consent. Although the consent was filed and recorded by the court, a certificate of confirmation was never issued to consummate the distribution of the estate on those terms.

Summons for confirmation

10. The proposal for distribution of the estate comprising three undisputed properties of the deceased was set out in the summons for confirmation of grant dated 16th February 2017 filed by the deceased's only surviving widow, Dorcas. She proposed the following distribution;

Bunyore/Esiandumba/73 (“the Farmland”) to be distributed to all the deceased sons and their families as follows;

- Dorcilla Okwaro and Martha Okwaro
- Julia Okwaro
- Mary Nyawiri
- Kelvin Okwaro, Richard Okwaro and Moses Okwaro
- Johnstone Ombima Okwaro
- Elizabeth Munde Okwaro
- Elijah Obiero, Wilfred Okwaro
- Grace Barrack Alili
- Joseck Okwaro
- John Mark Okwaro
- Mercy Odingo Okwaro

Bunyore/Esiandumba/16 (“Homestead”) to be distributed equally between

- Johnstone Ombima Okwaro
- Dorcas Akeyo Okwaro

Rabuor Plot 5/35 (“Rabuor”)

- Dorcas Akeyo Okwaro
- Elizabeth Odindo and Mary Nyawiri

11. Apart from considering the affidavits filed by the parties, I heard oral testimony from Johnstone (PW 1), Mary (PW 2), Julia (PW 3), Dorcas (PW 4), Pamela Awinja Okwaro (PW 5), Elijah Obiero Okwaro (PW 6) and Anna (PW 7).

The testimony

12. Johnstone agreed with the mode of distribution proposed by Dorcas save that he wanted DNA tests conducted to determine whether Elijah Okwaro, Wilfred Okwaro and Melsa Okwaro were children of the late Joshua Okwaro and whether John Mark Okwaro was the deceased’s son with Dorcas. He told the court that Dorcas had seven children, including John Mark, after the deceased’s death. When cross examined, Johnstone admitted that John Mark was born two weeks before the deceased’s death. As to whether Anna should inherit a part of the homestead, Johnstone was of the view that Anna, being the last born from the second house. He supported Anna’s claim to the Rabuor Plot as it belonged to their late mother, Esther. Johnstone testified that he paid Kshs. 100,000/- to Julia in accordance with the 2004 consent hence he was entitled to occupy Kisumu/Municipality Block 7/34. He insisted that the property of his late siblings should be subject to fresh distribution.

13. Mary and Julia were in agreement with the distribution of the farmland. They supported Anna’s claim to the Rabuor plot as it initially belonged to her mother and a share in the homestead as she was the deceased’s last born daughter. Julia told the court since several of the deceased’s sons had their homes at the homestead, it would be if the homestead was shared between Dorcas and Johnstone as they would demolish those houses.

14. Dorcas testified that the farmland was already distributed and that she only indicated what was already on the ground. As regards the Rabuor plot, she testified that it was meant for the wives of the deceased and that she collects rent from only one side and rent on the other side is collected by Elizabeth Odindo and Mary Nyawiri. She told the court that Anna is not entitled to a share on the plot as she was already allocated a plot in Ng’iya Market which had a posho mill and she sold it. She further testified that Nyanza Engineering belonged to the families of Jacktone and Joshua and that Johnstone was only a tenant. Dorcas testified that there were six house at the homestead. The houses were occupied by Dorcas, Johnstone Okwaro and the families of the late Esther Okwaro, the late Jackton Nyawiri, the late Henry

Okwaro and the late Nashon Okwaro. Dorcas did not have any issue with Anna getting a share of the homestead.

15. Pamela Awinja Okwaro and Elijah Obiero Okwaro are the daughter and son of the late Jacktone Nyawiri and Joshua Okwaro respectively. They testified that their fathers were the rightful beneficiaries of Nyanza Engineering. They told the court that Johnstone occupied the property as a tenant but had refused to pay rent. They also testified that Julia held the title documents to the property and she had adamantly refused to hand it over to them. They therefore prayed that Johnstone be ordered to vacate and Julia be ordered to transfer the plot to them.

16. Anna's case was that she was entitled to the farmland, homestead and the Rabuor plot. She testified that the Rabuor plot was allocated to her when she was child and that her brother Nashon allowed the deceased's wives to use it as she was still young. She insisted that she did not at any one time transfer her interest in the plot to any of the deceased's wives. Anna told the court that she was entitled to her mother's homestead as she was the last born. She was also of the view that she was entitled to a share of the farmland as she was unmarried.

