



REPUBLIC OF KENYA



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**In re the Estate of Shadrack Onyalo Olang' (Deceased) (Succession Cause 353 of 2015) [2024] KEHC 9681 (KLR) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9681 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
SUCCESSION CAUSE 353 OF 2015**

**JK SERGON, J**

**AUGUST 1, 2024**

**IN THE MATTER OF 'THE ESTATE OF SHADRACK ONYALO OLANG' (DECEASED)**

**BETWEEN**

**CYPRINA CONSOLATA NYAORO ONYALO ..... PETITIONER**

**AND**

**TERESIA AMOLO ONYALO ..... 1<sup>ST</sup> OBJECTOR**

**JACOB JOSEPH ONYALO ..... 2<sup>ND</sup> OBJECTOR**

**CHARLES KENNEDY OPIYO ..... 3<sup>RD</sup> OBJECTOR**

**JUDGMENT**

1. The petitioners filed a summons for confirmation of grant dated 14th April, 2023 seeking the following orders;
  - (i) That the grant of letters of administration intestate made to the petitioners on the 20th day of April, 2017 be confirmed.
  - (ii) That costs of the application be in the cause.
2. The summons for confirmation of grant is supported by grounds on the face of it and the affidavit sworn by Cyprina Consolata Nyaoro Onyalo the petitioner herein.
3. The petitioner avers that the grant of letter of administration of the estate of the deceased was made to her and the three objectors.
4. The petitioner avers that the deceased died intestate on 8th March, 2016, the deceased was polygamous and left behind several beneficiaries.



5. The petitioner aver that there is no application for provision of dependants that is pending and that the identification and shares of all persons beneficially entitled to the estate of the deceased's estate had been ascertained and determined as follows;

Description of Property Shares



Kericho Municipality 631/IV/31	<p>Half share to Cyprina Consolata Nyaoro Onyalo</p> <p>Half share to be held by Consolata Nyaoro Onyalo, Teresa Amolo Onyalo, Jacob Joseph Onyalo, Charles Kennedy Opiyo in trust for all beneficiaries of their respective houses in equal shares.</p>
North Nyakach/West Agoro/1347	<p>0.308 acres to Consolata Nyaoro Onyalo to hold in trust for the beneficiaries of the 2nd house in equal shares</p> <p>0.308 acres to Teresa Amolo Onyalo to hold in trust for the beneficiaries of the 4th house in equal shares</p> <p>0.308 acres to Jacob Joseph Onyalo to hold in trust for the beneficiaries of the 1st house in equal shares</p> <p>0.308 acres to Charles Kennedy Opiyo to hold in trust for the beneficiaries of the 3rd house in equal shares</p>
North Nyakach/West Agoro/1504 Road of Access	<p>Whole share to be held by Consolata Nyaoro Onyalo, Teresa Amolo Onyalo, Jacob Joseph Onyalo, Charles Kennedy Opiyo in trust for all beneficiaries of their respective houses in equal shares.</p>
Kisumu/West Agoro/2555	<p>0.0411 acres to Consolata Nyaoro Onyalo to hold in trust for the beneficiaries of the 2nd house in equal shares</p> <p>0.0411 acres to Chalres Kennedy Opiyo to hold in trust for the beneficiaries of the 3rd house in equal shares</p> <p>0.0411 acres to Teresa Amolo Onyalo to hold in trust for the beneficiaries of the 4th house in equal shares</p>
<p>North Nyakach/Kabodho East/3090</p> <p>North Nyakach/Kabodho East/3096</p>	<p>0.618 acres to Consolata Nyaoro Onyalo to hold in trust for the beneficiaries of the 2nd house in equal shares</p> <p>0.618 acres to Charles Kennedy Opiyo to hold in trust for the beneficiaries of the 3rd house in equal shares</p>



