



REPUBLIC OF KENYA



**In re Estate of Musa Nanyuma Orakha (Deceased) (Succession Cause 40 of 1999) [2023] KEHC 23419 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23419 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 40 OF 1999  
PJO OTIENO, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**FATUMA LUBALE NETIA ..... 1<sup>ST</sup> ADMINISTRATOR  
HASSAN OPWORA OGOLA ..... 2<sup>ND</sup> ADMINISTRATOR  
ABDALLA OLWENYA ..... 3<sup>RD</sup> ADMINISTRATOR**

**AND**

**GULAM HUSEIN ORATA WANGATIA (SUBSTITUTED BY IMMAM RALPH WANGATIA) ..... PETITIONER**

**RULING**

1. Musa Nanyuma (“Deceased”) died on 27<sup>th</sup> March, 1974 and according to the chief’s letter, he was survived by the following: -
  - a. Munyanya Nanyuma- Wife (Deceased)
  - b. Mwanahwa Nechesa- Wife (Deceased)
  - c. Omar Ogola Nanyuma-Son
  - d. Asman Munyanya-Son
  - e. Gulam Husein Orata Wangatia
  - f. Wilfred M. Salasya
  
2. Gulamusein Orata Wangatia petitioned this court for letters of administration intestate for the estate of the deceased and the court issued a grant in respect thereto on 22<sup>nd</sup> June, 1999. In the petition, he indicated that the estate of the deceased comprised of property known as LP No. E. Wanga/lubitu/753



measuring 3.08 Hectares that is, 7.5 acres but notably Munyanya Nanyuma and Wilfred M. Salasya were not included in the list of survivors.

3. By an application dated 24/4/2007, Omari Ogola Nanyuma, a son of the deceased, filed summons for revocation of the grant on the ground that the petitioner failed to obtain his consent in filing the succession cause and that there had been failure to disclose something material. In the affidavit in support of the application for revocation of grant, the objectors asserted that the petitioner was not a son to the deceased as alleged in the petition but an alleged purchaser of two acres of the estate from the deceased. That application was by consent allowed as prayed on the 29.09.2008.
4. One, Fatuma Lubale Netia, a daughter to the deceased, also filed another summons for revocation of the grant on among other grounds that the proceedings to obtain the grant were defective in substance but the same was subsequently withdrawn before determination.
5. An amended grant of letters of administration intestate was on the 28.06.2021 issued to Fatuma Lubale Netia, Hassan Opwora Ogolla and Abdalla Olwenya as joint administrators. On the 10.11.2021, a summons for confirmation of grant was lodged as supported by the affidavit of Fatuma Lubale Netia sworn the same day in which she avers that the deceased had three survivors namely;
  - i. Mwanaisha Nechesa- Widow
  - ii. Omari Ogola Nanyuma-Son(Deceased) survived by  
Mwanamina Atitwa Okola-Wife  
Hassan Opwora Ogola-son  
Abdalla Olwenya-Son
  - iii. Fatuma Lubale Netia-Daughter
6. She asserts that the estate of the deceased was indebted to the following purchasers; Juma Anzabasi Oduori who purchased 2.0 acres out of the 2.5 acres of the deponents share, Gulam Husien Orata Wangatia who purchased 2.0 acres from the Deceased, Wilfred Melekia Salasia and Herman Many Wanyama. She thus proposes that the estate be distributed between her, the dependants of her deceased brother and the four purchasers as follows: -
  - a. Mwanamina Atitwa Okola  
Hassan Opwora Ogola 2.75 acres jointly  
Abdalla Olwenya
  - b. Fatuma Lubale Netia -0.5 acres
  - c. Juma Anzabasi Oduori -2.0 acres
  - d. Imam Ralph Wangatia -2.0 acres
  - e. Wilfred Melekia Salasia -0.125 acres
  - f. Herman Many Wanyama -0.125 acres
7. The application and its proposed mode of distribution attracted protest from Imam Ralph Wangatia who in an affidavit sworn on 31<sup>st</sup> January, 2022 avers that his late father, Gulam Husein Orata Wangatia purchased a total of 3.5 acres from the deceased's estate and that the acreage bought was adjudicated and confirmed by the court in Land Disputes Tribunal at Mumias Case No. 15 of 2002 between Gulam



Husein Orata Wangatia vs Omari Ogola Nanyuma & Asuman Munayanya Nanyuma which order was adopted by the court in CMC Kakamega Misc Application No. 158 of 2002. He exhibited the order for its full effect and tenure.

8. The 3<sup>rd</sup> administrator, Abdalla Olwenya, also protested the mode of distribution proposed by the administrator by an affidavit of objection sworn on 31<sup>st</sup> January, 2022. In that affidavit he asserts that Gulam Husein Orata Wangatia was sold a total of 3.5 acres and that Fatuma Lubale Netia sold off her share of the estate to one Juma Anzabasi Oduori but there has always been a dispute as to how much she sold. He claims that Fatuma Lubale Netia is taking advantage of the succession process to allocate herself more land and he therefore makes a counter proposal that the distribution of the estate to be as follows: -
  - a. Mwanamina Atitwa Okola
  - b. Hassan Opwora Ogolla 2.75acres jointly
  - c. Abdalla Olwenya
  - d. Fatuma Lubale Netia 1.25acres jointly
  - e. Juma Anzabasi Oduori
  - f. Immam Ralph Wangatia-3.5acres
  - g. Wilfred Melekia Salasia-0.125acres
  - h. Herman Many Wanyama -0.125acres
9. Hassan Opwora Ogola, the second administrator also filed an affidavit protesting the proposed distribution. Sworn on 11<sup>th</sup> October, 2022, the affidavit reiterates the averments of Abdalla Olwenya, word for word, and reiterates the proposed distribution by his brother and co-administrator.
10. It was directed that parties file and exchange submissions which was done and I have had the benefit of perusing both sets off submissions.