Determination

17. I have reviewed the evidence and considered the written submissions. The issues that arise for determination are as follows;

- Whether John Mark Okwaro and the children of Joshua Mwenje Maganga should be subjected to DNA tests to prove their paternity?
- How should the Farmland, Homestead and the Rabuor Plot be distributed?

Whether DNA tests should be done?

18. Johnstone has prayed that John Mark and the children of Joshua be subjected to DNA tests to prove their paternity. He testified that John Mark Okwaro was born just two weeks before the death of the deceased and is not the deceased's son. He also claims that Elijah Obiero, Melsa Okwaro and Wilfred Okwaro be subjected to DNA tests as they were not children of the late Joshua Mwenje and his wife Anna Okwaro who are both deceased. From the record, it is clear that John Mark was involved in distribution of the estate and at no time did Johnstone raise the issue of his paternity. It is also the first time that he is raising the issue of Joshua's children.

19. The general principle is that the court will not order a person to undergo a DNA test unless the applicant establishes a sufficient basis. As regards the paternity of John Mark, it is not in dispute that he was born two weeks before the deceased's death. No evidence was shown that he could not have been the deceased's son. The evidence could not surmount the presumption of legitimacy in terms of **section 118** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which states as follows;

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

20. Johnstone did not provide any evidence to show that or discount the fact that the Melisa Ambuka Okwaro, Elijah Okwaro and Wilfred Okwaro were the children of the late Joshua Okwaro. Their claim to the estate was not contested by any of the other beneficiaries. In addition, when the 2004 consent was filed it was clear and it was understood that Joshua had an estate which is clear evidence that he had children by the time he died. More specifically clause (v) of the 2004 consent which recognised that the children of Joshua Okwaro. In light of such evidence, a DNA test is unnecessary.

21. I would also add that **section 29** of the *Law of Succession Act* defines a dependant. **Section 29(b)**

states thereof states that a dependant includes, “*such of the deceased’s parents, 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 his death*”. It is clear that the **Act** does not dependency on blood relations but on maintenance. Even if the children were no Joshua’s biological children, he accepted and recognised them as his own.

The Homestead

22. The Homestead is where the deceased was residing with his wives and their families. According to the evidence, the deceased’s sons constructed their houses on the property and their families are still residing on it. Although there is consensus that Dorcas, as the deceased’s only surviving widow should remain on the property, the inclusion of Johnstone is contested on several grounds. Julia suggested that the property should be inherited by Barrack, the last born son, in accordance with Kinyore Customs. Anna supported this proposal and also insisted that she too was entitled to part of the homestead.

23. From the testimony of all the parties the beneficiaries have built their houses on the homestead and the main house which belonged to Esther is still intact. Children of the late sons of the deceased live on the compound which is shared communally. They fear that if the land is given to Dorcas and Johnstone, they will be evicted. In order to deal with these concerns, I direct that the homestead be held in trust for the beneficiaries in undivided shares so that they continue sharing the same communally to avoid boundary disputes. The families who have built on the houses shall have unimpeded access to their houses. Further any further developments shall only be with the consent of the trustees of the property.

The Farmland

24. The proposal regarding the Farmland was that all the deceased’s sons share the property equally. It was agreed that the Farmland had been subdivided and the beneficiaries had already occupied it. The only objection by Johnstone is that Elijah Obiero, Melsa Okwaro and Wilfred Okwaro were not the children of the Joshua Okwaro and his wife Anna Okwaro who are both deceased and that John Mark Okwaro was not a son of the deceased. I have already dismissed these objections. In the submissions, counsel for Anna did not object to the distribution of the Farmland to the deceased’s sons as had already been decided by the family.

The Rabuor Plot

25. The Rabuor Plot is a commercial plot with two shops in the model of trading centre building. Dorcas claims that she is entitled to the plot as she is the deceased’s surviving widow. According to her the plot was given to the wives and since then she has been collecting rent from one side of the building while the other side is occupied by Elizabeth Odundo and Mary Nyawiri. Anna also staked her claim to the Rabuor plot on the basis that it belonged to her mother, Esther. She explained that when her father died, she was still very young and although she was given some posho mills like the other members of the family, these were sold to assist other members of the family.

