



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 28 OF 2018

(CORAM: HON. R.E. ABURILI - J)

JENIFA ACHIENG OKOTH.....APPELLANT

VERSUS

DORSILA AKELO OKOTH.....RESPONDENT

(An Appeal from Ruling and Order of Bondo PM's Court in Succession Cause No. 114 of 2016 delivered on the 12.10.2018 before Hon. M. Obiero, Principal Magistrate)

JUDGMENT

1. This Appeal arises from the Ruling and order of Hon. M. Obiero, PM made on 12/10/2018 in Bondo PM Succession Cause No. 114/2016 in the matter of the **Estate of James Ouma Okoth (deceased) vs. Jenifa Achieng Okoth (Administrator and Dorsilla Okoth (Objector))**.

The history of the dispute is that the appellant Jenifer Achieng Okoth is the biological mother of the deceased James Ouma Okoth. She lodged a petition for grant of letters of Administration Intestate in her capacity as mother of the deceased who died intestate on 18/8/1993 but was not survived by any widow or child. He left the following assets registered in his name as the absolute proprietor.

(1) North Sakwa/Ajigo/470

(2) North Sakwa/Ajigo/480

(3) North Sakwa/Ajigo/526

2. On 12/7/2016 the Respondent herein **Dorsila Akello Okoth** lodged an objection in respect of the Petition of grant. The matter proceeded by way of viva voce evidence and vide a Ruling rendered on 3/4/2017, the trial court held that the Objector being the step mother to the deceased could not be a beneficiary of the estate. The objector was dissatisfied with the ruling of 3/4/2017 and appealed to this court vide Siaya HCCA No. 6 of 2017.

3. Vide a judgment of this court made on 20/4/2018 (Hon. J.A. Makau J) directed that the following issues be determined by the trial court:

(1) Registration of North Sakwa/Ajigo/470.

(2) The land being held in customary trust of all family members.

(3) Lack of grant of representation in respect of the estate of Elijah and Harbat Okoth Obondo.

(4) Allegation of lack of property bonafide passed to any of the sons of Harbat Okoth Bonyo.

4. The learned Judge appreciated the seriousness of the issues raised that touched on the fibre of the family values and directed the Petitioner to file an application for distribution of the estate within 60 days and the Respondent to file any protests thereto.

5. With the above directive from the superior court, the Petitioner (now appellant) filed summons for confirmation of a grant and an affidavit of distribution sworn on 23/5/2018. The Respondent filed a counter affidavit on distribution of the Estate of the deceased sworn on 17/8/2018.

6. Vide a Ruling dated 12/10/2018 the trial court held that **the Respondent herein was entitled to the estate of the deceased as a beneficiary**

and Dependant. The trial court also held that (material) *the Respondent had been cultivating the Parcel No. N.S/A/470 for over 40 years with clearly demarcated boundaries and that the history of the parcels demonstrated that the same were part of family land before the same were given to the deceased.*

7. That Ruling is what provoked this Appeal by the Petitioner.

8. The Appellant's Memorandum of Appeal sets out ten grounds of appeal namely: -

(1) The Honourable Magistrate erred in law and in fact for finding the Respondent was a dependant of the deceased;

(2) The Honourable Magistrate erred in law and in fact for finding that the Respondent was entitled to a share in the estate of the deceased;

(3) The Honourable Magistrate erred in law and in fact for failing to find that that Respondent was not a dependent and or was not maintained by the deceased immediately prior to his death;

(4) The Honourable Magistrate erred in law and in fact for failing to appreciate the evidence on record did not meet the threshold required in determining dependency to the deceased; immediately prior to his death;

(5) The Honourable Magistrate erred in law and in fact for failing to find that the parcel of Land North Sakwa/Ajigo/470 was not family land in respect to the Respondent but was land bequeathed to the deceased by the grandfather, making the deceased the owner of the three parcels bequeathed North Sakwa/Ajigo/470, North Sakwa/Ajigo/480, North Sakwa/Ajigo/526;

(6) The Honourable Magistrate erred in law and in fact in failing to find the Respondent's cultivation of the parcel North Sakwa/Ajigo/470 was not the required legal proof of dependency to the deceased estate;

