



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 1274 OF 2015

IN THE MATTER OF THE ESTATE OF OYOSI OYUOYA alias OYOSI OYWOYA (DECEASED)

BETWEEN

TITUS ODWARI ODIWA.....1ST ADMINISTRATOR

MARIKO OLWAL OGAL.....2ND ADMINISTRATOR

MAURICE OTIENO NYANJONG'.....3RD ADMINISTRATOR

AND

RICHARD NONDO KEKE.....1ST OBJECTOR

SABINA AKOTH ONDIWA.....2ND OBJECTOR

JULIUS ABUTO AMOLLO.....3RD OBJECTOR

AND

DANIEL MOSES OOKO OGUTA.....INTERESTED PARTY

JUDGEMENT

1. **OYOSI OYUOYA alias OYOSI OYWOYA (deceased)** died sometimes on 23rd May, 1974.

2. Deceased was polygamous and had 6 wives.

1) Mariam Mbinya

2) Salome Ochindo

3) Maritha Mwago

4) Omoro Maruwa

5) Leba

6) Oloo

3. Whereas Salome Ochindo; Maritha Mwago, Omoro Maruwa and Leba were blessed with several children, Mariam Mbinya and Oloo were not.

4. All the widows and children of the deceased are deceased. The dispute herein is between the grandchildren of the deceased who do not agree concerning the distribution of the estate of the deceased which comprises of the following assets.

1) KISUMU/GEM-RAE/14

2) KISUMU/GEM-RAE/40

3) NORTH NYAKACH/GEM-RAE/74

4) KISUMU/GEM-RAE/103

5. By a summons for confirmation dated and filed on 08th July, 2019, **TITUS ODWARI ODIWA and MARIKO OLWAL OGAL (1st and 2nd administrators respectively)** applied for confirmation of the grant and proposed a mode of distribution which the Objectors opposed.

6. At the hearing, it was revealed that the deceased had about 96 grandchildren. The Administrators and the Objectors do agree on the mode of distribution with the 1st Objector proposing to retain the whole of **NORTH NYAKACH/GEM-RAE/74**.

7. At the hearing, it was also revealed that some portions of the deceased's estate had been disposed off by sale to among others the interested party herein. It was also alleged that the 2nd Objector's father Joshua Oyosi had disposed off part of **KISUMU/GEM-RAE/14** and **KISUMU/GEM-RAE/40** to one Yusto Matamu.

Analysis and Determination

8. I have considered the evidence on record and I have deduced the following issues for determination:

1) **What right do purchasers have over deceased's estate**

2) **How should the estate be distributed**

What right do purchasers have over deceased's estate

9. Section 45 of the Law of Succession Act (*the Act*) provides as follows:

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

10. The Interested Party and other purchaser no doubt bought part of deceased's estate not from the deceased but from persons that did not have a grant of representation under the Act authorizing them deal with the property of the deceased. This position is reinforced by section 82(b) (ii) of *the Act* which provides that no immovable property shall be sold before confirmation of the grant.

11. The alleged sellers had no capacity to enter into sale agreements with the Interested Party or any other purchaser. The sellers are intermeddlers and could not pass a good title to the Interested Party or any other purchaser who are themselves also intermeddlers and this Court as a court of equity shall not aid them as they are at fault. (See **Elly Odhiambo Onyuka v Ayub Odhiambo Migwalla [2005] eKLR**).

How should the estate be distributed

12. **Section 40 of the Act** stipulates how the net intestate ought to devolve where the deceased was polygamous in the following terms: -

(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 39.

13. 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.”

14. The foregoing holding applies to this case in that the deceased's grandchildren can only inherit the shares that would have been inherited

by their parents, not as individuals but jointly as a household from where they would then distribute the shares among the children in each household.

15. In view of the foregoing, it is hereby ordered that:

1) The deceased's estate comprising of KISUMU/GEM-RAE/14; KISUMU/GEM-RAE/40; NORTH NYAKACH/GEM-RAE/74 and KISUMU/GEM-RAE/103 shall devolve in equal shares to his children

2) The deceased's grandchildren shall inherit the shares that would have been inherited by their deceased parents, not as individuals but jointly as a household from where they shall distribute according to the number of grandchildren in that household

3) This cause is hereby referred to a Court Annexed Mediator to assist the parties come up with an amicable mode of distribution

4) Mention on 10th February, 2020 to confirm if parties have reached a settlement

DELIVERED AND SIGNED THIS 5TH DAY OF DECEMBER 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant	- Amondi
1st administrator	- Present
2nd administrator	-Present
3rd Administrator	- N/A
1st Objector	-N/A
2nd Objector	-N/A
3rd Objector	- N/A
Interested Party	- N/A