



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**SUCCESSION CAUSE NO.245 OF 2003**

**IN THE MATTER OF THE ESTATE OF PATRICK ONGAKI NYAKUNDI (DECEASED)**

**LIDYA ONGAKI.....1<sup>ST</sup> APPLICANT/OBJECTOR**

**LILIAN ONGAKI.....2<sup>ND</sup> APPLICANT/OBJECTOR**

**CHRISTINE ONGAKI.....3<sup>RD</sup> APPLICANT/OBJECTOR**

**VS**

**ROSE NYASUGUTA ONGAKI.....1<sup>ST</sup> RESPONDENT/1<sup>ST</sup> PETITIONER**

**TOM ASIAGO ONGAKI.....1<sup>ST</sup> RESPONDENT/1<sup>ST</sup> PETITIONER**

**RULING**

**INTRODUCTION**

1. This Ruling concerns the estate of **PATRICK ONGAKI** who died intestate on 5<sup>th</sup> September 1998. The letters of administration were issued to his son, **TOM ASIAGO ONGAKI** and his widow, **ROSE NYASUGUTA ONGAKI** (the Respondents) on 7<sup>th</sup> February 2019.

**BACKGROUND**

2. The Application arises from a suit that was instituted on 10<sup>th</sup> July, 2003 by the 1<sup>st</sup> Petitioner and the 2<sup>nd</sup> Petitioner's late mother, **FRANCESCA MORAA** seeking letters of Administration of the letters intestate to administer the estate of the late **PATRICK ONGAKI NYAKUNDI** who died in 1998.

3. The matter was dismissed for want of prosecution on 10<sup>th</sup> July, 2006 but later reinstated after the 1<sup>st</sup> Petitioner who moved the court successfully vide an Application dated 30<sup>th</sup> November, 2018. The 2<sup>nd</sup> petitioner was allowed to substitute his late mother later on and a grant of letters of Administration issued 7<sup>th</sup> February 2019.

4. On 12<sup>th</sup> April, 2019 the petitioners did file an affidavit for mode of distribution and the matter was set up for hearing.

5. However, on 29<sup>th</sup> August, 2019 the Applicant's filed an objection seeking revocation of the grant of letters of administration issued on 7<sup>th</sup> February 2019 on grounds that:

a) They are daughters of deceased.

b) The Respondents fraudulently excluded them from the succession process and also omitted them from the list of beneficiaries and the proposed mode of distribution of the deceased property known as LR NO. WEST KITUTU/BUGUSERO 618 that measures 6.0 Hectares or thereabout.

c) The Respondents did so while fully aware that the Applicants are daughters of the deceased.

d) The Respondents swore a false Affidavit on 10<sup>th</sup> January, 2019 alleging that the all beneficiaries of the estate had agreed on the

mode of distribution of the estate is basically **LR NO. WEST KITUTU/BUGUSERO 618**.

e) there was no written consent by any beneficiaries approving the said mode of distribution.

f) the omission of the Applicant's names and their exclusion from the succession process is shows the ill intent of the respondent which is prejudicial to them.

g) the grant issued to the respondents is inoperative unless they are included in the administration of the estate.

h) it is in the interest of justice that to revoke the grant so that all parties participated fully and they be included as beneficiaries of the estate of the deceased.

6. Parties however by consent the compromised the Application by consent by allowing **LIDYA ONGAKI**, the 1<sup>st</sup> Applicant herein to be a co- administrator on 3<sup>rd</sup> October 2019 and a grant of letters of Administration was issued reflecting the new position.

7. The court directed parties to file their respective Affidavits on the mode of distribution of the estate.

8. However, parties could not agree to file a joint affidavit on the mode distribution since the respondents opted to rely on their mode of distribution filed on 12<sup>th</sup> April, 2019 by and filed another affidavit on 16<sup>th</sup> December,2019 all of which excluded the applicants. The applicant filed their own mode of distribution of the estate vide a supplementary affidavit dated 19<sup>th</sup> December, 2019 that proposed an equal distribution of the estate factoring in all the daughters of the deceased.

