



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 2 OF 2019

IN THE MATTER OF THE ESTATE OF JOHNSON OMAE ABURI (DECEASED)

JARED ONGWAE OMAE.....APPLICANT

VERSUS

GRACE OBEGI OMAE.....1ST RESPONDENT

GEORGE KENNEDY OMAE.....2ND RESPONDENT

PETER NYANDUSI.....PROTESTOR

RULING

1. On the 21st December 2020 **Peter Nyandusi** (the protestor) filed a chamber summons dated the 24th November 2020 seeking the following orders;

i. That the grant of letters of administration intestate issued on the 20th May 2019 and confirmed on the 14th August 2019 and the mode of distribution therein be set aside.

ii. That the distribution of the estate of the deceased among beneficiaries as indicated in the certificate of confirmation of grant be reviewed accordingly and the certificates of confirmation be amended and a fresh one be reissued.

iii. That then cost of the application be on then cause.

2. The application is brought under Section 40, 49 of the Laws of Succession Act and Section 73 of the Probate and Administration Rules.

3. The application is supported by the supporting affidavit of Peter Nyandusi dated 24th November 2020. It is further supported by George Kennedy Omae (Interested Party/ Petitioner) and Philip Arasa Omae (2nd interested party/ Petitioner). George Omae filed a Replying Affidavit dated 6th July 2021. The Application was opposed by Jared Ongwae Omae vide a Replying Affidavit dated 3rd June 2021.

PROTESTOR'S CASE

4. In his supporting affidavit to the application, the Protestor avers as follows; that he is the son of the deceased together with the administrators George Kennedy Omae (George) Philip Omae (Phillip) and Jared Ongwae (Jared). That after the confirmation of grant was done on 14th August 2019, the Administrators have failed to proceed diligently with the administration of the Estate of the deceased as they have sold some pieces of land to 3rd Parties and have appropriated for themselves bigger shares than other beneficiaries before demarcation is done. That the distribution of the Estate of the deceased as per the mediation report was unfair to the beneficiaries of the Estate and as per the wishes of their late father. Their late father had three pieces of land as follows;

a) Nyaribari Chache/B/B/Boburia/2284 measuring 6 acres ancestral land,

b) Nyaribari Chache/B/B/Boburia/2280 measuring 4 acres purchased,

c) Kitaru settlement Scheme/10 measuring 60 acres.

5. That his late father had two wives; Grace Omae and Mary Omae, both deceased. That the administrators misled the mediator when he allocated the ancestral land measuring 6 acres to Philip instead of subdividing it into 2 equal parts among the two houses of Grace and Mary.

That the 4 acres purchased by the deceased was purchased by the deceased and his first wife Grace in 1966. The land parcels in the settlement scheme was also purchased by the deceased and his first wife Grace in 1966 and measures approximately 60 acres. The 2nd wife, Mary was married in 1976. That it is unfair if Mary's son gets 24.5 acres against the other beneficiaries who will get 3 acres each. That he is aware that his late father sold 9 acres of the settlement scheme to **Charles Nyamweya** and allocated 2 acres to their sister **Josephine Nyanchama**. The land now left in the settlement scheme for distribution measures approximately 49 acres. That the deceased left behind the following dependants namely; **Jared Ongwae Omae, Evans Ogega Omae, George Kennedy Omae, Daniel Nyasinga Omae, Justus Nyagaka Omae, Peter Nyandusi Omae, Benjamin Nyamweya Omae, Philip Arasa Omae, Charles Nyamweya Omosa (Purchaser) and Josephine Nyanchama Omae (Daughter)**.

6. That if Jared retains the 6 acres then he should not benefit from the settlement scheme. That the 49 acres should be allocated to the 7 sons with each getting approximately 7 acres. That the 24.5 acres as per the certificate of grant if given to the 6 brothers each will benefit approximately 4 acres each. That some sons will be disadvantaged with larger shares than the others. That if the confirmed grant is left as it is now then Philip from the 2nd house will benefit 4 acres from parcel no. 2280 in addition to 24.5 acres from Kiratu Settlement Scheme, totalling 29.5 acres.

7. That the entire estate should be sub-divided as follows;

a) LR. NO. NYARIBARI CHACHE/B/B/BOBURIA/2284 measuring approximately 6 acres be retained by Jared Ongwae Omae and/ or sub-divided among the two houses

b) LR. NO. NYARIBARI CHACHE/B/B/BOBURIA/2280 be shared equally among two houses and Philip Arasa Omae to have 2 acres and the 6 sons of the 1st house to share the rest.

c) Kitaru Settlement Scheme plot No. 10 to be shared as follows;

1) Charles Nyamweya the purchaser to retain his 9 acres.

2) Josephine Nyanchama to retain 2 acres.

