



IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.288 OF 2009

IN THE MATTER OF THE ESTATE OF BONFACE OKELLO OKUMU (DECEASED)

ODERO OKELLO1ST PETITIONER

AND

STEPHEN EGESA OKELLO2ND PETITIONER

R U L I N G

1. Stephen Egesa Okello (**Egesa**) and Odero Okello (**Odero**) are not agreed as to how the Estate of their late father Boniface Okello Okumu (**Deceased**) should be distributed. This ruling attempts to resolve that disagreement.
2. The Deceased died on 31st August 1979 and is a Bukhayo, a subtribe of the Luhyia. It is common cause that the Deceased's Estate comprises land parcel described as South Teso/Angoromo/380. According to the Official Search Certificate dated 14th October 2009 it measures 5.8 hectares (approximately 14.36). It is also agreed between Egesa and Odero that the Deceased was married to two wives and were blessed with the following children;

- I. Okumu Okello
- II. Stephen Egesa Okello
- III. Vincent Odero Okelo
- IV. Raphael Bwire
- V. Alphonse Nyangweso Okello
- VI. Anyango Okello

Those are five sons and one daughter. Raphael, Alphonse and Stephen belong to the house of Nasirumbi, while Okumu and Odero to the house of Mary. Both Raphael and Alphonse are now dead. Raphael died on 17th May 1988 and according to Egesa, Alphonse died before the Deceased.

3. When Egesa testified on 9th December 2013, he told Court that sometime in 1979, the Deceased called all his sons and divided the land according to his wishes. It was his testimony that in this division the upper portion was for Okumu Okello, Odero and himself. That each of them has distinct parcels which they have occupied since 1979. His position is that Okumu Okello got 2 acres, Odero 1 ¼ acres and himself 1 ¾ acres. That this would also be in tandem with Khayo customary law in which the eldest son gets the biggest share. It was also his testimony that Odero gave his 1 ¼ acres to Okumu Okello.
4. Odero told Court that he and his three other brothers (Raphael, Alphonse and Okumu) were close to the Deceased. That Egesa spent all his life in Uganda. He even claimed that Egesa did not attend the Deceased's funeral. That they and not Egesa would have known if the Deceased had

- during his lifetime distributed his land to his children.
5. He further told Court that it was the wish of the Deceased that Mary's house takes the upper portion of land while Nasirumbi's takes the lower portion. The upper portion is the smaller of the two measuring 1.98 hectares while the upper portion measures 3.84 hectares. It was the wish of Odero that all the 5 sons got equal shares.
 6. The evidence of Odero was supported by that of Emmanuel Ekasiba (PW 2). According to him the Deceased did not distribute his land when alive. That the upper side of the land is occupied by Egesa and Odero while Alphonse occupied the lower portion.
 7. Okumu Okello was the 1st born son of the Deceased. His evidence was in his affidavit of 16th December 2013. He was unable to give oral evidence because he suffers loss of speech. In a medical report dated 3rd June 2009 prepared by Dr Patson Kabuta, the Doctor stated that the cause of disability was a Trauma. In his affidavit evidence, which was not therefore subjected to cross-examination, he took the position that all 5 sons of the Deceased should get an equal share of land and that 0.10ha be given to their sister Anyango Okello.
 8. That in a nutshell is the evidence that requires my evaluation. And I must do so bearing in mind that the law applicable to this dispute is Khayo Customary Law. This is because the Deceased died on 31st August 1979 and by dint of Section 2(1) of The Law of Succession Act, that statute is only applicable to Estates of Deceased persons dying after the commencement of the Act. The commencement date of the Act was 1st July 1981. These then are the issues that this Court sees are for determination:-
 - a. Did the Deceased distribute his property to his heirs during his lifetime?
 - b. If not, did the Deceased allocate land to each house during his lifetime?
 - c. If the answer to both (a) and (b) are in the negative, what does each heir deserve?
 9. It needs to be remembered that Egesa and Odero jointly presented this Petition. That joint walk came to an end on 27th November 2012 when Egesa applied for confirmation of the Letters without involving Odero. A contentious issue is whether or not the Deceased had, prior to his death, distributed his property to his heirs as claimed by Egesa. On this there is word of Egesa on the one hand against that of Odero and his witness on the other hand. Who is the Court to believe?
 10. At the time of applying for confirmation, Egesa did not make this critical disclosure. In his affidavit of 27th November 2012, he set out the respective shares of the beneficiaries as follows:-