### **Issues, Analysis and Determination**

11. A perusal of the summons for confirmation of grant and the affidavit in support, the affidavits protesting proposed mode of distribution and the submissions filed isolate only one issue to arise for determination by the court. The issue is how the estate of the deceased ought to be distributed. I consider this to be the only issue because, all sides agree that there are purchasers of portions of the estate who are entitled to the portions purchased. The only contention is whether the portion bought by Gulam Hussein Orata Wangatia was 2.0 acres or 3.5 acres.
12. From the documents on record, it is unanimous that the deceased was survived by two widows and two children; Omari Ogola Nyanyuma and Fatuma Lubale Netia. The son to the deceased, Omari Ogola Nyanyuma, died before the estate could be distributed leaving behind a widow and two sons. In terms of section 41 of the Act, his share shall go to the established survivors known to be: -

#### **A. Mwanahawa Munyanya-Widow (Deceased)**

Omari Ogola Nanyuma-Son(Deceased)- survived by  
Mwanamina Atitwa Okola-Wife  
Hassan Opwora Ogola-Grand son



Abdalla Olwenya-Grand Son

**B. Mwanaisha Nechesa - Widow(Deceased)**

Fatuma Lubale Netia-Daughter

13. The deceased whose estate is the subject matter herein having died intestate and survived by two widows and two children, the provisions of section 40 of the *Law of Succession* is called into application. That provision dictates that the deceased's personal and household effects and the residue of his net intestate estate 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.
14. With the two widows of the deceased being deceased, it then follows that the estate of the deceased ought to be distributed among two units being the two children of the deceased and the acknowledged beneficiaries.
15. The common position is that portions of the estate were sold by the deceased in his life time and others by the beneficiaries who acknowledge portions so sold as their own and subject to deduction from what they would otherwise get. In the affidavits of the 2<sup>nd</sup> and 3<sup>rd</sup> administrators, in support of the claim by Imma Ralph Wangatiah (the Protestor), the portion of land sold to Gulam Wangatia has been finally determined by judicial process, in Land Disputes Tribunal at Mumias Case No. 15 of 2002; between Gulam Husein Orata Wangatia vs Omari Ogola Nanyuma & Asuman Munayanya Nanyuma which order was confirmed and adopted by the court in CMC Kakamega Misc Application No. 158 of 2002 to have been 3.5 acres. Being a final judicial pronouncement, it is not capable of question in these proceedings but must be taken judicial notice of and given the due effect.
16. The court thus finds that contrary to the position taken by the 1<sup>st</sup> administrator that only 2.0 acres was sold, the estate of Gulam Hussein Orata wangatia, represented by Immah Ralph wangatia, is entitled to 3.5 acres from the estate. That position of the decree of the judicial process appear to have been implemented by the entry number 7 in the register which assigns to Imma Ralph Wangatiah 3.5 acres.
17. That determination leaves 4 acres to be shared among the two beneficiaries and the three other purchasers. Irrespective of which of the beneficiaries sold their share to Wilfred Melekia Salasia, Herman Manya Wanyama, because the 1<sup>st</sup> administrator owns up to the sale to Juma Anzabasi Oduori, the 4 acres must be shared between the 1<sup>st</sup> administrator and the family of her brother and father to 2<sup>nd</sup> and 3<sup>rd</sup> administrator. In those circumstances, the 1<sup>st</sup> administrator gets 2 acres while the family of the 2<sup>nd</sup> and 3<sup>rd</sup> administrators also get 2 acres to share equally or as agreed within the family.
18. Because the sales to Wilfred Melekia Salasia and Herman Manya Wanyama were effected on dates and by persons not disclosed to the court, and contrary to the provisions of section 45 of the Act, their claim is in the nature of claim to land which must be dealt with outside the succession cause. The court assumes that the parties to those transactions will consensually conclude same as transactions over land in the usual manner but not as a succession dispute. On the other hand, the 1<sup>st</sup> administrator owns up to having sold her share to Juma Anzabasi Oduori, after the death of the deceased and without the authority of the court envisaged under section 35 as read with section 82(b)ii. That is equally a matter outside the courts mandate in this succession cause. The court must keep to its line of settlement of inheritance dispute and not transactions over land. It would have been different had all the parties agreed by consent on what is due to each of the beneficiaries and the purchasers, in which even the court would be called to acknowledge parties' agreement. Here however, there is a dispute as between the



beneficiaries after the interests of the purchasers is taken into account for which reason the inheritance dispute must be separated from that on claim over land.

19. In conclusion, the grant dated 28.06.2021 is confirmed and the estate distributed as follows.
  - a. Imah Ralph Wangatia - 3.5acres
  - b. Mwanamina Atitwa Okola
  - c. Hassan Opwora Ogola - 2.0 acres to be shared equally
  - d. Abdalla Olwenya
  - e. Fatuma Lubale Netia -2.0 acres
20. For avoidance of any doubt, and by way of a restatement, the claims by Wilfred Melekia Salasia, Herman Many Wanyama and Juma Anzabasi Oduori are outside the mandate of the court sitting as a succession court. Such claims may be pursued against the concerned obligants as may be appropriately advised by counsel.
21. Let the certificate of confirmation of grant issue forthwith to enable the estate be transmitted within 90 days from today. The matter will be mentioned on the 17.2.2024 for confirmation that the administration shall have been completed.
22. Being a family matter, between a lady and her nephews and acknowledged purchasers, there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

