



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 268 OF 2010

BETWEEN

MONICA ELIZABETH DONDE OCHIENG.....1ST APPLICANT

TRUPHOSA ODONGO OKONG'O.....2ND APPLICANT

GRACE AKINYI ONYANGO.....3RD APPLICANT

ZILPHA ATIENO RAO.....4TH APPLICANT

AND

STEPHEN MIRUKA OKUMU.....1ST RESPONDENT

PHANUEL ONYANGO OKUMU.....2ND RESPONDENT

JACOB OTIENO JOBUNGA.....3RD RESPONDENT

FREDRICK ODHIAMBO JAGERO.....4TH RESPONDENT

RULING

1. By a ruling dated, 23rd day of March 2017 in Monica Elizabeth Donde Ochieng & 3 Others v Stephen Miruka Okumu & 3 Others [2017] eKLR, this court determined the Applicant's objection vide a Notice of Motion dated 29th April 2015 in the following terms among others:

- 1) That the asset Kisumu/Dago/65 originally belonged to Okumu Osir who died on 13th February 1979.
- 2) That the late Okumu Osir was married to four wives Nerea Mbaja Okumu, Mary Owuor Okumu, Owade Okumu and Priscilla Aloo Okumu who are all deceased.
- 3) That Edward Jobunga to whose estate these proceedings relate and the four applicants were all children of Okumu Osir, deceased and the administrators/Respondents are their offspring.
- 4) That as the daughters of the deceased who are applicants herein should have made their way in these proceedings as these proceedings strictly speaking are not for the benefit of the estate of Edward Jobunga Okumu but of his father Okumu Osir
- 5) That as children of Okumu Osir, the applicants stood in equal standing to Edward Obunga Okumu who was their brother and still rank higher in priority to the administrators now before this Court notwithstanding their sex or gender.
- 6) That it is only fair and just that their right to the portion they claim be considered albeit at the appropriate time which is

at the time of confirmation of the grant.

7) That the grant of letters of administration having been issued on 17th September 2010 the same is long overdue for confirmation and the administrators shall apply for confirmation within sixty days of this ruling.

8) That pending confirmation of the grant the applicants shall have unrestrained access to their mother's homestead and house but this does not mean that they have liberty to waste the estate.

2. Subsequently, the Respondents applied for confirmation of the grant by summons dated 15.05.17 and filed on even date in which they proposed that **0.02 Ha** of the estate which comprises of **Kisumu/Dago/65** be distributed to the Applicants and the remaining portion in the names of the Respondents/Administrators with each representing each of the four houses of their deceased father's houses, for their own benefit and for the benefit of other members of their respective houses.

3. Subsequently, the 3rd Respondent/Administrator by his affidavit sworn on 22nd November, 2018 filed on even date proposed that the estate be distributed to the surviving children, grandchildren and daughters in law of Okumu Osir and to his affidavit attached the schedule of proposed distribution filed on 24th September, 2018. In that proposed mode of distribution, the Applicants are to share 0.10 ha with their nephews who are grandchildren of Okumu Osir.

4. The Applicants protested the proposed mode of distribution by an affidavit of protest sworn by the 1st Applicant on behalf of her co-Applicants on 14th July, 2017 and filed on even date. The 1st Applicant faulted the Administrators for not making a fair proposal for the daughters of Okumu Osir and for not providing for their sisters **Ruth Akinyi** and the family of **Jennifer Ajuang (deceased)**.

5. In her affidavit sworn on 03rd December, 2018 and filed on 04th December, 2018, the 1st Applicant proposed that 0.4 ha of the 5.2 ha of **Kisumu/Dago/65** be distributed for the benefit of the 7 daughters of Okumu Osir and the remaining portion measuring 4.8 ha be distributed for the benefit of their 10 brothers. Distribution for the benefit of the daughters was proposed as follows:

i. Monica Elizabeth Donde Ochieng	0.075 ha
ii. Truphosa Odongo Okong'o	0.075 ha
iii. Grace Akinyi Onyango	0.075 ha
iv. Zilpha Atieno Rao	0.075 ha
v. Agneta Abongo (deceased with no child)	Nil
vi. Ruth Akinyi	0.05 ha
vii. Family of Jennifer Ajuang (deceased)	0.05 ha

6. The objection was heard by way of viva voce evidence with both the 1st Applicant and the 3rd Respondent maintaining their respective proposed modes of distribution as stated hereinabove. Thereafter the parties dutifully filed written submission and the family tree of Okumu Osir.

