



REPUBLIC OF KENYA



In re Estate of Odhiambo Amuga Olaka (Deceased) (Succession Cause 88 of 2015) [2023] KEHC 25135 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 88 OF 2015
WM MUSYOKA, J
NOVEMBER 10, 2023
IN THE MATTER OF THE ESTATE OF ODHIAMBO AMUGA OLAKA
(DECEASED)**

RULING

1. The deceased herein died on 15th February 1973, according to the certificate of death on record, serial number 0238036, dated 19th February 2015. There is a letter from the Chief of Elugulu Location, dated 5th March 2015, which indicates that the deceased had 1 wife, namely the late Paskalia Agola, and was survived by 2 sons, Augustine Wesonga Odhiambo and Philip Asimo Odhiambo, and a grandson, Patrick Odhiambo Onyango. He was said to have died possessed of Marachi/Ebukhalalire/344. Representation to the intestate estate was sought by Augustine Wesonga Odhiambo, in his purported capacity as son of the deceased, through a petition filed herein on 6th March 2015. They listed the 3 individuals named in the Chief's letter, as the sole survivors of the deceased, and Marachi/Ebukhalalire/344 as the asset that the deceased died possessed of. Letters of administration intestate were made to him on 13th August 2015, and a grant was duly issued, dated 16th September 2015.
2. Augustine Wesonga Odhiambo filed an application dated 31st June 2016. He proposed that Marachi/Ebukhalalire/344 be shared out between the 3 identified survivors as follows: Augustine Wesonga Odhiambo – 1.8 hectares, Philip Asimo Odhiambo – 1.2 hectares, and Patrick Odhiambo Onyango 1.2 hectares. Philip Asimo Odhiambo filed a summons, dated 23rd March 2016, seeking that the grant be not confirmed pending agreement on distribution of the estate. He complained that the proposed distribution was not fair. Orders were subsequently made, for a surveyor to visit Marachi/Ebukhalalire/344, to establish the acreage occupied by each son or the survivors of the deceased. The surveyor filed a report on 3rd July 2017, dated 30th June 2017. He identified the “shares” of the beneficiaries, as per the situation on the ground, as follows: Augustine Wesonga Odhiambo – 1.81 hectares, Philip Asimo Odhiambo – 1.23 hectares, and Patrick Odhiambo Onyango 0.98 hectare. He identified the total acreage as 4.02 hectares. Augustine Wesonga Odhiambo subsequently filed a further affidavit, sworn on 19th February 2018, to propose distribution as per the surveyor's findings.



3. Another summons, dated 26th March 2018, was filed at the instance of Silvester Omondi Asimo, on 10th September 2018, seeking substitution of Philip Asimo Odhiambo as applicant in the application dated 23rd March 2016, with Silvester Omondi Asimo, on grounds that the former had died. It was averred that the deceased had been survived by 3 sons, namely the late James Onyango Odhiambo, Augustine Wesonga Odhiambo and the late Philip Asimo Odhiambo. It was proposed that Marachi/Ebukhalalire/344 be shared equally between the 3, so that each take 1.4 hectares. It was stated that the family of the late James Wesonga Odhiambo was to be represented by Patrick Odhiambo Onyango, and that of the late Philip Asimo Odhiambo by Silvester Omondi Asimo. That would then mean Marachi/Ebukhalalire/344 be shared out equally between Augustine Wesonga Odhiambo, Patrick Odhiambo Onyango and Silvester Omondi Asimo.
4. Silvester Omondi Asimo filed a summons for revocation of grant, dated 8th March 2021, seeking revocation of the grant made to Augustine Wesonga Odhiambo, a fresh grant be made to Augustine Wesonga Odhiambo, Vitalis Omondi and Silvester Omondi Asimo, and a surveyor visit Marachi/Ebukhalalire/344 to demarcate it between the 3 households. His case was that Augustine Wesonga Odhiambo had obtained the grant without the consent of the other survivors of the deceased, and there had been concealment of matter from the court. He proposed appointment of an administrator from each house of the sons of the deceased. There was attached to his affidavit in support, a letter from the Chief of Elugulu Location, dated 2nd March 2021, setting out the members of the 3 households of the sons of the deceased. The family of the late James Onyango Wesonga was said to comprise of Patrick Odhiambo, Vitalis Omondi, the late David Owino (survived by Kevin Owino, Julius Owino and Edwin Owino), Clara Adipo and Eunice Achieng; that of the late Philip Asimo Odhiambo comprised of Sylvester Omondi Asimo, John Onyango Asimo, Julius Oduor Asimo, Jacob Ochieng Asimo, Kennedy Opondo Asimo, Alice Akinyi Asimo and Eunice Akoth Asimo; and Augustus Wesonga Odhiambo was indicated to be alive. Silvester Omondi Asimo filed another affidavit sworn on 22nd November 2021, listing the sons of the deceased, and their grandsons. The revocation application was resolved without a formal hearing, and fresh administrators were appointed, being Vitalis Omondi, Augustine Wesonga and Sylvester Omondi, on 19th October 2021, and a grant of letters of administration intestate was issued to them, dated 1st July 2022.
5. The appointment of administrators paved way for confirmation of grant. 2 applications were filed. One by Augustine Wesonga Odhiambo, dated 9th November 2022; and the other by Silvester Omondi Asimo, dated 6th December 2022. That dated 9th November 2021 seeks distribution of a property described as Marachi/Ebukhala/2015, between Augustine Wesonga Odhiambo, Philip Asimo Odhiambo and Patrick Odhiambo Onyango, as per the surveyor's report, so that Augustine Wesonga Odhiambo takes 1.81 hectares, Philip Asimo Odhiambo takes 1.23 hectares and Patrick Odhiambo Onyango 0.98 hectare. A further affidavit was filed by Augustine Wesonga Odhiambo, on 3rd April 2023, sworn on 30th March 2023, to attach the surveyor's report of 30th June 2017. It is averred that the boundaries were planted by the deceased prior to his death. The summons for confirmation of grant, dated 6th December 2022, seeks to distribute a property described as Marachi/Bukhalalire/344 between Sylvester Omondi Asimo (on behalf of John Onyango, Julius Oduor and Jacob Ochieng) and Vitalis Omondi (on behalf of Patrick Odhiambo and Cliconda Atsieno), so that each takes 4 acres. The application dated 6th December 2022 was withdrawn by a notice filed herein, dated 1st February 2023, and was substituted with a summons for confirmation of grant, also dated 1st February 2023. The only new thing in the new application was to propose equal distribution of Marachi/Ebukhalalire/344 between the 3 administrators equally.



