



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 178 OF 2006

**IN THE MATTER OF THE ESTATE OF PAULO ODHIAMBO
INDUALI.....DECEASED**

AND

PROTUS ABWIRE ODHIAMBO.....PETITIONER

VERSUS

JOSEPHAT OKELLO OJIAMBO.....OBJECTOR

RULING

1. Paul Odhiambo Induali died intestate on 28th October, 1999. Subsequently Protus Abwire Odhiambo (henceforth simply referred to as Protus) commenced Busia H. C. Succession Cause No. 178 of 2006.
2. In an affidavit in support of petition for letters of administration intestate (Form P&A5) sworn on 22nd November, 2006 he averred at paragraph 6 that the deceased died intestate and left him, Thadeus O. Odhiambo, Josephat Okello, Robert Abwire, Vitalis Oduor, Kenneth Ouma and Lambert Odhiambo surviving him. He indicated the assets of the deceased as L.R. No. Bukhayo/Matayos/846 and Bukhayo/Matayos/836. No liabilities were disclosed.
3. About two months later, the Objector/Protestor Josephat Okello Ojiambo (hereinafter simply referred to as Josephat) filed Succession Cause No. 16 of 2007 relating to the same estate. Through an affidavit (Form P&A5) sworn on 23rd January, 2007 in support of the petition, he averred that the survivors left behind by the deceased were himself, Jennipher A. Odhiambo, Anna Anyango, Mildred Akochi, Robert Wabwire and Caroline Auma. He listed the only asset as L.R. Bukhayo/Matayos/836 and indicated that there were no liabilities.
4. On 27th July, 2014 Tuiyott, J stood over Succession Cause No. 15 of 2007 generally and directed that the file be placed in Succession Cause No. 178 of 2006. From the conduct of the parties and their advocates it appears that the two files were merged under Succession Cause No. 178 of 2006. This matter has therefore proceeded as Succession Cause No. 178 of 2006.
5. Through the affidavits filed by the parties and the evidence adduced at the hearing of the protest it emerged that the deceased had three wives: Manea Odhiambo, Jennipher Atieno Odhiambo and Agnes Oduya. Of the three wives only Jennipher Atieno Odhiambo is alive. Merging the lists provided by Protus and Josephat, those left behind by the deceased are Protus Wabwire Odhiambo, Thaddeus O. Odhiambo, Vitalis Oduor, Jennipher Atieno Odhiambo, Josephat Ojiambo, Mildred A. Ojiambo, Anna A. Odhiambo, Caroline A. Odhiambo, the late Robert Wabwire, Lambert Odhiambo and Kenneth Ouma.

6. In a proposed distribution contained in his affidavit sworn on 11th February, 2013 in support of the summons for confirmation of grant, Protus wants to distribute the estate as follows:

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- a) Protus Abwire Odhiambo - 0.417 ha
- b) Kenneth Andrew Ouma - 0.400 ha
- c) Vitals Oduor Ojiambo - 0.612 ha
- d) Thadeus Ouma Ojiambo - 0.112 ha
- e) Lambert Makokha Ojiambo - 0.191 ha
- f) Vincent Paul Musumba - 0.780 ha

BUKHAYO/MATAYOS/836

- a) Josephat Okello - 0.767 ha
- b) Protus Abwire Odhiambo - 0.767 ha
- c) Petronila Kadogo Wabwire - 0.877 ha

7. On his part, Josephat through his affidavit sworn on 1st September, 2015 in protest against the confirmation of grant proposed that L.R. No. Bukhayo/Matayos/746 goes to the 1st and 3rd houses and L.R. No. Bukhayo/Matayos/836 be given to the 1st house. It is his case that the estate had been distributed by the deceased in that order. He averred that Vincent Paul Musumba who has been given a share of the estate by Protus is a stranger and is not entitled to a share of the estate.

8. In his oral testimony Protus told the court that his proposed distribution was in compliance with the decision of their deceased father who had fixed the boundaries a few months prior to his demise. Further, that his sisters have no objection to the proposed distribution. He also averred that Vincent Paul Musumba is a purchaser having bought a portion of Lambert's share in the estate.