3) The remaining 49 acres to be shared among 7 sons of Johnson Omae Aburi of the two houses and each to get 7 acres each.

8. George Kennedy Omae in his replying affidavit dated 6th July 2021 stated as follows; that the shares indicated in the confirmed grant will greatly disadvantage the other houses as one house will benefit more than the other house. That the estate of the deceased should be shared equally among the beneficiaries of the deceased to avoid confrontation in the family. His proposal is that the shares in the Kitaru settlement scheme /10 shares to be divided amongst the sons, Jared, Evans, George, Danile, Joshua, Peter and Benjamin each to get 6.25acres. B/B/ Boburia/2284 measuring 6 acres each of the beneficiaries (sons) from the 1st house to have a share equivalent to 0.75. B/B/Boburia /2280 measuring 4 acres each share a portion measuring approximately 0.5 acres. Philip the only son in the 2nd house to get 6.25acres from Kitaru settlement scheme, 0.75acres from B/B/Boburia/2284 and 0.5 acres from B/B/Boburia/2280. 9 acres from Kitaru settlement scheme/10 be allocated to Charles Nyamweya Omosa a purchaser and 2 acres from the said settlement scheme to their sister Josephine Nyanchama. That this mode of distribution is fair and that the certificate of confirmation should be amended accordingly. That section 40 of the Law of Succession Act should apply so that they all benefit equally.

9. Jared Ongwae Omae opposed the application. He is a son of the deceased from the 1st house and co-administrator, with Philip, and George as per the grant issued on the 20th May 2019. In his replying affidavit dated 3rd June 2021 he depones as follows; the application is misconceived and is anchored on falsehoods. That it is made in bad faith and is aimed at restraining the administrators from discharging their mandate in administering. That before the letters of administration was applied for the family sat under the leadership of their late uncle Charles Siringi and they agreed on how to share the property as shown in the Minutes dated 2nd February 2007. That during the mediation the protestor and Charles supported them financially and agreed that whatever the beneficiaries may agree they were in support and had no objection. That before the death of their father the family agreed to allocate their late sister Nyanchama 2 acres, but since then the protestor has been cultivating the said land. That their late father had sub-divided the Kitaru Settlement land equally between the 2 wives less the 9 acres he had sold to Charles Nyamweya. That it was the wish of his father that the 1st house to occupy Nyaribari Chache/B/B/Boburia/2284 measuring 6 acres and the 2nd house to occupy Nyaribari Chache/B/B/Boburia/2280 measuring 4 acres. That the protestor has sold his portion in Kitaru Settlement. That he urges the court to visit the scene to confirm the situation on the ground. That they have never sold any portion of the estate of the deceased. That the application is an abuse of the court process.

10. Parties filed submissions. I have read and considered the said submission. In summary these are the parties' submissions. According to the protestor the mediator did not cater for the interest of all the beneficiaries. He proposes that the mode of distribution be reviewed as per the proposals in his supporting affidavit. He urged the court to take into account the provisions of section 40 of the Law of Succession Act as the deceased was a polygamous man with 2 wives. He urges the court to revoke and annul the certificate of grant and have a fresh one reissued. George the 2nd respondent submitted that the confirmation of grant was made as a result of the mediation. He states that the mode of distribution as per the said mediation is unfair. He further submits that the court should note that he did not attend the mediation nor did other beneficiaries namely Daniel, Peter and Benjamin. That the 2 petitioners Jared, Philip together with Evans and Justus attended the mediation. That the proposal under the mediator was done under coercion for those who were present in court against those who did not attend.

11. The 2nd and 3rd administrators reiterated the contents of their affidavit and submitted as follows; that the issues for determination are;

- i. Whether the protestor has laid a basis to warrant revocation of the grant that was issued in favour of the respondents.
- ii. Whether the Summons for setting aside grant lodged by the applicant is merited.

On the first issue it was submitted the protestor has not invoked the provisions of section 76 of the Law of Succession Act(the Act) but has instead invoked the provisions of sections 40 and 49 and Section 73 of the Act. That none of the said sections are relevant. That there are no grounds to revoke the grant as provided under Section 76 of the Act. That the Protestors main grievance is the mode of distribution, this is not a ground for revoking the grant. That the protestor had the opportunity to oppose and or challenge the Mediation report before the same was adopted by the Court and he did not. He has come to court late. That the protestor cannot raise the issue again as the court had dismissed an application seeking to challenge the mediation. That the Protestor cannot re-litigate on the issue as this is tantamount to an appeal in disguise. That the Mediation report is a final settlement which is binding on all parties. It was further submitted that the court should not attach any weight on the consent that was purported to be entered by the Protestor and George one of the administrators. Reliance was made on the following cases; *Henry Kiambi M'mugwika vs. Newton Kimathi M'mugwika & 2 others [2021] eKLR*, *Re Estate of Mburu Gitau (deceased) [2002] eKLR* and *Re Estate of Mbugua Njogu (Deceased) [2018] eKLR*.