(7) The Honourable magistrate erred in law and in fact in exercising his discretion arbitrarily in determine the reasonable portion due to the Respondent in the parcel of land known as North Sakwa/Ajigo/470, notwithstanding that the Respondent was not a dependant to the deceased;

(8) The Honourable Magistrate erred in fact and law in disregarding the evidence on record and proceeding to assign a portion of the parcel North Sakwa/Ajigo/470 to the Respondent on the basis that the same was family land;

(9) The Honourable Magistrate erred in fact and law for failing to appreciate the provisions of Section 39 of the Law of Succession Act in respect to who is a dependant and further that a dependant ought to be maintained by the Deceased immediately prior to the date of his death;

(10) The Honourable Magistrate erred in fact and in law by failing to consider, evaluate and give due weight to the Appellant's submissions which contended various aspects of position advanced by the Respondent and now taken up by court in its ruling thereby disregarding the appellant's case.

9. The appeal was argued by way of written submissions and oral highlights in court.

10. The appellant's written submissions dated 6/4/2019 were replicated in the oral submissions whereas the Respondents counsel's written submissions dated 19th March 2019 were adopted as canvassing the opposing to the appeal.

11. Revisiting the evidence before the trial court as required by *Section 78 of the Civil Procedure Act* and espoused in *Sielle v Associated Motor Boat Company Ltd.[1968] EA 123*, the *viva voce* evidence taken on 8.2.2017 in respect of the objection to grant of letters of Administration in favour of the appellant Petitioner was as follows:

12. PW1 (Objector) **Dorsila Okello Okoth** testified that she knew the Petitioner as her co-wife. That their husband (deceased) was **Herbert Okoth** who died in 2012 November. PW1 stated that **James Ouma Okoth** the deceased whose estate was subject of the Succession proceedings was the Petitioner's son. She further testified that prior to the demise of her husband, she was living on the part of parcel **No. North Sakwa/Ajigo//538** where her husband was buried and it measures about 3 acres. She also stated that she carried out farming activities on **North Sakwa/Ajigo//470** which was registered in the names of **James Ouma Okoth**, the deceased son of the Petitioner. She stated that her claim was for parcel **No(s) 470 and 538**. She stated that Parcel **No North Sakwa/Ajigo/470** which measures about 6 acres, she was claiming for half a share which is 3 acres since the parcel was given to the deceased by the grandmother and that the parcels of land originally belonged to the child's grandfather, her husband who owned 5 parcels of land registered in his own names but that parcel **No. North Sakwa/Ajigo/470** was not one them, and that with respect to the other parcels of land, he sold them to other people.

13. In cross examination by the Petitioner, the Objector maintained that she had been cultivating parcel **No. North Sakwa/Ajigo/470**. Further, that she was given 3 parcels of land and that her son Kennedy sold 2½ acres.

14. PW2 **Penina Oduol** gave evidence on oath and stated that she knew the Petitioner and Objector as they all lived in the same village and that the Petitioner and Objector had been ploughing the same land for a long time which land belongs to their late husband.

15. PW3 **Carolyn Achieng** testified for the Objector and stated that she knew the petitioner as her step mother whereas the Objector was her mother. She stated that the Petitioner and Objector had been ploughing the same parcel of land without having any dispute. She stated

that the said parcel belonged to her mother and that her father died in 2010. In cross examination by the Petitioner, she stated that she was aware that the Petitioner had been willing to give to her mother a portion of land.

16. The Petitioner **Jenifa Achieng Okoth** testified as DW1 and recalled that she knew **James Ouma Okoth**, her son who died in 1993 when he was 20 years old, unmarried and childless. She acknowledged that the Objector was her co-wife and that they live in the same home. Their husband is deceased. She stated that parcel No. **North Sakwa/Ajigo/470** is registered in the name of **James Ouma Okoth** her deceased son as it was given to him by his grandfather. She stated that the Objector is not entitled to the said portion of land as she has her own parcels of land and that her sons too have their own parcels of land.

17. In cross-examination by the Objector, the Petitioner stated that the parcel of land in dispute is **North Sakwa/Ajigo/527** not **North Sakwa/Ajigo/538** nor **North Sakwa/Ajigo/470**. She maintained that her late son was bequeathed the land by his grandfather.

