



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 623 of 2015

IN THE MATTER OF THE ESTATE OF PETER OKOLA OCHIENG (DECEASED)

BETWEEN

FLORENCE ACHIENG OKOLA.....1ST PETITIONER/RESPONDENT

NICHOLAS JUMA OKOLA.....2ND PETITIONER/RESPONDENT

AND

ROSEDALIMA AKWIRI NDONG'.....OBJECTOR/APPLICANT

JUDGMENT

Introduction

1. **PETER OKOLA OCHIENG (deceased)** died sometimes on 20.01.2000. Deceased's family comprised of the following:

1st wife

Felistas Wadenya Okola (deceased)

Children

- 1) Rosedalima Akwiri Ndong' -Daughter
- 2) Bernard Juma Okola - Son (deceased- no family)
- 3) Fredrick Okello Okola - Son (deceased- no family)

2nd wife

Florence Achieng Okola - Widow

Children

1. Nicholas Ouma Okola - Son
2. Philip Odhiambo Okola - Son

2. Letters of Administration were issued jointly to the **Florence Achieng Okola** and **Nicholas Juma (1st and 2nd Petitioners** respectively) on 22.09.2016.

3. Subsequently, a Certificate of Confirmation of Grant was issued on 1st September, 2016 distributing L.R. **KISUMU/KORU/1277, L.R. KISUMU/DAGO/2465** and L.R. **KISUMU/DAGO/2480** to the 1st Petitioner and her sons Nicholas Ouma Okola and one Philip Odhiambo Okalo in equal shares.

Application

4. By summons dated 11th April, 2019 and filed on 12th April, 2019, **Rosedalima**

- 1) **Annulment of Grant of Letters of Administration and Certificate of Confirmation of Grant issues to the Petitioners**
- 2) **Revocation of the transfer of LAND PARCEL NO. KISUMU/KORU/1277 from the name of the Deceased to the name of the Petitioners and one Philip Odhiambo Okalo**
- 3) **Revocation of the sub division of LAND PARCEL No.2126; 2127; 2128; 2129 and 2130 and the transfer of the aforesaid parcels of land into names of the Petitioners and any third parties and any further transfer and/or sub division of the resultant parcels from the sub division of LAND PARCEL NO. KISUMU/KORU/1277**
4. **An order does issue for rectification of the register to revert ownership of LAND PARCEL NO. KISUMU/KORU/1277 to the name of the Deceased**
5. **Any other order**
6. **Costs be provided for**

Objector's' Case

5. The objection was disposed off by way of *viva voce* evidence. The Objector stated that she was a biological daughter of the deceased and his 1st wife Felistas Wadenya Okola (Deceased). Objector told court that his siblings Bernard Juma Okola and Fredrick Okello Okola are deceased and did not have wives or children.

6. Objector faulted the Petitioners for distributing her father's estate to solely to themselves and Philip Odhiambo Okalo and thereafter disposing off part of the estate thereby disinheriting her.

Petitioners' Case

7. The 1st Petitioner conceded that the Objector is deceased's daughter from his first wife. She also conceded that she petitioned for letters of administration intestate and did not include the Objector as a beneficiary to the deceased's estate. She explained that the Objector had benefitted from **KSM/MUN/ BLOCK 12/217** which was transferred to Objector's husband on 25.02.91 and was therefore not to benefit from the residue of deceased's estate.

8. 1st Petitioner additional confirmed that she had caused **LR. NO. KISUMU/KORU/1277** measuring about 34.02 Ha to be partitioned and that she had sold off several portions. It was further her evidence that the Objector had caused **LR NO. KISUMU/DAGO/616** to be partitioned into **LR. NOs. KISUMU/DAGO/2465** and **LR. KISUMU/DAGO/2480** which Objector and her husband had sold off.

Analysis and Determination

9. After the hearing, I encouraged the parties herein to try an out of court settlement. I referred the matter for court annexed mediation on 24.02.2020. By a report dated 07.08.2020, the mediator reported that the parties had not reached a settlement and the matter came before me for resolution.

10. I have considered the objection vis-à-vis the evidence on record and submissions filed on behalf of the parties.

11. During the hearing, there featured 3 parcels of land which I wish to address as hereunder.

1) KSM/MUN/BLOCK 12/271

12. The Petitioners argue that the Objector was not to benefit from **LR. NO. KISUMU/KORU/1277** since she had been bequeathed **KSM/MUN/BLOCK 12/271**.

13. A Green Card in respect of this property demonstrates that a certificate of lease was issued in the name of Raymond Oloo Ndong', the Objector's husband on 25.02.1991 which was 9 years before the death of the deceased.

14. Section 42 of the Law of Succession which provides as follows:

Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild

or house.

15. It is not disputed that **KSM/MUN/BLOCK 12/271** was settled in the name of Objector's husband and not the Objector. The Petitioners' argument that the Objector was not to benefit from **LR. NO. KSM/KORU/1277** since she had been bequeathed **KSM/MUN/BLOCK 12/271** is therefore not merited.

2) LR. NO. KISUMU/DAGO/616

16. The green card for this land demonstrates that it was registered in the name of the deceased up to 21.02.2007 when it transferred to Erick O. Onunga. The land was on 22.03.07 partitioned into two portions i.e. **LR. Nos. KSU/DAGO/2465** and **LR. Nos. KSU/DAGO/2480**. Whereas there is evidence that the said land parcels are now registered in the name of third parties, the 1st Petitioner's assertion that the Objector and her husband clandestinely sold the land was not proved by evidence and must therefore fail.

