



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO.39 OF 2016

IN THE MATTER OF THE ESTATE OF OSORO MOTARI (DECEASED)

MISHAEL OGOTI OSORO.....OBJECTOR

-VERSUS-

JERUSA MOIGE OSORO.....1<sup>ST</sup> RESPONDENT

DUNCAN OMARI OSORO.....2<sup>ND</sup> RESPONDENT

DANIEL TITUS GESICHO.....3<sup>RD</sup> RESPONDENT

WILSON NYABAYO OSORO.....4<sup>TH</sup> RESPONDENT

**RULING**

1. This matter relates to the estate of **OsoroMotari** (deceased) who died on 21<sup>st</sup> October 1998. Upon the objector's application, the letters of administration issued to the 1<sup>st</sup> respondent on 10<sup>th</sup> November 2004 and confirmed on 3<sup>rd</sup> June 2005 were revoked. In a ruling dated 27<sup>th</sup> September, 2018 this court found that the 1<sup>st</sup> respondent had failed to disclose all the beneficiaries of the estate and issued a fresh grant in the names of the 1<sup>st</sup> respondent and the objector. The administrators were directed to file an application for confirmation of the grant listing all assets and beneficiaries of the deceased and to propose a mode of distribution or in the alternative file affidavits on the mode of distribution if they could not agree on a list of assets and a mode of distribution of the assets.

2. MishaelOgotiOsoro filed an application to confirm the grant on the 15<sup>th</sup> January 2020 pursuant to the court giving directions having noted that the parties were heard before the said application was filed. The directions were given in court on the 18<sup>th</sup> December 2019. The evidence adduced before the said application was filed was on how the estate was to be distributed. The affidavits filed after the said application was filed do not adduce any new evidence, but reiterates what is deponed in their earlier affidavits.

3. Pursuant to the foregoing directions of this court, **MishaelOgotiOsoro** (*the objector*) swore an affidavit on 31<sup>st</sup> December 2018 proposing his mode of distribution. He avers as follows; that the deceased was married to two wives namely **JerusaMoigeOsoro**, 1<sup>st</sup> wife who is now 100 years and his co-administrator and **TeresiaKeruboOsoro**, the 2<sup>nd</sup> wife. He is the eldest son of the deceased who had 13 children from both houses to wit;

**1<sup>st</sup> house**

- 1) **MishaelOgotiOsoro**
- 2) **Samson NyakiriaOsoro**
- 3) **Daniel GesichoOsoro**
- 4) **Duncan Omari Osoro**
- 5) **WilsonNyabayo**

**6) Roseline Osoro (married)**

**7) Junes Osoro (married)**

**8) Martha Osoro (married)**

**9) Marisellah Osoro (married)**

**2<sup>nd</sup> house**

**1) Peter Gesimba Osoro**

**2) Simon Nyabate Osoro**

**3) Ayibu Osoro**

**4) Magoma Osoro (married)**

4. That prior to his demise the deceased owned the following assets;

**1) Land Parcel No. Bassi/Bogetario 11/2301**

**2) Land Parcel No. Bassi/Bogetario 11/268**

**3) Land Parcel No. Bassi/Bogetario 11/453**

5. According to the objector, the deceased had sub-divided Land Parcel No. Bassi/Bogetario 11/2301 amongst all his sons, including him prior to his demise. He claims that after the death of the deceased his brothers, led by Wilson 4<sup>th</sup> respondent, interfered with the portion earmarked for him by uprooting the boundary markings and evicted him from the land. That in addition to his portion of Land Parcel No. **Bassi/Bogetario 11/2301** the deceased had also given him Land Parcel No. **Bassi/Bogetario 11/268**, that none of the beneficiaries raised any complaint when his father was alive. Land parcel No. **Bassi/Bogetario 11/453** was allocated to his brother **Samson Nyakiria Osoro**. He suggests that a competent surveyor be appointed to ascertain each beneficiaries' share of land parcel No. **Bassi/Bogetario 11/2301** which he states should be restored to the status left behind by the deceased. The objector's proposes mode of distribution as follows;

**1) Land Parcel No. Bassi/Bogetario 11/453 - to Samson Nyakina Osoro**

**2) Land Parcel No. Bassi/Bogetario 11/268- to the objector**

**3) Land Parcel No. Bassi/Bogetario 11/2301- to each beneficiary as per the demarcations on the ground done by the deceased.**

6. During the hearing of this matter, the objector adopted the averments in his affidavits sworn 31<sup>st</sup> December 2018 on 24<sup>th</sup> May 2019 as his evidence. He reiterated that the deceased had given him parcels of land being parcel 11/268 and a portion in parcel No. Bassi/Bogetario 11/2301 as per customary law since he was the eldest son. He testified that his youngest brother, the 4<sup>th</sup> respondent, had destroyed his house and the coffee he had planted in his portion of land in parcel No. Bassi/Bogetario 11/2301 and began cultivating that portion. That he had married all his wives on land parcel No. Bassi/Bogetario 11/2301 and testified that when the deceased was alive, he had a bigger portion of land and there had been no complaint. That the deceased had also given his brother Samson Nyakina Osoro 2 cows in addition to land parcel No. 453 but had not given him a portion in land parcel No. 2301. He stated that each son including those of the deceased's younger wife had a portion of land in land parcel No. 2301 and he urged the court to assist him get back his share of the land. In cross examination and reexamination, the objector stated that the deceased had asked him to stand for the small house during succession.