Analysis and Determination

7. It is not disputed that Okumu Osir was survived by 4 wives and 17 children. The wives and some of the children are since deceased. His four houses comprised of the following heirs:

1st wife

PRISCILLA ATOO OKUMU (deceased)

Children

- 1) Njaga Okumu (deceased)
- 2) Edward Jobunga Okumu (deceased)
- 3) Dickson Odhiambo Okumu (deceased)

2nd wife

NEREAH MBATA OKUMU (deceased)

Children

- 1) John Amonyo (deceased)
- 2) Francis Odago Okumu (deceased)
- 3) Monica E.D. Ochieng
- 4) Trufosa Odongo Okongo
- 5) Zilpah Atieno Rao
- 6) Grace Akinyi Onyango Agneta Abongo (deceased)

3rd wife

Mary Owuor Okumu (deceased)

Children

- 1) Erastius Atinda
- 2) Barrack Otieno
- 3) Nicholas Odhiambo
- 4) Steven Miruka
- 5) Ruth Akinyi

4th wife

Christabel Owade Okumu (deceased)

Children

- 1) Jagero Okumu (deceased)
- 2) Jennifer Ajuang (deceased)

8. The issue in dispute is the determination of the shares to be allocated to the heirs in property known as **Kisumu/Dago/65** measuring about 5.2 ha.

9. At this point in time, the widows of Okumu Osir are deceased and the law applicable to distribution of the disputed asset is Section 38 of the Law of Succession Cap 160 Laws of Kenya (**the Act**) which provides as follows:

38. Where 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.(Emphasis added)

10. The parties herein are in agreement that a strict application of Section 38 of **the Act** would mean that families of Okumu Osir's children who are themselves deceased might not benefit from the deceased's estate. The parties are similarly in agreement that the spouses and grandchildren of Okumu Osir's children who are deceased are entitled to the respective shares of their fathers and mothers.

11. In the persuasive decision in the case of **Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR**, Musyoka J stated as follows: -

“.....grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

12. The foregoing in my considered view applies to spouses who similarly inherit indirectly through their spouses, the children of the deceased.

13. One thing that stands out prominently in this cause is that the Respondents have not made an equal proposal for the daughters of Okumu

Osir whereas some have not at all been provided for. It is evident from the Respondents' proposal that it is skewed in favour of the sons, daughters in law and grandchildren of the Okumu Osir's to the disadvantage of his own daughters who are lawfully entitled to an equal share with their brothers.

14. The proposal by the Respondents leaves no doubt in the mind of the court that they are acting under the fallacious patriarchal family tree which excluded daughters and any one claiming under them from inheriting from their fathers. 15. Today, it will be pretentious for any person to say or act ignorantly of the fact that discrimination of any person on the basis of gender or status is prohibited under the Constitution of Kenya, 2010, because; other than the existence of abundantly clear provisions of the Constitution, the chain of judicial decisions on discrimination on the basis of gender or status are equally clear. (See **Rono v Rono & Another, 2008 1 KLR (G & F) page 803; Douglas Njuguna Muigai v John Bosco Maina Kariuki & another [2014] eKLR; Mwongera Mugambi Rinturi & another v Josphine Kaarika & 2 others [2015] eKLR; Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR and Joyce Kabiti M' Turuchu v David M' Ntiritu Kiambi [2016] eKLR).**

16. Having said that, I find and hold that none of the 17 children of Okumu Osir, ranks in a higher level in priority to the others notwithstanding their sex or gender. Similarly, none of the daughters in law and grandchildren of Okumu Osir ranks on a higher level of priority to his daughters.

17. A simple arithmetic of subdivision of 5.2 ha into 17 portions representing the number of children of Okumu Osir demonstrates that each of them is entitled to an equal share of 0.305 ha. The foregoing notwithstanding, the 6 daughters of Okumu Osir who are jointly entitled to 1.8 ha are only asking for 0.4 ha thereby relinquishing 1.4 ha of their birth right. Truly, the daughters' claim for 0.4 ha of the entire estate is reasonable and their desire that their portion includes **Nerea Mbaja Okumu** homestead is sensible and ought to be appreciated by the other family members.

18. Having said that, I conclude that there is overwhelming evidence in support of the applicants' case for 0.4 ha of **Kisumu/Dago/65**.

19. In the result, it is hereby ordered **THAT**:

- 1. The Respondents/Administrators and the Applicants identify 0.4 ha of Kisumu/Dago/65 which shall comprise respective portions of each of the daughters of Okumu Osir and which portions shall include the homestead of Nerea Mbaja Okumu**
- 2. The remaining portion measuring 4.8 ha, unless otherwise agreed shall be distributed equally to the 10 sons of Okumu Osir and where deceased, their spouses and children, not as separate entities as proposed by the Respondents/Administrators but as a joint entity each share representing each son**
- 3. The Respondents/Administrators are directed to file the schedule of mode of distribution of the respective shares representing each of the 17 children of the Okumu Osir within 30 days from the date hereof with a view to take a date for confirmation**
- 4. The parties should take note that in the event of failure to reach a settlement, this court will not hesitate to distribute the estate in terms of Section 38 of the Law of Succession Cap 160 Laws of Kenya ((the Act) or as it may deem fit in the circumstances**

DATED AND DELIVERED IN KISUMU THIS 03rd DAY OF October 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

Petitioner - Mr Bagada/Nyanga

Objector - Mr Sala