



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**  
**SUCCESSION CAUSE NO.889 OF 2015**  
**FORMERLY HC KISII SUCC. CAUSE NO.219 OF 2004**

**IN THE MATTER OF THE ESTATE OF:**

**JAMES OMONDI JURE ..... DECEASED**

**AND**

**PAMELA AKINYI OMONDI .....OBJECTOR/APPLICANT**

**VERSUS**

**JANE ATIENO NYAMUTHE.....RESPONDENT/PETITIONER**

**RULING**

[1] According to the death certificate exhibited herein, the deceased, **James Omondi Jure**, died on 5<sup>th</sup> March 2004, at the age of fifty (50) years.

The necessary application for grant of letters of administration intestate respecting his estate was presented in court by **Jane Atieno Nyamuthe**, in her capacity as the surviving second widow of the deceased. She listed other beneficiaries of the estate apart from herself. These included the surviving first widow of the deceased, **Pamela Akinyi Omondi**, as well the surviving two sons of the deceased, **Erick** and **Brian** and the three surviving daughters, **Stacy**, **Sharon** and **Daisy**. All these had not attained the age of majority. They were all minors as at the time of the death of the deceased.

Nonetheless, the first widow made a cross-petition for the grant which doubled up as an objection to the application for the grant made by the second widow.

[2] The matter proceeded to a hearing on the merit with each party prosecuting and defending their respective cases against each other. Finally, the High Court at Kisii rendered a judgment on the **16<sup>th</sup> January 2015**, upholding the first widow's objection and directing and/or ordering that the grant of letters of administration intestate respecting the estate of the deceased be issued to both widows and that a summons for confirmation of grant be taken out within sixty (60) days from that date. The formal issue of the grant was on the **13<sup>th</sup> March 2015**, but the necessary summons for confirmation of grant dated **12<sup>th</sup> March 2016**, was filed herein by the second widow, Jane Atieno Nyamuthe, who deponed a supporting affidavit dated 12<sup>th</sup> March 2016, in which she sets out the manner of distribution of the deceased's entire estate among all the beneficiaries.

[3] In response to the second widow's summons for confirmation of grant and her proposal on the mode of distribution of the estate property, the first widow, Pamela Akinyi Omondi, filed the affidavit dated 13<sup>th</sup> April 2016, in which she effectively protests and disagrees with the second widow's suggested manner of distribution of the estate property set out in paragraph 12 of her supporting affidavit.

The first widow therefore made her own suggestion which is set out in paragraph 15 of the protest affidavit. She prayed that the distribution of the estate ought to take into account her input and/or

personal contribution in acquiring the estate and that the second widow was married by the deceased in 1995 after several assets had been acquired by the deceased and herself.

[4] The first widow (**Objector**) contended that after the death of the deceased, the second widow (**petitioner**) forcefully took over the asset known as **Kavirondo Hotel** standing on land parcel **No. Homa Bay Municipality Block 1/318** and stuck with it for about twelve (12) years within which time she misappropriated and concealed the income generated therefrom.

The objector further contended that the said Kavirondo Hotel was built by the deceased, and herself without tangible contribution from the petitioner for improvement and/or development thereof.

In paragraph 13 of her protest affidavit, the first widow gives a list of all the assets belonging to the deceased consisting of twenty (20) parcels or plots of land and a motor vehicle Reg. No. KAD 193 Pick-up and contended that the parcels/plots of land described as Homa

Bay Municipality **1432/404** and **1432/368** together with **plot No.10B Kobodo Market and Motor vehicles Reg. No. KAD 688** and **KAE 160 Y** are her personal property and not property of the deceased's estate and are therefore not available for distribution as suggested by the petitioner.

The objector therefore, prayed for the issuance of the certificate of confirmation on the basis of her proposed mode or manner of distribution of the deceased's estate.

[5] As depicted in both the petitioner's supporting affidavits and the objector's affidavit in protest, the underlying factors in this dispute are the distribution of the estate among the two houses of the deceased and the alleged ownership of some of the identified assets by the objector as opposed to the deceased and therefore his estate.

Ownership of an identified asset is a key ingredient in determining whether or not the property is part of the estate property, hence available or unavailable for distribution among the beneficiaries.

The petitioner's list of assets is set out in paragraph 10 of her affidavit. It included a total of twenty three (23) immovable assets i.e. parcels/plots of land and movable assets in the form of three motor vehicles Reg. Nos. KAD 688 X (Lorry), KAE 160Y and KAD 193 X pickup and monies held in two bank accounts Nos.008-3810076 and 008-2205810.