	<p>0.618 acres to Teresa Amolo Onyalo to hold in trust for the beneficiaries of the 4th house in equal shares</p> <p>0.618 acres to Jacob Joseph Onyalo to hold in trust for the beneficiaries of the 1st house in equal shares</p> <p>0.6795 acres to Consolata Nyaoro Onyalo to hold in trust for the beneficiaries of the 2nd house in equal shares</p> <p>0.6795 acres to Charles Kennedy Opiyo to hold in trust for the beneficiaries of the 3rd house in equal shares</p> <p>0.6795 acres to Teresa Amolo Onyalo to hold in trust for the beneficiaries of the 4th house in equal shares</p> <p>0.6795 acres to Jacob Joseph Onyalo to hold in trust for the beneficiaries of the 1st house in equal shares</p>
North Nyakach/Kabodho East/4160	A whole share to Charles Kennedy Opiyo to hold in trust for the beneficiaries of the 3rd house in equal shares
North Nyakach/Kabodho East/4159	A whole share to Teresa Amolo Onyalo to hold in trust for the beneficiaries of the 4th house in equal shares
North Nyakach/Kabodho East/4158	Half share to Jacob Joseph Onyalo to hold in trust for the beneficiaries of the 1st house in equal shares
Half share to Teresa Amolo Onyalo to hold in trust for the beneficiaries of the 4th house in equal shares	

6. Teresa Amolo Onyalo the 1st objector on behalf of the other co-objectors filed an affidavit of protest dated 9th May, 2023 in response to the summons for confirmation of grant.
7. The 1st objector avers that the deceased was married to four wives in his lifetime, two were now deceased and that all the wives were blessed with several children.
8. The 1st objector avers that the deceased died intestate and left behind several properties listed in the P&A Form attached to the petition and that LR No. Kisumu/God-Abuoro/503 was under his name at the time of his death but was transferred into the petitioner's name unprocedurally and therefore not listed among the assets of the deceased.



9. The 1st objector avers that she and the co-objectors did not agree with the mode of distribution of the estate in the summons of confirmation as the same gives the petitioner more property than the rest of them. The objectors were therefore proposing as follows;
- i. Kericho Municipality 631/IV/31 be shared equally among the four houses of the deceased as the same is prime property with the Kericho Central Business Districting Housing 13 business premises and 18 residential premises with a monthly turnover of Kshs. 220,000/= which the petitioner was solely collecting since the demise of the deceased. The objectors therefore wanted an account of all monies received and an order that all the rental proceeds be deposited in an interest earning account operated by the four administrators.
  - (ii) North Nyakach/West Agoro/1347 be left exclusively to the 4th house as the deceased had bequeathed the property to his 4th wife and built her a home on the said parcel.
  - (iii) North Nyakach/West Agoro/1504 the objectors did not object as they were all in agreement with the petitioner that it is an access road.
  - (iv) Kisumu/West Agoro/2555 the objectors were in agreement that it should be shared among the three houses.
  - (v) North Nyakach/Kabodho East/3090 and North Nyakach/Kabodho East/3096 the objectors objected to the same being shared among the four houses as the deceased had allocated them to the 1st house during his lifetime at that all parties to this succession cause were privy to the said information.
  - (vi) North Nyakach/Kabodho East/4158, North Nyakach/Kabodho East/4159 and North Nyakach/Kabodho East/4160 the objectors were not opposed to same going to the 3rd, 4th and 1st houses respectively however, they urged this Court to consider that these were as a result of subdivision of North Nyakach/Kabodho East/1712 which was subdivided into four portions by the petitioner and that that petitioner took North Nyakach/Kabodho East/4157 a fact she intentionally omitted.
  - (vii) North Nyakach/Kabodho East/4157 the objector proposed that it should be shared between the petitioner and Charles Kennedy Opiyo as to hold in trust for the beneficiaries of the 2nd and 3rd houses in equal shares as the 3rd wife and one of her sons were buried on the said parcel of land and because the petitioner had transferred LR No. Kisumu/God-Abuoro/503 into her sole name yet the said parcel was bequeathed to the third wife by the deceased herein.
  - (viii) The objectors faulted the petitioner for her silence with regards to the two bank accounts at the Kenya Commercial Bank and Barclays Bank (now ABSA Bank) operated by the deceased at the time of his demise .
10. The court directed that the protest proceed by viva voce evidence. The objectors availed 4 witnesses who testified in support of their case.
11. Jacob Joseph Onyalo (Pw. 1) stated that he executed a witness statement and wished to adopt it as his evidence-in-chief. Pw. 1 stated that the deceased was his father and that he was from the first house, he stated that the deceased left several properties to wit Kericho Municipality 631/IV/31 a residential cum commercial property that generates rental income and that the petitioner herein had been collecting rental proceeds to the exclusion of the rest of the family. Pw.1 further stated that the deceased distributed all his properties during his lifetime save for the Kericho Plot. Pw. 1 stated that he objected to the mode of distribution proposed by the petitioner and was in support of the proposed mode of distribution propounded by the objectors and adopted the contents of the affidavit of protest.