18. DW2 **George Richard Otieno Obonyo** testified that the Petitioner was his sister inlaw and so was the Objector as both were wives of his late brother **Herbert Okoth**. He stated that the deceased **James Ouma** who died in 1993 was the son to the Petitioner. He stated that his late father **Elijah Obonyo** had a very big parcel of land so during adjudication he subdivided it among his sons and grandchildren and to **James Ouma (now deceased)** he gave three parcels being **North Sakwa/Ajigo/470**, **North Sakwa/Ajigo/48** and **North Sakwa/Ajigo/526**. He stated that at the demise of **James Ouma**, he was not married and that the Objector sold the land that was given to her son Omollo and remained with one parcel only.

19. That when the Petitioner wanted to inherit her son's land, the Objector refused and filed the objection. The issue was discussed at family level but the Objector rejected the findings of the family.

20. In cross-examination by the Objector, DW3 reiterated his evidence in chief and added that the Objector sold her parcels Nos **North Sakwa/Ajigo/476**, **North Sakwa/Ajigo/527** and **North Sakwa/Ajigo/534** to other people. He denied taking any parcel of land from the Objector. He stated that she sold her land to other people and that both her and the Petitioner were living on parcel NO. **North Sakwa/Ajigo/583**.

21. In his ruling dated 3.4.2017 the trial court cited **Section 39(1) of the Law of Succession Act** and determined the sole issue which was whether the Objector was the dependant of the deceased **James Ouma Okoth**. He found the answer in the negative and dismissed the objection and ordered that a grant of letters of administration intestate do issue in favour of the Petitioner. It was that ruling which gave rise to Siaya **HCCA No. 6 of 2017**. In the said appeal, the learned J.A. Makau J allowed the appeal partially. He however, ordered that the Respondent to remain the only administrator of the deceased's estate. He also ordered the Respondent to file and serve upon the Appellant her scheme of mode of distribution within 60 days of the date of judgment 20/4/2018 for her response. He also remitted the matter back to the trial court for hearing and determination of the issues on the mode of distribution. Each party was to bear their own costs.

22. In arriving at the above decision, the learned Judge considered the fact that there were serious issues raised regarding trusteeship on the disputed property. The gist of the Respondent's objection dated 13/7/2016 was that the suit land was family property and that she is entitled to share the estate of the deceased, yet the Petitioner had not involved her as the first wife. She wanted the petition to be set aside so that the whole family members who are bonafide beneficiaries of the estate be involved and enlisted.

23. When the matter was remitted back to the trial court for rehearing and reconsideration of the issues raised by Hon. J.A. Makau J, the trial magistrate reversed his earlier decision and found that the Objector had been cultivating a part of land parcel **North Sakwa/Ajigo/470** for over 40 years hence she was a dependent of the deceased **James Ouma Okoth** and as such, she was entitled to a share equivalent to $\frac{1}{2}$ of the said parcel. He found that the history revealed that the parcels of land subject of succession proceedings were part of the family land before the same were given to the deceased. With regard to the other parcels of land **North Sakwa/Ajigo/480** and **North Sakwa/Ajigo/526**, he ordered that the same should be registered in the name of the Petitioner.

24. In their submissions, counsel for the appellant maintained that the Respondent was not the dependant of the deceased as stipulated **in Section 39 of the Law of Succession Act**. Further, that the Objector never mentioned who the family members and their interests in the property were. She relied on the Chief's letter dated 13/4/2016 which identified the appellant herein as the sole survivor and beneficiary of the deceased's estate. Counsel maintained that there was no evidence to demonstrate that the Objector was being maintained by the deceased prior to his death. He submitted that there was no evidence that the respondent was cultivating Parcel **North Sakwa/Ajigo/470** as the land was bequeathed to the deceased while he was still a minor and that the Respondent's minor son was also bequeathed 3 parcels of land hence the Respondent cannot claim a share in the appellant's son land.

25. Counsel emphasized that the husband to the Petitioner and Respondent was alive when his father bequeathed his land to his grandchildren hence the parcels of land in dispute was a *gift inter vivos* to the deceased James Ouma Okoth by his late grandfather and that as such, the issue of trusteeship does not arise. Counsel also argued that the parcels of land in issue were first registration hence they are not subject of redistribution.

26. Counsel submitted that the Objector did not even name the family members on whose behalf she was claiming the land, as her children who are of age did not give consent for her to pursue the Estate of the deceased on their behalf.

