



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
SUCC. CAUSE NO. 315 OF 2009

IN THE MATTERS OF THE ESTATE OF VINCENT ODUOR HANDA (DECEASED)

AND

WILFRED OCHIENG ODUOR.....1ST PETITIONER

DORCAS AMBIYO CHIMOTO.....2ND PETITIONER

VERSUS

PATRICIA AWINO ODUOR HANDA.....OBJECTOR

RULING

1. When Vincent Oduori Handa (the Deceased herein) died intestate on 26th November 2002, he left behind two widows namely Patricia Awino (the Objector) and Dorcas Ambiyio (the 2nd Petitioner). These two, together with Wilfred Ochieng Oduor (the 1st Petitioner) who is on one side with his mother the (2nd Petitioner), have not agreed on how the Estate of the Deceased ought to be distributed.
2. The genesis of this dispute is a Petition for Grant of Letters of Administration Intestate presented jointly by the 1st and 2nd Petitioner on 4th November 2009. Pursuant thereto, the Court issued a Grant in favour of the 2 (two) Petitioners on 2nd March 2010. That Grant was subsequently confirmed on 1st November 2010.
3. Enter an aggrieved Objector into the proceedings on 13th December 2011. By way of a Notice of Motion of the same date, the Objector sought the following prayers;-
 - a. **That the Grant of Letters of Administration in respect of the estate of VINCENT ODUOR HANDA the Deceased herein issued to WILFRED OCHIENG ODOURI and DORCAS AMBIYO CHIMOTO be revoked and or annulled.**
 - b. **That the Grant of Letters of Administration in respect of the deceased's estate be issued to the Applicant/Objector PATRICIA AWINO ODUOR HANDA for purposes of further Administration and Distribution.**
 - c. **That cost of this Application be provided for.**
4. On 1st December 2012, Kimaru J issued the following directions in respect to the disposal of these proceedings:-

“Directions are hereby issued that the matter in dispute regarding distribution shall be heard by *viva voce* evidence. Prohibition is hereby issued staying any further

transactions in respect of LR NO Bukhayo/Mundika/1807 and Bukhayo /Bugengi/1280 pending the hearing of the case”.

This decision is therefore an attempt to answer the Application for Revocation as well as to distribute the Estate of the Deceased.

5. The Objector is the 1st wife of the Deceased and together were blessed with one child namely Eunice Adhiambo Handa. The Objector’s evidence was that the Deceased also married a lady by the name Judith as a second wife. Judith is now dead. The evidence is that the Deceased’s union with Judith did not last for long but was nevertheless blessed with a child by the name Anyango. It was her further testimony that the Deceased later married the 2nd petitioner as a third wife and together were blessed with the following children:-

- a. Vitalis Oduor
- b. Dominic Owino Oduor
- c. Lydia Olesi
- d. Phaustine Omondi Oduor

6. The Complaint against the Petitioner is twofold. First that some children of the Deceased namely Dominic, Lydia, Eunice and Anyango were left out of the list of beneficiaries. Secondly that the Petitioners have attempted to lock her out from her matrimonial home standing on Bukhayo/Bugengi/1807 (also referred to as Plot 1807). She was to be solely given that parcel because, according to her, her home stands on it. Although she concedes to have at one time resided on Bukhayo/Bugengi/1280 (also referred to as Plot 1280), she says that it was only for 21 days after the death of the Deceased for purposes of mourning her dead husband.

7. The Objector called two witnesses. Both George Oduor Rapela (OW2) and Charles Oduor Handa (OW3) supported the Objectors version of things. OW2 was the cousin of the Deceased, while OW3 his half-brother. OW2 told Court that the Deceased built a house for the Objector at Rest, Busia (Plot No. 1807) and then for the 2nd Petitioner at Korinda (Plot No. 1280), OW3 gave similar evidence and added that the Deceased had prior to his death settled his family as he had wished them to live. The Objector being on Plot No. 1807 and the 2nd Petitioner on Plot No. 1280.

8. The 1st Petitioner is a son of the Deceased and the 2nd Petitioner. He confirms that the Deceased left behind the following children:-

- a. Patricia Awino
- b. Dorcas Chimoto
- c. Vitalis Otieno
- d. Wilfred Ochieng
- e. Phaustine Omondi
- f. Domnic Owino
- g. Lydia Olesi
- h. Eunice

And although he further acknowledges excluding Lydia and Eunice from the Petition proceedings he does not Object to their inclusion now. He explained why he and his mother, the 2nd Petitioner, went it alone in the Petition. That the Objector had attempted to secretly take out succession to the Estate of the Deceased without involving them and could not be trusted. That further she had attempted to sell part of the Deceased’s Estate behind the back of other beneficiaries.

