



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 805 OF 2009

**IN THE MATTER OF THE ESTATE OF AKUN ODENY ALIAS AKUNI ODENYI.....
.....DECEASED**

BETWEEN

PETER ONDIEK AKUNI.....PETITIONER

AND

TIMINA MADANGA AKUN

JOHN L. AKUN

GRACE VIHENDA

RISPA AYUMA OOKO

ANNA ROSA DAUDI

KELLY ODENY.....OBJECTORS

J U D G M E N T

Introduction

1. The deceased herein, Akun Odeny alias Akuni Odenyi died intestate on 28.06.2008. He was survived by 2 wives, namely Petinala Oketch Akun (now Deceased) and Timina Madanga Akun (still living) and is the 1st objector herein. At the time of his death, the deceased was the registered proprietor of land parcel No. Butso/ Shikoti/201 which measures 16.00acres. The deceased was also survived by the following children.

1. Children of Petinala Oketch (1st house)

Peter Ondiek Akun (son)

Jones Ohuru Otenyi (son)

Maria Atieno Salome – Daughter

Kelly Odeny S/O of late Julius Akun

2. Children of Timina Madanga (2nd house)

John Lango

Risper Ayuma Ooko(wife of deceased son)

Grace Vihenda Ouma (wife of deceased son)

Anna Rosa Daudi Alias Anna Anyoso Rosa – Daughter

2. These proceedings were commenced vide Kakamega HCC Succ. Cause 792 of 2009 in which the Petitioners were Timina Madanga Akun and Jones Ohuru Otenyi. These 2 petitioners represented the 2 houses of the deceased. This second cause was filed by Peter Ondiek but the grant issued to the said Peter Ondiek has since been revoked. The grant of letters of Administration issued in Succession cause No. 792 of 2009 to Timina Madanga and Jones Ohuru still stands.

The Dispute

3. The dispute in this case revolves around distribution of the deceased's estate. As a result of the same the court heard oral evidence from both sides. Timina Madanga Akun, the objector testified that contrary to the contention by Peter Ondiek and his witnesses, the deceased never shared out his estate among his beneficiaries. She proposes that the estate of the deceased be distributed between the two houses in the ration of 7.1 to 8.9 acres representing 4 units of the 1st house and 5 units of the 2nd house. Reliance for this proposition is placed on Section 40 of the Law of Succession Act, cap 160 of the Laws of Kenya (the Act).

4. Peter Ondiek, the Petitioner also testified and called witnesses. He represents the 1st house and proposes that the estate of the deceased should be distributed along the lines made by the deceased before he died which is to the effect that the distribution of the estate should follow a trench that was dug by the deceased running from the top of the farm to the river on the lower side. Mr. Ondiek also testified to the following:-

- i) That his mother Petinala Oketch Akun bought one (1) acre of land sometime in 1951 and that this one acre was inadvertently included in the deceased's estate.
- ii) That Petinala had been given 11 acres of the deceased's estate while Timina had been give 5 acres in addition to a further 12 acres that were outside the deceased's estate
- iii) That Petinala's and Timina's respective portions were clearly marked out by trenches allegedly, made by the deceased.

Site visit by the Court

5. During the hearing of the case the parties urged the court to visit the land with a view to seeing and establishing for itself whether indeed the deceased had dug out trenches to demarcate the distribution of his estate between his 2 houses. However, when the court went to site, it could not see the trenches as alleged by the Petitioner and his witnesses. The parties were not in agreement about the location and extent of the trenches nor were they able to point out those trenches clearly to the court.

Issues for Determination

6. From the evidence that has been placed before me, the issues for determination are the following.
- i) Whether the deceased had 2 wives

ii) Whether he had shared out his estate between the 2 houses before he died.

iii) If the answer to 2 above is in the negative, how should the estate of the deceased be shared out among the beneficiaries.

iv) Should the one (1) acre allegedly bought by Petinala be separated from the deceased's estate?

