



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 217 OF 2006

IN THE MATTER OF THE ESTATE OF

THE LATE JARED ODHIAMBO K'OBUNGAH (DECEASED)

AND

IN THE MATTER OF A PETITION BY LILIAN ABONGO OLANGO AND GEORGE DANIEL OLUOCH OBUNGA

AND

IN THE MATTER OF APPLICATION BY

LILIAN ABONGO OLANGO.....PETITIONER

VERSUS

JENIPHER ABONGO OBUNGA.....OBJECTOR

JUDGMENT

Jennifer Abongo Obunga and **Lilian Abongo Olango** are both widows of the late **JARED ODHIAMBO OBUNGAH**. They have tried to amicably distribute the assets which their late husband left behind, however, they were not successful.

1. In the circumstances, the parties have asked the Court to have the Grant, which was issued on 29th May 2008, confirmed.
2. Pursuant to **Section 71** of the **Law of Succession Act**, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all the persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.
3. It is common ground that Jennifer Abongo Obunga, was the 1st wife of the deceased. Jennifer has one child, **ANNE ATIENO OBUNGAH**.
4. It is further common ground that Lilian Abongo Olango was the 2nd wife of the deceased. Lilian has 3 children namely;
 - (a) **LENNOX OBUNGAH**;
 - (b) **LEVIN OBUNGAH**; and
 - (c) **ANGELO OBUNGAH**.
5. In the circumstances, there is no dispute about the identities of the beneficiaries to the Estate.
6. The second issue requiring attention is the identification of the properties which constitute the Estate. It is well settled that the only property which the Court may distribute is the “*free property*” of the deceased.
7. **Section 3** of the **Law of Succession Act** defines “*free property*” as follows;

“..... in relation to a deceased person, means the property of which the person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”

8. It is common ground that the following properties were available for distribution to the beneficiaries of the Estate of the late Jared Odhiambo K’Obungah.

(i) L.R. NO. KISUMU MUNICIPALITY/

BLOCK x/xxx;

(ii) L.R. NO. KISUMU MUNICIPALITY/

BLOCK x/xxx;

(iii) L.R. NO. NAKURU MUNICIPALITY/

BLOCK x/xxx (“langalanga”);

(iv) L.R. NO. NAKURU MUNICIPALITY/

BLOCK x/xxx (“Langalanga”);

(v) CENTRAL KASIPUL/KAMUMA/xxx;

(vi) CENTRAL KASIPUL/KAMUMA/xxx;

(vii) CENTRAL KASIPUL/KAMUMA/xxx;

(viii) EAST KASIPUL/KAKELO DUDI/xxx;

(ix) EAST KASIPUL/KAKELO DUDI/xxx.

9. In the application dated 28th August 2018, Jennipher proposed that the 2 properties in Kisumu be sold. Thereafter, the proceeds ought to be used to pay to her, the costs of these proceedings (in accordance with the Ruling dated 29th May 2008).

10. Jennipher also wanted to be reimbursed for the rates which she paid earlier. The total sum she had paid was Kshs 408,655/=.

11. Thirdly, Jennipher asked the Court to take into account all the rents which her co-administrator had been collecting since the death of Jared. According to Jennipher, there was need to balance out the benefits which Lilian had received, by giving to her (Jennipher) an equivalent sum.

12. And after carrying out the said exercise, Jennipher says that the Court should direct that the balance still available from the sale proceeds, should be divided equally between the 2 widows.

13. In principle, justice is about fairness. Fairness is best attained when each person is accorded a reasonable portion of the estate that the person has an entitlement to a share.

14. In order to attain fairness, the Court would have to take into account some level of balancing, by taking into account the benefits, if any, that the beneficiaries had derived from the Estate prior to the confirmation of the grant.

15. As an example, I find that when proceeds from rental income were used to pay school fees for the children of Lilian, that would have to be taken into account when the Court was determining how to distribute the property of the deceased.

16. Similarly, if either of the Administrators incurred expenses in preserving any assets of the estate, that would have to be taken into account by the Court.

17. On the one hand Jennipher contends that Lilian’s share should be discounted by the sum of Kshs 3.0 Million, so as to take into account the rental income which Lilian had obtained from the rental units in Nakuru.

18. However, Jennipher did not provide the Court with material upon which her calculation of the claim for that sum could be verified by the Court.

19. On the other hand, Lilian pointed out that Jennipher had been collecting rents from the 2 parcels of land in Kisumu.

20. According to Jennipher, the said 2 parcels in Kisumu had been invaded by Jua Kali, and therefore it had been problematic collecting any

rent therefrom.