27. Counsel also submitted that the trial court did not determine the issues framed by the High Court in HCCA 6/2017 and instead narrowed down the issue to distribution of the estate.

28. He contended that no boundaries were proved nor cultivation by the Objector hence the court should not have exercised discretion in the absence of proof, to share out parcel No. **North Sakwa/Ajigo/470** equally between the appellant and the Respondent, which sharing denied the Appellant her right to the estate.

29. Reliance was placed on ***Re estate of M'Muthamia Mwendwa (deceased)[2016]eKLR*** and a submission made that mere relationship was not sufficient and that proof of dependency was key. Counsel urged the court to allow the appeal and set aside the order giving a portion of parcel ***North Sakwa/Ajigo/470*** to the Respondent.

30. In opposition to the appeal, the Respondent's counsel Mr. Ochanyo relied wholly on the Respondent's written submissions filed on 19/3/2019 and added that the trial court was right in distributing the parcel of land as it did as the decision was informed by the advisory opinion made by Hon. J.A. Makau J in ***HCCA 6/2017***. He urged this court to uphold the decision of the trial court.

31. In the written submissions dated 19/3/2019 the Respondent's counsel argued that the property in question was given in trust by virtue of the age of James Ouma Okoth who was a minor when his grandfather registered the land in his (minor's) names and that both the Appellant and the Respondent utilized that land ***North Sakwa/Ajigo/./A/470*** for over 40 years hence there subsisted a customary trust in favour of family members. He also emphasized that beacons are clearly evident on the ground.

32. Secondly, counsel submitted that the subject parcel of land was initially held by Elijah and Sarah Obonyo the father and mother in-law of the disputants herein and subsequently by the late husband to the disputants., Mr. Habert Okoth Obonyo and that circumstances under which they were inequitably registered in the names of sons of the disputants are unclear hence the subject land was subject to a customary trust as there was no proper succession proceedings bequeathing the subject property to the deceased James Ouma Okoth. Counsel relied on ***Section 45 of the Law of Succession Act*** and argued that in the instant case, there was no grant issued in respect of the estate of ***Elijah, Habart Okoth Obonyo and James Ouma Okoth*** (all deceased) and that a minor cannot own property and purport to transfer or transmit the same.

33. Thirdly, counsel argued that the decision in ***HCCA 6/2017*** is what informed the ruling subject of this appeal, it was argued that the High Court faulted the trial court for relying on ***Section 39 of the Law of Succession Act*** in determining who was entitled to the estate of James Ouma Okoth and that this court cannot reverse that decision.

34. Counsel submitted that the Respondent was only interested in parcel No. ***North Sakwa/Ajigo/470*** which she had tilled for over 40 years uninterrupted. He urged the court to dismiss the appeal and uphold the decision of the trial court which was informed by the decision by J.A. Makau J in ***HCCA 6/2017***.

DETERMINATION

35. I have given careful consideration to all the evidence adduced before the trial court on the question of distribution of land Parcel ***No. North Sakwa/Ajigo/470***. I have also considered the rival submissions by the respective parties' advocates and the authorities relied on.

36. In making my determination in this matter, I must first and foremost set out certain undisputed facts which are: That the deceased was the son of the Petitioner/Appellant and that the Appellant and Respondent are co-wives whose husband is the late Habart Okoth Obonyo, who is also the father to the deceased James Ouma Okoth.

37. It is also not in dispute that the land Parcel No. ***N/Sakwa/Ajigo/470*** which is in dispute is registered in the name of the deceased James Ouma Okoth as shown by the Certificate of official search dated 12/5/2016 and that the deceased became the registered proprietor thereof on 9/10/1978, and so are the other parcels of land ***North Sakwa/Ajigo/480*** and ***North Sakwa/Ajigo/526***.

38. It is further not in dispute that James Ouma Okoth died on 18.8.1993 and according to the Death Certificate No 0450691 at page 10 of the record of appeal, he was aged 34 years old and a peasant farmer meaning he was born in 1959 and therefore as at the time he became registered as proprietor of the said parcels of land, he was aged 19 years old.