The objector's list is set out in paragraph 13 of her affidavit and includes twenty (20) parcels/plots of land and one movable asset i.e. motor vehicle registration no. KAD 193.

[6] However, in the petition for grant of the letters of administration filed on 14<sup>th</sup> October 2004 by the petitioner, the immovable assets included ten (10) parcels/plots of land and the movable assets included three motor vehicles Reg. No. KAD 688 X, KAE 160Y and KAD 193X. All these were valued at more than Kshs.10 million. The liabilities were yet to be determined.

It would appear that the additional ten (10) or thirteen (13) parcels/plots of land identified in the affidavits of both the petitioner and the objector were not included in the petition and so were the bank accounts containing monetary income belonging to the deceased.

[7] Be that as it may, the subject summons for confirmation of grant dated 12<sup>th</sup> March 2016, was in the

first instance listed for hearing on 14<sup>th</sup> April 2016, but was adjourned to 15<sup>th</sup> April 2016, as the court did not sit on that day due to other official engagements.

On 15<sup>th</sup> April 2016, the parties appeared in court through their respective counsel i.e. **MR. O.M. OTIENO**, for the petitioner and **M/S KASIRA** for the objector. It was then that M/s Kasira informed the court that the only issue in the matter was the mode of distribution and the under valuing of some of the assets.

The court noted that the parties were agreed that the only issue was distribution. It then directed that the objector was at liberty to file an affidavit in respect of valuation and that written submissions be filed by the parties who were then to appear for ruling on 6<sup>th</sup> May 2016, on which date it was deferred to 27<sup>th</sup> May 2016, as the parties were yet to file their submissions.

**[8]** A new ruling date was set for 27<sup>th</sup> June 2016, as the trial judge (**Majanja, J.**) was on transfer to Kisumu on the 27<sup>th</sup> May 2016.

Come the 27<sup>th</sup> June 2016, and the matter was placed before the incoming judge (**Omondi, J.**) who read to the parties the ruling made and signed by the outgoing judge on the 24<sup>th</sup> June 2016.

Thereafter, the objector requested for a hearing date with regard to the contested issues identified in the court's ruling. These were:-

**i. Whether some of the properties and in particular, Kavirondo Hotel were acquired jointly by Pamela (objector) and the deceased prior to his marriage to Jane (petitioner) and whether and to what extent she should be given credit for her contribution.**

**ii. Whether some of the properties proposed for distribution are Pamela's personal assets and therefore unavailable for distribution.**

It was therefore directed that it would be in the interests of justice for the court to take "**viva-voce**" testimony from both parties and their witnesses to determine the issues conclusively.

**[9]** In that regard, hearing effectively commenced on 14<sup>th</sup> July 2016, with the testimony of the **objector (PW1)**.

This was followed at a later stage with the testimony of her witness, **James Osano Olonde (PW2)**, after which she closed her case.

In defence, the petitioner (**DW1**) testified and called two witnesses, **Edward Ochieng Aringo (DW2)** and **Nicholas Odhiambo Ariyo (DW3)**.

Thereafter, both parties filed their written submissions through **M/s Mungu Kimetto & Co. Advocates**, on behalf of the objector and **M/s O.M. Otieno & Co. Advocates**, on behalf of the petitioner.

The duty of this court is to make a determination on the twin issues raised herein on the basis of the evidence and the applicable law.

**[10]** Basically, this is a suit involving the estate of a person who died intestate, meaning that he did not make a Will on how his property would devolve among his dependants and heirs upon his demise.

In the circumstances, a petition was in the first instance presented by the petitioner for grant of letters of administration intestate respecting the estate of the deceased. The objector responded by a cross petition and objection to making of a grant in favour of the petitioner. This developed into a protracted dispute which was eventually settled by the court in its ruling or judgment of 16<sup>th</sup> January 2015, which effectively decreed that grant of letters of administration intestate be issued jointly to the petitioner and

the objector.

As joint administrators/administratrix of the estate of the deceased, they were or are expected to perform their duty in the best interest of the beneficiaries of the estate and in accordance with the provisions of the **Law of Succession Act (Cap 160 Laws of Kenya)**.

Towards that end, the petitioner took out the present disputed summons for confirmation of grant dated 12<sup>th</sup> March 2016, one year after the grant was issued.