9. The 1st Petitioner further explained that the Objector currently resides on Bukhayo/Mundika/1807 while the 2nd Petitioner resides on Bukhayo/Bugengi/1280. On the latter plot, all the brothers of the 1st Petitioner have put up homes. The 2nd Petitioner basically supported the evidence of her son and stated that she carried out distribution as per the wishes of her late husband which included that the plot 1807 be developed by all the children. She also claimed that she had a

- house on plot 1807 and that the Objector, similarly, had a house on plot 1280.
10. Albert Alasi Osuru (PW3) was not cross examined on the contents of his witness statement dated on 23rd April 2014 which was adopted as his evidence herein. The highlight of his evidence is that the Deceased built a home in Bukhayo/Mundika/1807 and the Objector occupied one part of it while the 2nd Petitioner occupied the other. That this arrangement held until the time of the demise of the Deceased.
 11. Phaustine Omondi Oduor (PW4) is a blood brother to the 1st Petitioner. He, his other blood brothers and mother (the 2nd Petitioner) have established homes on Bukhayo/Bugengi/1280, while the house of the Objector stands on Plot 1807. That his brother (Wilfred) started to build on portion of plot No. 1807 after the death of the Deceased and has completed a building at the front of the plot.
 12. On the basis of the evidence before Court and on the questions to be answered by this decision, I see the following as the issues for this Court's determination;-
 - a. **Who are the surviving dependents of the Deceased?**
 - b. **Did the Grant of Representation issued to the 1st and 2nd Petitioners on the 2nd November 2010. Satisfactorily identify the persons and shares of all persons beneficially entitled to the Estate?**
 - c. **If the answer to (b) is in the negative, what is the proper order for distribution?**
 13. The Deceased was a polygamous man. Although the position of the Objector was that the Deceased was married to three (3) wives, his alleged short lived union to Judith was not satisfactorily proved. From the evidence of both sides there is common ground that the following survived the Deceased.

1st House :-

- a. **Patricia Awino Oduor Handa (Widow)**
- b. **Eunice Adhiambo Handa (Daughter)**

2nd House:-

- a. **Dorcas Ambiyu Chimuto (Widow)**
- b. **Wilfred Ochieng Oduori (Son)**
- c. **Vitalis Otieno Oduori (Son)**
- d. **Dominic Awino Oduori (Son)**
- e. **Paustine Omondi Oduori (Son)**
- f. **Lydia (Daughter)**

In accordance with provisions of section 29 of the Law of Succession Act, all the persons named above are dependents and would be beneficially entitled to the estate of the Deceased.

14. In the Letters the Certificate of Confirmation obtained by the 1st and 2nd Petitioners, distribution was ordered as follows;-

- | | |
|-----------------------------------|----------------|
| a. WILFRED OCHIENG ODUORI | 0.35 HA |
| b. VITALIS OTIENO ODUORI | 0.30 HA |
| c. DORMINIC OWINO ODUORI | 0.30 HA |
| d. PHAUSTINE OMONDI ODUORI | 0.30 HA |
| e. DORCAS AMBIYO CHIMOTO | 0.15 HA |
| f. SAM FRANCIS OBURE | 0.05 HA |
| g. PATRICIA AWINO | 0.15 HA |

BUKHAYO/MUNDIKA/1807

To be registered in the names of WILFRED OCHIENG ODUOR AND DORCAS AMBIOY CHIMOTO in trust of all Deceased dependents.

The provisions of section 35 of the Law of Succession Act in respect to intestacy does not make a distinction between male and female children. That is, the provisions of the Law do not discriminate against the female children. This Court is not told that the Daughters of the Deceased being Eunice and Lydia have denounced their entitlement to their father's estate. Straightaway therefore the Certificate of the Grant is irregular for excluding these two beneficiaries.

