



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 402 OF 2013

IN THE MATTER OF THE ESTATE OF JOSEPH OGADA OLUNGA (DECEASED)

JUDGMENT

1. The applications for determination are dated 6th March 2014. It seeks confirmation of the grant made on 29th May 2014 to Alice Akoth Ogada and Florence Atieno Obel alias Josephine Atieno Obel, hereinafter referred to as the first and second administrators.

2. The application dated 6th January 2014 is by the second administrator. She has identified survivors of the deceased as two widows - Alice Akoth Ogada and Florence Atieno Obel alias Josephine Atieno Obel, and six (6) children – Maureen Achieng Ogada, Janet Amondi Ogada, Lillian Adhiambo Ogada, Caren Abura Ogada, Victor Ouma Ogada and Michael Olunga Ogada.

3. The assets identified by the second administrator as available for distribution are:-

a. Shares –

- i. Housing Finance Company of Kenya (HFCK),
- ii. Tembo Coopreative Investment Society,
- iii. Cooperative Bank of Kenya Limited, and
- iv. East African Breweries Limited;

b. Motor vehicles registration marks and numbers

- (i) KAL 460L,
- (ii) KAM 848U, and
- (iii) KAM 977W;

c. Landed property –

- i. Lucky Summer Estate Company Limited LR No. 31 Ruaraka Plot No. 534 (R47) 1998,
- ii. Lucky Summer Estate Company Limited LR No. 31 Ruaraka Plot No. 522 (R537),
- iii. Lucky Summer Estate Company Limited LR No. 31 Ruaraka Plot No. 996 (R1034) 1995,

- iv. Lucky Summer Estate Company Limited LR No. 31 Ruaraka Plot No. 955(R1033) 1999,
- v. Land No. 106 Okore Estate Kisumu,
- vi. Kisumu Plot No. 334,
- vii. Kisumu Plot No. 335,
- viii. LR No. 15158/40,
- ix. Baba Dogo plot,
- x. Gathecha plot,
- xi. Jua Kali Squatters Settlement Scheme (Plot No. 180),
- xii. Nairobi Block 96/204 Civil Servant House No. 115,
- xiii. Kabondo/Kakangutu East/115,
- xiv. LR 16286 (IR No. 55877) Kisumu,
- xv. Plot No. 3 Nyeri,
- xvi. Plot No. 106 Okore Estate Kisumu;

d. A company known as Gekoyo Maringo Housing Company Limited;

e. Pension funds held by East African Breweries Limited; and

f. Funds with the Public Trustee in Cause No. 375/2004.

4. She has proposed distribution as follows:-

a. to Alice Akoth Ogada:

i. the shares in Housing Finance Company of Kenya and Tembo Cooperative Investment Society;

ii. Motor vehicles registration marks and numbers KAL 460L and KAM 848U; and

iii. Lands and Plots - Lucky Summer Estate Company Limited LR No. 31 Ruaraka Plots Nos. 534 (R47) 1998 and 522 (R537), Land No. 106 Okore Estate Kisumu, Kisumu Plot No. 334, Kisumu Plot No. 335, LR No. 15158/40, Jua Kali Squatters Resettlement Scheme (Plots Nos. 179 and 180), the Baba Dogo Plot and the Gathecha Plot; and

b. To Florence Atieno Obel:

i. The shares in East African Breweries Limited and Cooperative Bank of Kenya;

ii. Motor vehicles registration mark and number KAM 977W;

iii. Lands and Plots - Lucky Summer Estate Company Limited LR No. 31 Ruaraka Plots Nos. 996 (R1034) 1995 and 955(R1033) 1999, Nairobi Block 96/204 Civil Servant House No. 115, Kabondo/Kakangutu East/115, LR 16286 (IR No. 55877) Kisumu, Plot No. 3 Nyeri and Plot No. 106 Okore Estate Kisumu; and

iv. Funds held by the Public Trustee in Cause No. 375/2004.

c. To Alice Akoth Ogada and Florence Atieno Obel – pension funds held by the East African Breweries Limited, at the ratio of 1:4.