6. Directions were initially given on 11th July 2023. The application, dated 6th November 2022, was to be treated as the main application; while that, dated 1st February 2023, was to be treated as the protest to it. The confirmation application was to be disposed of by way of viva voce evidence. Those directions were reversed on 20th September 2023, when the parties proposed to address the issues by way of written submissions instead. Augustine Wesonga Odhiambo submits that the parties had agreed to send a surveyor on the ground, to ascertain acreage in possession and use of each of the 3 sons of the deceased. The court is urged to go by the report filed by the surveyor, as it reflects the situation prevailing on the ground since 1985, when the deceased died. Silvester Omondi Asimo and Patrick Odhiambo Onyango cite section 38 of the *Law of Succession Act*, Cap 160, Laws of Kenya, which provides for equal distribution of the assets between the children of an intestate. *Mary Wangari Kibika v John Gichuhi Kinuthia & 2 others* [2015] eKLR (Muigai, J) and *In re Estate of William Mbogori Kathiama (Deceased)* [2018] eKLR (Gikonyo, J) are cited in support.
7. The parties did not address me on the law to apply to the distribution herein. Augustine Wesonga Odhiambo would like me to distribute the estate based on occupancy on the ground, alleging that that was the status quo as at the date the deceased died in 1985, suggesting that the occupancy was based on how the deceased had settled his children on the ground. On their part, Silvester Omondi Asimo and Patrick Odhiambo Onyango, want me to apply section 38 of the *Law of Succession Act*, presumably on the premise that that is the applicable law. I raise this as the certificate of death on record indicates that the deceased herein died in 1973, long before the *Law of Succession Act* came into force on 1st July 1981. Under section 2(1) of the Act, the provisions of the Act only govern the estates of persons dying after the Act came into force; while section 2(2) of the Act applies the law and custom that was in operation, prior to the coming into force of the Act. See *Rono v Rono & another* [2005] 1 EA 363, [2005] eKLR (Omolo, O’Kubasu & Waki, JJA) and *Joseph Achichi Aburili v George Ochola Aburili* [2017] eKLR (Majanja, J).
8. As the deceased died in 1973, before 1st July 1981, the law to apply to the intestate estate herein are not the intestacy provisions in Part V of the *Law of Succession Act*, but the law that governed intestate estates in 1973. The deceased, from his name, appears to be African, and the applicable law to intestate estates of Africans then was African customary law. The parties herein have not indicated the particular tribe or community to which the deceased belonged, from which I would then be able to determine the applicable customary law. The name of the deceased appears to suggest that he was Luo, but the land was situated within territory occupied by the Marachi, a Luhya sub-tribe. I cannot tell, whether he belonged to either of the 2, and I cannot tell which customs applied to his estate, as between Luo customary law and Marachi customs. Whatever the case, the applicable law should be either. Unfortunately, none of the parties sought to ascertain the substance of either.
9. For avoidance of doubt, section 2(1)(2) of the *Law of Succession Act* provides as follows:
 - “2. Application of Act
 - (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
 - (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the



date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

3) ...”

