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REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE NO. 179 OF 2009

IN THE MATTER OF THE ESTATE OF JAMES AKOTH NDONGA (DECEASED)

AND IN THE MATTER OF AND APPLICATION BY CONCILATA AWAR AKOTH, MARY ATIENO AKOTH AND CONSILATA AKINYI AKOTH

RULING NO. 2

Introduction

1. This matter concerns the estate of **JAMES AKOTH NDONGA** of North Alungo Sub-location, South West Seme Location within Kisumu County who died on 31st May 2008. He left behind three widows, Concilata Awar Akoth also referred to as Colleta Awala Akoth (“Colleta”), Mary Atieno Akoth (“Mary”) and Consilata Akinyi Akoth (“Consilata”) who filed the petition for letters of administration. The grant of letters of administration intestate was issued to them on 22nd May 2009.

2. Consilata Akinyi applied for confirmation of the grant by the summons dated 16th October 2012. In response to the application, the other widows filed affidavits and the court directed that the matter be heard by oral testimony. Chemitei J., began hearing the matter and in the course of the hearing, it emerged that the deceased had written a will dated 13th February 1997. When I took over conduct of the matter, I directed that the will be proved and by a ruling dated 5th October 2016, I issued the grant of probate of the deceased’s will. I also directed Gerphas Odhiambo, the executor to prepare and file an inventory of the assets both in the will and those not reflected in the will. Since there were other properties not in the will, I also issued a grant of letters of administration intestate to Gerphas Odhiambo in accordance with the proviso to **section 66** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** (“**LSA**”).

The deceased’s will and assets

3. Before I proceed to consider the evidence and resolve the dispute, it is important to highlight distribution of the property in the deceased’s will dated 12th February 1997. The will provided as follows:

- The first wife, Colleta, was given a developed plot comprising residential premises at Tom Mboya Estate, **KISUMU/MUNICIPALITY/BLOCK 4/358** for life and in common with her sons Fred Otieno Akoth, Joseph Ouma Akoth and George Ochieng Akoth in equal shares. She was also given a partly developed plot **KISUMU/KOMBEWA/1183** situated at Kombewa Market for life and the remainder in common with her sons in equal shares.
- The second wife, Mary, was given Plot **KISUMU/MANYATTA ‘A’/3299** on which stands two family residential units near Car Wash in Migosi area for life and in common with her sons Elisha Otieno Akoth, Paul Muga Akoth and Julius Odhiambo Akoth and remainder to Elisha Otieno Akoth and Paul Muga Akoth in equal shares. She was also given a developed Plot with two family residential units situated at Migosi area, **KISUMU/MANYATTA ‘A’/571**, in common with her sons Elisha Otieno Akoth, Paul Muga Akoth and Julius Odhiambo Akoth during the life time and remainder to be shared as follows: One house to Julius Odhiambo Akoth and the second house to be shared out equally between Elisha Otieno Akoth, Julius Odhiambo Akoth and Paul

Muga Akoth.

- The third wife, Consilata, was given **KISUMU/KONYA/2245** which was as undeveloped and vacant piece of land approximately 3 acres at Konya and some cattle with her sons Willis Ochieng Akoth and Paul Otieno Akoth in equal shares. She was also given **KISUMU/MANYATTA 'A'/321**, a developed piece of land with four shops and one residential unit situated at Migosi area for life and the remainder to her three sons Philip Juma Akoth, Willis Ochieng Akoth and Paul Otieno Akoth.
- **KISUMU/KONYA/648** which the deceased described as a vacant plot measuring 8 acres was to be divided into seven equal shares between Fredrick Otieno Akoth, Elisha Otieno Akoth, Philip Juma Akoth, George Ochieng Akoth, Joseph Juma Akoth, Julius Odhiambo Akoth and Paul Muga Akoth.
- Motor vehicle registration no. KAA 116L to Colleta and George Ochieng Akoth jointly. Motor vehicle registration no. KSQ 218 to Consilata and Willis Ochieng Akoth and Paul Otieno Akoth jointly.
- **KISUMU/MUHORONI/75** be sub-divided into three equal shares and shared between Mary's sons; Elisha Otieno Akoth, Paul Muga Akoth and Julius Odhiambo Akoth.
- **KISUMU/MUHORONI/74** be sub-divided into three equal shares and shared between the sons of Consolata Akinyi Akoth: Philip Juma Akoth, Willis Ochieng Akoth and Paul Otieno Akoth.
- **KISUMU/MUHORONI/474** be sub-divided into two equal shares between George Ochieng Akoth and Joseph Ouma Akoth.
- **KISUMU/MUHORONI/475** to Fredrick Otieno Akoth absolutely.