5. Upon being served with the application, the first administrator swore an affidavit in reply on 17th March 2014 and lodged it at the registry on even date. She agrees with the co-administrator on the survivors of the deceased, but disagrees on the property available for distribution. The assets that are available for distribution according to her are the shares in the four quoted companies, the funds with the Public Trustee and the East African Breweries Limited/Kenya Breweries Limited, motor vehicles KAL 460P and KAM 977W, Nairobi Block 96/204 Civil Servants House No. 115 and Kabondo/Kakang'utu East/115. She argues that the rest of the assets are not documented while others are subject to ongoing disputes.

6. She proposes that the shares and the funds be shared equally amongst all the eight (8) survivors of the deceased. She suggests that motor vehicle KAL 460P be shared between the two widows, while the other, KAM 977W be given to Caren Lillian and Janet. Nairobi Block 96/204 Civil Servants House No. 115 has been allotted Florence Atieno Obel and Victor Ouma Ogada, while Mike Ogada has been allotted Kabondo/Kakang'utu East/115.

7. In response to the proposals by the first administrator, the second administrator swore an affidavit on 2nd April 2014. She states that the ownership of all the assets listed in her earlier affidavit was well documented in the name of the deceased, and she attached copies of the documents to prove her case. She complains that the co-administrator has omitted from her list the Ruaraka properties where she has been collecting rent. On the cars she states that they ought to be shared equally between the widows. She protests to sharing the Nairobi house with her stepson, arguing that it was her matrimonial home which had been bought specifically for her by the deceased.

8. It was directed on 30th September 2014 that the application be disposed of by way of oral evidence. The matter was heard on 18th November 2014 and 16th February 2015.

9. The first to take the stand was the second administrator applicant. She stated that the assets had been ascertained by the administrators, but the two had been unable to agree on the distribution. She testified that no valuations had been done on any of the assets. She conceded that some of the landed properties did not have property documents for the administrators had not collected the certificates of titles. She conceded to holding Photostat copies of certificates of the Kisumu property. She also concedes that she did not have any documents relating to the Gathecha plot, and original documents for the Baba Dogo property. She said that the Nyeri property had a debt.

10. The first administrator on her part testified that she lived at Lucky Summer, while the second administrator lived at Civil Servants Kariobangi South. She rooted for distribution of the assets as per her proposed distribution on the grounds that most of the assets did not have proper documents. She stated that she lived in a property bought by the deceased, and she had tenants in the houses and was collecting rent, adding that the second administrator also had tenants at the Kariobangi house and was collecting rent too. She explained that the money from the Public Trustee was paid into her account, but she was unaware that the same was to be shared equally between them. She took the view that if the administrators do not agree on the distribution, then the assets ought to be valued. She argued that the property where she resides should be given to her and her children, while the second administrator should retain the house she occupies and should have it with Mike who was also 'her son.'

11. The deceased herein died on 5th June 2002. As he died after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force, and as he died intestate, his estate fell for distribution as per Part V of the Act.

12. The deceased had married twice, as he is survived by two widows. It has not been indicated the

systems under which he married them, and in the absence of that I shall presume that all were married under customary law. He was therefore a polygamist.

13. The law governing the distribution of the intestate estate of a polygamist is section 40 of the Act. the said provision states as follows: -

'(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal estate and household effects and 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.

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

14. The deceased's household in this case comprises of two house, that of the first administrator and that of the second administrator. The first house comprises of a surviving widow and her six (6) children, meaning that it has seven (7) survivors. The second house comprises one surviving widow without children. In total the estate has eight (8) survivors.

15. By dint of section 40(1) the eight (8) survivors translate to eight (8) units. The first house has seven (7) units while the second house has one (1) unit. The assets should be split into eight (8) units, and upon distribution to the houses according to the number of children in each house, the first house will get seven (7) units or shares of the estate, while the second will get one (1) unit or share in the estate. This would mean that the first house should get 87.5% of the estate while the second house gets 12.5%. Put differently, the first house is entitled to seven eighths (7/8) of the estate, while the second house is entitled to one eighth (1/8) thereof. Section 40(1) is meant to achieve equity in the distribution of the estate. The sum total of section 40(1) is that the estate of the intestate ought to be shared out equally amongst the deceased widows and children.

16. I have noted from the proposals by the second administrator that she wanted the stated shared equally between the houses regardless of the number of children in each house. That is the approach under customary law. The same is inequitable as it results in house with a small number of survivors taking a bigger share of the estate compared with the house with the larger number of survivors. In any event, the estate herein is not subject to customary law in view of section 2(1) of the Law of Succession Act.