15. On the question of distribution, it seems agreed that the 2nd Petitioner and her children occupy and use Plot No. 1280. The evidence of PW4 who was called by the Petitioners was insightful. He confirmed that he and his brothers and their mother (2nd Petitioner) have established their respective homes on Plot No. 1280. According to the Official Search availed to Court that land measures 1.6 Hectares. The Objector does not stake any claim over that parcel of land and told court that it was agreed between her and the 2nd Petitioner that parcel 1280 belongs to the house of the 2nd Petitioner while Plot No. 1807 belongs to her. I shall re-visit this shortly.
16. The crux of the controversy herein is the persons entitled to Plot No. 1807. The evidence by the Objector and her witnesses was that prior to his death, the Deceased constructed a permanent house for the Objector on Plot No. 1807. The Objector herself says that she has resided there from the year 1978. On the other hand there is evidence that during the period of mourning of the Deceased a temporary home was constructed on Plot No. 1280 for the Objector. It was her evidence that she used that house only during that period and the house has since been brought down.
17. As for the Petitioners, they took the position that they have a stake in Plot No. 1807. In particular, the evidence of the 1st Petitioner was that he has resided in the house on Plot No. 1807 since birth. And the 2nd Petitioner told Court that it was the wish of the Deceased that Plot No. 1807 which is a town plot be developed by all his children. She then said that she has a home on Plot No. 1807. That evidence by the Petitioners runs into difficulty when considered against the evidence of their own witness, PW4. PW4 told court that the Objector resides on Plot No. 1807 while the 2nd Petitioner and her male children have homes on plot No. 1280. He then gave some damning evidence against the 1st Petitioner. That it was only after the death of the Deceased that the 1st Petitioner commenced construction of a building on Plot 1807. On my own assessment, I believe the evidence of the Objector as was corroborated materially by the Petitioners own witness, (PW4) that the home of the Objector stands on Plot No. 1807 and was established by the Deceased prior to his death.
18. Bearing the foregoing in mind how should this Court then distribute the assets of the Deceased? As always, this being a dispute in respect to a Polygamous Intestate, section 40 of the Law of Succession Act provides the guide on distribution:-

“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 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”.

19. At the close of hearing this Court, on its own motion, suggested to the parties that taking a valuation of the two properties could be useful in informing the Court on fair distribution of the Estate. On 4th of March 2015 both parties, led by the Petitioners, declined to take up that proposal. For that reason the Court can only rely on the area of the properties in reaching its decision. Plot No. 1280 is 1.6 Hectares while Plot No. 1807 is 0.035 Hectares. It would make sense if all beneficiaries were to remain on land where they have currently settled as long as that arrangement would substantially comply with the requirements of section 40(1). The house of the 2nd Petitioner occupies Plot No. 1280. That house including the Widow has six (6) members. If Plot No. 1280 was to be divided equally then each member would get approximately 0.26 Hectares. The Objector occupies Plot No. 1807 which is 0.035 Hectares. She has only one child,

and this property would be between her and her child. The land they take up would be much smaller than the 0.26 Hectares available for the members of the House of the 2nd Petitioner on Plot No. 1280. But as earlier noted, the Objector is not interested in Plot No. 1280. For this reason I reach a decision that each House shall take up the property on which the home of its widow stands. Plot No. 1280 shall go to the 2nd Petitioner and her children, while Plot No. 1807 shall go to the Objector and her Daughter.

20. I reach this decision keenly aware that the 1st Petitioner has developed a portion of Plot No. 1807. But the evidence on record is that he commenced the development thereon after the death of the Deceased. It seems to me that this conduct was an attempt by him to assert himself on Plot No. 1807 and thereby steal a march on the other beneficiaries. He was in fact intermeddling with the property of the Deceased. He choose a perilous path and must live with the consequences of the choice he made. The 1st Petitioner must vacate plot No. 1807.

21. As it was the wish of both widows that children's shares devolve upon them immediately, I ultimately make the following orders on distribution:-

1. L.R Bukhayo/Mundika/1807 be divided equally between the Objector and her daughter Eunice Adhiambo. The Objector shall hold a life interest of her share which shall, on her death or remarriage, devolve upon Eunice Adhiambo.
2. L.R Bukhayo/Bugengi/1280 be shared equally between the 2nd Petitioner and all her children. The 2nd Petitioner shall hold a life interest in respect to her share and which share shall, on her death or remarriage, devolve upon her surviving children in equal shares.

22. So as to give effect to this distribution I make the following further orders:-

- a. The changes made to the Register of Bukhayo/Mundika/1807 pursuant to the Certificate of Confirmation of Grant dated 2nd November 2010 shall forthwith be cancelled and reversed to the entry prior to the changes.
- b. The Objector, Patricia Awino Oduor Handa, is hereby appointed as a Co-Administrator to the Estate of the Deceased to join the 1st and 2nd Petitioner.

23. No order in costs

DATED, DELIVERED AND SIGNED THIS 23RD DAY OF APRIL, 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

KADENYICOURT ASSISTANT

.....FOR PETITIONERS

.....FOR OBJECTOR