On cross examination Pw. 1 stated that he was not privy to the information as to when the Kericho Plot was acquired and that the petitioner had information as to when the Kericho Plot was purchased. Pw. 1 stated that the petitioner was paying land rent and rates in respect to the Kericho Plot and other properties. Pw. 1 confirmed that North Nyakach/Kabodho East/4157 was registered in the name of the petitioner. Pw. 1 stated that there were allegations that the petitioner had unprocedurally registered LR No. Kisumu/God-Abuoro/503 and transferred the same to herself while the deceased was sick and that they had medical reports indicating that the deceased was of unsound mind at the time. Pw. 1 stated that there was a time when the County Government had threatened to repossess Kericho Property and that he tried to pay outstanding rent/rates but the money was returned and it was a possibility that the petitioner had made the said payments. On reexamination, Pw. 1 stated that he could not tell where the books of accounts in respect to the Kericho Plot were kept.

12. Teresa Amolo Onyalo (Pw. 2) stated that she executed a witness statement and wished to adopt it as her evidence-in-chief. Pw. 2 stated that the deceased died intestate and that he had four wives, she was his fourth wife and resided on the land parcel in North Nyakach/West Agoro/1347 and had put up her house, where she lives with her children. Pw. 2 urged this Court to adopt her mode of distribution as set out in the affidavit of protest as it was equitable. On cross examination, Pw. 2 stated that she could not tell whether her late husband operated a bank account. Pw. 2 stated that she got married to the deceased in 1973 and that it was possible that the petitioner and the deceased had joint business. Pw. 2 stated the petitioner had been collecting rental proceeds from the Kericho Plot. Pw. 2 stated that her husband was unwell when the petitioner unprocedurally registered LR No. Kisumu/God-Abuoro/503 and that they did not institute legal proceedings against the petitioner. Pw. 2 stated that she was aware that North Nyakach/Kabodho East/4157 was registered in the name of the petitioner. Pw. 2 stated that the deceased had distributed his property during his lifetime and that she did not agree with the proposed mode of distribution in the summons for confirmation of grant. Pw. 2 stated that she was one of the administrators appointed on 20th April, 2017, however, she was not informed on the filing of the instant succession cause.
13. Charles Kennedy Opiyo (Pw. 3) stated that he recorded a witness statement and wished to adopt it as his evidence-in-chief. Pw. 3 stated that he was protesting against issuance of the grant. Pw. 3 stated that the original land parcel was North Nyakach/Kabodho East/1712 which was subdivided into four portions by the petitioner after the demise of the deceased and that North Nyakach/Kabodho East/4159 was apportioned to the 4th house whereas North Nyakach/Kabodho East/4160 was apportioned to the 3rd house and that he was living on the said parcel being a member of the third house, however, his mother's grave was on North Nyakach/Kabodho East/4157. Pw. 3 stated that the petitioner was collecting rental proceedings from the Kericho Plot to the exclusion of the rest of the family, he therefore proposed that the rental proceeds should be put in a joint bank account. On cross examination, Pw. 3 stated that he was not privy to information as to how Kericho Municipality 631/IV/31 was acquired. Pw. 3 also stated that LR No. Kisumu/God-Abuoro/503 was unprocedurally registered in the name of the petitioner, at the time the deceased was ailing. Pw. 3 stated that they did not institute legal proceedings against the petitioner. Pw. 3 stated that they contested the sub division of North Nyakach/Kabodho East/1712 into four equal parcels and produced the mutation form as part of the exhibits. Pw. 3 stated that they did not file any case to nullify any transactions on the said parcel of land.
14. Dr. Samuel O. Juma (Pw. 4) a medical doctor practising Internal Medicine stated that he examined the deceased and his findings were that the deceased had diabetes which led to dementia and therefore recommended that the deceased was not fit to deal with his property. Pw. 4 produced the medical report as PExh. 9. On cross examination Pw. 4 stated that in his medical report he did not attach any treatment



