



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE NO 41 OF 2010
IN THE MATTER OF THE ESTATE OF AMENYA MOGUCHE OBIERO (DECEASED)

AND

CHARLES KIAGE AMENYA.....PETITIONER

AND

GERALD AMENYA BOSIRE.....1ST OBJECTOR

JOSEPH ABUGA AMENYA.....2ND OBJECTOR

AND

NEMWEL ORANDI AMENYA.....1ST INTERESTED PARTY

NICOLAS OMBATI AMENYA.....2ND INTERESTED PARTY

RULING

1. This succession cause relates the estate of Amenya Moguche Obiero who died on 30th June 1980. The only property forming the estate is Central Kitutu/Mwabosire/802.
2. The deceased was survived by Charles Kiage Amenya, Joseph Abuga Amenya, Gerald Bosire Amenya, John Nyamasege Amenya, Nicholas Ombati Amenya, Joyce Nyanganyi Mose, Nemwel Orandi Amenya and Hellen Kerubo Omwenga.
3. Charles Kiage Amenya and Joseph Abuga Amenya were appointed as joint administrators.
4. The Charles Kiage Amenya filed an objection dated 21st November 2016 alleging that the beneficiaries had failed to agree on the mode of distribution as some of the beneficiaries wanted to take bigger portions than others. He sought an order directing the land registrar/surveyor to sub-divide the estate. The Petitioner filed a supporting affidavit in support of the application.
5. The application was opposed by Joseph Abuga Amenya who contend that the land registrar lacks jurisdiction on issues of distribution and advanced that it is the succession court that has the jurisdiction to distribute the deceased's estate to the beneficiaries.
6. On 18th May 2016 the petitioner filled summons for confirmation of grant.
7. This court on 25th June 2016 this court directed that the objection dated 21st November 2013 be deemed to be the protest to the confirmation of grant.
8. Following the court order, Nemwel Orandi Amenya filed an affidavit of protest and deposed that Gerald and Joseph have occupied a section of the land that should be shared between all the 6 beneficiaries. In an affidavit dated 15th August 2018 he avers that the land was subdivided into 7 portions, 6 to the deceased's son and the deceased retained a 7th portion popularly known as 'emonga'. When the deceased's died their mother who is also deceased continued to occupy of the 'emonga'. He averred that the objectors have now taken possession of the 'emonga' thus enhancing the acreage of their portions. He averred that the court should thus make a determination on the distribution of the 'emonga' but maintain the scheme of distribution that was adopted by the deceased in regard to the 6 portions shared

between his sons.

9. The petitioner in a further affidavit filed on 7th June 2017 deposed that in 2004 the court in **Kisii CMCC No 1395 of 2004** held that the trees forming part of the 'emonga' should be shared.

10. Joseph Abuga Amenity filled an affidavit in support of the mode of distribution. He explained that in 1976 all the 6 sons of the deceased were allotted their parcels of land and have been in possession of their respective parcels for over 45 years. He advanced that the mode of distribution should take into account the demarcations that had been placed by the deceased when he gifted the land to his 6 sons. The deceased's daughters, Hellen Kerubo Omwenga and Joyce Nyang'anyi Mose both supported that the proposal that the deceased's estate should be distributed to the 6 sons. They proposed that it should follow the 1973 subdivisions made to each of his sons.

11. On 16th October 2018 this court directed the land registrar and the surveyor to visit LR. NO. CENTRAL KITUTUM/MWABOSIRE/802 to establish the acreage occupied by each beneficiary, the acreage and the position of the land known as the 'emonga' and also do a report on the existing structures. According to the report by the county surveyor all the 6 sons of the deceased were in occupation of the land as per the subdivisions made by the deceased with each portion having a live fence as a boundary. The 'emonga' was occupied by the deceased's sons with the exception of Charles Kiage Amenity and Nemwel Orandi Amenity.