**[11] Section 71** read with **Section 83 (9) (g)** of the **Law of Succession Act**, clearly indicate and provide that the confirmation of grant and the completion of the administration of the estate are factors intended to take a short time. Thus, an application for confirmation of grant is required to be made after expiration of six (6) months from the date of the grant and the administration of the estate is required to be completed within six (6) months from the date of the confirmation of the grant.

It is herein evident that both administratrix of the estate of the late James Omondi Jure (deceased) are already in breach of the Succession Act by their failure or neglect to complete the administration of the estate within the required period of time.

**[12]** A further breach of the Act is demonstrated by the failure of both administratrix to produce to the court within six (6) months from the date of the grant a full and accurate inventory of the assets and liabilities of the deceased and also an accurate account of all dealings therewith up to the date of the account as required by **Section 83 (e)** of the Act.

Be that as it may, it was pre-supposed that both administratrix cum dependants/beneficiaries were agreed on the manner of distribution of the estate prior to any one of them or both of them taking out the summons for confirmation of grant.

This current dispute on the mode of distribution is a confirmation that the impugned summons for confirmation of grant was taken out without consensus. It is because of this reason that the dispute has been raging in this court for an unnecessary long period of time, yet the Succession Act provides for the manner of distribution of the estate where the intestate deceased person was polygamous such as in this case.

**[13]** In a polygamous setting, a “**house**” is defined in **Section 3** of the Act as a family unit comprising a wife, whether alive or dead at the date of death of the husband and the children of that wife.

Herein there was no dispute or substantial dispute that both the administratrix were wives of the deceased with the objector being the first wife and the petitioner, the second wife. It did not matter whether or not one was married before the other. The fact remained that each one of them and their children formed the two houses of the deceased all entitled to benefit from the estate of the deceased as provided by the law.

**Section 40** of the Act specifically provides for the distribution of the estate of a polygamous man who dies intestate in the following terms:- “**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 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.**”

**[14]** When examining this provision, the Court of Appeal in the case of **Esther Wanjiku Burugu –vs- Margaret Wairimu Burugu NKU Civil Appeal No.319 of 2002**, observed that the provision does not state that the division must be equal and that it specifically states that although the distribution of the estate of a polygamous person is in the first instance to be among the house, it nonetheless specified that that would be done according to the number of children in each house.

It was therefore the view of the court, that the provision negates any proposal that the division must be

equal between the houses for to say so would ignore the fact that in most instances, the number of children in each house is never equal.

In **Mary Rono –vs- Jane Rono & Another (2005) e KLR**, the Court of Appeal stated that if parliament had intended that there must be equality between the houses, there would have been no need to provide in **Section 40** of the **Act** that the number of children in each house be taken into account.

[15] It is clear from the foregoing observations that **Section 40** of the **Succession Act** is invariably the applicable provision of the law in the present circumstances. Therefore, any proposed mode of distribution of the estate ought to be compatible with and in accordance with the provision as to leave no room for distribution based on the whim of the holder of the grant or her/his sentimental feelings. This is fortified by the decision of Court of Appeal in the case of **Elizabeth Chepkoech Salat –vs- Josephine Chesang**

**Chepkwony Salat, NBI Civil Appeal No.211 of 2012**, where it was again held and reiterated that, **Section 40** does not provide for equality between houses or that each child must receive the same or equal portion. The court held the view that the net intestate estate should be shared according to a ratio reflecting the number of units in two house as was done in the case of **Catherine Nyaguthi Mbauni –vs- Gregory Haima Mbauni – Civil Appeal No.34 of 2004 at Nyeri [2009] e KLR**.

[16] Most significant, the court held as follows:-

**“Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own**

**motion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust”.**

[17] The Court indicated that a court of law cannot purport to qualify the full rigour of **Section 40(1)** of the **Act** and noted that the respective proposals of the spouses in that case did not result into a consent judgment as the proposal of each was apparently subject to the entire scheme of distribution proposed by each being accepted by the Court.

According to the court, such proposals have little weight in the application of statutory principles.

In this case, the situation is more or less similar as both the petitioner and the objector have come up with respective proposals thereby indicating that they were not agreed on the manner or mode of distribution as they did not confine themselves to or heed the provisions of **Section 40 (1)** of the **Succession Act**.