- notes and outline the previous medical history of the deceased herein. Pw.4 stated that he prepared the medical report at the behest of some of the family members.
15. At the close of the objectors case, the petitioner testified and availed 1 witness in support of her case.
  16. Cyprine Consolata Nyaoro Onyalo (Dw.1) stated that she recorded a witness statement and wished to adopt it as her evidence in chief. In her witness statement she stated that she used proceeds from gainful work as a prolific dancer and several businesses to contribute towards acquisition of Kericho Municipality 631/IV/31 before the deceased married the third and fourth wives. Dw. 1 stated that LR No. Kisumu/God-Abuoro/503 was transferred to her by the deceased during his lifetime and constituted part of their matrimonial property and she therefore had a huge stake towards its acquisition. Dw. 1 stated that North Nyakach/West Agoro/1347 had been equally distributed among the four households by the deceased during his lifetime, however the members of the 4th household encroached on it to the exclusion of the other beneficiaries. Dw. 1 stated that North Nyakach/Kabodho East/3090 and North Nyakach/Kabodho East/3096 were equally subdivided among the four households by the deceased. Dw. 1 stated that North Nyakach/Kabodho East/4157 rightfully in her name and she was holding in it trust for the beneficiaries of the 2nd house and the same is resultant from the subdivision of North Nyakach/Kabodho East/1712 and that all the other houses got a share of the the said parcel upon subdivision. Dw. 1 said that the other beneficiaries had been collecting rent from commercial properties and failed to account for the same. Dw. 1 reiterated that she made the instant statement in support of the proposed mode of distribution in the summons for confirmation of grant and that the proposed mode of distribution was fair and equitable.
  17. In her witness testimony, Dw. 1 stated that she got married to the deceased after his first wife had passed on. Dw. 1 stated that she contributed to the purchase of Kericho Municipality 631/IV/31 sometime in the 1960s. Dw. 1 stated that she proposed that the estate be distributed in the schedule of distribution set out in the affidavit filed in support of confirmation of grant.
  18. On cross examination, Dw. 1 stated that she contributed towards the purchase of the property, hence had a share in the said plot. Dw. 1 stated that she did not ask her husband to include her name as a co-owner of the said plot and that she could not ascertain her contribution towards acquisition of the property. Dw. 1 stated that she had lived with the deceased, her late husband the longest and that her husband married two other women. Dw. 1 confirmed that the deceased had not made a will. Dw. 1 stated that she was aware that the deceased held several bank accounts and that she did not have access to the said accounts. Dw. 1 stated that she solely collected rental proceedings from Kericho Municipality 631/IV/31 and used the same to maintain the properties and pay rent and land rates.
  19. Gaudensia Aoko Okech (Dw. 2) stated that she recorded a witness statement and wished to adopt it as her evidence in chief. On cross examination, she stated that the petitioner had several businesses and had contributed towards the purchase of Kericho Municipality 631/IV/31.
  20. The parties were directed to file written submissions which I have duly considered.
  21. The petitioner complied and filed her written submissions, the petitioner submitted that she had an equitable right to the property acquired during her marriage with the deceased. The petitioner further submitted that she and the deceased acquired property in the subsistence of their marriage and that she had made substantial contribution towards the acquisition of Kericho Municipality 631/IV/31. The petitioner cited section 8 of the *Matrimonial Properties Act*, No. 49 of 2013 which stipulates in the event of dissolution of a marriage, matrimonial property acquired by the man and the first wife be retained equally by the man and the first wife, if the property was acquired before procuring another marriage.



