



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.119 OF 2009

IN THE MATTER OF THE ESTATE OF ABASA BUNDA ODAK

(DECEASED)

PETER ODAK OBASAPETITIONER/RESPONDENTS

VERSUS

RAPHAEL OGOLLA OCHIENG.....APPLICANT/OBJECTOR

R U L I N G

1. The provisions of the now Order 45 of the Civil Procedure Rules are applicable to Probate and Administration proceedings. This is by dint of Rule 63 of The Probate and Administration Rules. The Notice of Motion dated 13th March 2012 is an application for review and would be brought under Order 45 of The Civil Procedure Rules. In it the Applicant seeks the following order:
 1. **This matter be certified as urgent.**
 2. **This Honourable court be pleased to review its order herein made on distribution, issued on the 16th day of November 2011.**
 3. **Upon the order of review this Honourable court be pleased to give such further orders and/or directions as it may deem just and fair in the circumstances of this matter.**
 4. **Costs of this application be provided for.**

This Court is told by the Applicant that the Ruling of Onyancha J delivered on 16th November 2011 has an error apparent on its face. That the error is on the order of distribution.

2) The Respondent is opposed to the Application and is of the view that no such error is revealed. Counsel for the Respondent argued that once the Court made its ruling, it became *functus officio* and the only recourse available to the Petitioner is that of an Appeal.

3. This Court has carefully read and understood the decision of Onyancha J whose review is sought; Before making the order on distribution the Judge observed,

“.....That is to say, that he had no right to change the original proposal of distribution which gave his father and his brother, Ochieno Odako half to half of the land, to the present one to ¼ to ¾.”

Elsewhere the Judge also remarked,

“Whether the issue of mode of distribution is sufficient to revoke the grant or not, my view, is that it can be sufficient cause for revocation. However, it may not be necessary to do so since the original proposal was ½ to ½ and none of the parties, even beneficiaries have stated that such distribution was wrong.”

In making the order for distribution the Judge finally concluded,

“Distribution should according, revert to the original proposal.....”

The pith of the decision of the Judge is that the estate should be distributed in the manner proposed by Ochieng Odaka Abaga, the original Petitioner. What then are the terms of that proposal? That is contained in the Affidavit of Ochieng Odako of 22nd February 2007 in which in paragraph 5 identifies the persons entitled to the estate of the deceased and their respective shares as follows:

Ochieng Odak Marachi/Bujumba/1788

Peter Odak Abasa equal share

Peter Omina Weyama 80ft by 100ft

4. If this is to be compared with the order on the face of the Ruling which is:-

“Martin Akongo Abasa – 2 ½ Acres

Anjeline Anyango Ochieng– 2 Acres

Peter Omina Weyame – 1 Acre”,

then, it is apparent that there is an error on it. This is because it was the firm view of the Judge, expressed on at least 3 occasions in his ruling, that the estate should be distributed as originally proposed so that the families of the two brothers would get equal shares.

5. So as to correct this error, this Court does hereby review that erroneous part of the decision delivered on 17th November 2011 and in its place orders distribution as follows;

Peter Omina Weyama - 80ft x 100ft

Family of Martha Akongo Abasa - 0.88ha

Family of Anyango Ochieng - 0.88ha

As none of the parties was to blame for the error, I would make no order on costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 12TH DAY OF NOVEMBER 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR PETITIONER

.....FOR APPLICANT