9. The court on 5<sup>th</sup> February, 2020 directed the parties on engage a surveyor to visit the parcel of land to confirm the acreage of the area occupied by the beneficiaries through the facilitation of the three Administrators and to file a report thereafter.

10. The Respondents in efforts to defend their position on why wanted they excluded the Applicants, filed supplementary affidavits on 7<sup>th</sup> July, 2020. In their respective Affidavits the respondents averred

a) The deceased person who had two wives divided the parcel of land equally to the two houses.

b) The boundary dividing the land to the two houses is well marked on the ground and was put in place by the deceased person himself during his lifetime to file a suit for grant of letters of administration.

c) The property is currently being occupied by the 1<sup>st</sup> Petitioner, 2<sup>nd</sup> Petitioner, **FELIX MOKUA ONGAKI** and **NIMROD OMARI ONGAKI** all from the two houses.

d) The Applicants who are daughters of the deceased are all married and reside at their respective matrimonial homes.

e) Despite their father dying way back in 1998, the applicants had never laid any claim on the sharing of the property.

f) Since the succession process commenced in 2003, the Applicants had never raised any objection.

g) They, together with the other two sons of the deceased, have lived on their respective shares allocated to them by their father openly without the Applicants ever raising a finger.

h) The claim by Applicants is an afterthought aimed at causing anarchy in an otherwise peaceful occupation by the Respondents and their other two brothers

i) The surveyor's report attached showed there is nothing remaining for distribution since the entire estate is already shared amongst the two houses.

j) Any interference particularly a fresh distribution of the estate other than the one contained in the Affidavit sworn on 12<sup>th</sup> April 2019 will create animosity to the two houses who have at all times lived peacefully.

11. On 9<sup>th</sup> July, 2020 it was confirmed that parties had as directed on 5<sup>th</sup> February, 2020 filed rival surveyors' reports and exchanged. It was agreed by counsel for both parties that since the only pending issue was on the distribution of the estate, they were both going to file and exchange written submissions on the same.

12. The applicants filed their submissions on 20<sup>th</sup> August, 2020 while the Respondents filed their submissions on 8<sup>th</sup> October, 2020.

13. The matter came up for highlighting of submissions on 8<sup>th</sup> December, 2020 wherein counsel for the applicant highlighted his submission in the absence of counsel for the respondents.

## **SUBMISSIONS**

## APPLICANTS' SUBMISSIONS

14. Counsel for the applicant argues that the respondents are trying to create an impression that the property was already distributed by the deceased yet there are no official records of any boundaries indicative of any subdivision.
15. Counsel submitted that the deceased died without a will in consonance with definitive section 3 of the Law of Succession Act Cap 160 as read together with sections 5 to 30, the respondents having failed to prove that there was an oral will it can only be said that he died intestate.
16. He further submits given that deceased person died intestate, the respondents therefore without legal backing allocated themselves portions of the parcel of land exclusion of the daughters. He argues such actions are based on a barbaric tradition that daughters cannot inherit properties. He contends that the said tradition is repugnant to the constitution of Kenya and the law of succession.
17. It is also his submission in as much as the Applicant do not stay on the suit property, they are bonafide heirs of the deceased since they are his children.
18. Regarding the averment by the 1<sup>st</sup> Respondent in her replying Affidavit filed on 16<sup>th</sup>, December, 2019 allocate together with her co-wife the in proportion of the her getting 3.22 HA and her co-wife getting 2.93 HA, counsel argued that such was baseless given that there was no document to confirm such assertion cannot merit because they do not qualify to meet the requirements of gifts inter vivo. He relied on the case of **Re Estate of the late Gideon Manthi Nzioka (Deceased) (2015) eKLR**.
19. In conclusion he urged this court to rely on the Part 5 in particular Section 40 of the law of succession act to determine the property should be shared equally and in pro rata basis and in accordance with the mode of distribution presented by the Applicant.
20. Counsel opposed the Respondents averment that the property is fully occupied by various individuals and beneficiaries of the decease. He argues that according to the surveyors' reports, the area under occupation which is at extreme south of the property is 1.04 ha. The vast stretch of the property measuring approximately 4.57 ha is under crop farming and a section under conservation with trees and low shrubs measures approximately 0.20 Ha. He also pointed out a section measuring 0.034 allegedly sold to the church albeit illegally. Thus he believes given most of the land is unoccupied the property can still be equally distributed by factoring in the shares that that are occupied by beneficiaries with the additional shares on a pro rata basis.