12. At the hearing, Charles Kiage Amenity testified that the deceased had 6 sons and 2 girls. He testified that the deceased did not sub-divide the shamba but acknowledged that there was an 'emonga'. He told court that the 'emonga' should be divided in equal shares. On cross examination he testified that the deceased had divided the land amongst his son and he only had an issue with the division of the 'emonga'.

13. Joseph Abuga adopted his affidavit dated 20/7/2018 as his evidence. He testified that their brother Nyamasege Amenity went missing from March 1994 and 3 of his brothers utilize the land. He testified that he occupies part of the 'emonga' and has about 5 structures on the land. He testified that since he has lived in the land for 20 years his occupation of the land where he has buried his wife. He told court that Charles does not have a stake in the 'emonga' because his parents used a lot of property to help pay dowry considering that he married 4 times. He testified that their parents decided that Charles should not have a portion in the 'emonga'.

14. Nemwel Orandi Amenity testified that the deceased subdivided the land and maintained a portion known as the 'emonga'. He testified that although he occupies the 'emonga' as well as his portion given to him by the deceased, he proposed that the 'emonga' should be divided into 6 portions for each of the sons. Orandi Amenity. I filed an affidavit dated 15/8/2018. I adopt it as my evidence. He testified that following the death of their mother the objectors entered into the 'emonga' that he had been occupying with his mother and placed boundaries.

ANALYSIS AND DETERMINATION

15. Having considered the pleadings filed herein, the evidence by the parties and the rival submissions the main issue for determination relates to distribution of the 'emonga' and the portion that was given to John Nyamasege Amenity.

16. In this case it was not challenged that the deceased distributed part of his property amongst his sons when he was still alive. This court is obligated to take into account that the deceased had left some of his estate to some of his beneficiaries through gift inter vivos. The manner in which the land was apportioned between the deceased's sons was not challenged by any of them. The deceased's 5 all occupy the portions that they were given by the deceased.

17. The only issue for determination is the distribution of the portion of the deceased's land known as the 'emonga' and the portion initially given to John Nyamasege Amenity. It was also not contested that John Nyamasege Amenity who was unmarried had left home in 1994 and his whereabouts remained unknown. Following the decision in **Kisii High Court Petition No. 16 of 2020** John Nyamasege Amenity was presumed dead. This therefore means that his portion measuring 0.45 Ha is also subject to distribution.

18. It was not in dispute that the deceased subdivided the land between his six sons before his death and also carved out a seventh portion, 'emonga'. The only issue raised by the beneficiaries regards the distribution of the 'emonga' which measures 0.468 Ha.

19. These two portions shall thus be distributed in accordance to **section 38 of the Law of Succession Act. Section 38 of the Law of Succession Act** provides that;

“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.”

20. The portion of the deceased's land known as the 'emonga' and the portion that had been earlier allocated to John Nyamasege Amenity are hereby divided equally among between the deceased's sons. The two of the deceased's daughters, Hellen Kerubo Omwenga and Joyce Nyang'anyi Mose both supported that the proposal that the deceased's estate should be distributed amongst his sons. I however note that some of the deceased's sons have constructed their homes within the 'emonga' and thus the distribution should take into account their homes within the 'emonga'.

Distribution

21. The estate herein shall be distributed as follows:

1. CHARLES KIAGE AMENYA – 0.39 Ha gifted by the deceased

2. NICHOLAS OMBATI AMENYA – 0.488 Ha gifted by the deceased

3. GERALD AMENYA BOSIRE – 0.48 Ha gifted by the deceased

4. NEMWEL ORANDI AMENYA – 0.5 Ha gifted by the deceased

5. JOSEPH ABUGA AMENYA – 0.48 Ha gifted by the deceased

6. The portion called the ‘*emonga*’ and the parcel that had been apportioned to JOHN NYAMASEGE AMENYA shall be distributed equally between the deceased’s 5 sons.

22. There shall be no order as to costs.

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

R. E. OUGO

JUDGE

In the presence of;

Mr. Momanyi for Mr. Charles Amenya/Petitioner

Mr. Mulisa For the interested Party

Mr. Obure Absent

Ms. Rael Court Assistant