



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 271 OF 2006

IN THE MATTER OF THE ESTATE OF ATODONGOLE LONROTONG LOTAM

(DECEASED)

REBECCA C. ATODONGOLE.....APPLICANT

VERSUS

GEOFFREY LOTAM ATODONGOLE AND OTHERS.....RESPONDENTS

JUDGEMENT

The deceased died intestate. He left behind the following children

1. Geoffrey Atodongole
2. Samuel Atodongole
3. Joseph Atodongole
4. Edward Porit Atodongole
5. Rebecca Atodongole
6. Monica Atodongole
7. Mary Atodongole
8. Hellen Chelagat Reuben
9. Rosa Atodongole Senteya
10. Elizabeth Chepochukok Ptiony
11. Tereza Chepchukok Lokomo
12. Susan Lotam
13. Selina Chemutai Lotam

The administrators of the said estate are Geoffrey Atodongole and Rebecca Atodongole. The deceased

left behind land parcel **No West Pokot/Siyoi/878 measuring 13 Hactares**. The parties did not agree on the mode of distribution. Each one of them thereafter were instructed to file separate mode of distribution.

Its also instructive to note that the beneficiaries are all children of the deceased. None of them is a widow. It is also not indicated whether they are from separate houses. I shall therefore proceed under the premise that they are of one unit. They are all sisters and brothers. There are generally two camps, that which is led by the 1st administrator Geoffrey and the second camp by Rebecca. Each of them have proposed separate mode of distribution.

Geoffrey has proposed that he inherits 2 acres, the three brothers do inherit 5 ½ acres each while all the nine sisters to inherit 1 ½ acres each.

This proposal according to him was agreed by 10 members of the family out of three. According to him the same is equitable in the circumstances and shall foster peace within the family. Special reliance in their submissions was on the now famous case of **Mary Rono Vs Jane Rono and Walter Rono Civil App. No 66 (2002)**.

On its part Rebecca and her camp have proposed that since there was no agreement the entire estate ought to be shared equally. She argued that the provisions of Section 38 of the Law of Succession Act does not discriminate on the gender and that all the beneficiaries have equal rights. She relied on the case of **John Ngugi Karanja Vs SAMUEL Njau Karanja (2016) eKLR** where **Matiro J** expanded on the question of equality and equity.

It is worthy to note also that earlier on the parties had filed separate mode of distribution of the estate but were not able to agree. Infact the girls namely Hellen, Rosa, Elizabeth, Teresa, Susan and Saline had agreed to take up 1 acre each.

Since the parties disagreed it is therefore for this court to distribute the land in question.

This court is alive to the provisions of Article 27 of the current constitution which bars discrimination particularly on sex, marital status or social status inter alia.

Equally the provision of Section 38 of the Law of Succession Act which provides as follows:-

Section 38 “ where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, If there be only one, or be equally divided among the surviving children.”

My understanding of the above provisions is that at no time should a beneficiary of an estate be left out or be discriminated against. Each ought to at least get a share from the deceased estate whether male or female. This court is also aware of the dynamics in the society, namely that not all estates are endowed. Neither are all estates equal. In other words, one cannot be mathematically precise in the quest for distribution of the estate. In as much as section 38 of the Act anticipated equality, I do not think that there can be total equality.

This is so because not all the beneficiaries can be equal. Some could be young and still in a dire need of resources where as others may have already been provided by the deceased during his/her lifetime. In distributing the estate therefore I hold an humble view that each estate ought to be treated as separate and distinct with special regard to holding the virtues, tenets and the spirit of the constitution so as to ensure that there is no discrimination.

The decision of **Omolo JA** (as he then was) in **Rono Vs Rono (Supra)** ought to be reproduced. The learned Judge stated as follows in regard to Section 40(1) of the succession Act.

“ 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 during the distribution still has a discretion to take into account or consideration the number of 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.

Now do I see any provision in the Act that each child must receive the same or equal portion.

That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated, and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equity.”

In the case at hand although Rebecca proposes that the estate be shared equally, I do not think that the same would be provident. Several of her sisters had already agreed to take one acre each. I take this to mean that where they are married or in their current stations they are happy. In other words to foster family peace and unity, they have agreed to inherit an acre each.

Geoffrey in particular has agreed to take up 2 acres. Again this must be informed from his own perspective. I do not see any reason why this court should deny him such.

The issue that ought to be interrogated is the entitlement of Rebecca, Monica and Mary. From their earlier proposal the rest of the brothers were to get 5 acres each whereas in the other proposal they opine that they each get 7 acres.

Whereas there are suggestions that the three ladies Rebecca, Monica and Mary had been married and they were now at home and that they could still inherit from where they were married, this argument was not contested by them. Although this argument appears discriminatory, the court is well alive to such prevailing circumstances. However reasonable provisions ought to be provided for them. Since they have not disputed that they can still inherit from where they were married it would not be fair in the circumstances for them to get equal shares from their three brothers who for all intent and purposes know the suit land as their only inheritance.

As earlier alluded and taking into totality the circumstances in this case which can be distinguished from the authorities provided by the counsels on record, namely, that it relates to the children and not houses I shall proceed to distribute the suit land as hereunder:

1. Geoffrey Atodongole - 2 acres
2. Rosaline C. Atodongole - 1 acre
3. Elizabeth Chepochukok Ptiony - 1 acre
4. Susan Atodongole Lotam - 1 acre
5. Hellen Chelagat Rueben - 1 acre
6. Selly C. Poghisyo - 1 acre
7. Teresa Lokomoi - 1 acre
8. Rebecca Atodongole - 3 acres
9. Monica Atodongole - 3 acres

10. Mary Aripe Atodongole	- 3 acres
11. Samuel Atodongole	- 5 Acres
12. Joseph Atodongole	- 5 Acres
13. Edward Lotam	<u>- 5 acres</u>
Total	<u>- 32 acres</u>

Since this is a family feud, each party shall bear their respective costs.

Delivered this 5th day of December 2016.

H. K. CHEMITEI

JUDGE

In the presence of

Kiarie for the Petitioner/Respondent

No appearance for Waweru

Kirong – Court Assistant