3) LR. NO. KISUMU/KORU/1277

17. The gravamen of this cause mainly revolves around the distribution of **LR. NO. KISUMU/KORU/1277** which appears from the evidence, to have been the deceased's only free estate.

18. After the confirmation of the grant, the Petitioners and Philip Odhiambo Okola caused **LR. NO. KISUMU/KORU/1277** measuring **34.02 Ha** to be partitioned into 5 portions i.e. **LR. NO. KISUMU/KORU/2126, 2127, 2128, 2129** and **2130**.

19. **LR. NO. KISUMU/KORU/2126** measuring 26.81 Ha was registered in the name of Florence Achieng Okola (**1st Petitioner**) and her sons Nicholas Ouma Okola and Philip Odhiambo Okola. The same was subsequently partitioned into two portions i.e. **LR. NO. KISUMU/KORU/2207** and **LR. NO. KISUMU/KORU/2208**.

20. **LR. NO. KISUMU/KORU/2207** measuring 26.20 Ha was then portioned into 4 parts as follows: **KISUMU/KORU/2316; 2317; 2318** and **2319** as follows:

1) **LR. NO. KISUMU/KORU/2316 measuring 6.0 Ha** is registered in the name of Florence Achieng Okola (**1st Petitioner**) and her sons Nicholas Ouma Okola and Philip Odhiambo Okola

2) **LR. NO. KISUMU/KORU/2317 measuring 9.16 Ha** is also registered in the name of Florence Achieng Okola (**1st Petitioner**) and her sons Nicholas Ouma Okola and Philip Odhiambo Okola

3) **LR. NO. KISUMU/KORU/2318 measuring 10.24 Ha** was sold off to Gordon Zachary Oyomno and Violet Akoth Oyomno

4) **LR. NO. KISUMU/KORU/2319 measuring 08 Ha** was sold off to William Ouko Yimbo and Ruth Akeyo Oluoch

21. **LR. Nos. KISUMU/KORU 2127, 2128, 2129** and **2130** which are partitions of **LR. NO. KISUMU/KORU/1277** were distributed as follows:

1) **LR. NO. KISUMU/KORU/2127 measuring 4.86 Ha** was sold off to George Onyango Owaga

2) **LAND PARCEL NO. KISUMU/KORU/2128 measuring 1.21 Ha** was sold off to Dennis Otieno Omondi and Martha Chao Onyango

3) **LAND PARCEL NO. KISUMU/KORU/2129 measuring 0.2 Ha** is registered in the name of Florence Achieng Okola (**1st Petitioner**) and her sons Nicholas Ouma Okola and Philip Odhiambo Okola

4) **LAND PARCEL NO. KISUMU/KORU/2130 measuring 0.40 Ha** registered in the name of Florence Achieng Okola (**1st Petitioner**) and her sons Nicholas Ouma Okola and Philip Odhiambo Okola

22. Finally, **LR. NO. KISUMU/KORU/2208** measuring 0.61 Ha which was partitioned from **LR. NO. KISUMU/KORU/2126** was sold off to Salim Omar Suleiman and Fatuma Omar Suleiman

23. Section 40 of the Law of Succession Act (*the Act*) provides: -

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. (Emphasis added)

24. From the foregoing provisions of the law therefore, the deceased's estate in

LR. NO. KISUMU/KORU/1277 ought to have been distributed equally between the following:

Florence Achieng Okola - Surviving widow

Nicholas Ouma Okola - Son

Philip Odhiambo Okola - Son

Rosedalima Akwiri Ndong' - Daughter

25. Out of the total 34.02 Ha, each of the four beneficiaries is entitled to 8.505 Ha but only 15.76 Ha are available for distribution the other 18.26 Ha having been sold off the Florence Achieng Okola (*1st Petitioner*) and her sons.

26. I have agonized on the issue of reverting the title in **LR. NO. KISUMU/KORU/1277** to the name of the deceased and I have come to the conclusion that it would not be in the interest of justice for the reason that that would affect the rights of other parties who are not parties to these proceedings. Other than that, I also find that from the 15.76 Ha in the 4 portions registered in the names of the Florence Achieng Okola (*1st Petitioner*) and her sons, the Objector can safely get her rightful share of her father's estate with Florence Achieng Okola (*1st Petitioner*) and her sons bearing the burden of receiving a reduced share having sold off the bulk of the estate to third parties.

27. Consequently, I find that the objection has merit and it is therefore hereby ordered as follows:

1) The Objector is entitled to 8.505 Ha of deceased's estate

2) The 8.505 Ha share shall be hived out of LR. NO. KISUMU/KORU/2316; LR. NO. KISUMU/KORU/2317; LR. NO. KISUMU/KORU/2129 and LR. NO. KISUMU/KORU/2130 registered in the name of Florence Achieng Okola, Nicholas Ouma Okola and Philip Odhiambo Okalo

3) The 8.505 Ha shall include the Objector's mother's matrimonial house

4) Petitioners shall bear the costs of these proceedings

DATED AT KISUMU THIS 14TH DAY OCTOBER 2020

T. W. CHERERE

JUDGE

Court Assistants - **Ms. Amondi/ Ms. Okodoi**

For Petitioners - **Mr. Olel for Olel, Onyango, Ingutiah & Co. Adv**

For Objector - **Mr. Okoth for Geofrrey O. Okoth & Co. Advocates**