39. From the evidence adduced by the Appellant and the Respondent in the lower court, and as per the Green card, the deceased received the three parcels of land as a gift from his late grandfather and so did the Objector's son Kennedy Omollo Okoth who also received Parcel No. 5334, 476 and 527 while he was still a minor. Therefore, although counsel for the Objector claims that a minor cannot own property, that argument is skewed and has no legal or factual basis at all. Similarly, a minor's estate can be subject to succession proceedings.

40. The Objector maintains that she is entitled to a share of parcel No. ***North Sakwa/Ajigo/470*** but she does not lay claim on the other two parcels registered in the name of the deceased James Ouma Okoth. She is however, non-responsive as far as the three parcels of land ***North Sakwa/Ajigo/534, North Sakwa/Ajigo/476*** and ***North Sakwa/Ajigo/527*** registered in her son's names are concerned.

41. She further claims that she had been cultivating the said parcel ***North Sakwa/Ajigo/470*** for over 40 years and that boundaries are evidence but she did not avail any Survey map to show the current status of the said parcel of land. ***That notwithstanding, she claims that she is a dependant of the appellant's son because the said land was registered in the deceased's name to hold it in trust for the family.***

42. All parties are in agreement that the deceased's father, Habart Obonyo was alive when his father (Habart's) bequeathed the respective parcels of land to his grandchildren - Kennedy Omollo Okoth and James Ouma Okoth.

43. Therefore, the main issue for determination is whether the parcel of land subject of the succession proceedings and this appeal was registered in the name of James Ouma Okoth to hold it in trust for the family and whether the said parcels of land are gifts inter vivos therefore not available for distribution to the family of Obonyo who also got their share of his land.

44. I must however point out that the question of inequality in the manner the parcels of land were given to the grandson - Kennedy and James does not arise as was submitted by counsel for the Objector who was insinuating some form of fraud as there was no allegations by way of any evidence, of any fraud. Counsel cannot be allowed to adduce evidence from the bar by way of submissions. I would proceed and expunge any evidence introduced by way of submissions, as submissions are not evidence but arguments.

45. Having said so, I now come to the question of the land parcel No. **North Sakwa/Ajigo/ 470**. In my humble view, this land and all the other parcels registered in the name of the deceased James Ouma Okoth and Kenneth Omollo Okoth are *gifts inter vivos* and therefore any person claiming that a customary trust was established by virtue of usage/cultivation for a period exceeding 40 years uninterrupted as stated by the trial court and submitted by the objector's counsel, must file suit before the court of competent jurisdictions namely, the Environment and Land Court (ELC) to determine the existence of those rights namely, customary trust rights and or a claim for adverse possession. It is now an established principle of law that questions of customary trusts or adverse possession are not to be determined in succession proceedings.

46. In the instant case, the trial court, in my humble view mixed issues of dependency and customary trusts. Dependency is well spelt out in Section 39 of the Law of Succession Act and in this case, it is clear that the Objector, not being one of those persons listed as a dependant under the Act, as the land was registered in the appellant's son's names, the same way the objector's son Kennedy Omollo was registered as proprietor of 3 parcels of land each gifted by their grandfather, the objector cannot turn around and claim dependency from the deceased James Ouma Okoth. ***I find and hold that the objector herein was not a dependant of the deceased James Ouma Okoth.***

47. In my humble view, the appellant is the only person who is entitled to petition for a grant and to administer the estate of the deceased James Ouma Okoth and if any other person has any legitimate claim to the said estate by way of a trust or occupation of the disputed parcel of land, then they must seek redress on account of customary trust and or adverse possession before the appropriate court with competent jurisdiction to make such orders, and not to stifle the petitioner's efforts to obtain a grant and or administer the estate of her deceased son.

48. The issue of customary trust or adverse possession is an issue that can only be determined by the Environment and Land Court (ELC), a court of equal status with the High Court, and not this court or even the Magistrates' court in its exercise of jurisdiction in Succession proceedings.

49. What, in essence, the Objector/Respondent was claiming was occupation and ownership of the suit parcel and not dependency which was not proved as by law established.

50. The **Law of Succession Act** does not confer on the Succession court the power to determine ownership of a parcel to determine ownership of a parcel of kind of make a declaration or determination that a trust exists.

51. It follows that where there are third parties having a claim of ownership against the deceased as is in this case then that falls under the exclusive jurisdiction of the Environment and Land Court. **See in the matter of the Estate of Peter Igamba Njoroge, Succession No. 432/2009 Vs. R cited in Succession Cause No. 488/2010 in Re Estate of the Late Jonathan Kinyua Waititu (deceased)[2017]eKLR** where it was held.