26. From the record it is clear that the only other property that Anna got after distribution was a plot in Ng’iya which was sold to assist her sister who was ailing. Since the other members of the family also received posho mills, Anna was still too young as such she was disadvantaged. While I think Dorcas should be allowed to continue collecting rent from the one side of the shop during her life time, entire property should devolve to Anna upon her death. Since Anna did not benefit from the Farmland, she should benefit from the Rabuor Plot.

Other properties

27. I would remiss if I did not deal with the issue of **Kisumu/Municipality Block 7/34** commonly known as Nyanza Engineering which according to the 2004 consent was given the family of Jackton Nyawiri and Joshua Okwaro. Johnstone claims that he paid Kshs. 100,000/- to Julia and he is that entitled to rent the

property. Although there is an agreement to pay rent, the agreement cannot be in perpetuity. Moreover, Julia cannot bind the actual beneficiaries of the property. It is now time that the property is devolved free from encumbrances to the two families and I so order.

28. Likewise, I cannot adjudicate on any dispute regarding a property **Kisumu/Municipality Block 7/36**, the Makasembo Road property, mentioned by Anna as its particulars were not furnished and its status as the deceased's property was contested without laying a proper foundation either in the application for confirmation or the replying affidavits.

29. Counsel for Johnstone had argued that at this stage it is not possible to give effect to **section 71(2)** of the **Law of Succession Act** which provides that before distributing the estate the court should be satisfied as to the respective identities and shares of all the persons beneficially entitled. I disagree. Given the history of this family and the fact that the beneficiaries have been identified and having heard the parties, I am satisfied that the only way to resolve this case is to distribute the estate to the identified beneficiaries. If the other properties have not been disclosed or identified, the fault must lie with the administrators including Johnstone. In any case, the record shows that the family members had already divided the deceased's property amongst themselves. Finally, the 2004 consent shall now be incorporated into the certificate of confirmation.

Disposition

30. From what I have stated, I now dispose of the deceased estate by confirming the grant on the following terms;

(a) **BUNYORE/ESIANDUMBA/73** in equal shares as follows;

- Dorsila Okwaro and Martha Okwaro
- Julia Sihore Okwaro
- Estate of Jacktone Nyawiri
- Kelvin Okwaro, Richard Okwaro and Moses Okwaro in equal shares
- Johnstone Ombima Okwaro
- Elizabeth Amunga Odindo
- Elijah Obiero, Wilfred Okwaro and Melsa Okwaro in equal shares
- Grace Barrack Alili
- Joseck Ongute Okwaro
- John Mark Okwaro
- Mercy Odingo Okwaro

(b) **BUNYORE/ESIANDUMBA/16** to be held by Johnstone Ombima Okwaro, Dorcas Akeyo Okwaro, Anna Ongonga Okwaro and Grace Barrack in common but undivided shares in trust for family members.

(c) **RABUOR PLOT NO. 5/35** to Anna Ongonga Okwaro but Dorcas Akinyi Okwaro shall have a life interest in $\frac{1}{2}$ share of the property she occupies.

(d) **KISUMU MUNICIPALITY BLOCK 7/34** as follows;

$\frac{1}{2}$ share to the Estate of Jackton Nyawiri and $\frac{1}{2}$ share to Elijah Obiero Okwaro, Melsa Ambuka Okwaro and Wilfred Ang'ana Okwaro in equal shares.

(e) **KISUMU BLOCK 7/32** to Dorcas Akeyo Okwaro in trust for Joseck Okwaro and John Mark Okwaro in equal shares.

(f) **KISUMU MUNICIPALITY BLOCK 6/156** as follows;

$\frac{1}{2}$ share to Julia Sihore Okwaro in trust for Tony Okwaro, Nicholas Okwaro, Teddy Okwaro

and Timothy Okwaro in equal shares and ½ share to Andrew Okwaro.

(g) **KISUMU MUNICIPALITY BLOCK 6/271** to Julia Sihore Okwaro in trust for Tony Okwaro, Nicholas Okwaro, Teddy Okwaro and Timothy Okwaro in equal undivided shares.

31. There shall be no order as to costs as this is a family matter.

DATED and DELIVERED at KISUMU this 20th day of December 2017

D. S. MAJANJA

JUDGE

Mr Odeny instructed by Bruce Odeny and Company Advocates for the 2nd and 3rd Administrators.

Mr Ojuro instructed by Otieno, Yogo, Ojuro and Company Advocates for the 1st administrator.

Mr Mwamu instructed by Mwamu and Company Advocates for the Julia Sihore Okwaro and Anna Ongonga Okwaro.