



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 3 OF 2007

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPHAT OTANDE OKUKU –
DECEASED**

BETWEEN

**FRIDAH SHEUNDA OTANDE.....PETITIONER/
RESPONDENT**

VERSUS

**1. BENSON BWAKALI OTANDE
2. JOSEPH OTANDE ONYOLO.....OBJECTORS/
APPLICANTS
3. PETER SHISIA ONYOLO
4. SHADRACK ANGARA OTANDE**

RULING

1. On 30.6.2010, I delivered a Ruling on behalf of Chitembwe, J. in which the learned Judge distributed the estate herein. He rendered himself partly as follows;

“ (i) Plot No. E./WANGA/LUBINU/315 to be divided equally between the Petitioner and the 3rd Widow, Margaret Otande. The widows shall take the said portions together with their respective children.

(ii) Plot No. E./WANGA/LUBINU/397 to be distributed as follows;

- (a) **1st Objector – Benson Bwakali Otande – 2.5 acres.**
- (b) **Dinah Anyangu Otande (2nd widow) and her children – 4 acres.**

(iii) The 1st Objector, Benson Bwakali should not get a share out of Plot No. E.WANGA/LUBINU/315 as his share will be taken care of in plot No.397.

The objection by the objectors herein is dismissed. The application for confirmation of grant dated 2nd February, 2008 is hereby granted and the shares of each beneficiary shall be distributed as indicated hereinabove. Each party shall meet his/her own costs.”

2. After the above orders, I issued a Certificate of Confirmation of grant on 13.7.2010 but on 26.7.2010, Benson Otande, Joseph Otande Omolo, Peter Shisia Otande and Shadrack Angara Otande sought orders that the above decision be reviewed, varied or set aside because new and important evidence had emerged which could not be provided prior to the decision and there is therefore sufficient reason to review the orders. Further, that there was a mistake on the face of the record.

3. In the supporting Affidavit sworn on 26.7.2010, they have jointly deponed as follows;

- (i) That the learned Judge denied them a chance to call all their witnesses and chose to hear only one out of the five witnesses that they had lined up;
- (ii) That they were denied a chance to cross-examine the Petitioner because she never gave evidence;
- (iii) that the mode of distribution was inequitable.

4. In a Supplementary Affidavit sworn on 24.9.2010, they added that they had video evidence which they wanted to rely on and which was never tendered. That it would have been fair, in any event, that the land be equally divided amongst the deceased’s children with the widows having a life interest in the same.

5. In response to the Application, Fridah Sheunda Otande filed a Replying Affidavit sworn on 16.8.2010 and in it she deponed that the Applicants ought to appeal against the Ruling on distribution as nothing new has been demonstrated in the Application.

6. Further, that at the hearing of the objection, parties chose to proceed the way they did and she chose not to call any evidence but relied entirely on her Affidavit on record. That therefore the decision reached was fair and the Application should be dismissed with costs.

7. I have read the Submissions filed by the Advocates and I note as follows;

8. That on 10.11.2009, it was directed that the issue of distribution be heard by way of “oral evidence and [parties] to call witnesses”.

9. On 10.11.2009 when the matter was listed for hearing, only Joseph Otande testified for the Objectors and in respect of the Petitioner, her advocate stated that his client would rely on her Affidavit wholly but thereafter the Applicants were not given a chance to cross-examine her on the contents of that Affidavit.

10. I see no reason to say more; Once parties did not comply with the directions issued on 10.11.2009, there was certainly a mistake on the face of the record in the language of order 44 Rule 1 of the Civil Procedure Rules. Justice demands that parties should tender all evidence that they have and the other side given a chance to cross-examine them on the veracity of their claims.

11. In a contested estate such as this one, each party ought to have its day in court.

12. In the event, I will accede to the Application and order parties to take fresh dates when the case on distribution can be reheard afresh.

13. Each party will bear their own costs.

14. Orders accordingly.

Delivered, Dated and Signed at Kakamega this 22nd day of February, 2011.

ISAAC LENAOLA

J U D G E