“Secondly, I do not think that those succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an estate by third parties. In this case, the objectors ought to institute separate proceedings to articulate or vindicate - their claims / rights. I therefore do hereby held that this court has no jurisdiction to determine the claim of trust to give any relief in respect thereof.”

52. Similarly in **HC Succession Cause No. 864 of 1996[2015]eKLR**, the High Court held that a Succession Court has no jurisdiction to resolve a claim brought against the estate /the proprietary interest on land based on an alleged trust and the appropriate forum is the Land and Environment court. The court stated:

“The mandate of the Probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the Probate court being incompetent to deal with such issues but rather than the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

53. In other words, the Succession court is not the appropriate forum to handle issues regarding the distribution of the free estate of the estate.

54. Therefore, the Succession court being devoid of the mandate to dig deeper into the issues of ownership or title to land adverse possession or a resulting customary trust in land against the estate of the deceased, an Objector ought to file a case before an Environment and Land Court.

55. In such a case, in the event that the relevant court finds that the land belongs to the objector and not the estate, then such property is excluded from the schedule of the estate properties. However, should the court find that the property forms part of the estate, then the court will be moved to distribute it or amend the list of assets.

56. **Rule 42(2) of the Probate and Administration Rules** provides:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may, prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by Order appropriate and set aside the particular share or estate or the property comprising it to abide determination of the question arising in proceedings under Order XXXVI Rule 1 of the CPR and may thereupon, subject to the proviso to Section 71(2) of the Act, proceed to confirm the grant.”

57. Thus, where there is a question or issue with the treatment for properties with a claim on trust and included in the estate properties, the succession court is empowered to, before confirmation of the grant, to remove the property in contest from the schedule of assets and have the same determined separately as to its proprietorship in the Environment and Land Court. If the property is found to be part of the estate of the deceased, the same is restored back to the schedule of assets for distribution.

58. In **Re Estate of Francis Peter Njuguna Rungi (deceased) (2016) eKLR. Succession 1566/2013, Musyoka J held:**

“My understanding of this is that where a claim is brought by anyone, whether a beneficiary or survivor of the deceased or even a third party, that he has an interest of one sort or other in estate property, such property shall be set aside or be removed from the schedule of assets to await determination of the question as to the interest of the claimant. Should it be established that the property or part thereof belongs to the claimant then the asset or part thereof remains removed from the schedule. However, should it be established that the claimant had no interest of any sort in it; the property is restored to the schedule and thereafter distributed under section 71 of the Act... The applicant is claiming exclusive ownership of Plot No. 1 –310 Mathare North. That is a matter that this court ought not to venture into determining. That is the exclusive province of the Environment and Land Court. The role of the probate court is to distribute those assets that are indisputably the deceased”

59. For the above reasons, I hold and find that this appeal succeeds to the extent that the objector is not a dependant of the deceased James Ouma Okoth and that a grant shall issue and be confirmed in favour of the petitioner Jenifa Achieng Okoth with respect to parcels of land Nos. **North Sakwa/Ajigo/480 and North Sakwa/Ajigo/526**. However, Parcel No. **Sakwa/Ajigo/470** which has a dispute over alleged customary trust and occupation is hereby removed from **the schedule of assets of the deceased’s estate to await determination of the question as to the interest of the claimant**.

60. For avoidance of doubt, and in accordance with Rule 42(1) of the Probate and Administration Rules, the above **No. Sakwa/Ajigo/470** shall be left out of the schedule of assets of the estate of the deceased James Ouma Okoth until the issue of customary trust and or adverse possession or occupation of the said portion of land by the objector is resolved by the Environment and Land Court. Such proceedings if any shall be commenced within six months from the date hereof in default, the appellant petitioner to apply to this court for restoration of the parcel of land **No. Sakwa/Ajigo/470** to the schedule of assets.

61. As parties are close family members, I order that each party shall bear their own costs of this appeal and of the Succession Cause in the trial court.

Dated, signed and delivered at Siaya this 5th day of November, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Jenifa Achieng Okoth Appellant

Mr. Ochanyo Advocate h/b for Ms Owesi for the Respondent

CA: Winnie and Modestar