

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 567 OF 2006
IN THE MATTER OF THE ESTATE OF
MARTIN OKWARO ARODI (DECEASED)

BETWEEN

EDWARD O. OKWARO.....APPLICANT

AND

MESHACK OKERO OKWARO.....1ST RESPONDENT

CALLEB ABONG'O OKWARO.....2ND RESPONDENT

RULING

1. Martin Okwaro Arodi (“the deceased”) died at the ripe old age of 81 years on 15th August 1994 in Nyalunya, Kisumu. One of his widows, Rose Anyango Okwaro, took out the petition for grant of letters of administration for his estate. According to the petition and affidavit in support the deceased had the following three houses and survivors: -

1. Nereah Ligawa Okwaro - 1st Wife (deceased)

- Caleb Abong'o Okwaro
- Japhet Nyagol Okwaro

2. Eunia Onyando Okwaro - 2nd Wife

- Edward Okwaro

3. Rose Anyango Okwaro – 3rd Wife

- John Odawa Okwaro
- Meshack Okero Okwaro
- Godfrey Arodi Okwaro
- George Owino Okwaro

2. On 28th March 2007, the grant was issued to Rose Anyango Okwaro. This was followed by an application for confirmation dated 13th June 2008 and proposed distribution of the deceased’s assets as follows:-

- **Caleb Abong'o Okwaro and Japheth Nyagol Okwaro – Kisumu/Manyatta ‘A’/ 1268 and Kisumu/Muhoroni 064/095 (BLOCK A).**
- **Eunia Onyando Okwaro and Edward Okwaro - Kisumu/Muhoroni 064/495 and Kisumu/Muhoroni 064/095 (BLOCK B).**

- **Rose Anyango Okwaro, John Odawa Okwaro, Meshack Okero Okwaro, Godfrey Arodi Okwaro, George Owino Okwaro - Dunga 546 Nyalenda B, Kisumu/Muhoroni/064/95 (BLOCK C).**

3. The application for confirmation was never heard as Caleb Abong'o Okwaro lodged a summons for revocation of grant dated 7th July 2008 in which he claimed that Rose had not involved the first house in taking out the proceedings, that certain properties of the deceased were not disclosed and that the proposed distribution was unfair and that she had proposed to distribute land that does not belong to the estate of the deceased namely **Kisumu/Manyatta 'A'/1268** which the deceased had sold prior to his death.

4. When the application for revocation first came up for hearing on 5th March 2009, the parties indicated that there was a possibility of settlement of the matter. Thereafter parties engaged in meeting but the hearing nevertheless commenced on 9th December 2009. During the proceedings, it transpired that dispute was about distribution. The parties were given an opportunity to resolve the matter. On 12th February 2010, they recorded a consent revoking the earlier grant. A new grant was issued and Caleb Abong'o Okwaro, Edward Osore Okwaro and Meshack Okero Okwaro were appointed as administrators. The grant was also confirmed on the following terms;

Caleb Abong'o Okwaro Muhoroni Plot No. 064/95 Block A 2 ½ Acres

Muhoroni Subsistence Plot No. 495 ½ share

Kisumu/Nyalunya/2449 ½ share

Edward Okwaro Okwaro

Muhoroni 064/95 Block B

Muhoroni Subsistence Plot No. 495 ½ share

Kisumu/Nyalunya/2449 ½ share

Meshack Okero Okwaro

Muhoroni 064/95 Block C

Dunga Nyalenda Plot No. 546 Whole

5. Not so long after, Edward Okwaro filed an application dated 10th September 2010 seeking to correct the schedule of properties as follows:-