## THE RESPONDENTS SUBMISSIONS

21. Conversely, the Respondent's counsel submitted the deceased person had before his demise and subdivided the property in the proportion of 3.22 for the 1<sup>st</sup> house ha and 2.93 HA for the second house and none of the beneficiaries never complained before his demise and that they all consented to mode of distribution upon application for letters of grant of submissions.
22. He argues that the 1<sup>st</sup> wife having passed on her share of the property in the net should devolve to her dependants and since after the death of the 1<sup>st</sup> wife the deceased was survived by 2<sup>nd</sup> wife 1<sup>st</sup> respondent the subdivision should take cognisance of the provisions of section 35.
23. He argues that the applicants having been long married and do not reside on the property and that they are people of means it is in the interest of justice that the objection proceedings be dismissed. It his contention that the property should be divided in accordance with mode of distribution set by the deceased before his demise.

## ANALYSIS AND DETERMINATION

24. Having carefully analysed the pleadings, the evidence on the record and the submissions of the advocates of the respective parties' I find that the main issue that arises for determination is whether the estate should be distributed equally including the Applicants paying keen attention to the provisions of the intestate succession.
25. In order to effectively determine the issue of equal distribution of the estate including the Applicants, the two questions that arise from the positions taken by the parties are as highlighted below;
- a) Can it be said that the property was already distributed by the deceased during his lifetime and thus the applicants have chance in getting anything from it?
  - b) Does it mean once the Applicant got married and are not entitled to get a share from the estate?

26. The answer to the first question is rather straight forward. I take judicial notice that the proceedings of this suit followed the rules and procedures of intestate succession which basically means that the deceased person died without a will. Before his death, obviously none of the respondents had acquired any rights over any of the portion of his estate as no evidence was placed before me that the he had bequeathed any property to any of them. As submitted by counsel for the Applicants, the Respondents did not tender any evidence to demonstrate that deceased person wrote any will or made any oral will devolving his entire estate which is basically parcel number **LR NO. WEST KITUTU/BUGUSERO 618** solely to his widows and sons in the proportionate they have stated herein above. In fact, if there was any such evidence the learned counsel for the respondents would not have urged me to rely on section 35 of the Law of Succession Act which is a section that purely deals with intestate succession. Further the two rival surveyor reports filed by parties present a vindictive position that in case there is boundary dividing the shares of the two families, the same is not registered. It is therefore not true the deceased had divided the

property before his demise and if indeed he had done so then he would have caused the said portions to be registered. I therefore find that the property was never divided by the deceased to the sons and widows solely during his life time and thus his entire estate must be divided strictly following the intestate procedures and thus the respondents claim that the property had already been subdivided by the deceased fails.

27. The second questions on whether the fact that the applicants who are married are entitled to pursue a share of the estate of the father, the argument advanced by the respondent the applicant having been married, they shouldn't claim from the estate of the deceased more disturbing, backward and discriminative.

28. **In Re Estate of Solomon Ngatia Kariuki (Deceased) (2008) EKLK**, the court stated as follows on the existing provisions of the Law of Succession Act and made a very strong statement on the issue of discrimination against daughters generally in succession matters ;

*“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”*

29. It is unfortunate that despite having the 2010 Constitution in place for over 10 years and numerous pronouncements by the courts on the issue of discrimination against married daughters and inheritance from their parents, it is still considered inappropriate in some quarters for daughters who are considered to be happily married and to having property of their own, to express any interest in their parents' estate. They are being accused of being selfish, of acting in bad faith, of wanting to fuel a family feud yet they do not live in the 'home', of harassing those who only have their parents' heritage to look up to and nothing else.

