



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 544 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE JULIUS OBONDO KONDI

AND

IN THE MATTER OF APPLICATION BY:

CAREN ADOYO OBONDO.....PETITIONER

AND

IN THE MATTER OF AN APPLICATION FOR OBJECTION BY:

GEORGE OTIENO OBONDO & SAMSON ODOYO OBONDO.....OBJECTORS

RULING

The late **JULIUS OBONDO KONDI** died on 1st May 2006.

1. During his lifetime, Julius had two wives, **MARGARITA AKUMU OBONDO** and **CAREN ADOYO OBONDO**.
2. The first wife, Margarita died on 29th December 2002, whilst the second wife, Caren is still alive todate.
3. Following the demise of Julius , Caren filed **HIGH COURT SUCCESSION CAUSE NO. 86 OF 2010**, (which will hereinafter be cited as "*the first case*").
4. It is common ground that the first case was premised on the grounds that Julius had died intestate.
5. Two years after the first case had been instituted, Caren filed this current case, **HIGH COURT SUCCESSION CAUSE NO. 544 OF 2012**, (which will hereinafter be cited as "*the second case*").
6. The second case was premised on the Written Will of Julius.
7. On 18th June 2013 the Court issued a Grant of Probate of the written will to Caren, who had been cited as the Executor of the Will of Julius.
8. At the time when the Court issued the Grant of Probate, the first case was still subsisting.
9. Meanwhile, following the issuance of the said Grant of Probate, Caren had taken steps to sub-divide the property **L.R. NO. KISUMU/SONGHOR/23** into seven parcels. The said seven parcels of land were **L.R. NO. KISUMU/SONGHOR/1148, 1149, 1150, 1151, 1152, 1153 and 1154**.
10. By an application dated September 2015, two sons of Julius brought an application seeking the revocation or the annulment of the Grant of Probate which had been issued to Caren.
11. By the said application, the Objectors also asked for the cancellation of the registration of the seven parcels of land which had been created by the sub-division of **KISUMU/SONGHOR/23**.
12. Whilst awaiting the determination of those issues, it was ordered that the 7 parcels of land be preserved, by way of a caveat which would

prevent any dealings with, or transfer, or sub-division, or conveyance of any of the said parcels.

13. The first question that arises is whether or not the Petitioner had concealed material facts from the court, when she sought and was granted Probate in the second case.
14. As far as she is concerned, there was a valid Will, and therefore she was right to have filed the second case.
15. The fact that the Petitioner followed all the procedures that are applicable when one is seeking grant of probate, has not been seriously challenged.
16. The Petition was duly gazetted before the court issued the Grant of Probate.
17. Thereafter, when there were no objections, the Petitioner commenced the process of the sub-division of the property constituting the Estate of the deceased.
18. It is the Petitioner's case that she was entitled to commence the process of sub-division because she was the Executrix of the Will.
19. There is no doubt that in the Will which the Petitioner relied upon, the deceased had given a clear indication about how he wished to have his property distributed.
20. Therefore, the Petitioner submitted that there was no reason for her to wait until the Grant was confirmed before she could proceed with the process of sub-division.
21. Her reasoning is based upon a comparison of the requirement under **Section 71(2)** of the **Law of Succession Act**, which governs cases of intestacy, and the cases where there was a Will.
22. She submitted that in cases of intestacy, the court only confirmed the Grant after it is satisfied that all persons who were beneficially entitled to a share of the Estate of the deceased, had been provided for.
23. In contrast, the Petitioner pointed out that when there was a Will, it is the author of the said Will who will already have made appropriate provisions for persons he deemed to be beneficiaries of his Estate.
24. If there is a valid Will, it would constitute the wishes of the deceased. Such a Will would not constitute the wishes of the Executor or the Executrix.
25. Therefore, whether or not the terms of the Will did constitute a fair and equitable distribution of the Estate, is not a matter for which the Executor or the Executrix can be held accountable.
26. The role of the said Executor or the Executrix is to give effect to the terms of the Will.
27. In this case, the Petitioner has deponed that Advocate **JOHN OLAGO ALUOCH** attended the burial of the late **JULIUS OBONDO KONDI**.
28. Whilst at the said burial, the advocate is said to have been given an opportunity to address the mourners.
29. During the address to the mourners, Advocate Olago Aluoch is said to have publicly stated that the deceased had written a Will, and that the said Will was in the custody of the Advocate.
30. **ALFRED AMBOGO OBONDO**, who is the first-born son of the late Julius Obondo Kondi, also swore an affidavit confirming that during the burial of his late father, Advocate Olago Aluoch said that the deceased had written a Will.
31. Indeed, Alfred emphasized that the issue about the existence of the Will could be ascertained or verified by **CHIEF SAMUEL OGALO**, who had officiated at the burial of the deceased.
32. If the depositions by Caren and Alfred were factually accurate, it would be expected that the Petitioner would never have lodged a Petition for Letters of Administration Intestate.
33. However, the Petitioner blames the Clerk to Advocate Olago Aluoch for having made the serious error of lodging a Petition based on the assumption that the deceased died intestate.
34. I find it hard to accept the Petitioner's explanation, considering that although the Petitioner was not an advocate, she is said to have given instructions that the first case be filed in court.
35. In his affidavit, John Olago Aluoch expressly said;

