



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 403 OF 2015

IN THE MATTER OF THE ESTATE OF JOSHUA DEYA AWITI (DECEASED)

-between-

GRACE ATIENO ODUOL

SAMWEL OTIENO ODUOL.....PETITIONERS/PLAINTIFFS

-versus-

BEATRICE ENGEZA DEYA.....OBJECTOR/DEFENDANT

JUDGMENT

1. When the deceased herein, **Joshua Deya Awiti**, died on 06/07/2015, one of his wives, **Grace Atieno Oduol**, and her son, **Samwel Otiemo Oduol**, petitioned for grant of letters of administration intestate. A Grant was issued in their joint names on 16/03/2016.
2. By a Notice of Motion dated 31/10/2016 and filed in Court on 02/11/2016 (hereinafter referred to as '**the application**') the Petitioners/Administrators applied for the confirmation of the grant. The application was supported by the affidavit of **Grace Atieno Oduol** (hereinafter referred to as '**Grace**') sworn on 31/10/2016. The application proposed to distribute the estate of the deceased in accordance with a Survey Report which was annexed to the affidavit of Grace. The Report was prepared by one **Yonah Fredrick Otiemo** for the Migori County Surveyor and was dated 28/06/2016. I shall refer to it as '**the Report**'.
3. The application was opposed by **Beatrice Engeza Deya**, the Objector herein, who was one of the wives of and who also survived the deceased. The objection centered on only one issue; whether the portion of the estate land allocated to the Objector was gifted to and ought to be shared with one son of the second Petitioner.
4. To be able to deal with this issue there is need for a brief background of this matter. The deceased married six wives and was blessed with several children. Prior to his death the deceased demarcated his land, **Suna East/Kakrao/5666**, in accordance with each house and apportioned each house a distinct portion. He then affixed boundaries to each portion which stand to date. The family of the deceased lived well until the demise of the deceased when these succession proceedings were commenced. All went on well until the filing of the proposed distribution to the estate property. At that point in time the Petitioners whom are now the Administrators of the estate claimed that the deceased had gifted the Objector's portion to one of the sons of the second Petitioner herein, **Samwel Otiemo Oduol**, (hereinafter referred to as '**Samwel**') and demanded that the Objector shares her portion with the said Samwel's son, one **Dennis Odhiambo** (hereinafter referred to as '**Dennis**'). That was the nature and basis of the objection.
5. The objection and the application were both heard together by way of oral evidence. The Petitioners were deemed as the Plaintiffs and the Objector was deemed as the Defendant. The Plaintiffs testified and reiterated their proposed mode of distribution and closed their case. The Defendant testified as **DW1** and called three witnesses in support of the objection. The witnesses were **Kiliopa Odhiambo Odera (DW2)** whose father was a brother to the deceased, **Hezekiah Ogonda Adenya (DW3)** who was the village elder and **Nicodemo Okello Owiti (DW4)** who was a brother to the deceased.
6. DW2, DW3 and DW4 all supported the Objector/Defendant. To them, the proposal by the Plaintiffs is unfair since there was no basis to hive out the Objector's share in favour of Dennis who is a grandson to the deceased given that Samwel has his share of the property and ought to settle all his children thereat. Grace as well has her distinct share.
7. I have patiently considered the matter before me. There is indeed no objection to the manner the deceased demarcated his land unto his family. It is also settled that the respective portions of the property are distinct with clear boundaries. The Objector is a wife to the deceased. She also has her children just like the rest of the wives of the deceased. The contention that the deceased gifted the Objector's portion to Dennis was raised by the Plaintiffs. Dennis did not testify. Apart from the assertion by the Plaintiffs no further and independent evidence was tendered to the effect that the deceased gifted Dennis. The circumstances of the gifting are unclear. The deceased did not leave behind a

written will. However, even if it was to be taken that the deceased made an oral will still the requirements for proof of that oral will under **Sections 9 and 10 of the Law of Succession Act, Cap. 160** of the Laws of Kenya were not availed.

8. DW2, DW3 and DW4 were elderly members of the society and knew the affairs of the deceased well. They all disagreed with the Plaintiffs on the aspect of the alleged gift. They found the Plaintiffs to be grossly unfair to the Objector with a clear intention of disinheriting her contrary to the intentions of the deceased. They joined hands with the Objector in calling for the full restoration of portion allocated to the Objector by the deceased and the eviction of Dennis if he was on that portion of the estate land.

9. The Plaintiffs having failed to prove that the Objector's portion was gifted in any way to Dennis, the objection must and is hereby sustained. The distribution of the estate of the deceased shall be as how the deceased intended it to be and the Objector shall inherit her portion to the exclusion of all.

10. In the end, the following final orders do hereby issue: -

(a) The Grant of Letters of Administration made to Grace Atieno Oduol and Samwell Otieno Oduol is hereby confirmed.

(b) The estate property being Suna East/Kakrao/5666 shall devolve as per the proposed distribution contained in the Migori County Surveyor's Report dated 28/06/2016 save that the name of Dennis Odhiambo shall stand expunged from the Report. For clarity purposes, Beatrice Engeza Deya shall have 1.41 Hectares of the estate land.

(c) The estate property, Suna East/Kakrao/5666, shall be sub-divided as per the said Surveyor's Report dated 28/06/2016 and respective title deeds issued accordingly.

(d) In the event the said Dennis Odhiambo occupies any part of the portion devolved to Beatrice Engeza Deya he shall give vacant possession thereof within 30 days of this order and in default execution to issue.

(e) Each of the beneficiaries identified in the Survey Report shall meet the costs of sub-division of their respective portions as well as the costs of these proceedings.

(f) This matter shall be fixed for a Mention on 3/04/2019 with a view to ascertain the progress and for further orders on closure of the file.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Grace Atieno Oduol and Samwel Otieno Oduol, the Petitioners in persons.

Beatrice Engeza Deya, the Objector in person.

Evelyne Nyauke – Court Assistant