



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 15 OF 2018

IN THE MATTER OF THE ESTATE OF ABROS ADERA NYAMEYA (DECEASED)

YOSABIA NYABOKE.....1ST PETITIONER

JOSEPH ONYAMBU.....2ND PETITIONER

VERSUS

SAMUEL NYAMANYA.....1ST OBJECTOR

JOHN MAGETO.....2ND OBJECTOR

ONYAMBU ALIBEA AMBROSE.....3RD OBJECTOR

ZACHARIA MAGARE AMBROSE.....4TH OBJECTOR

CECILIA NYAMBORI.....5TH OBJECTOR

AGNES KERUBO.....6TH OBJECTOR

J U D G M E N T

1. This matter relates to the **ESTATE OF ABROS ADERA NYAMWEYA** who died intestate on 21st December 1994 aged seventy five (75) years old.
2. It is common ground that he was survived by his two wives; Susan Bosibori Nyamweya and Maria Wanjiri Andrew.
3. The two wives died in 2017. Susan died on 3rd March 2017. For Mary the date is not clear as the record shows various dates, the 6th, the 7th and the 27th March 2017 respectively.
4. Each wife had six children, among them Petitioners who are from the first house and the Objectors who are from the second house.
5. The Petitioners petitioned this court for Grant of Letters Administration Intestate on 23rd February 2018 and the grant was issued to them on 24th June, 2019. The 1st objector filed the Protest on the 6th February 2019 vide an Affidavit sworn on the 5th February 2019 on his and on behalf of his siblings.
6. According to form the form P & A 5 filed in court, the deceased had only one asset with an indication of no liabilities i.e. **L.R Nakuru/Rare/Gichobo/8** indicated to have an estimated value of Kshs.30, 000,000/=.
7. The Petitioners' claim is that their father's estate is made up of L.R Nakuru/Rare/Gichobo/8 which they want distributed equally between the two families.
8. That their mother's body remains unburied because it was her wish that she be buried next to her husband who is buried on that parcel of land.

9. The Objectors contend that the Petitioner's mother was given her own parcel of land **L.R Nakuru/ Rare/Gichobo/Block 1/42** during the lifetime of the deceased husband and each family has had the occupation of their own land. That the Petitioners have no **L.R Nakuru/ Rare/Gichobo/8**.

PETITIONERS CASE

10. The petitioners contend that their deceased mother Susan Bosibori Nyamweya was married to the deceased in accordance with Kisii Customary Law. It was their testimony that in 1964, the Government of Kenya directed all squatters living on European Land to be registered and issued with land titles and each of their deceased parents registered themselves and were issued with land titles. That their deceased father acquired absolute title of land known as Nakuru/Rare/Gichobo/8 measuring 8½ acres while their deceased mother acquired absolute title of land known as Nakuru/Rare/Gichobo/Block 1/42 measuring 10 acres.

11. The Petitioners contend that their deceased parents constructed a matrimonial home in all that parcel of land known as Nakuru/Rare/Gichobo/8 where they lived until when the deceased married the second wife who they claim was their mother's niece. That this forced their mother to leave as she felt disrespected. She moved to her land known as Nakuru/Rare/Gichobo/Block 1/42. She later bought a plot at Subuku where she lived before her death.

12. The 1st Petitioner stated that when their father died he was buried on Nakuru/Rare/Gichobo/8 and their mother participated in his burial as his first wife and it was her wish that in the event of her death she would be buried next to her husband. When their mother passed on they wanted to fulfill her wish of burying her next to her husband but there was resistance from the objectors who claimed that this was father's land and it belonged entirely to their house.

13. Efforts to resolve the issue out of court failed.

14. The 1st Petitioner testified that she was aware that her father had allowed his brother, their uncle, to use part of the land Nakuru/Rare/Gichobo/8 temporarily. That none of her family members live on that land. That the objectors' mother was buried on that land together with their father. She testified that it was their position that they are entitled to half of Nakuru/Rare/Gichobo/8.

PROTESTORS'/OBJECTORS' CASE

15. The objectors in their Affidavit of Protest sworn on 5th February, 2019 contended that the petitioners filed this Succession Cause without their knowledge and or consultation; *That the Petitioners' mother was estranged from their father at the time he married their mother Maria Wanjiri Andrew; That their father had another parcel of land L.R No. Nakuru/Rare/Gichobo Block 1/42 which he had given to the Petitioner's mother Susan, while the objector's mother was given L.R No. Nakuru/ Rare /Gichobo/ Block 8; That the deceased built a house for their mother on L.R No. Nakuru/Rare/Gichobo/Block 8 where he lived with her until his death and that is where he was buried; That the mother to the Petitioners though the first wife did not object to the husband being buried there and participated in the burial; That it was only after the death of their mothers that the Petitioners started to plot to grab their land L.R No. Nakuru Rare Gichobo/8 yet prior to deceased's death he had fully subdivided L.R No. Nakuru/Rare/Gichobo/8 amongst them and their uncle; each got 1½ acres while their uncle one Ibrahim Nyanwono Onyambu 2 acres; That the Petitioners do not deserve to be granted letters of administration to the estate of the deceased because they already have their own land which the deceased bequeathed them.*

16. It was their position that the grant of letters should be issued to the 1st objector to enable him distribute the estate to the beneficiaries.