10. As the applicable customary law has not been identified and ascertained, I shall have no option, but apply the provisions of the [Law of Succession Act](#). But before I do so, I must determine whether I should distribute the property based on occupancy on the ground. The argument articulated is that that occupancy is based on the boundaries that the deceased established in 1985. First of all, the certificate of death on record indicates the date of death as 15th February 1973, so I do not know where 1985 is coming from. Secondly, distribution of the estate of a dead person is not based on the boundaries on the ground, but on what the law prescribes. See *In Re Arusei* [2003] KLR 76 [2003] eKLR (Nambuye, J) and *Leah Chepkemei Kipyego v Mary Chesenge Kipyego* [2007] eKLR (F. Ochieng, J). It is permissible, though, for distribution based on occupancy, to be adopted by the court, where there is consent of all the beneficiaries. See *Justus Thiora Kiugu & 4 others v Joyce Nkatha Kiugu & another* [2015] eKLR (Visram, Koome & Otieno-Odek, JJA) and *In re Estate of Juma Shiro (Deceased)* [2016] eKLR (Mwita, J). If the intestate died prior to the commencement of the [Law of Succession Act](#), distribution will follow the substance of the applicable customary law; and where he died after the commencement, then the provisions of the [Law of Succession Act](#), on intestacy will apply, subject to any consents or agreements by the survivors or beneficiaries. See *Justus Thiora Kiugu & 4 others v Joyce Nkatha Kiugu & another* [2015] eKLR (Visram, Koome & Otieno-Odek, JJA) and *In re Estate of Juma Shiro (Deceased)* [2016] eKLR (Mwita, J). There is no proof of the applicable customary law here. There is no agreement on distribution. The parties decided to take the easy way out, a shortcut, written submissions, so no evidence was led on how those boundaries came about, yet the surveyor’s report makes no reference to any boundaries. Thirdly, reference to boundaries suggests inter vivos distribution. No evidence was led on any such *inter vivos* distributions. In any case, such lifetime distributions would only be reckoned where the deceased took some steps towards actualizing the lifetime distribution. The land herein is registered. A lifetime distribution would have only been feasible where the same was subdivided into 3 and transferred to the names of the 3 sons. Such would require that consent of the relevant land control board, under the [Land Control Act](#), Cap 302, Laws of Kenya, be obtained for subdivision and transfer of the land. There is no evidence that the deceased took any step in that direction, yet the law is that the court could infer an intention to transfer such land, where some step was taken, say obtaining consents of the land control board and getting mutations done, but the deceased dies before completing the exercise. See *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya, J) and *Lucia Karimi Mwamba v Chomba Mwamba* [2020] eKLR (Gitari, J). I can only conclude that there was no inter vivos distribution, and there is no evidence that the occupancy on the ground, as per the surveyor’s report, had anything to do with the deceased.
11. There is no evidence that the deceased was survived by a spouse, and so the property is for distribution amongst the children. Only 3 children were disclosed, all sons. There is no mention of daughters. I note that the deceased died in 1973, and customary law applied, which did not reckon daughters in succession, as their share was in the households of their husbands. See *Kanyi v Muthiora* [1984] KLR 712 (Kneller JA, Chesoni & Nyarangi, Ag JJA) and *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292 (Hancox, CJ, Masime & Kwach, JJA). I am alive to Article 27 of [the Constitution](#), which outlaws discrimination based on gender; and Article 2(4), which renders any law, including customary law, and any act, which contravenes [the Constitution](#), invalid. See *In re Estate of Evan Muthui s/o Nyamu* [2019] eKLR (Ngaah, J) and *Wanjiru & 4 others v Kimani & 3 others* [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA). I risk labouring in vain, if I go ahead and distribute



this estate before there is disclosure of the daughters of the deceased, and their involvement in the matter.

12. The 2 provisions state as follows:

“2. Supremacy of this Constitution

- (1) ...
- (2) ...
- (3) ...
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- (5) ...”

“Equality and freedom from discrimination

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) ...
- (7) ...
- (8) ...”

13. Where there are no spouses, the applicable law would be sections 35(5) and 38 of the [Law of Succession Act](#), both of which provide for equal distribution of the property amongst the children. Section 41 is also relevant, it allows the children of any dead child of the deceased, to step into the shoes of their dead parent, and to take the share that such parent would have taken, had he or she been alive. These provisions state:

“Where intestate has left one surviving spouse and child or children

- (1) ...



- (2) ...
- (3) ...
- (4) ...
- (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

38. Where intestate has left a surviving child or children but no spouse

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

41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate." (emphasis mine)

14. Before I make final orders in the matter, let the parties bring themselves within compliance with Articles 2(4) and 27 of *the Constitution*, by disclosing whether the deceased had any female children, and the names of such female children. The matter shall be mentioned thereafter, for further directions.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 10TH DAY OF NOVEMBER 2023.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Jumba, instructed by Balongo & Company, Advocates for Augustine Wesonga Odhiambo.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for Silvester Omondi Asimo and Patrick Odhiambo Onyango.

