REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 805 OF 2009

IN THE MATTER OF THE ESTATE OF AKUN ODENY alias AKUNI ODENYI (DECEASED)

RULING

1. On 31st August 2016 Sitati J. delivered a judgement herein, where the penultimate paragraph read as follows:

> *"In conclusion and noting that the available estate for distribution is 16 acres the same shall be shared in the ratio of 4:5 between the first and second houses so that the first house with 4 units is entitled to 7.5 acres while the second house with 5 units is entitled to 8.9 acres."*

2. For reasons that are not yet clear to me from the record, the advocates on record came up with a consent expressed in a letter dated 30th May 2017, signed by counsel for both sides, and filed herein on even date. That consent was adopted as an order of the court by the Deputy Registrar on the same date it was filed. It reads as follows:

> *"BY CONSENT*
>
> *1. A certificate of confirmed Grant be issued in the names of the two administrators.*
>
> *2. The estate comprised in land parcel BUTSOTSO/SHIKOTI/201 shared as follows:-*
>
> > *a. JONES OHURU OTENYI ….. 7.1 ACRES (to hold in trust for himself, Peter Ondiek Akun, Maria Salome Otieno and Joseph Odeny).*
> >
> > *b. TIMINAH MADANGA AKUNGU ….8.9 acres (to hold for himself , john Lango Akuni, Lisiba Ayuma Abulimo, Anna Rosa Daudi and Grace Vihenda Odemu)."*

3. There is also a document from the Regional Survey Office, Kakamega, dated 18th February 2019, saying that the land had been surveyed and the owners identified and the extent of their land established. The matter was mentioned on 10th April 2019 for the parties to confirm the terms of the surveyor's report. Those in attendance confirmed their agreement with the report. Jones Ohuru Otenyi chose to stay away.

4. The court had pronounced itself on the distribution of the property in the judgement of 31st August 2016. The property was to be distributed as between the two houses of the deceased in the ratios worked out by the court. It would appear that there were attempts by the parties to fiddle with that judgment and to walk away from it or to circumvent it, by filing a consent to change its terms and by getting a surveyor to distribute the property based on occupation on the ground rather than as per the judgement of the court.

5. A judgement of a court can only be changed by the same court on review. I have ploughed through the material before me, and I have not seen any application for review of the judgement of Sitati J. I have gone through the minutes of the Judges who handled the matter after 31st August 2016. I have not seen any orders reviewing that judgement. The consent dated 30th May 2017 was not endorsed by the Judge. It could only be binding if endorsed by the Judge, as such endorsement can only be by a judicial officer with power to make the orders that are the purport of the consent. An endorsement by the Judge would have been equivalent to a review of the judgement. Such a consent could not validly be endorsed through a recording by the Deputy Registrar.

6. The survey report that the parties purported to use as a basis for contradicting the judgement of 31st August 2016 had not been ordered by any Judge. It appears to have been procured by the parties *suo moto*. The said report cannot possibly be superior to the judgement of the court.

7. The judgement of 31st August 2016 was binding to the parties. The only way to deal with where any one was aggrieved by it would to challenge it on appeal at the Court of Appeal. The machinations by the parties herein must surely come to naught.

8. The orders that Sitati J. made in that judgement were founded on section 40 of the Law of Succession Act, Cap 160, Laws of Kenya, for the deceased had died a polygamist. Section 40 says as follows:

> "*40. Where intestate was polygamous*
>
> *(1) 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 estate 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.*
>
> *(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."*

9. The judgement was in line with section 40(1). The court considered the children in each house in working out the ratio of distribution. What the administrators should have done after that is to distribute the property in terms of section 40(2), that is distribution of the assets according to sections 35 to 38 of the Law of Succession Act, depending on how each individual house was constituted.

10. The first house comprised of children only, for the first wife was deceased, so the applicable mode of distribution of the acres due to that house is that prescribed in section 38, which applies to situations where the deceased was survived by children but no spouse. The effect of that is that the acres or hectares due to the first house should be shared equally between Peter Ondiek Akun, Jones Ohuru Otenyi, Maria Atieno Salome and Kelly Odeny s/o late Julius Akun. The provision says as follows:

> "*38. 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 second house, there is a surviving spouse and children. The acres allocated to that house by Sitati J. should be distributed in accordance with the scheme of distribution set out in section 35. The surviving spouse takes the share for that house during life interest, and upon determination of life interest the property would be shared equally by the children in that house according to section 35(5). That should mean that the acres or hectares assigned to the second house by the judgement should devolve upon Timina Madanga, during her lifetime, and thereafter to John Lango, Risper Ayuma Ooko, Grace Vihenda and Anna Rosa Daudi, in equal shares. Section 35(1) says:

> "*35. Where intestate has left one surviving spouse and child or children*
>
> *(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—*
>
> > *(a) the personal and household effects of the deceased absolutely; and*
> >
> > *(b) a life interest in the whole residue of the net intestate estate:*
>
> *Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person*
>
> *(2)* …
>
> *(3)* …
>
> *(4)* …
>
> *(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."*

12. What the Deputy Registrar should have done is to issue the administrators with a certificate of confirmation of grant in the terms stated in the judgment as summarized in paragraphs 10 and 11 of this ruling. All the proceedings and maneuvers that the parties engaged in after 31st August 2016 were designed to defeat the judgement. They are null and void. Let the Deputy Registrar act in terms of paragraphs 10 and 11 of this ruling. Any party aggrieved by the orders made herein has the liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

13. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF NOVEMBER, 2019

W. MUSYOKA

JUDGE