



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 160 OF 2014

IN THE MATTER OF THE ESTATE OF GIBSON HOSEA ATENG (DECEASED)

BETWEEN

RUFUS JUMA ATENG.....1ST PETITIONER/RESPONDENT

SALOME ATIENO ADALA.....2ND PETITIONER/RESPONDENT

AND

GIBSON OMONDI ATENG.....1ST OBJECTOR/APPLICANT

JOYCE ACHIENG ATENG.....2ND OBJECTOR/APPLICANT

JUDGMENT

Introduction

1. **GIBSON ATENG (hereinafter referred to as deceased)** died sometimes on 07th June, 1990. Deceased's estate comprised of the following;

- 1) **Land Parcel No. East Gem/Jina/ 271**
- 2) **LR. NO. 37/113/4/DACC Road, Nairobi**
- 3) **Title No. I.R. 25550 (Original No. 37/326/237)**

2. Letters of administration were issued on 09th June, 2014 to **RUFUS JUMA ATENG** and **SALOME ATIENO ADALA**, son and daughter of the deceased (**hereinafter referred to as the 1st and 2nd Petitioners/Respondents respectively**).

3. By an application dated 16th August, 2016 filed on 19th December, 2016, **GIBSON OMONDI ATENG** and **JOYCE ACHIENG ATENG (hereinafter referred to as the 1st and 2nd Objectors/Applicants respectively)** and who are son and widow of **ELIAKIM HENRY OCHIENG**, a son of the deceased applied that upon confirmation of the grant, **LR. NO. 37/113/4/DACC Road, Nairobi** be distributed to them. The application is based on grounds among others that the property was allocated to them by the deceased way back in 1979.

4. The court directed that the dispute be determined by way of *viva voce* evidence.

OBJECTORS/APPLICANTS' CASE

5. **PW1 GIBSON OMONDI ATENG**, the 1st Objector/Applicant stated that his family has lived on **LR. NO. 37/113/4/DACC Road, Nairobi** for the last 40 years the property having been given to his parents by the deceased. He additionally stated that his deceased father had paid the balance of the mortgage sum on the property before his death.

PETITIONERS'/RESPONDENTS' CASE

6. **RUFUS JUMA ATENG**, the 1st Petitioner/Respondent stated that the deceased had 5 children who are:

1) **SIMON PETER ONYANGO** (deceased son) who had two houses

(a) Everline Akinyi Ogada (widow) and her daughter Caroline Atieno Ogada

(b) Monica Aor Opangá (widow) and her children Jenifer Yuaya Ateng, Margaret Atieno Ateng' and Victor Hosea Ateng'

2. **ELIAKIM HENRY OCHIENG** (deceased son) who's survived by his widow Joyce Ochieng the 2nd Objector/Applicant and her children Judy Ochieng, Gibson Ochieng, Filgona Ochieng, Phoebe Ochieng and Patrick Ochieng

3. **SALOME ATIENO ADALA** 2nd Petitioner/Respondent (daughter)

4. **RUFUS JUMA ATENG'**, 1st Petitioner/Respondent (son)

5. **TRUPHENA ATENG'** (deceased daughter) who's survived by her son Reuben Odhiambo Onyango

7. 1st Petitioner/Respondent proposed that deceased's property be distributed in equal shares representing each of his children. He further proposed that the 1/5 share in respect of **TRUPHENA ATENG'** (deceased daughter) be distributed equally to him and the 2nd Petitioner/Respondent for the reason that Reuben Odhiambo Onyango had by his affidavit sworn on 26th February, 2016 and filed on the same date stated that he had no interest in deceased's estate. In support of their case, the Petitioners/Respondents on 29th May, 2019 filed a proposed mode of distribution dated 28th May, 2019.

Analysis and Determination

8. The deceased died intestate and his property that is subject to succession is in terms of Section 34 of the Law of Succession Act Cap 160 Laws of Kenya (**hereinafter referred to as *the Act***) all his free property of which he has not made a will which is capable of taking effect.

9. Section 3 of ***the Act*** defines "**free property**" to mean the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

10. Section 38 of ***the Act*** states that:

Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

11. In the case at hand, there is evidence that some of the deceased's children have died leaving their families domiciled on deceased's property. A strict application of Section 38 of ***the Act*** would mean that only the Petitioners/Respondents will stand to benefit from the deceased's estate. The foregoing provision is therefore no longer good law for the reason that it has the effect of destabilizing families and in some cases might result in evictions of families who in some cases have nowhere else to call home.

12. The Petitioners/Respondents have indeed appreciated that fact and have proposed that the deceased's property be distributed to each of the deceased's children with the families of their deceased's siblings benefitting from what the deceased's children who are themselves deceased would have been entitled to.

