



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
SUCCESSION CAUSE NO.889 OF 2015
(FORMERLY KISII HC SUCCESSION CAUSE NO.219 OF 2004)

IN THE MATTER OF THE ESTATE OF:

DR. JAMES OMONDI JURE (DECEASED)

BETWEEN

JANE ATIENO NYAMUTHE PETITIONER/APPLICANT

AND

PAMELA AKINYI OMONDI RESPONDENT/PROTESTOR

JUDGMENT

1. When **DR. JAMES OMONDI JURE** (deceased) died on 29th June 2004, his two widows **PAMELA AKINYI OMONDI** and **JANE ATIENO NYAMUTHE** petitioned for grant of letters of administration. However when the matter was due for confirmation, a dispute arose over some assets, namely **KAVIRONDO HOTEL** which **PAMELA** (the 1st wife) insisted she had jointly acquired with the deceased prior to his marriage to **JANE**, and wherefrom the court ought to consider the extent of her contribution to its acquisition and whether this should be factored into the distribution.

2. Pamela also insists that there are some properties which are her personal assets and not available for distribution. In the course of Pamela's being cross examined by Mr. Otieno, counsel for her co-wife (Jane), counsel showed her some documents which were intended to challenge her claim to the so called "personal assets". Her counsel Mr. Kimetho objected, saying the documents were strange both to himself and his client as they had not been served with the same.

3. Mr. Otieno did not deny this, but he explained that he had found the documents after the court had made the ruling and he did not want to stall the hearing and he pleaded with the court to allow reference to be made to the documents, then Mr. Kimetho could always peruse them later. He clarified that the last court session, he had informed this court of the need for parties to file and exchange all documents.

4. Owing to the difficulties the judge had in the previous rulings, there were contested issues which required further evidence and which made it difficult for the court to make a ruling on the mode of distribution.

5. Mr. Kimetho had objected to this, but experienced challenges during the hearing, but Mr. Otieno was flexible and accommodated him .

6. Since counsel objected to pre-trial procedures, they were forced to proceed under the old rules where it was not necessary to file documents. Now he wants to lock out any evidence which may help the court to establish the truth.

7. Mr. Otieno explained that parties had earlier filed documents, but Majanja (J) ruled that there was need for further evidence to establish the truth, hence the attempt to refer to the impugned documents. Counsel also stated that there is a document which was only made available to him after Majanja J had delivered his ruling, however the first letter was filed and served as at the time of filing for confirmation of the grant.

8. Counsel also points out that there are two sets of searches from Homa Bay County Lands Office with conflicting information as to who own the land and it will be necessary to call the Registrar of Lands.

9. He urges the court to allow reference to be made to the documents because to decline would actively result in concealing material facts.

10. Mr. Kimetho in opposing reference to the documents urges court to consider the two rulings by Majanja J dated 24/06/2016 and delivered on 27/06/2016 which considered it necessary to call for viva voce evidence so as to resolve the stalemate, so the court should restrict itself to that and allow for documents to be introduced otherwise it will be setting aside the ruling by Majanja (J).

11. Mr. Kimetho is clinging to paragraph 3 of the ruling by Majanja J that:-

“I believe that it would be in the interests of justice for the court to take viva voce testimony from both parties and then witnesses to determine the issues conclusively.”

12. Mr. Kimetho does not deny that infact the parties did proceeded under the old civil procedure rules which did not make it mandatory for parties to file and exchange documents before trial.

13. This matter has taken eternity because of the rigid position taken by both widows regarding the ownership of some of the assets – were the assets jointly owned by deceased plus Pamela and/or singly owned by Pamela? How else can this issue of ownership be established? By simply saying this is my property?

14. My understanding of the phrases viva voce evidence or oral evidence simply means that a party makes a verbal prosecution of her claim in court – it does not mean a party cannot refer to any document. How can Mr. Kimetho argue that way when PW1 has all along referred to documents in her evidence in chief.

15. If this court shuts out the documents, then there will never be an evidence to this matter, what is needed is to establish the truth concerning the contested assets and I can see no better way of doing that than to refer to documents which allege ownership.

16. I therefore overrule the objection raised by Mr. Kimetho and allow reference to be made to the same.

Delivered and dated this 17th day of November, 2016 at Homa Bay

H.A. OMONDI

JUDGE