



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 852 OF 2005

IN THE MATTER OF THE ESTATE OF JOSEPH ABONGO ODIPO (DECEASED)

BETH NYAWIRA GATHONI.....APPLICANT

VERSUS

SHARON ATIENO ABONGO1ST RESPONDENT

JANE SEWE ODIPO.....2ND RESPONDENT

JUDGMENT

1. The deceased Joseph Abongo Odipo died intestate on 28th August 2004. During his life he married Beatrice Odhiambo who bore him a daughter Sharon Atieno Abongo (the 2nd respondent). Beatrice later died. He married the applicant Beth Nyawira Gathoni. They did not get a child. The deceased left his mother Jane Sewe Odipo (the 2nd respondent).
2. The estate of the deceased comprised –
 - (a) LR No. 82/175/6060 – which is a house in Donholm Phase 5;
 - (b) developed Plot No. CI/248 at Kayole;
 - (c) money in bank account No. xxxxxx; and
 - (d) motor vehicle registration No. KAQ xxxx – Toyota
3. The applicant filed summons dated 9th July 2019 seeking the confirmation of the grant that was jointly issued to her, the 1st respondent and Charles Odour Kado on 30th May 2019. She proposed that she gets the Donholm house and the 1st respondent gets the Kayole property. The Kayole property consists of a three storey building with 29 rental rooms. Regarding rental income, she proposed that the 2nd respondent be getting 1/3 of the proceeds and the 1st respondent gets 2/3 of the proceeds. She stated that the money at the bank (Standard Chartered Bank) had already gone to the 2nd respondent. The basis upon which she wanted the Donholm property was that it was her matrimonial home with the deceased and she contributed to its development.
4. The 1st respondent filed a replying affidavit in which she stated that she was opposed to the proposal by the applicant. She sought to see the title documents of the Donholm and the Kayole properties, and also sought their valuation. She stated that the applicant had not made full disclosure of the assets and the liabilities of the deceased. She further stated that the 2nd respondent was a beneficiary of the estate of the deceased. Lastly, that the applicant had no child with the deceased and that she did not support any member of the family.
5. The 2nd respondent opposed the application. She stated that the bank account had less than 5,000/= which she withdrew. She proposed that the Kayole property should be bequeathed to the 1st respondent and that the applicant gets a life interest in the Donholm property which would then go to the 1st respondent. She also claimed that the applicant had failed to disclose all the deceased's assets, including the 1st respondent's late mother's household goods.

6. Even as the respondents allege that the applicant failed to disclose some of the assets of the deceased, there was no evidence they placed on record to show that the deceased had more property than the inventory in the petition. I find that the deceased did not have any other property.

7. The 2nd respondent did not apply to be considered as a dependant of the deceased under any of **sections 26, 28 and 29** of the **Law of Succession Act (Cap. 160)**. Indeed, after she got the money in the bank she did not in her affidavit seek to be given any of the property in question. That means that, and I find, the only beneficiaries for the estate of the deceased are the applicant and the 1st respondent.

8. The deceased left a widow and a child. **Section 35** of the **Act** provides that the widow is entitled to household effects and a life interest in the immovable property, and that the life interest will cease if she remarries. If this law is upheld, the two properties (Donholm and Kayole) would ultimately go to the 1st respondent absolutely. Such an arrangement would not find favour with me, given the 2010 Constitution whose **Article 45(2)** provides that parties to a marriage are entitled to equal rights at the time of that marriage, during the marriage and at the dissolution of the marriage. The **Law of Succession Act** assumes that it is only men who create wealth in the family, and they are the only ones who can purchase and/or acquire assets in the family. It fails to recognise that wives, even when they are not formally employed, contribute to the acquisition and development of family wealth. This is what the applicant is saying about the Donholm property. She helped to develop it. The **Act** in its **sections 35, 40** and so on proceeds on the basis that, upon the death of the male spouse, his children can have absolute claim to the immovable property that he left but his widow can only collect household goods and have only a life interest on the immovable property, irrespective of whether or not she helped acquire it. Good luck, **Part II** of the **Sixth Schedule** of the Constitution provides that all existing laws that have yet to be aligned to the Constitution, be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution. It is with this in mind that I will deal with the distribution of the estate.

9. That being so, and given the facts of the case, I confirm the grant issued herein on the basis that the applicant shall get LR No. 82/175/6060 – Donholm Phase 5 absolutely, and the 1st respondent shall get Plot No. CI/248/Kayole absolutely.

10. This is a family dispute. Each part shall bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2021.

A.O. MUCHELULE

JUDGE