9. I did request the parties to swear affidavits on the actual size of each of the two parcels of land. Protus' affidavit was sworn on 8th December, 2016 and that of Josephat was sworn on 7th December, 2016. They both agree that L.R. No. Bukhayo/Matayos/846 measures 3.6 hectares whereas L.R. No. Bukhayo/Matayos/836 measures 2.4 hectares.

10. The law governing distribution in a polygamous family is found in Section 40 of the Law of Succession Act, Cap 16. The law was further enunciated by Waki, JA in **Rono v Rono & another [2005] 1 KLR 538** when he stated that:

“More importantly, Section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in Section 3 of the Act as a “family unit comprising of a wife....and the children of that wife.” There is no discrimination of such children on account of their sex.”

11. Omolo, JA explained his understanding of Section 40 of the Law of Succession Act, Cap 160 as follows:

“My understanding of that section is that while the net intestate is to be distributed according to houses, each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of the children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.”

12. In the case at hand, the distribution proposed by Protus is not correct as it leaves out a surviving widow and daughters of the deceased. He has also inserted the name of a purchaser. The purchaser's interest can only be taken care of by whoever sold him the land.

13. On the other hand Josephat's proposal fails to take into cognizance the requirement of the law that each surviving widow and child be treated as a unit.

14. In the case at hand we have not been told about the marital status of the daughters of the deceased. They have also not renounced their rights to inherit from the estate of the deceased. No evidence has been placed before the Court to show that any of the beneficiaries should receive special treatment so as to receive a large share of the estate. Protus' claim that the deceased had distributed the estate prior to his demise was not backed by any evidence. He indeed admitted that even though the deceased had allegedly given him a share from L.R. No. Bukhayo/Matayos/836 he has not been able to use that share meaning that no boundaries had been established as he claimed. Had there been evidence that the deceased had indeed distributed his estate before his demise this Court would have taken that factor into account in distributing the estate.

15. The result is that each unit is entitled to an equal share. The total size of the two parcels is six hectares. Those entitled to benefit are

- a) Protus Wabwire Odhiambo,
- b) Thaddeus O. Odhiambo,
- c) Vitalis Oduor,
- d) Jennipher Atieno Odhiambo,
- e) Josephat Ojiambo,
- f) Mildred A. Ojiambo,
- g) Anna Odhiambo,
- h) Caroline A. Odhiambo,
- i) Petronila Kadogo Wabwire (wife to the deceased Robert Wabwire)
- j) Lambert Ojiambo, and
- k) Kenneth Ouma

16. Each beneficiary is therefore entitled to 0.545 hectares. Josephat has however proposed that the six members of the 2nd house namely Jennipher Atieno Odhiambo, Josephat Ojiambo, Mildred A. Ojiambo, Anna A. Odhiambo, Caroline A. Odhiambo and the wife of the deceased Robert Wabwire be given L.R. No. Bukhayo/Matayos/836 and nothing more. He proposes that Protus Wabwire Odhiambo, Thadeus O. Odhiambo, Vitalis Oduor, Lambert Odhiambo and Kenneth Ouma benefit from Bukhayo/Matayos/846.

17. Although this proposal will result in smaller pieces for Protus and his mother and siblings, I find this

to be a proposal that will ensure that the families live as they lived when the deceased was alive. It will also ensure peaceful enjoyment of the estate by the beneficiaries. In that regard, this court agrees and direct distribution as follows:

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- a) Protus Wabwire Odhiambo - 0.72 ha
- b) Thadeus O. Ojiambo - 0.72 ha
- c) Vitalis Oduor - 0.72 ha
- d) Lambert Odhiambo - 0.72 ha
- e) Kenneth Ouma - 0.72 ha

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- a) Jennipher Atieno Odhiambo - 0.4 ha
- b) Josephat Ojiambo - 0.4 ha
- c) Mildred O. Ojiambo - 0.4 ha
- d) Anna A.Odhiambo - 0.4 ha
- e) Caroline A. Odhiambo - 0.4 ha
- f) Petronila Kadogo Wabwire - 0.4 ha

18. Any renunciations by Mildred Ojiambo, Anna Odhiambo and Caroline Odhiambo will be to the benefit of the members of the 2nd house of Jennipher Atieno Odhiambo to be shared equally among the units in that house.

19. This being a family matter, each party will meet own costs.

Dated, signed and delivered at Busia this 16th day of February, 2017

W. KORIR,

JUDGE OF THE HIGH COURT