



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**

**P&A NO.58 OF 2004**

**IN THE MATTER OF THE ESTATE OF HEZEKIAH WAMURWA OKORA (DECD)  
MATHEW DINDI WAMURWA.....APPLICANT/ADMINISTRATOR**

**= VERSUS =**

**CHRISTOPHER MAKOKHA  
GODFREY WAMURWA.....OBJECTORS**

**J U D G E M E N T**

This ruling arises from an Affidavit of Protest to proposed Confirmation of Grant signed on 19.6.2008 and filed on the same day. The Protester sought postponement of the confirmation of the grant until certain issues and matters are settled either by consent or by the court.

Later on and by a consent recorded by both sides, in writing on 8.12.2010, the parties agreed to put before this court the following issues for resolution:-

- a) Whether confirmation of the grant should be done before or after a survey of the shares of land allotted to each beneficiary is done.
- b) Whether one Everlyne Atsieno, the wife of Chadwick Eliud Opiyo, one of the beneficiaries by right, is entitled to the share which would have gone to her deceased's husband.

I have carefully perused and considered the written submissions filed by both sides. In respect to the first issue of whether or not the survey should be done before confirmation, I observe that survey was at one time in March, 2004 carried out with mutations being drawn. The survey was apparently based on the distribution of the land based upon a division of the land done by the deceased, Hezekiah Wamurwa Okora, before he died. There is evidence on record that each shareholder or beneficiary resides on the share given to him or her and in accordance with physical boundaries fixed on the ground between the beneficiaries.

It would appear to me, accordingly, that each beneficiary's share is certain since each is marked by physical boundaries on the ground, notwithstanding that the exact size of each may not be exactly known. In my understanding then, and according to practice, a confirmation of a grant may be made so long as each beneficiary's share is physically known and is visually clear on the ground. Furthermore in cases where such occurs, every beneficiary may be called upon to bring his own surveyor to confirm the size of his share, although land certificates may not be available until overall original piece of land is surveyed.

There is no doubt however that it would be cheaper and more convenient to conduct a survey of the estate land all at once.

Going back to the issue before court, it is my view in respect of this case, to state that confirmation of the grant, may and can be done before a survey of a specific portion is conducted since boundaries are clearly marked on the ground.

The second issue is whether Susan Evalyne Atsieno is entitled to a share of the estate of the deceased?

There is no dispute at all that she is the widow of Eliud Chadwick Opiyo, and that she has a child with Opiyo, known as J.E.O who is a minor. It is not denied either, that Eliud Chadwick Opiyo was entitled to a share of his father's land. Indeed it is not disputed that there is on the ground a share of land belonging to him which will go to his widow and children, unless there is a good legal reason to bar such transmission.

In this case the reason raised by the Objector/Protester is that he thinks should bar Susan Evalyne Atsieno and her daughter J.E.O, inheriting her husband's share, is that she has left her matrimonial home, and presently resides at her parent's home. The Objector raises no reason as to why the deceased's daughter J.E.O cannot inherit her deceased's father's share.

I have carefully considered this matter. I am of the opinion and it is my finding on this issue that Susan Evalyne Atsieno and her daughter J. E. O are entitled to and should inherit Eliud Chadwick Opiyo share of land. The widow is the first entitled under the relevant Act, The Law of Succession Act (Sections 36 and 37) and under the Constitution. In her absence, the child J.E.O, is entitled.

In my concluding view therefore, the share that belongs to Eliud Chadwick Opiyo on the ground shall go to his wife, jointly with one of the Administrator's of her choice, to hold for her benefit and for the benefit of J.E.O until she attains the age of 18 years old. Orders are made accordingly.

Dated and delivered at Busia this **28<sup>th</sup>** day of **September** 2011.

D.A. ONYANCHA  
JUDGE.