



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 357 OF 1989**  
**OSUNDWA CHITECHI.....DECEASED**  
**AND**  
**FRANCIS MUKOLWE OSUNDWA**  
**NATHAN MUMIA SHIUNDU.....PETITIONERS**  
**PATRICK OCHIENG ONYANGO**

**RULING**

**INTRODUCTION**

1. The deceased herein OSUNDWA CHITECHI to whom this cause relates died interstate on 30<sup>th</sup> September, 1973. His estate comprised the parcel known as L.R. No. North/Wanga/Koyonzo/534 measuring approximately 47 acres. The deceased left the following heirs/beneficiaries surviving him:-

- i. FRANCIS MUKOLWE OSUNDWA
- ii. FGEORGE OMUMIA OSUNDWA.
- iii. PETER LUTTA OSUNDWA
- iv. ODUOR OSUNDWA
- v. MUKOLWE OSUNDWA
- vi. JOHN OMULAMA OSUNDWA
- vii. MAURICE CHITECHI OSUNDWA
- viii. MUSUNGU OSUNDWA
- ix. DICKSON OSUNDWA.

2. The Grant of Letters of administration were issued to FRANCIS MUKOLWE OSUNDWA. The objectors NATHAN MUMIA SHIUNDU and PATRICK OCHIENG ONYANGO then filed a summons

for revocation of grant dated 9<sup>th</sup> March, 2007 which the petitioner conceded to on the 4<sup>th</sup> October, 2012. It meant therefore that the petitioner jointly with NATHAN MUMIA SHIUNDU and PATRICK OCHIENG ONYANGO would be the administrators of the deceased's estate herein.

3. The 1<sup>st</sup> petitioner FRANCIS MUKOLWE OSUNDWA was then directed to file for the confirmation of the said grant and they all filed affidavits on the mode of distribution of the deceased's estate. The affidavits were at variance and the petitioners were not in agreement on the mode of distribution of the deceased's estate.

### **Submissions.**

4. The court directed that the cause proceeds by way of oral evidence to enable the court determine distribution. In the course of the proceedings, the court ordered that the surviving daughters of the deceased file affidavits to indicate if they are interested in a share of the deceased's estate. Parties then filed their respective submissions. I see on record the submissions by NATHAN MUMIA SHIUNDU and FRANCIS MUKOLWE OSUNDWA.

5. In his submissions Nathan maintains that he is entitled to inherit a portion of his late grandfather's estate and that he is entitled to all his 8 acres that were due to his father. He submits that it was wrong for the petitioner Francis Mukolwe and Patrick Ochieng to exclude him from the inheritance because he was not in use of land parcel N/Wanga/Koyonzo/534. He explains that since his father was entitled to inherit from the deceased, but died, he too should benefit from the deceased's estate herein by virtue of being a son to MOSES SHIUNDU OSUNDWA (Deceased). He claims that NETIA OSUNDWA who is aware of this proceedings and who is a son of the deceased herein is not entitled to the estate of the deceased herein because he neither testified nor filed papers and thus relinquished his share of the estate.

6. FRANCIS MUKOLWE OSUNDWA the 1<sup>st</sup> petitioner also filed his submissions wherein he submits that PATRICK OCHIENG ONYANGO'S wanted the 5 acres given under the name of his father be changed to his. He claims that PATRICK OCHIENG ONYANGO did not tell the court whether he had brothers and sisters who were also entitled to a share of their father's share. He opines that he PATRICK OCHIENG ONYANGO had no quarrel with the way the property had been shared.

7. On Nathan's claim of 8 acres of land, he submits that Nathan is not entitled to receive any share of the deceased's estate because he does not utilize any part of land parcel No. N. Wanga/Koyonzo/534 and that he conceded that his (Nathan's) father had another parcel of land N. Wanga/Koyonzo/523 measuring 23 acres where he lives and where his father was buried. He further submits that his witnesses' statements remained unchallenged.

### **Determination.**

8. In determination the issue of distribution in this case, the court is guided by the provisions of the Law of Succession Act Cap 160 Laws of Kenya. The Law of Succession recognizes all the children of a deceased person as having a right to inheritance. The deceased herein left many sons. According to the evidence on record the deceased herein settled his sons on various parcels of land. Since the deceased herein was advanced in age he appointed his second elder son MOSES SHIUNDU OSUNDWA together with his cousins MARIKO CHITECHI and SIMON CHITECHI to assist him in the allocation of his land.

9. The record shows that the following sons were settled before the death of the deceased herein. FRANCIS MUKOLWE OSUNDWA was settled on parcel No. N/WANGA/KOYONZO/528, JOHN LUTTA OSUNDWA (Deceased) settled on parcel No. N/WANGA/KOYONZO/526 where PETER LUTTA OSUNDWA now lives, MUSUMBA OSUNDWA was settled on N. WANGA/KOYONZO/533, JOSEPH NETIA OSUNDWA was settled on N/WANGA/KOYONZOXO/532 and N/WANGA/KOYONZO/531. GEORGE MUMIA OSUNDWA N/WANGA/KOYONZO/529, ODUORI OSUNDWA was settled on N/WANGA/KOYONZO/525. MOSES SHIUNDU OSUNDWA settled on Land Parcel N/WANGA/KOYONZO/523 and he gave MOSES SHIUNDU OSUNDWA, his son N/WANGA/KOYONZO/191. Further from the evidence on record other sons of the deceased who were

apportioned land included MOURICE CHITECHI OSUNDWA, JOHN MULAMA OSUNDWA, MUSUNGU OSUNDWA and DICKSON OSUNDWA.

10. From the record, it seems that MOSES SHIUNDU OSUNDWA (deceased) got a larger portion of land than the rest i.e. 35 acres. Nathan Mumia the son of MOSES SHIUNDU OSUNDWA (deceased) who is the 2<sup>nd</sup> petitioner claims that he is entitled to inherit a portion of his late grandfather's estate and is entitled to all the 8 acres that were due to his father.

11. According to the provisions of the law, it is the children of the deceased herein who are entitled to inherit from his estate. Section 40 of the Law of Succession Act Cap 160 provides

***“40 (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 section 35 to 38.”***

12. This court earlier ordered that all the children of the deceased herein should file affidavits indicating whether or not they are interested in the deceased estate. I have not seen any affidavit by the daughters of the deceased herein although it is clear that the deceased had four (4) daughters surviving him.

13. Be it as it may it is trite law that the Law of Succession Act does not discriminate between gender in matters of succession or inheritance. See the case of **Eliseus Mbura M'thara vs. Harriet Ciambaka and Another 2012 eKLR** where **Lesitt J.** stated that:-

***“The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession act and indeed under the constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.”***

14. Since the daughters of the deceased have not filed affidavits it remains therefore that the deceased estate shall be distributed amongst the sons. The only parcel of land for distribution is all that parcel of land known as L.R. No. N/WANGA/KOYONZO/534. The same remains to be distributed equally among the sons of the deceased and where a son is deceased, their share will devolve to their respective beneficiaries.

**SIGNED, DATED AND DELIVERED** at KAKAMEGA this 10<sup>TH</sup> day of NOVEMBER, 2016.

**C. KARIUKI**

**JUDGE.**

**In the presence of:-**

.....Osango for 3<sup>rd</sup> .....for the Petitioner(s).

.....Other petitioners N/A .....for the Respondent.

.....Anunda ..... Court Assistant.