Caleb Abong'o Okwaro Muhoroni Plot No. 064/95 Block A 2 ½ Acres

Muhoroni Subsistence Plot No. 495 1 Acre

Kisumu/Nyalunya/2449 0.245Ha

Edward Okwaro Okwaro Muhoroni 064/95 Block B 2 ½ Acres

Muhoroni Subsistence Plot No. 495 1 ½ Acres

Kisumu/Nyalunya/2449 0.245 Ha

Meshack Okero Okwaro Muhoroni 064/95 Block C 2 ½ Acres

Dunga Nyalenda Plot No. 546 100 X 60 yards

6. A further application was filed on 3rd March 2011 by Eunia Onyando Okwaro and Rosa Anyango Okwaro in which they stated that the Certificate of Confirmation issued on 12th February 2010 be amended to reflect clear sub-divisions of the property amongst the wives and sons of the deceased. They proposed as follows;

Nereah Ligawa Okwaro (Dec'd) Muhoroni Plot No. 064/95 Block A 2 ½ Acres

Muhoroni Subsistence Plot No. 495 1 Acre

Kisumu/Nyalunya/2449 0.245Ha

Eunia Onyando Okwaro Muhoroni 064/95 Block B 2 ½ Acres

Muhoroni Subsistence Plot No. 495 1 ½ Acres

Kisumu/Nyalunya/2449 0.245 Ha

Rosa Onyango Okwaro Muhoroni 064/95 Block C 2 ½ Acres

Dunga Nyalenda Plot No. 546 100 X 60 yards

7. On 15th March 2011, Edward Osore Okwaro filed grounds of opposition in which he purported to withdraw the application filed on 10th September 2010 and that of 3rd March 2011. On 9th March 2011, Meshack and Caleb filed an affidavit in which they stated that they had no objection to the property being administered by their mothers and that in their view the estate was shared equitably. In turn, Edward filed an affidavit of protest in which he proposed that distribution be done as proposed by elders at a meeting held on 5th October 2008 at Martin Okwaro Arodi's house.

8. Caleb Okwaro in his affidavit of 22nd May 2014 deponed that Edward was part of the administrators who were appointed by the Court and that he had filed the protest in bad faith since the property was distributed in the manner their father had intended and the only issue was for each beneficiary to take his share. He further stated that it was wrong to include **Kisumu/Manyatta 'A'/1268** because the deceased had sold it prior to his death while **Muhoroni Subsistence Plot No. 495** was divided between Nereah and Eunice. He confirmed that all the properties had been distributed as agreed by the family. In his response in the affidavit of 11th June 2014, Edward insisted that **Kisumu/Manyatta 'A'/1268** was still part of the deceased estate. He contended that **Muhoroni Subsistence Plot No. 495** should be given to his mother, Eunia Onyando Okwaro exclusively.

9. On 10th October 2014, Edward filed a summons for revocation or annulment of grant in which he sought an order that;

The Certificate of Confirmation of Grant issued on the 12th February, 2010 be revoked (or annulled) on the ground that the mode of Distribution should be as per the agreement made on 5th October 2008.

10. The hearing of these matters commenced before Chemitei J. and I completed it. What emerged was that on one side were members of the 1st and 3rd house who insisted that the consent recorded before Karanja J., on 12th February 2010 finalized the matter and the only issue left is for each beneficiary to be allocated his share. Edward, the only son of the 2nd house, was on the other side insisted that distribution must be done in accordance with a meeting held on 5th October 2008 at Martin Okwaro's house.

11. Prior to the confirmation of the grant there was a family meeting on 5th October 2008 where various

proposals were floated. As to whether the court should adopt the resolution of the meeting as proposed by Edward, I find that there were two records of the meeting produced by the parties and although they differ in some respects both minutes show that the discussions were inconclusive in resolving the issue of distribution of the deceased property particularly in view of the objection by the 1st house.

12. If indeed the meeting resulted in an agreement, it superseded by the consent recorded in court on 12th February 2010 that resolved the distribution. The parties who testified that is; Rose Okwaro (PW 1), Caleb Abongo Okwaro (PW 2), Japhet Nyangol (PW 4) and Meshack Okwaro (PW 5) were clear that the consent recorded in court had been implemented and it is Edward who was being an impediment to the family to complete the process.