SUBMISSIONS

PROTESTORS' SUBMISSIONS

17. The protestors filed their submissions on 16th November, 2020. They submitted on the following issues;

- 1. Whether L.R No. Nakuru/Rare/Gichobo Block 1/8 ought to be shared by the two wives.**
- 2. Whether Susan Bosibori Onyambu ought to be buried on LR No. Nakuru/Rare/Gichobo Block 1/8.**
- 3. Whether the status quo obtaining on the two families should be maintained.**

18. On the first and second issue the protestors submitted in the negative, on the third in the affirmative respectively for the following reasons; *The objectors were born and bred on L.R No. Nakuru/Rare/Gichobo Block 1/8 and have resided on the same for over forty four (44) years and developed it; The deceased prior to his death subdivided this land to the objectors and Susan Bosibori who was aware then never raised any objection; Susan Bosibori during her lifetime never raised any claim with regard to this parcel of land; The deceased similarly never raised any objection to the use of L.R Nakuru/Rare/Gichobu Block 1/42 by Susan Bosibori; The family of Susan Bosibori are living on the land parcel L.R Nakuru/Rare/Gichobu Block 1/42 which the deceased gave them, have even buried three (3) of their siblings thereon and sold three (3) acres thereof without any objection from the deceased and as such they should continue residing there; That L.R No. Nakuru/Rare/Gichobo Block 1/8 belongs to objectors by virtue of adverse possession having peacefully resided on the said parcel for so long; That the Petitioners are guilty of laches; That subdividing L.R No. Nakuru/Rare/Gichobo Block 1/8 will be extremely prejudicial to the objectors as it would mean evicting them from their various portions of land contrary to the will of the deceased, it will wreak havoc in the deceased's family and will be problematic as its unclear which portion to subdivide to the petitioners and which portion to remain to the objectors since there are homes on the land parcel and even graves of their loved ones.*

19. On the second issue, the protestors submitted that Susan Bosibori should be buried on land parcel L.R Nakuru/Rare/Gichobo Block 1/42 because; *Some of her deceased children were buried on this land; that to bury Susan on Land L.R No. Nakuru/Rare/Gichobo Block 1/8 is akin to allowing petitioners to gain entry rights to the burial site at any time for the purpose of conducting any rites and ceremonies that they wish to the inconvenience of the objectors and in particular to the person allocated that particular area of land; There is no evidence that Susan Bosibori Onyambu decreed that she must be buried alongside her husband; There is no law that she must be buried alongside her husband; That there is no evidence that the deceased constructed a house for Susan Bosibori and lived with her on L.R Nakuru/Rare/Gichobo Block 1/8.*

20. The protestors urged this court to dismiss the petition as it has no merit.

PETITIONERS' SUBMISSIONS

21. The petitioners maintained that the deceased had only one property in his name and there is no evidence that this property ever changed hands.

22. They argued that there was no evidence that the land had been subdivided as alleged.

23. That neither the doctrine of adverse possession nor the issue of limitation of time was applicable as this was family property,

24. That Susan Bosibori should be buried on the deceased land as per her wishes and that L.R No. Nakuru/Rare/Gichobo Block 1/8 should be distributed equally between the two families.

ISSUES FOR DETERMINATION

(1) Whether the Doctrine of adverse possession or limitation of time is applicable with respect to the L.R NO. NAKURU/RARE/GICHOBO/8

(2) Whether L.R NO. NAKURU/RARE/GICHOBO BLOCK1/42 forms part of the estate of the deceased.

(3) Whether the Susan Bosibori Onyambu is beneficially entitled to a share.

(4) Where should Susan Bosibori be buried?

(5) Whether land L.R No. Nakuru/Rare/Gichobo Block1/8 should be subdivided and distributed equally to the two wives.

ANALYSIS & DETERMINATION

(1) Whether the Doctrine of adverse possession or limitation of time is applicable with respect to the L.R No. Nakuru/Rare/Gichobo/8

25. The Petitioners have filed a Petition for grant of letters of administration to administer their father's estate. The matter before me is with respect to the estate of the deceased person herein. The issue of adverse possession or limitation of time cannot arise as the issue before me is the administration of the estate as per the Law of Succession Act.