17. After the assets have been distributed to the houses as per section 40(1), section 40(2) would then kick in. the estate should thereafter be dealt with in terms of sections 35 to 38 of the Act. The first house comprises of a surviving widow and children, the share due to them under section 41(1) should be dealt with as per the requirements of section 35. She takes the personal and household effects of the deceased absolutely, and a life interest in the remainder. She may distribute the property under life interest on appointment to the children as per section 35(2), and upon termination of life interest the assets ought to be distributed equally amongst the children.

18. As the second house does not have children, the share of the estate due to them under section 40(1) shall be dealt with under section 36 of the Act. The relevant part of that provision for the purpose of the instant case is section 36(1). For avoidance of doubt, the said provision states as follows: -

'(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to –

a. The personal and household effects of the deceased absolutely; and

b. The first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is greater; and

c. Life interest in the whole of the remainder: provided that if the surviving spouse is a

widow that life interest shall be determined upon her remarriage to any person.'

19. The proposals by the first administrator appear to me to be more in line with what is envisaged in section 40(1) of the Law of Succession Act. She proposes equal distribution of some of the assets amongst all eight (8) survivors of the deceased.

20. In distributing the estate herein, I am cognizant of the fact that there are two surviving widows who reside in some of the premises which make up the estate. The residence of the second widow is clearly identified to be on Nairobi Block 96/204 Civil Servant House No. 115. The first widow is said to reside in Lucky Summer Estate, however it is not clear on which particular property as there are four properties there. I am also cognizant of the fact that the assets have not been valued, although.

21. In view of everything that I have stated above, I hereby order that the estate of the deceased be distributed in the following terms:-

a. That the shares in Housing Finance Company of Kenya, Tembo Cooperative Investment Society, East African Breweries Limited and Cooperative Bank of Kenya to be sold and the proceeds of sale to be shared equally between Alice Akoth Ogada, Florence Atieno Obel alias Josephine Atieno Obel, Maureen Achieng Ogada, Janet Amondi Ogada, Lillian Adhiambo Ogada, Caren Abura Ogada, Victor Ouma Ogada and Michael Olunga Ogada;

b. That the motor vehicles registration marks and numbers KAL 460L, KAM 977W and KAM 848U to be sold and the proceeds of sale to be shared equally between Alice Akoth Ogada, Florence Atieno Obel alias Josephine Atieno Obel, Maureen Achieng Ogada, Janet Amondi Ogada, Lillian Adhiambo Ogada, Caren Abura Ogada, Victor Ouma Ogada and Michael Olunga Ogada;

c. That the pension benefits held by the East African Breweries Limited to be shared equally between Alice Akoth Ogada, Florence Atieno Obel alias Josephine Atieno Obel, Maureen Achieng Ogada, Janet Amondi Ogada, Lillian Adhiambo Ogada, Caren Abura Ogada, Victor Ouma Ogada and Michael Olunga Ogada;

d. That Florence Atieno Obel alias Josephine Atieno Obel shall have Plot No. 106 Okore Estate Kisumu absolutely to compensate her for the loss of her entitlement to the money that was paid to Alice Akoth Ogada by the Public Trustee and in lieu of the entitlement envisaged by section 36(1)(b) of the Law of Succession Act;

e. That Florence Atieno Obel alias Josephine Atieno Obel shall have Nairobi Block 96/204 Civil Servant House No. 115 during life interest and thereafter to Maureen Achieng Ogada, Janet Amondi Ogada, Lillian Adhiambo Ogada, Caren Abura Ogada, Victor Ouma Ogada and Michael Olunga Ogada in equal shares;

. g. That the remainder of the estate shall be held by Alice Akoth Ogada during life interest and thereafter to Maureen Achieng Ogada, Janet Amondi Ogada, Lillian Adhiambo Ogada, Caren Abura Ogada, Victor Ouma Ogada and Michael Olunga Ogada;

h. That each party shall bear their own costs.

22. The grant made on 29th May 2014 is hereby confirmed and the estate shall devolve as per paragraph 21 above.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH DAY OF AUGUST, 2016.

W. MUSYOKA

JUDGE