4. In the inventory of assets filed by the Gerphas Odhiambo the only properties not in the will were **KISUMU/KONYA/741**, **KISUMU/ANGOGA/4044**, the deceased's ancestral home in Seme, and **KAJULU/KOKER/1615**

The dispute

5. From the oral evidence and depositions filed by the parties, the dispute relates to three properties; **KISUMU/KONYA/648** ("Plot 648"), **KISUMU/KONYA/741** ("Plot 741") and **KAJULU/KOKER/1615** ("Plot 1615"). The issue concerns whether the properties had been disposed of by the deceased after he had written the will and prior to his death.

6. Under the will, **Plot 648** was to devolve to the deceased's seven sons in equal shares but after the deceased passed away, the family discovered the property had been transferred to Philip Juma Akoth ("Philip"), Willis Ochieng Akoth ("Willis") and Paul Otieno Akoth ("Paul Otieno"). They also discovered that **Plot 741**, which was not in the will, had been transferred to Philip, Willis and Paul Otieno. In light of this I directed them to show how the property was registered in their names. I also directed the District Land Registrar to furnish to the court, the Green Card and the documents used to transfer the properties to the three beneficiaries.

7. It is also not in dispute that during his lifetime that deceased sold **KISUMU/KONYA/2245** ("Plot 2245") and it is no longer part of the estate.

8. Philip testified that while the deceased was still alive he was carrying out livestock farming on **Plot 2245**. In due course, he expressed the wish to raise money and construct additional units on **KISUMU/MANYATTA 'A'/3299**. The deceased then sold **Plot 2245** and told him that he would compensate his mother, Willis and Paul Otieno by giving them **Plots 648** and **741**. In doing so, he executed transfers, applied for land control board consent and the only step left was for the transfers to be registered which was done after the deceased passed away. Philip told the court that from the

proceeds of sale, the deceased built additional units on **KISUMU/MANYATTA 'A'/3299**.

9. Willis also testified that he was consulted by the deceased prior to selling **Plot 2245** and following disposal of the property, the deceased transferred **Plot 741** to them. He further testified that he and Paul Otieno have occupied the property and have constructed their homes on the property.

Plots 648 and 741

10. The first question I must answer is whether **Plots 648** and **741** are part of the estate of the deceased. I have looked at the documents filed in court by the Kisumu District Land Registrar pursuant to orders issued by the court. As regards **Plot 648** the deceased executed a transfer in favour of Philip, Willis and Paul Otieno after obtaining Land Control Board Consent on 28th February 2007. The execution of this document is consistent with deceased's desire to compensate the 3rd house after disposing off **Plot 2245**.

11. For gifts *inter vivos* to be valid the gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete in order to be valid though it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. **Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67** states as follows with respect to incomplete gifts:

Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.

12. I am satisfied that the deceased intended to transfer his interest in the **Plot 648** to his three sons and he did so expressly by seeking Land Control Board consent and executing the transfer to consummate his intention. I find and hold this transaction was complete for purposes of constituting an *inter vivos* gift.

13. As regards **Plot 741**, the Registrar did not produce any transfer documents. He remarked on the copy of the Green Card dated 8th December 2017 as follows, "*No document of transfer in the parcel file. No details of succession cause/or grant used to effect the entries on the green card.*" In these circumstances, the transfer does not meet the standard set for the validity of an *inter vivos* transfer as I have outlined above and since the entries are not supported by proper documentation, the transfers and related entries are hereby cancelled and the property shall revert back to the name of the deceased.

Intestacy

14. The finding I have made in respect of **Plot 741** is not the end of the matter as this court still has to distribute the intestate properties to the beneficiaries. Since the deceased was a polygamous man and he left behind, three wives and children, the distribution of his estate is governed by **section 40** of the **Act** which stipulates as follows:

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 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.