Analysis and Determination

12. The Protestor in his application dated the 24th November 2020 seeks to have the grants of letters of administration intestate issued on the 20th May 2019 and confirmed on the 14th August 2019 and the mode of distribution **set aside**. He also seeks that the distribution of the estate of the deceased amongst the beneficiaries as indicated in the certificate of the grant be reviewed accordingly and that the certificate of confirmation be amended and afresh one be reissued.

13. The Protestor in his affidavit appears to have no problem with the 3 administrators George Omae, Philip Omae and Jared Omae. He has not challenged their appointment as administrators of the deceased's estate. In my view what his challenging is the mode of distribution of the deceased's estate. The applicant is not expressly seeking a revocation of the 2 grants but a redistribution of the estate of the deceased. His main reason is that according to him the distribution was unfair as one beneficiary the son from the 2nd house was to get a larger share of the deceased's estate.

14. I have carefully perused the court file. On the 20th May 2019 Justice Majanja made the following order;

- i. *The grant herein is revoked as a fresh grant do issue to George Omae, Philip Omae and Jared Omae.*
- ii. *The grant shall be confirmed in terms of the mediation agreement (KIS/MED/17/19) subject to the property KITARU SETTLEMENT SCHEME/10 being surveyed.*
- iii. *The survey shall be carried out by the County Surveyor Nyamira County to ascertain the shares of each beneficiary.*
- iv. *The cost of the survey shall be borne by the beneficiaries equally.*
- v. *The grant shall be confirmed upon filing of a report confirming the shares.*
- vi. *The survey shall be supervised by the Assistant County Commissioner of the area under appropriate security directed by him.*
- vii. *Mention on the 27.06.2019 to confirm the position.*

15. On the 27.06. 2019 the parties were not ready. The matter was adjourned. On the 05.08.2019 Mr. Rono informed the court that the order issued on the 20.05.2019 was not in conformity with the mediation agreement and that they had filed an application to amend the Order. Mr. Rono prosecuted the application dated the 30.07.2019 on the 9.08.2019. The said application was seeking a review of the order dated the 20.05.2019. He informed the court that the matter went for mediation but that the same was adopted and an Order issued on the 20.05.2019. That the Order omitted several facts of the mediation agreement and that they were promoted to file their application. He relied on the affidavit supporting the application dated 30.7.2019. The application dated the 30.7.2019 sought to review the order dated 20.05.2019. It also sought to have the interested party included in the order of distribution of the estate, that the Order dated 20.05.2019 which omitted some parts of the mediation agreement be amended and issued in terms of the Mediation. The grounds on the face of the application were that; during the issuance of the Order dated 20.05.2019 the applicant's (Jared) lawyer was not aware of the date nor did the lawyer instruct one Mr. Ondego to hold brief and that Mr. Rono came to know of the Order issued only upon visiting the court on the 18th July when he was issued with the same Order. That the issue of valuation and parcel no. Baburia/2284 was omitted though it was part of the Mediation Agreement and is crucial and needs much attention and that issue of survey and Security is also of great importance and needs to be reviewed. In his supporting affidavit dated the 30th July 2019, the applicant deposed that his advocate was never aware of the date 20.05. 2019 nor did his advocate instruct one Mr. Ondego to hold his brief. That he knows of his own knowledge that never at any given date his lawyer has never failed to communicate to him the dates when he matter is set for hearing or mention. That if his lawyer could have been aware of the date, he could have informed him hence both his lawyer and he could not have missed court. That the Order omitted some parts of the Mediation Agreement as it did not touch on Kisii Farm (¼ acre from Baburia/2284) and valuation. Nyamweya Omosa an interested party too swore an affidavit indicating too that he was not in court when the Order was made nor was George Kennedy Omae the 2nd Respondent. That he learnt that his interest on the land was not captured on the Order as mentioned on the mediation Agreement made on the 10th May 2019 when both lawyers were present. That the survey process should be carried out by the District Surveyor and not the County Surveyor and that the Security should be provided by the OCS and not the County Commissioner. That he supports a review or amendment of the Order dated 20.05.2019.

16. In my Ruling dated 14th August 2019, I held as follows: ***"The application is for review of the Order dated 20.05.2019 and that the***

interested party be included in the distribution of the estate. The Order of 20.05.2019 clearly states that the grant shall confirmed in terms the Mediation Agreement (KIS/MED/17/19) and that the subject to the property Kitaru Settlement Scheme/10 being surveyed. There is nothing to be reviewed. The grant was confirmed as per the Mediation Agreement. A confirmed grant shall be issued in terms of the said agreement. No order as to costs.”