Analysis and Determination

7. On the issue of whether or not the deceased had 2 wives there is overwhelming evidence that the deceased had 2 wives; Petinala Oketch who is since deceased and Timina Madanga who is still alive. Both parties admitted this fact

8. The second issue is whether the deceased had shared out his estate between the 2 houses before he died. According to the objector, nothing could be further from the truth, yet the Petitioner says that the deceased shared out his estate in two distinct portions between his 2 houses, and that the deceased built a house for his first wife Petinala in a new compound while Timina was settled in the original compound. The Petitioner testified that he saw his father the deceased dividing the land into two portions which were divided by a clearly marked trench. However, as stated earlier in this judgment, the Petitioner was unable to show to the Court the "clearly marked" trench, so it is difficult to say whether indeed the deceased divided his estate into two portions as alleged by the Petitioner and his witnesses. The Petitioner also testified that the deceased did not share out the land equally between the two houses having given a bigger share to the second house. He also explained that the reason why the second house has only 5 acres of land is because Timina allowed her nephew to grab some of the land intended for the second house.

9. Regarding the number of beneficiaries the Petitioner stated that while the first house has 4 sons and one daughter who is married, the second house had 5 children, but one by the name Oindo Akuni is deceased without issue. The second house therefore has 4 sons and one daughter by the name Anne Anyoso alias Anne Rosa. According to the Petitioner, Ooko Akuni, a son of the second house, though deceased is survived by a wife and children. It is the Petitioner's contention that while the family of the first house has remained on the portion of land given to it by the deceased, the family of the second house is causing problems by crossing the boundary and entering the portion of land belonging to the first house.

10. After considering all the evidence on record the submissions and the law. I find that there is no firm evidence to the effect that the deceased shared out his land between his two houses before he (deceased) died, whether the sharing was proportional or not.

11. The third issue for determination is how the estate of the deceased should be shared out among the beneficiaries. The evidence in this case reveals that the deceased is survived by children and a spouse in the person of Timina Madanga. In this regard, Section 40 of the Law of Succession Act, Cap 160 Laws of Kenya is applicable, which means that the "net intestate estate, 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." The first house in this case has 4 children. Though one is deceased he is survived by a child. The second house has 4 children because one Oindo Akuni died without issue. The second house also has Timina who is a spouse to the deceased, so altogether the second house has 5 units while the first house has 4 units, making a total of 9 units who are entitled to share in the deceased's estate. In sharing out the net intestate estate, the provisions of Sections 35 and 37 shall apply.

12. The distribution of the deceased's estate shall also be done in accordance with the provisions of Article 60(1)(f) of the Constitution of Kenya 2010, which reads as follows;-

"60(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles;-

a

b

c

d

e.....

f. Elimination of gender discrimination customs and practices related to land and property in land;
and

g”

13. What is intended by the above provision is that all the children of the deceased whether male or female are entitled to an equal share of the deceased’s estate, unless the female children expressly state that they are not interested in having such a share.

14. The last issue for determination is whether the one (1) acre allegedly bought by Petinala in 1951 should be separated from the deceased’s estate. I have carefully considered D Exhibit 2 and note that though Petinala may have bought the one(1) acre, there is no doubt that the deceased was the first registered proprietor over the said one(1) acre which formed part of the deceased’s estate. I agree with Objector’s submissions that Petinala’s one (1) acre was subsumed when the deceased got registered as its proprietor.

Conclusion

15. In conclusion, and noting that the available estate for distribution is 16 acres the same shall be shared in the ratio of 4:5 between the first and second houses so that the first house with 4 units is entitled to 7.1 acres while the second house with 5 units is entitled to 8.9 acres. For guidance in this regard, I have relied on Court of Appeal decision in Nyeri Court Appeal Civil Appeal No. 8 of 2015 Francis Mwangi Thiong’o and 4 others –vs. – Joseph Mwangi Thiong’o

16. Regarding the costs of this matter each party shall bear its own costs.

Orders accordingly.

Judgment delivered dated and signed in open court this 31st day of August 2016

RUTH N. SITATI

JUDGE

In the presence of

Miss Wilunda for Mr. Kundu (present) for Objectors

Mr. Getanda (present) for 2nd Petitioner and 1 Beneficiary

Mr. Lagat Court Assistant