



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 406 OF 2014

IN THE MATTER OF THE ESTATE OF JOHANA MULONGA OMUDHE – DECEASED

AND

**IN THE MATTER OF AN APPLICATION BY LAWRENCE OCHIENG MULONGA AND
EUNICE ACHIENG OCHIENG – APPLICANTS**

RULING

The deceased to whose estate these proceedings relate is Johana Mulonga Omudhe. The proceedings commenced in the Principal Magistrate's Court at Siaya where letters of administration were on 16th January 2012 issued to Lawrence Ochieng Mulonga and Eunice Achieng Ochieng. The said letters of administration were confirmed on 18th December 2012 whereupon the estate of the deceased comprising Siaya/Kochieng "A"/394 devolved to Lawrence Ochieng Mulonga and Eunice Achieng Ochieng equally.

On 22nd May 2013 Consolata Achola Mulonga one of the widows of the deceased filed a Miscellaneous application being Kisumu High Court Succession Misc. Application No. 307 of 2013 in which she sought an order for transfer of the cause from Siaya P.M's Court to Kisumu High Court. That application was heard by Muchelule J. on 21st March 2014 and was allowed. Consequently the matter was transferred here and is now Kisumu High Court Succession No. 406 of 2014 which is before me for determination.

From the start the Court proceeded as if this was a summons for revocation of grant/certificate of confirmation. Indeed when the parties first appeared before the Court they were directed to file a list of distribution. When it was eventually filed Andrew Aluoch disagreed with it and this Court gave the family more time to see if they could agree. They did not do so and when they next came to Court on 19th December 2014 directions were given that the matter proceed by way of oral evidence. Consolata Aluoch and Andrew Aluoch were constituted the Plaintiffs and the rest of the beneficiaries the defendants. It turns out however that save for the application for transfer of the matter from Siaya P.M's Court to this Court there was no application to undo what had been done in the Lower Court. Be that as it may this Court having heard the dispute it has a duty to do substantive justice to the parties which duty is fortified by the inherent power bestowed upon it by Rule 73 of the Probate and Administration Rules.

From the evidence tendered by both sides the only free property of the deceased and which is the subject of these proceedings is LR. NO. Siaya/Kochieng "A"/1394.

This Court heard that the deceased had other parcels of land which he had bequeathed to his sons in his lifetime. These are:-

- **Siaya/Kochieng "A"/1196 to Oluoch Mulonga.**

- **Siaya/Kochieng "A"/1193 to Oluoch Mulonga otherwise known as Andrew Oluoch Mulonga.**
- **Siaya/Kochieng "A"/1197 bequeathed to Paul Ochieng Mulonga but which he sold to Fredrick Otieno Owira.**
- **Siaya/Kochieng "A"/1194 to Odhiambo Mulonga.**
- **Siaya/Kochieng "A"/1196 also to Odhiambo Mulonga.**
- **Siaya/Obambo/2158 to Betha Aluoch Mulonga but transferred to Silvanus Juma Mulonga on 3rd November 2004.**
- **Siaya/Obambo/2150 – Silvanus Juma Mulonga.**
- **Siaya/Kochieng "A"/1192 – Ndaguo Mulonga.**

Section 3(1) of the Law of Succession Act defines estate as the free property of a deceased person. That which the deceased had bequeathed to his children in his lifetime does not form his estate though it can be taken into account as a previous benefit – (see Section 42 of the Act).

According to Consolata Achieng – the applicant – and her son Andrew Aluoch the deceased gave land parcel now in dispute to three of his four wives. Domitila Ogwindi Mulonga and Pilister Abongo Mulonga the first and second wife respectively were given one half of the land to occupy while Consolata Achola was given the other half. Bertha Aluoch Mulonga the 4th wife was settled in Siaya/Obambo/2158 together with her children. Of the sons of the deceased only Lawrence Ochieng Mulonga (the Respondent) did not get land from his father. The Court heard that the reason for this was that he was still very young at the time. He testified that the reason he had asked the Court to transfer this L.R. Siaya/Kochieng "A"/1394 to him was because his brother Silvanus Ochieng also known as Ndagwa Mulonga had sold the land that he was supposed to inherit. Consolata Aluoch and her son Andrew were however adamant that Lawrence Ochieng could not inherit this land as his mother's house had been given land which her son later sold. They called two witnesses. Joseph Nyakwak Odul a village elder and Melchizedek Rando Opiyo, a Luo Council Elder who testified that indeed the deceased had given the land to his three widows and that the position should remain as deceased had wished it to be.

Silvanus Juma Mulonga testified on behalf of his brother Lawrence Ochieng. He stated that it was his late father's wish that the parcel of land now in dispute be shared by his youngest children and that because Consolata refused to go to the Land Registry for that purpose the Land Registrar advised Lawrence Ochieng (the Respondent) to file a succession cause. He contended that a dispute arose in regard to the land their father had apportioned to his mother forcing him (Silvanus) to pay for it and when he did that the land was transferred to him. He denied that he has sold the land now in dispute.

This Court gave the parties an opportunity to file submissions but received only those of the Applicants. The same have been considered alongside the evidence adduced.

It is not in dispute that the only free property of the deceased in this cause is Siaya/Kochieng "A"/1394. Section 34 of the Law of Succession Act provides that:-

"A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect."

Whereas it is alleged that the deceased gave this land to three of his four wives he did not make a will capable of taking effect and so his estate (free property) is subject to the rules of intestacy.

Section 40 of the Law of Succession Act sets out the manner in which the estate of a deceased who was polygamous is shared. That is the manner in which this estate shall devolve so that each house

of the deceased gets an equal share of LR. NO. Siaya/Kochieng "A"/1394. However as it was admitted that Lawrence Ochieng Mulonga was never given land and has no land to his name what he would have inherited having fallen into the hands of his brother Silvanus after he bought it off from people who had a dispute with his father, the whole portion given to the deceased's

fourth house shall devolve to him (Lawrence Ochieng Mulonga). It emerged from the evidence that Eunice Achieng Ochieng freely disposed of the parcel of land that their father had given them and will in any event get a share from the portion that will go to her mother in-law's house.

Accordingly the Certificate of grant issued on 18th December 2012 to Lawrence Ochieng Mulonga and Eunice Achieng Ochieng is hereby revoked as in any case it was issued by a Court that had no jurisdiction the value of the estate having been stated as Kshs.300,000/= and the estate shall now devolve aforesaid. However if any portion of land may have been disposed by members of a house that portion shall be treated as a share of that house and shall not affect the shares of the other houses. The distribution shall also as much as possible and in so far as is practicable take into account the portions occupied by the widows in the respective houses. Parties shall bear their own costs.

Signed, dated and delivered at Kisumu this 8th day of October 2015

E. N. MAINA

JUDGE

In presence of:-

Applicants in person

Objector in person

CC: Moses Okumu