13. I have considered the evidence on record, submissions filed on behalf of both parties and the cited authorities and I have deduced the following issues for determination.

i. Whether LR. NO. 37/113/4/DACC Road, Nairobi should devolve to the Objectors/Applicants

ii. Whether the Objectors/Applicants are entitled to LR. NO. 37/113/4/DACC Road, Nairobi based on the doctrine of adverse possession

(a) Whether LR. NO. 37/113/4/DACC Road, Nairobi should devolve to the Objectors/Applicants

14. Section 42 of ***the Act*** provides that:

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. Whereas there is evidence that **ELIAKIM HENRY OCHIENG** and his family have lived on **LR. NO. 37/113/4/DACC Road, Nairobi** longer than any of his siblings, this in the absence of evidence that the property had been given or settled for their benefit cannot be equated to a gift by the deceased to them, to the exclusion of the entire family of the deceased.

16. The Objectors/ Applicants claim over **LR. NO. 37/113/4/DACC Road, Nairobi** is also based on their assertion that **ELIAKIM HENRY OCHIENG** paid the balance of the mortgage sum on the said property. There is however no evidence of such payment and had it been proved, this court would not have hesitated to order that the same be recovered from deceased's estate.

17. From the evidence on record, there is no evidence that the deceased had during his lifetime by will or otherwise, given or settled **LR. NO. 37/113/4/DACC Road, Nairobi** for the benefit of the family of **ELIAKIM HENRY OCHIENG**. The property is therefore part of deceased's free property subject to succession in terms of Section 34 of *the Act*.

(b) Whether the Objectors/Applicants are entitled to LR. NO. 37/113/4/DACC Road, Nairobi based on the doctrine of adverse possession

18. In **Kahindi Ngala Mwangandi v Mtana Lewa [2014] eKLR** cited by the court held that:

Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner. If the person in adverse possession continuous to occupy land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner's remedy as well as his title to the land are extinguished by virtue of the provisions of sections 7,9,13,37 and 38 of the Limitation of Actions Act.

19. The owner of the property is issue is deceased. The issue in question is whether adverse possession can be claimed against a deceased person. My considered view is that that claim would only have been sustained during the deceased's lifetime.

20. The foregoing notwithstanding and for argument's sake, for adverse possession to take place, the person must enter the suit property as a trespasser. Objectors/Applicants herein entered the subject property not as trespassers but with the consent of the deceased and with this set of facts, I have no doubt that their claim for adverse possession would not have been sustained even had the registered owner been alive. (See **Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997** and **Samuel Miki v. Jane Njeri Richu CA No. 122 of 2001**)

Disposition

21. In the result, and from the foregoing analysis, the court makes the following orders:

1) The objection has no merit and it is disallowed.

2) Since Reuben Odhiambo Onyango has declared that he has no interest in the deceased's estate, it is ordered that the deceased's estate shall devolve equally as follows:

a. ¼ to the family of SIMON PETER ONYANGO (deceased)

b. ¼ to the family of ELIAKIM HENRY OCHIENG (deceased)

c. ¼ to SALOME ATIENO ADALA (daughter)

d. ¼ to RUFUS JUMA ATENG' (son)

3) LR. NO. 37/113/4/DACC Road, Nairobi has elicited a lot of interest from each of the deceased's family members. It is impracticable that each one of them can adequately be accommodated into that property that comprises a residential house. The family of ELIAKIM HENRY OCHIENG who include the 2nd Objector/Applicant are currently in occupation of that property. The interest of justice dictates that the property be valued and sold and the proceeds thereof be shared into four equal parts, a piece for the benefit of the family of SIMON PETER ONYANGO (deceased); the family of ELIAKIM HENRY OCHIENG (deceased); SALOME ATIENO ADALA (daughter) and RUFUS JUMA ATENG' (son).

4) The family of ELIAKIM HENRY OCHIENG (deceased son) shall have first priority amongst interested purchasers and shall remain in occupation of the property until the property is disposed off. This order is however subject to review in the event that the property has not been disposed off in the next 6 (six) months.

5) It has not come out clearly from the evidence how the parties intend to distribute Title No. I.R. 25550 (Original No. 37/326/237). If the same is not distributable, the same shall be valued and sold and the proceeds thereof be shared into four equal parts, a piece for the benefit of the family of SIMON PETER ONYANGO (deceased); the family of ELIAKIM HENRY

OCHIENG (deceased); SALOME ATIENO ADALA (daughter) and RUFUS JUMA ATENG' (son).

6) This being a family matter, each party shall bear its own costs.

DELIVERED AND SIGNED AT KISUMU THIS 03rd DAY OF October 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Amondi/Okodoi

For Petitioners/Respondents - Ms Onyango/ Mr Ayaga

For Objectors/Applicants - Mr Sala