21. Whereas the Court might appreciate that Jennipher may have encountered problems in collecting rents from the persons who were in occupation of the 2 parcels of land, I find that it was incumbent upon Jennipher to provide particulars of the rents she had managed to collect.
22. The two protagonists have not been helpful to their respective positions in the case.
23. It strikes me that each of them is driven by suspicion about the other. But suspicion is not evidence which could assist the Court in coming up with an informed determination.
24. In my considered opinion, Jennipher has not made out a case that could persuade the Court to refrain from applying the provisions of **Section 40** of the **Law of Succession Act**.
25. Therefore, as the law requires the Court, when making provision for the distribution of the net estate of the deceased who had been polygamous, to take into account the number of children in each house, that is a factor that I am obliged to take into consideration.
26. In effect, Jennipher's house consisted of 2 units, whilst Lilian's house consisted of 4 units; as the law requires the Court to add the wives of the deceased as a single unit each, which is then added to the number of children who each of the wives had.
27. Pursuant to the provisions of **Section 40 (1)** of the **Law of Succession Act**, the law enjoins the Court to ensure that the children who required maintenance and education, after the demise of their father, should not be accorded equal treatment as the other children.
28. I am completely persuaded that when any child still required maintenance and education, the Court can only do justice to him or her by making appropriate provision in that regard. And whereas such consideration would lead to such a child being accorded more than the child who no longer required maintenance or education, it nonetheless gives rise to equity and fairness.
29. In this case the children of the 2nd house were relatively young when their father passed away. Therefore, there is absolutely no doubt that each of them was in need of maintenance and education.
30. To the extent that their mother utilized proceeds earned from the rents paid by tenants who resided in houses which constitute part of the estate, I find that the said action accorded to the young children, the much required maintenance and education.
31. In contrast, the child of the 1st house was not in need of such maintenance or education. Therefore, the said child was neither discriminated against nor prejudiced by the fact that those who were in need, were provided with the requisite monetary support.
32. Having benefitted from funds generated by the estate of their late father, the children of the 2nd house have now come of age. I therefore find that there would no longer be any reason that would justify the award of much more to the 2nd house.
33. I find that the proposal made by the 1st house, in respect to the 2 parcels of land which are in Kisumu, is indicative of the poor prospects for generating income from the said properties.
34. In contrast, the attraction of the properties at Nakuru is an indication of the good prospects for deriving rental income from those properties.
35. I hold the considered view that the two parcels of land in Kisumu be sold, and the proceeds of sale be divided equally between Jennipher and Lilian.

Langalanga, Nakuru

36. **Lilian** is to be given **L.R. NO. NAKURU MUNICIPALITY/ BLOCK x/xxx**.
37. **Jennipher** is to be given **L.R. NO. NAKURU MUNICIPALITY/BLOCK x/xxx**.

KASIPUL/KAKELO DUDI/xxx

38. In line with the agreement between the parties, this parcel of land will go to **JENNIPHER** and her daughter **ANNE**.

EAST KASIPUL/KAKELO DUDI/xxx

39. The deceased set up his homestead on this piece of land. Both parties have their respective houses on it.
40. Therefore, the property shall be owned by **JENNIPHER** and **LILIAN** in common, in equal shares.

CENTRAL KASIPUL/KAMUMA/xxx

41. This property shall be given to **JENNIPHER** and **ANNE**.

CENTRAL KASIPUL/KAMUMA/xxx

42. The property shall be given to **LILIAN, LENNOX, LEVIN** and **ANGELO**.

CENTRAL KASIPUL/KAMUMA/xxx

43. The property shall be given to **LILIAN, LENNOX, LEVIN** and **ANGELO**.

ST. MARY'S PLOT NO. xx/xxx

44. This is where **Lilian** resides. Therefore, it is allocated to her.

PLOT xx/xx (Often called "xx")

45. The said property should go to **Lilian**.

46. In arriving at the foregoing determination I have taken into account, (in addition to the factors outlined earlier herein), the fact that Jennipher admitted that she had collected some rents from the 2 parcels of land in Kisumu. However, she never provided accounts in that respect.

47. Jennipher also said that the employer of Jared (deceased) paid to her the benefits that became due upon his demise. Again, there was no statement of account provided by Jennipher with regard to the said benefits.

48. And I reiterate that **Section 40** of the **Law of Succession Act** has provided guidance to me, so that the fact that Lilian has more children than Jennipher has been taken into account.

49. Having made a determination that ensures equity, I now order that each party will meet their respective costs of these proceedings. In that regard, the proceeds from the sale of the two properties in Kisumu shall assist towards the payment of the costs.

DATED, SIGNED AT DELIVERED AT KISUMU

THIS 4TH DAY OF OCTOBER 2021

FRED A. OCHIENG

JUDGE