17. After this Ruling the protestor filed the current application. In the application dated the 30.7.2019 the applicant was seeking a review for reasons that the Mediation Agreement did not touch on Kisii Farm (1/4 acre Baburia/2284) and valuation. This is not what the current application seeks. As earlier stated the current application seeks a redistribution of the estate. The issue therefore is can there be a redistribution of the deceased's estate?

18. This court has inherent powers under Rule 73 of the Probate and Administration Rules. Rule 73 provides as follows;

‘Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’

19. I have gone through the Mediation Settlement Agreement dated 10th May 2019 and this is what I note. The agreement states as follows:

- “ 1. Ascertainment of the acreage farm in Kitaru by surveyor.*
- 2. The Kitaru Settlement scheme first be subdivided into two equal portions between two houses, Grace and Mary.*
- 3. The dependants of the first house (Grace) be subdivided into equal parts portions amongst 1. Evans Ogega 2. George Omae 3. Daniel Omae 4. Justus Omae 5. Peter Omae 6. Benjamin Omae.*
- 4. Josephine Nyanchama (deceased) be allocated 2 acres’*
- 5. The purchaser Charles Nyamweya be allocated 9 acres from the total acres in Kitaru Farm*
- 6. Jared Omae to retain Boburia/ Boburia 2284*
- 7. Philip Omae to retain Boburia/ Boburia 2280*
- 8. Philip Omae to retain approximately 24 acres in Kitaru Farm*
- 9. An equivalent value of ¼ acre from Boburia/ Boburia 2284 be apportioned to George in addition to his share in Kitaru Farm.*
- 10. Cost of valuer and surveyor to be shared equally.*

Jared Ongwae Omae and George Omae signed the Agreement. It also has a signature of J.R. Rono Advocate dated 10th May 2019. It is also signed by Emelda Bosire the Mediator. Attached to the Agreement is a Consent of Distribution signed by Jared Ongwae Ommae, Evans Ogega Omae, George Ommae, Justus Nyagaka Ommae and Philip Arasa Ommae. It was not signed by Josephine Nyanchama Ommae (deceased), Daniel Nyasinga Ommae, Peter Nyandusi Ommae, Benjamin Nyamweya Ommae, Charles Nyamweya Omosa and Emelda Bosire.

20. It is evident that the mediation agreement was not signed by all the parties. A mediation agreement that binds all parties is one that is signed by all parties. Failure by some of the parties in signing the agreement can only mean that they were not in agreement with the terms as indicated. Further having considered the contents of the affidavit it is evident that the son from the 2nd house will get far more acreage in land than the sons in the first house. In my view there is good reason to relook the mode of distribution considering that all the parties except the buyer were children of the deceased. Although it has been stated that the land was distributed as per the deceased's wishes there was no sufficient evidence adduced to support this. The application does not cite section 76 of the Act. The applicant seeks that the mode of distribution be set aside in order to have equal distribution of the deceased's estate.

21. The law that guides this court are sections 38 and 40 the Law of Succession Act. **Section 40** of the Act provides as follows;

(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 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.

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

Section 38 provides as follows;

“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”.

22. The provisions of section 38 as provided above is clear that the net intestate estate shall be divided equally among the surviving children. The administrators are in agreement that part of the land in the settlement scheme was sold to a buyer and another portion 2 acres was given to the deceased's daughter.

23. In view of the above, the applicant has shown that there is sufficient cause to set aside the mode of distribution to enable the beneficiaries share the assets equally.

24. Final orders'

- a. The grant issued on the 20th day of May 2019 is not revoked.
- b. The mode of distribution in the confirmed grant dated the 14th August 2019 is set aside.
- c. The deceased's estate shall be distributed as follows;
 - i. Nyaribari Chache B/B/Boburia 2284 to be shared equally amongst the 7 sons of the deceased.
 - ii. Nyaribari Chache B/B/Boburia 2280 to be shared equally amongst the 7 sons of the deceased.
 - iii. 9 acres of Kitaru Settlement scheme is allocated to Charles Nyamweya
 - iv. 2 acres of Kitaru Settlement scheme is allocated to Josephine Nyanchama
 - v. The remaining acreage in Kitaru Settlement scheme to be shared amongst the 7 sons in equal shares.
 - vi. The administrators will comply with the court order of 20.5.2019 to have a survey done on Kitaru settlement scheme to ascertain the share of each beneficiary.
 - vii. No order as to costs as this is a family matter.

DATED SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF FEBRUARY 2022.

R.E.OUGO

JUDGE

In the presence of:

Applicant	Absent
1st and 2nd Respondent	Absent
Protestor	Absent
Interested party	Absent
Kevin	Court Assistant