It is not for this court to **“rubber-stamp”** either of the two proposals but to direct the two administratrix, to come up with a scheme of distribution which is compliant with **Section 40 (1)** of the **Succession Act** as they should not expect the court to depart from the statutory principles set out therein.

Considering that the objector’s house is comprised of four units and that of the petitioner is comprised of three units, the estate ought to be distributed in the ratio of 4:3, the objector’s house getting  $\frac{4}{7}$  of each asset and the petitioner’s house getting  $\frac{3}{7}$  of each asset. (See, Catherine Nyaguthi Mbauni’s case (**Supra**) and Elizabeth Chepkoech Salat’s case (**Supra**).

[18] It is only after consenting to the aforementioned formulae and applying it to this case will the two administratrix jointly take out a fresh certificate for confirmation of grant. They must remember that in

this matter they are joined at the hip, like “**Siamese twins**” and should therefore co-operate and distribute the estate for the benefit of all the dependants of the deceased and allow him to truly “**rest in peace**”.

All that having been said and so that the application of the formulae aforementioned may have meaning and effect, it is important that the assets available for distribution be identified with certainty.

The current dispute is well highlighted in the affidavits of both the objector and the petitioner as supported further by “**viva-voce**” evidence. What comes out clearly is that the dispute does not revolve around all the assets of the deceased but rather on specified assets and in particular the property known as Kavirondo Hotel as well as parcels of land/plots described as **Homa Bay Municipality No.1432/404, Homa Bay Municipality No.1432/368** and **Plot No.10B Kobodo Market**.

Also in dispute are **Motor Vehicle Reg. No. KAD 688X** and **Motor Vehicle Reg. No. KAE 160Y**.

**[19]** Indeed, the two issues for determination are derived from the dispute surrounding the assets aforementioned.

With regard to the first issue, the objector contended that Kavirondo Hotel was acquired jointly by herself and the deceased prior to his marriage to the petitioner.

She therefore implied that the property or part thereof is not available for distribution especially to the petitioner as she made no contribution of any kind towards its construction and/or operations and in any event, the property was jointly owned by herself and the deceased meaning that she acquired full ownership upon demise of the deceased.

However, she conceded in cross-examination that she did present any documentary evidence to establish her alleged personal beneficial interest in the property. It would therefore follow that she failed to discharge her burden of proving on a balance of probabilities that the asset known as Kavirondo Hotel and the land on which it stands is not part of the estate of the deceased and hence, unavailable for distribution. The evidence of her witness (PW2) in that regard was not helpful. In fact, it left no doubt that the property belonged to and was solely owned by the deceased and therefore, available for distribution as part of his estate.

**[20]** With regard to parcels/plots of land described as No.1432/404 and No.1432/368 and plot No.10 Kobodo market, the objector did not avail any or sufficient evidence to show that the assets did not belong to the deceased as at the time of his death. She did not avail any credible documentary evidence to prove her alleged personal ownership of the assets and disprove the petitioner’s oral and documentary evidence (**D. Exhibit 1** and **D. Exhibit 3**) establishing that the assets actually belonged to the

deceased and therefore available for distribution. It was pointed out by the petitioner’s witness (**DW3**) that attempts were made by unknown persons to interfere with the relevant registers in the custody of the County Government of Homa Bay to alter or remove the name of the deceased as the owner of the assets in favour of the objector. However, there was no proof that the objector was in any way responsible for the alleged act which was criminal in nature.

In any event, the obligation to prove that the subject assets did not belong to the deceased and therefore unavailable for distribution lay with the objector. Her evidence in that regard did not discharge the burden.

**[21]** Similarly, there was no evidence from the objector to prove that motor vehicles Reg. No. KAD 688X and KAE 160Y were her personal property as at the time the deceased died nor disprove the fact that the vehicles were actually owned by the deceased as demonstrated in the documentary evidence availed herein by the petitioner (**D. Exhibit 2**).

In sum, the objector has failed to provide cogent and credible evidence for purposes of excluding the contentious assets from the inventory of all the assets identified as the property of the deceased and

therefore available for distribution to all his dependants and/or heirs.

The parties may now go back to the drawing board and agree on a scheme of distribution on the basis of the formulae suggested hereinabove by the court; after which, they may take out fresh summons for confirmation of grant within the next three months from this date hereof. In default, the matter be forthwith referred to the Public Trustee for necessary distribution of the estate to all the beneficiaries in accordance with the Law.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

[Dated and delivered this 30<sup>th</sup> day of **October, 2019**]