(2) Whether L.R No. Nakuru/Rare/Gichobo Block1/42 forms part of the estate of the deceased.

26. It is trite law that he who alleges must prove. The **Evidence Act Cap 80 Laws of Kenya** places the burden of proof to he who alleges.

27. Section 107 provides for **Burden of proof**

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

28. Section 108: **Incidence of burden**

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

29. Section 109: **Proof of particular fact**

“The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”

30. In this matter the court is concerned with the estate of the deceased person. According to the Law of Succession Act "estate" means the free property of a deceased person. **Free Property** is defined as **"the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."**

31. There is no evidence placed before this court that the deceased owned parcel number **Nakuru/Rare/Gichobo Block**1/42. The evidence is that he owned parcel number **Nakuru/Rare/Gichobo Block**/8. It was the duty of the objectors to provide evidence that indeed the deceased owned the two parcels of land then gave one to his 1st wife. What is clear is that at the material time, long before Maria was married the deceased and his wife Susan acquired both parcels of land, lived on number **Nakuru/Rare/Gichobo Block**/8 until Maria came into the picture forcing Susan to move out of the home. It is evident that she participated in the burial of her husband at that parcel of land because that was her and her husband's home. Deceased and the Petitioner's mother lived separately. The petitioners told this court that their parents separated because the deceased married the second wife who was a niece to their mother, their mother felt disrespected and she moved out of the matrimonial home. It is clear therefore that the petitioners' mother, lived on L.R NO. Nakuru/Rare/Gichobo Block1/42 not because the same had been bequeathed to her by the deceased but because of the disagreement she had with the deceased after he married the second wife.

(2) Whether Susan Bosibori is entitled to a share of L.R No. Nakuru/Rare/Gichobo/8

32. The deceased was a polygamous man prior to his death. He was married to both women. **Section 40 which provides for Where intestate was polygamous gives the answer.**

(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.

33. The two wives survived the deceased. As a husband to both of them he had only one property. He left one property behind in his name. He had it in his name since 1979. He died in 1994. All this time Susan had the title in her property in her name. If the deceased had intended to give Maria the whole of number 8 he could have easily transferred to her or to the others as claimed. But no such evidence was given. Hence each of his widows has a share of the deceased's estate. The 1st wife would ordinarily have the larger share having participated and contributed in the acquisition of the property before the entry of the second wife into the home.

(3) Where Susan Bosibori should be buried

34. It is not in dispute that Susan Bosibori who died 1n 2017 has not been buried. This is because according to her children she expressed he wish to buried next her husband. The objectors resist this on the ground that the Petitioners just want their land.

35. I must state from the outset that **the Law of Succession Act** mandates the court to deal with the estates of deceased persons. The estate before court is that of **Abros Adera Nyamweya**. The burial place of his 1st wife should not be an issue for determination by this court because that will be determined upon the distribution of his estate. Whether or not the deceased expressed the desire or wish to be buried next to her husband is not for this court to determine. The fact is she was his first wife, she and her husband set up a home there which she left and went to live on her own parcel of land. As a wife she is entitled to her own share of her husband's estate. Bosibori should be buried next to her husband.

(4) Whether land L.R No. Nakuru/Rare/Gichobo Block1/8 should be subdivided and distributed equally to the two wives

36. In the absence of agreement between the parties on the mode of distribution of the estate, the law requires that the estate of the deceased, who was polygamous, be distributed in accordance with **Section 40 of the Law of Succession Act** cited hereinabove.

37. The objectors came by way of a protest yet theirs was an objection to the appointment of the Petitioners as administrators of their father's estate. The Petitioners had not filed Summons for Confirmation of the Grant indicating the mode of distribution of the estate. There is the issue of the uncle. The objectors say he was given two (2) acres of land; the Petitioners say the land was given to him by the deceased.

38. The parties have submitted to the distribution of the estate. However, this other person is not a party to these proceedings. Failing to include him in the proceedings may just lead to other objections. Hence the real issue at this point is who should be the administrator of this estate.

39. Having found that the Petitioners' mother is beneficially entitled to the estate of her husband, the only other thing is to include the objectors in the administration of the estate.

40. Hence grant made to the petitioners be amended to include the 1st objector as an Administrator.

41. The Administrators are at liberty to file a Summons for Confirmation of the Grant either jointly or separately within thirty (30) days hereof of the issuance of the amended grant of letters of administration intestate.

42. No orders as to costs.

43. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF MARCH 2022.

MUMBUA T. MATHEKA

JUDGE

In the presence of:

Court Assistant: Edna

R. M. Machage & Co. Advocates N/A

M/s Ochieng' Gai & Co. Advocates N/A

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