22. The petitioner submitted that she ought to get a larger share of Kericho Municipality 631/IV/31 and that the strict interpretation of section 40 of the Law of Succession Act would result in a miscarriage of justice and cited In the matter of the Estate of Mwangi Giture (Deceased) Succession Cause No. 1033 of 1996 where the court deliberated at length on the manifest injustice that would result in the strict interpretation of section 40 of the Law of Succession Act, the 1st widow's entitlement vis-a-vis the 2nd widow or subsequent widow who perhaps came into a marriage much later to find that the 1st widow worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth.
23. The petitioner submitted that her preferred mode of distribution in the affidavit in support of the summons for confirmation of grant was fair and equitable in the circumstances in that she proposed that the contested Kericho Municipality 631/IV/31 be divided into two; one share to be hers and the other half to be shared by the other beneficiaries and all other properties to be distributed according to the wishes of the deceased.
24. The petitioner faulted the objectors for failing to furnish cogent evidence to prove the unprocedural transfer of LR No. Kisumu/God-Abuoro/503, she submitted that the same was not substantiated and not within the purview of this probate court.
25. The 1st, 2nd and 3rd objectors filed their submissions and maintained that the deceased had partially subdivided his estate during his lifetime and that each of the houses had settled on their respective share of the estate.
26. The 1st, 2nd and 3rd objectors submitted that since the deceased died intestate in 2013, after the Law of Succession came into force on 1st July, 1981, therefore the Law of Succession was applicable in this case and further that section 40 of the Law of Succession was applicable with respect to deceased's estate as he died intestate and was polygamous.
27. The 1st, 2nd and 3rd objectors maintained that the estate of the deceased should be divided among the houses according to the number of children in each house adding the surviving widow (s) as an additional unit to the number of children. They were adamant that the petitioner had not demonstrated to this Court any reason (s) that warrant the distribution of the estate in the manner proposed.
28. Having considered the pleadings, viva voce evidence and submissions by the parties, the issue for determination by this court whether to confirm the summons for confirmation of grant dated 14th April, 2023 in light of the affidavit of protest dated 14th May, 2023 filed by the objectors.
29. Pw. 1 in support of the affidavit of protest, testified that the deceased had settled the households in various parcels constituting his vast estate during his lifetime save for the Kericho/Municipality/631/IV/31 which was a residential property and that that the petitioner was collecting rental proceeds to the exclusion of the rest of the family. Pw. 2, the objector testified that the deceased had distributed his property during his lifetime and she therefore did not agree with the proposed mode of distribution in the summons for confirmation of grant. The objector was therefore adamant that her preferred mode of distribution took into account the wishes of the deceased. This Court finds that the objectors have not furnished evidence to support their assertion that the deceased had settled various households prior to his demise. On this premise, it is this Court's finding that the affidavit of protest dated 14th May, 2023 fails. In the case of Mary Wambui Kabguo v Kenya Bus Services Limited (1997) eKLR. The Court of Appeal stated as follows:- "The age long principle of law is that he who alleges must prove..." In the absence of evidence that the deceased has distributed his property in his lifetime, this court finds that the deceased died intestate.