13. Apart from seeking to rely on the resolution of the meeting of 5th October 2008, Edward's complaint is that his father settled his mother on the **Muhoroni Subsistence Plot. 495** alone and that under Luo Customary Law, the 1st and 3rd houses cannot mix with the 2nd house. This argument is an afterthought as the two widows had no problem sharing the **Muhoroni Subsistence Plot. 495** in their joint affidavit of 3rd March 2011. Likewise, Edward had no difficulty with his mother sharing the Plot with the 1st house in his chamber summons dated 10th September 2010.

14. While Luo Customary Law may be relevant in certain respects, the **Law of Succession Act (Chapter 160 of the Law of Kenya) ("the Act")** is clear on this that customary is not applicable to intestate succession in respect of an estate to which the **Act** applies. The applicable provision is **section 40(1)** of the **Act** which deals with the estate of a polygamous intestate and it 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.

15. Although, **section 40** of the **Act** underlines equality, our courts have since emphasized that the duty of the court is to promote equity and in doing so it can consider other factors (see **Rono v Rono [2005]eKLR**). The issue then is whether the distribution is fair. From the consent, the 1st and 2nd houses were given the entire plot in Nyalunya while the 3rd house got the Dunga plot. Hence each house got an urban/semi-urban property. As regards **Kisumu/Manyatta 'A'/ 1268**, there is evidence that the deceased sold part of it to Akombo Amolo before he died and he left a portion to Japhet. The property had not been included in the earlier proposals including in the joint affidavit of Eunia and Rosa sworn on 3rd March 2011. Again, Edward did not include it in the affidavit in support of his chamber summons dated 10th September 2010. Edward introduced **Kisumu/Manyatta 'A'/ 1268** to make a case to for his house to inherit **Muhoroni Subsistence Plot. 495** wholly.

16. In an application for revocation of grant made under **section 76** of the **Act**, the applicant has the burden of showing that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. Edward has not established any of the grounds for revocation. In my view the distribution is fair and accords with the principles in the **Law of Succession Act**.

17. Under the proviso to **section 71(2)** of the **Law of Succession Act**, the court to ascertain the persons beneficially entitled to a share of the deceased's estate. The shares have been ascertained in the proposal is contained in the joint affidavit of the two widow Eunia Onyando Okwaro and Rosa Anyango Okwaro sworn on 3rd March 2011 which is consistent with earlier confirmation. As the certificate of confirmation issued on 12th February 2010, did not reflect the share for each beneficiary, it is revoked and consequently the grant is confirmed on the following terms;

EUNIA ONYANDO OKWARO	Muhoroni/064/95 BLOCK B	2 ½ acres
	Kisumu/Nyalunya/2449	0.245 acre
EDWARD OSORE OKWARO	Muhoroni Subsistence Plot No. 495	1 ¼ acres
CALEB ABONG'O OKWARO	Muhoroni/064/95 BLOCK A	1 acre
	Muhoroni Subsistence Plot No. 495	1 ¼ acres
	Kisumu/Nyalunya/2449	0.1225 acre
JAPHETH NYANGOL OKWARO	Muhoroni/064/95 BLOCK A	1 ½ acres
	Kisumu/Nyalunya/2449	0.1225 acres
ROSA ANYANGO OKWARO	Kisumu/Nyalunya/2450	0.15
JOHN ODAWA OKWARO	Nyalenda/Dunga/546	½ share
ERICK ARODI OKWARO	Nyalenda/Dunga/546	½ share
MESHACK OKERO OKWARO	Muhoroni/064/95 BLOCK C	1 ¼ acres
	Kisumu/Nyalunya/2450	0.15 acres
NICK OUKO OKWARO	Muhoroni/064/96 BLOCK C	1 ¼ acres
GEORGE OWINO OKWARO	Kisumu/Nyalunya/2450	0. cre

18. It is now 22 year since Mzee Martin Okwaro Orodi passed away. His estate must now be put to rest. I dismiss the summons for revocation dated 10th October 2014. There shall be no order as to costs. Orders accordingly.

DATED and DELIVERED at KISUMU this 5th day of December 2016

D. S. MAJANJA

JUDGE