30. Those doing so miss the point. The fact of marriage per se for both sons and daughters, does not change the fact all are born in one family by the same parents. It is quite unfortunate for the Respondents to argue that the Applicants having been married a long time ago and are people of means are not entitled to a share of their father's estate

31. I am in agreement with Gikonyo J, who was faced with similar case; **Matter of the Estate of M'ngarithi M'miriti Alias Paul M'ngarithi M'miriti (Deceased) [2017] eKLR**, regarding the Discrimination of daughters in inheritance. He held that:

*From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when RONO vs. RONO [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically I am content to cite the proclamation by the Court of Appeal in the case of STEPHEN GITONGA M'MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR that: -*

*“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. (See article 27 of the Constitution). Accordingly, the 3<sup>rd</sup> Administrator and her children who are claiming the inheritance of late Festus K. M'Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M'Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally. (all emphasis added).*

32. It is therefore evident from the foregoing that I will be failing on my constitutional mandate to uphold a disputed mode of distribution that is based on an open discrimination on the grounds of gender, sex and status. The fact of the equality of the children in the inheritance of their parents' property, is the norm. Any exception must have a basis.

33. So what is the acceptable mode of distribution? The deceased died intestate. He was survived had two wives who were the late **FRANCESCA MORAA ONGAKI** who is said to have died some time in 2013 and **ROSE NYASUGUTA ONGAKI**. It is important to give a proper categorisation how the two houses appear.

a) **FRANCESCA MORAA ONGAKI -1<sup>st</sup> Wife [deceased]**

b) Tom Ongaki

c) Felix Ongaki

d) Lydia Ongaki

- e) Lilian Ongaki
- f) Nimrod Ongaki
- g) Christine Ongaki
- h) **ROSE NYASUGUTA ONGAKI – 2<sup>nd</sup> Wife**
- i) Merceline Ongaki
- j) Maurice Ongaki
- k) Nyakundi Ongaki
- l) Ben Ongaki

34. Having established that the deceased person was polygamous, Section 40 as read with section 3 of the Law of succession Act shall apply.

35. **Section 40 provides that:**

***“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.”***

36. As I have stated herein above, the provisions of Section 38 of the law of Succession Act which enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried shall also apply.

37. The Respondents have presented an argument that the suit property is fully occupied and there is no room to factor in the Applicant as such move will create animosity. As clearly demonstrated by counsel for the Applicant and as clearly presented by the rival surveyor reports before me, the argument by the Respondents is inaccurate. While it is true that there exist an informal boundary dividing the property into two, the greatest part of the property is not occupied. An entire portion measuring approximately 4.57 hectares has been left for crop farming. To make matters even worse for the Respondents, it averred and uncontroverted that they have recently without any legal authority sold a portion of the property they probably deemed surplus measuring approximately 0.034 Hectares to a church there even exist a portion measuring 0.20 Hectares left for trees and lower shrubs. I therefore agree with the counsel for the Applicant that there is room to still distribute the property equally amongst all the beneficiaries factoring in the shares already occupied by the respondents together the unoccupied shares in a pro rata basis and in line with the provisions of Section 40 and 38 of the law of succession.

38. It is common ground by both parties and which I agree with that the surviving spouse who is the 1<sup>st</sup> petitioner can hold the residue of shares on behalf of the 2<sup>nd</sup> house in trust and the other spouse **FRANCESCA MORAA ONGAKI** being deceased the shares in that house can only devolve to her children in equal shares pursuant to the provisions of section 35(5).

39. From the forgoing I upheld the objection by the Applicant’s to the extent that the estate of the deceased shall be divided equally amongst all beneficiaries of the deceased irrespective of the age or marriage status, factoring in the shares already occupied by the respondents together the unoccupied shares in a pro rata basis and in strict adherence to the provisions of the section 40 of the law of Succession Act Cap 160 as read together with Section 38 and 35(5) as herein above explained.

40. The parties shall each bear their costs as this is a family matter.”

**DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF FEBRUARY 2021.**

**R.E.OUGO**

**JUDGE**

**In the presence of:**

**Mr. B. Otieno For the Applicants/ Objectors**

**Miss Otieno h/B Mr. Omoyo For the respondents/petitioners**

**Ms. Rael Court Assistant**