Okumu Okello	-	0.79ha
Vincent Odero Okello	-	0.52ha
Stephen Egesa Okello	-	0.67ha
Chrispinus Madangasi Nyangweso	-	1.86ha
Albert Wandera Nyangweso	-	1.98ha

Besides, he conceded in cross-examination that he had left out Francis Okumu and Bernard from this list. Francis is a son of Raphael Bwire (now Deceased) who is the 1st born in the house of Nasirumbi while Bernard is a son of Alphonse Nyangweso the 2nd born in that house. He did not proffer any good explanation for this omission. I find that Egesa may not be believable, on those two accounts, and choose to believe Odero and his witness. In answer to the first question, I hold that the Deceased had not distributed his property prior to his death.

11) There is some unanimity of evidence that Egesa resides on the upper portion of the land (see evidence of DW1 and Egesa). There was the evidence that the house of Nyangweso occupies the lower portion. Nyangweso and Egesa come from one house, the house of Nasirumbi. If that were to be true then it makes non-sense of Odero's evidence that the Deceased had allocated the lower portion to Nasirumbi's house. Why then would Egesa be occupying the upper portion? I have to reach a

conclusion that the evidence that, the Deceased had allocated land to each house is too tenuous to believe.

12. Eugene Cotrans Restatement of African Law 2 guides my hand in resolving the last issue. In respect to Khayo custom, he restates,

“2. Estate of a married man with two or more wives, sons and daughters

(a) LAND

i) Each house keeps that land which was allocated to it during the husband’s lifetime.

ii) Land, which has not been allocated to any house, is divided among the houses with reference to the number of sons in each house.

Local variation. Among the Idakho, Isukha, Tiriki, and Maragoli, the land is divided equally among the houses irrespective of the number of sons in each house.

(my emphasis)

On the rules of distribution within each house he states (at page 45);

“The land is shared among the sons so that each son receives a slightly larger share than his immediate junior. The widow is entitled to use or cultivate a portion of the youngest son’s share until his Death. Daughters receive no share.”

13. South Teso/Angoromo/380 measures 5.8 hectares.(14.326 acres). According to the Khayo custom, Nasirumbi’s house which has 3 sons should get 3.48 hectares and Mary’s house which has 2 sons 2.32 hectares. If each son in Nasirumbi’s house was to get an equal share then each would get 1.16 hectares. But the Khayo custom requires that each son receives a slightly larger share than his immediate junior. Raphael (Deceased) was the 1st born, Alphonse (Deceased) was the 2nd born and Egesa the last. The houses of Raphael and Alphonse would therefore be entitled to more land than Egesa with Raphael’s receiving the highest share. Egesa would therefore be entitled to less than 1.16 hectares.

14. The proposal by Odero is that each son or where dead his home gets 1.14 hectares and 0.10 hectares be given to the daughter (Anyango Okello). The only beneficiary who objects to this formula is Egesa. But as would now be apparent, whether you apply the formula proposed by Odero or Khayo customary law, Egesa is not disadvantaged. Odero’s formula offers him 1.14 hectares while his entitlement under Khayo custom would be just about that acreage. (see reasons in paragraph 13 above). And Egesa would come out the worse if I was to assume that under Khayo customary law, land is divided equally among the houses irrespective of the number of sons in each house.

15. For the reasons stated this Court does order that the Estate of Bonface Okello Okumu be distributed as proposed by Odero, that is:

1. **Okumu okelo.....1.14HA**
2. **Odero Okelo.....1.14HA**
3. **Francis Joseph Bweire Okumu(to hold trust for himself & his brothers)1.14HA**
4. **Benard Ojiambo Nyangweso(to hold trust for himself and his brothers)1.14HA**
5. **Stephen Egesa Okelo1.14HA**
6. **Anyango Okello.....1.0HA**

16) Odero and Egesa are brothers, they are one family. The dispute herein was in respect to their father's Estate. I will not pit one against the other in costs. Each party shall share its own costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 31ST DAY OF JULY 2014.

IN THE PRESENCE OF:

GEORGE OMBUNGACOURT CLERK

.....FOR 1ST PETITIONER

.....FOR 2ND PETITIONER