“4. THAT thereafter the matter was not brought to my attention again until much later when I was informed by my former

Clerk, Aloys Owiti Nudi, that a Succession Cause No. 86 of 2010 had been filed by our firm on the instructions of the widow CAREN ADOYO OBONDO. I realized that that Succession Cause was erroneous because it was based on the mistaken belief that the deceased did not have a Will.”

36. Considering that the Clerk acted on the instructions of the Petitioner, I hold the considered view that the Petitioner was not right to have blamed the Clerk for carrying out her instructions.
37. If a person has made an error, he/she must take responsibility for the same. It is wrong to create a scape-goat, to cover for our own mistakes.
38. I further note that Advocate Olago Aluoch had made it clear that the Will which was in his custody would be read to the whole family.
39. Obviously, it was prudent to give to all the family members, an opportunity to be present when the Will was being read.
40. However, as the learned advocate has stated in his affidavit, and as has been verified by both Caren Adoyo Obondo and Alfred Ambogo Obondo, there were not more than three members of the family who were present when the Will was read. The said 3 persons were Caren, Alfred and Samuel Ogik Obondo.
41. I fully appreciate the Objectors’ concerns, that the Will, (if any) appears to have been read in their absence, and without their knowledge.
42. If they had been notified that there was a Will, and if they had been informed of the date, time and place when and where the Will was to be read, the Objectors would have been accorded an opportunity to raise their concerns.
43. But because the Objectors had no idea when and where the Will was to be read, they were denied their right to be heard.
44. If a person is not present when a Will is being read, he would not know whether or not a provision had been made for him.
45. It does appear that the terms of the Will largely mirror the mode of distribution which the Petitioner had suggested in the first case.
46. The Petitioner was well aware of the objections which the Objectors had in the first case. Logically, therefore, the Petitioner ought to have contemplated similar objections in the second case.
47. Pursuant to **Section 26** of the **Law of Succession Act**, the Court has discretion to make a reasonable provision for a dependant if it is of the opinion that the disposition of the deceased’s estate, as effected by his Will or by gift in contemplation of death or by the law relating to intestacy, had not made a reasonable provision for the dependant.
48. Therefore, even assuming that there was a valid Will, I find that it was wrong for the Petitioner to have taken steps to sub-divide the Estate prior to the confirmation of the Probate. I so find because the law contemplates the possibility of the court reviewing the provision, in appropriate cases, so as to make reasonable provisions to dependants.
49. By taking steps to have the land sub-divided in accordance with the terms of the Will, before the Court had confirmed the Probate, the Petitioner made a presumption that the Court would validate her actions.
50. Whilst it is possible that the court could validate the said sub-divisions, it is also possible that the court could vary some of the provisions made by the deceased.
51. The only way to give the beneficiaries an opportunity to exercise their respective rights is by an annulment of the Probate issued to Caren. I therefore allow the application in the following terms:

(i) The Grant of Probate issued to CarenAdoyo Obondo is annulled forthwith.

(ii) The validity of the Will has not yet been determined, and it is therefore open to the parties to canvass the said issue.

(iii) As it is not known whether or not the Court would ultimately uphold the validity of the Will, and also the provisions made in it, I order that until that issue is determined, the parcels KISUMU/SONGHOR/ 1148, 1149, 1150, 1151, 1152, 1153 and 1154 shall be conserved, and the Petitioner shall not have any dealings with any of them.

This Order is made solely for the purposes of insulating the Estate from incurring expenses which may or may not ultimately turn out to be unnecessary.

(iv) The District Land Registrar is restrained from registering any dealings with any of the seven parcels, until further order of the court.

(v) As this is a family dispute, which is yet to be determined, I order that each party will bear his/her own costs of the

application dated 16th September 2015.

DATED, SIGNED and DELIVERED at KISUMU This 11th day of June 2019

FRED A. OCHIENG

JUDGE