(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.

15. Section 3 of the **Act** defines the “house” as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. **Section 40** of the **Act** does not take away the discretion of the court to distribute the estate fairly or equitably. Further, that section is also subject to **section 42** of the **Act** which provides that in distributing the property, the court is entitled to take account the property the deceased gave to his children during his lifetime or under the will. It provides as follows;

42. Where-

(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.

That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child, grandchild or house.

16. Apart from **Plot 741**, the evidence shows that the other properties available under the rules of intestacy are **Plot 1615**, **KISUMU/ANGOGA/4040** and the deceased’s ancestral home **KISUMU/ANGOGA/4044**. The latter two properties do not have titles as the land is still under adjudication.

17. The argument made by Philip, Paul Otieno and Willis is that once **Plot 2235** was sold by the deceased, the 3rd house was disadvantaged hence in any event was entitled to **Plot 741** and **648** as compensation. They further argue that as a result of sale of the land, the deceased built three additional units on **KISUMU/MANYATTA ‘A’/3299** which increased its value to the detriment of the 3rd house. Thus in order to maintain equality between the houses, they are entitled to **Plots 648** and **741**. The other family members disagree and contend that since **Plot 648** was to be distributed to the seven sons and that the 3rd house should not benefit from both **Plots 648** and **741** and these should be divided among the family.

18. I have no doubt that when the deceased sold **Plot 2225**, he intended to compensate the 3rd House for the loss of **Plot 2225** and although he only managed to transfer **Plot 648**, I am convinced by the testimony of Consilata that the deceased had expressed the wish that the 3rd house should have **Plot 741**.

19. Further according to the will, **Plot 2225** was described as a vacant plot measuring 3 acres. This approximates the total area of **Plot 741** measuring 1.2 Ha (2.9acres) and **Plot 648** measuring 0.1Ha (0.2 acres) making a total of 3.1 acres which makes both plots equivalent in area to **Plot 2225**. Both plots are within the Kisumu Konya area which means the two plots are also of equivalent or similar value. I therefore grant **Plot 741** to the 3rd house as this is consistent with the wishes of the deceased and it equalizes the 3rd house to the others in the will after the deceased sold **Plot 2225**.

20. The intent of the deceased as discerned from the way he drew the will was to treat each house equally hence the transfer of **Plot 648** would not prejudice the 1st and 3rd house in terms of value.

Contrary to what the deceased stated in the will, **Plot 648** was not 8 acres but 0.2 acres which was to be shared between the seven sons. The sons, whom it was intended to benefit, were all given equal share of the plots in Muhoroni.

Plot 1615

21. As regards **Plot 1615**, the evidence is that when Concilata initially filed the application for grant of letters of administration she proposed that it goes to her son Paul Otieno. She explained in her further affidavit filed on 23rd July 2013 that the plot was given to her by the deceased and that is why she proposed to give it to her son. In her supplementary affidavit sworn on 5th August 2014, she deposed that she is entitled to it as she did not have any land to cultivate unlike her co-wives. She conceded though that **Plot 1614** was given to Mary. Colleta opposed this proposal and deposed in her affidavit filed on 6th December 2012 that the land was given to her by the deceased.

22. Mary also stated in her deposition sworn on 30th July 2014 that the deceased had, during his lifetime, given Colleta and Concilata, **KAJULU/KOKER/1736** and **1737** respectively while she was given **Plot 1615** and that the title deeds had been processed but Concilata had refused to release to them. Her position was that the deceased had expressed the wish that **Plot 1615**, which borders her **Plot 1614** which belongs to her, should be left for her benefit.

23. I have considered the evidence and I find that the deceased intended that each of his wives would have the Kajulu properties and it is clear that he gave each wife a property. I am however more inclined to believe Mary's testimony to the effect that her husband intended for her to have **Plots 1614** and **1615** which are adjacent to each other. When given an opportunity to cross-examine Mary on this aspect of the evidence, neither Colleta nor Concilata contested her claim. I therefore give **Plot 1615** to Mary.