30. It is evident from the petitioner and objectors case that the bone of contention lies in the distribution of Kericho/Municipality/631/IV/31 which is a lucrative commercial property that constitutes the estate of the deceased.
31. Pw. 1 in examination in chief faulted the petitioner for collecting rental proceeds for the commercial property to the exclusion of the family whereas on cross examination stated that he was not privy as to when the property was acquired and that the petitioner was paying the land rates and rent in respect to the commercial property. Pw. 2 (the objector) on cross examination, stated that she got married to the deceased in 1973 and that it was possible that the deceased and petitioner had joint businesses, she confirmed that the petitioner had been collecting rental proceeds from the commercial plot. Pw. 3 on cross examination stated that the petitioner was collecting rental proceeds to the exclusion of the rest of the family and therefore proposed that the rental should be put in a joint account and that he was not privy to information as to how the commercial property was acquired. The objectors therefore wanted the commercial property shared equally among the four houses, an account of all the monies received in respect of the commercial property and that all rental proceeds be deposited in an interest earning account operated by the four administrators.
32. Dw. 1 (the petitioner) in her evidence in chief stated that she used proceeds from her gainful work as a prolific dancer and several businesses to contribute towards acquisition of the commercial property before the deceased married the third and fourth wives sometime in the 1960s. On cross examination, she stated that she could not ascertain her contribution towards acquisition of the property, however, she had lived with the deceased the longest and that she used the rental proceeds from the commercial property to maintain the properties and to pay land rates and rents. Dw. 2 testified that the petitioner had several businesses and had contributed to the purchase of the commercial property. The petitioner therefore proposed that Kericho Municipality 631/IV/31 be divided into two; one share to the petitioner and the other half to be shared by the other beneficiaries. It is the petitioner's case that she made substantial contribution towards acquisition of the said property and that the property was acquired before the deceased procured the other marriages. Having considered the objectors and the petitioner's case this court finds that the petitioner has proven that she contributed towards acquisition of the property which was acquired prior to the subsequent marriages on a balance of probability.
33. The deceased being polygamous and having died intestate, means that his estate is within the ambit of section 40 of the *Law of Succession Act*. However, courts have been wary of the strict interpretation of section 40 of the *Law of Succession Act*, more so where it would occasion an injustice to the first widow in this case being Cyprina Consolata Onyalo. This court considered a plethora of cases and wishes to associate with the sentiments of *In re Estate of Josphat Irungu Kanyi (Deceased)* [2019] eKLR where Gitari J. observed as follows; "For the court to apply Section 40 Act strictly and fail to address the cry for justice by windows who have contributed to acquisition without giving an extra-share in recognition of their contribution is to perpetrate an injustice from the seat of justice on the basis of Section 40 of the Act. Hallmark of decision making is the exercise of unfettered discretion. The discretion of the court must be exercised fairly. As Justice Ngugi stated, courts should not abdicate their constitutional duty to do justice. I am of the view that by considering the contribution by the 1st wife in the distribution of the estate of a deceased who was polygamous the court would be able to address the unfairness, injustice and discrimination which would result from applying Section 40 of the *Act* strictly. A lot has been stated in the above cited cases to show that Section 40 of the *Act* is unfair to windows who are not supposed to get an extra share and are equated to children without giving any consideration to their contribution. I echo the sentiments by my brothers and sisters Judges that the *Act* should soon be corrected so that the distribution of the estate of the deceased takes into consideration the contribution of the widow (s) so that their shares are considered differently from that of the children. Before that



happens there is no harm in the court exercising discretion while considering the contribution by the window depending on the circumstances of each case.”

34. This court, having carefully considered the mode of distribution preferred by the petitioner and objector, viva voce evidence and submissions by the parties, finds that the mode of distribution preferred by the petitioner is equitable and just in the circumstances.
35. Consequently, the summons for confirmation of grant dated 14th April, 2023 succeeds giving rise to the following orders;
  - (i) The grant of letters of administration intestate made to the petitioners on the 20th day of April, 2017 is hereby confirmed and therefore the estate of the deceased should be distributed as set out in the schedule of distribution set out in the affidavit filed in support of the confirmation of grant.
  - (ii) The costs of the application be in the cause.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 1ST DAY OF AUGUST, 2024.**

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**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Rutoh

Kirui holding brief to Limo for Objectors

No Appearance for the Petitioners