Ancestral land

24. From the evidence, the ancestral land comprised two unadjudicated properties; **KISUMU/ANGOGA/4040** and **4044**. According to Colleta and Concilata, **Plot 4040** was owned by Alphonse Abongo Ndonga who moved to Songhor and left the land to the deceased. The deceased then gave the land to Colleta and Mary. Since the parties are agreed that this is the position, **Plot 4040** shall be shared equally between Colleta and Mary.

25. The ancestral land **Plot 4044** is where the deceased is buried. It shall be held by the three widows in trust for the family.

Other beneficiaries

26. The final issue I would like to deal with was raised by Bernadette Atieno Okoth in her further affidavit sworn on 6th August 2014 that the children of her late brothers' and sister's should be provided for. George Ochieng Akoth died in 2005 leaving behind two children; Leakey Odhiambo and Sidney Achieng Akoth. Fredrick Otieno Akoth died in 2008 leaving behind four children; Collete Awuor, James Akoth, Cecelia Achieng while Elizabeth Anyango Okoth died in 2011 leaving behind James Odhiambo and Nicole Akinyi to whom she was appointed as guardian. She prayed for consideration from Concilata's Akinyi Akoth's share.

27. From the above it is clear that both Fredrick Otieno and George Ochieng are direct beneficiaries and upon their death their wives and children are entitled to inherit their share of their grandfather's estate. In **Christine Wangari Gachigi v Elizabeth Wanjira Evans and 11 Others** NKU CA Civil Appeal No.

221 of 2007 [2014]eKLR stated as follows:

Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41 We affirm the learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceaseds' children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court

28. Unlike Fred and George who were provided for under the will, Elizabeth Anyango Okoth was not included in the deceased's will and her children who are now in the care of her sister Bernadette Atieno Okoth. Since she was a daughter from the first house, I direct that provision should be made for the two children from the house of Colleta.

Conclusions and Disposition

29. Since I have settled all the issues concerning the properties in the will and in order to bring this matter to a conclusion, I now **confirm** the grant of probate in accordance with the will excluding **KISUMU/KONYA/2245** which the deceased disposed off during his lifetime and **KISUMU/KONYA/648** which the deceased transferred during his lifetime.

30. I direct the Land Registrar, Kisumu to cancel all entries transferring **KISUMU/KONYA/741** to **Willis Ochieng Akoth, Phillip Juma Akoth and Paul Otieno Akoth** revert to the property to the name of the deceased.

31. The grant of letters of administration issued to Gerphas Odhiambo is confirmed on the following terms:

a. KISUMU/KONYA/741 shall be inherited by **Philip Juma Akoth, Willis Ochieng Akoth and Paul Otieno Akoth**.

b. KAJULU/KOKER/1615 shall be inherited by **Mary Atieno Akoth**.

c. KISUMU/ANGOGA/4040 shall be inherited by **Concilata Awar Akoth and Mary Atieno Akoth** in equal shares.

d. KISUMU/ANGOGA/4044 shall be held by the three widows; **Concilata Awar Akoth, Mary Atieno Akoth and Consilata Akinyi Akoth**.

e. Shares in Standard Chartered Bank (Certificate No. [particulars withheld]), Barclays Bank (Certificate No. [particulars withheld]) and KENGEN (Certificate No. [particulars withheld]) equally between the three widows; **Concilata Awar Akoth, Mary Atieno Akoth and Consilata Akinyi Akoth**.

f. Money in Standard Chartered Bank Accounts No. [particulars withheld] and [particulars withheld] shall be held in an estate account held by the administrator and the monies used for meeting the expenses for winding up the estate. The balance thereof on completion of the process shall be distributed to **Concilata Awar Akoth, Mary Atieno Akoth and Consilata Akinyi Akoth** in equal shares.

32. I direct **Concilata Awar Akoth** to make provision for **James Odhiambo and Nicole Akinyi**, children

of **Elizabeth Anyango Akoth** from her share of the estate. The beneficiaries and guardian shall be at liberty to apply.

33. The administrator shall file a statement of accounts every 6 months until the winding up of the estate is finalized.

34. I direct any member of the family with any title documents belonging to the deceased to hand them over to the executor/administrator within the next **fourteen (14) days** to enable him complete administration of the estate.

35. As this is a family matter there shall be no order as to costs.

DATED and DELIVERED at KISUMU this 21st day of December 2017

D. S. MAJANJA

JUDGE

All parties appeared in person.



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