7. The 4<sup>th</sup> respondent avers that he has been authorized by his co-respondents to swear a replying affidavit to the objector's affidavit. He admits that the deceased had three parcels of land namely Land Parcel No. Bassi/Bogetario 11/2301, Land Parcel No. Bassi/Bogetario 11/268 and Land Parcel No. Bassi/Bogetario 11/453.

8. He states that when letters of administration was sought, Land Parcel No. Bassi/Bogetario 11/268 which is occupied by the objector and Land Parcel No. Bassi/Bogetario 11/453 which had been given to Samson Nyakina by the deceased, were excluded from the cause. He refutes the objector's assertion that Land Parcel No. Bassi/Bogetario 11/268 was not ancestral land and states that their grandparents have been buried on that parcel of land and it was therefore ancestral land. He avers further that the effect of the objector's claim is to put on board all the deceased's assets which should then be distributed equally amongst the beneficiaries of the deceased. That the only portion the deceased had not distributed prior to his demise was Land Parcel No. Bassi/Bogetario 11/2301 measuring 9 acres which is supposed to be distributed amongst 4 people namely Daniel Gesicho Osoro, Duncan Omari Osoro, Teresa Nyangau (deceased) and himself. That they will each get 2.4 acres which is much less than what the objector owns.

9. In his oral evidence, the 4<sup>th</sup> respondent stated that the applicant who was the deceased's first born has 1.8 Ha equivalent to 4.6 acres, Samson Nyakiria Osoro has 0.9 ha equivalent to 2.4 acres while the remaining Land Parcel No. Bassi/Bogetario 11/2301 measures 3.8 Ha equivalent to 9 acres. That if the objector felt that he was not satisfied with how the deceased had apportioned his property, he was agreeable to a redistribution of all the deceased's assets.

10. In cross examination he reiterated that land parcel No. 268 was ancestral land but land parcel No.2301 was not ancestral land and had been purchased by the deceased. That the deceased had apportioned Land Parcel No. 2301 amongst his 3 sons and their step mother and that the objector had no portion in that parcel of land. He denied evicting the objector from land parcel 2301 and stated that the objector stayed in land parcel No.2301 when he was a youth and left in 1972. He also refuted the claim that the objector had planted coffee on his portion and stated that it was the deceased who had planted the coffee. He testified that as per Kisii culture, his brother's son dug the grave when the deceased died and he gave his brother a black female cow which had nothing to do with the land of the deceased. When examined by the court, the 4<sup>th</sup> respondent stated that he and the objector belonged to the 1<sup>st</sup> house. That their step mother had 3 sons Peter Osoro, Simon Osoro and Evans Osoro who occupied the side the deceased had set aside as Emonga which was within land parcel 2301 and that he was representing all the other sons including his mother.

11. The parties filed written submissions. Counsel for the objector argued that from the evidence tendered it was clear that the deceased had sub-divided and clearly demarcated the boundaries of his land parcel No. Bassi/Bogetario11/2301. Each beneficiary therefore had to be satisfied with what the deceased had allocated him. He submitted that the deceased was entitled to allocate his first born son two parcels of land and since none of the other beneficiaries complained to the deceased when he was alive he urged the court to intervene to safeguard the objector's interests in that parcel of land.

12. The 4<sup>th</sup> respondent urged the court to bring on board all the properties of the deceased and have them administered afresh.

13. The sole issue for determination herein is how the estate of the deceased should be distributed.

14. The parties in this case contend that before his demise, the deceased had already distributed his properties among his survivors. Such distribution by the deceased in law is known as a *gift inter vivos* which was defined by the court in **Re Estate of The Late Gedion Manthi Nzioka (Deceased) Succession Cause No. 122 of 2010 [2015]eKLR** thus;

*“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death: ...*

*For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way resulting trusts or the presumption of. Gifts of land must be way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be completed for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard **Halsburys Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 32 to 51.***

15. There is no dispute in this case that the deceased was the initial proprietor of the following properties;

1) Land Parcel No. Bassi/Bogetario11/453

2) Land Parcel No. Bassi/Bogetario11/268

3) Land Parcel No. Bassi/Bogetario11/2301

16. Both the objector and the respondents are in agreement that the deceased bequeathed Land Parcel No. Bassi/Bogetario11/268 to the objector and Land Parcel No. Bassi/Bogetario11/453 to his son Samson Nyakina Osoro. The copies of green cards annexed to the 4<sup>th</sup> respondent's replying affidavit sworn on 24<sup>th</sup> February 2017 confirm that the deceased transferred land parcel no. 453 to Samson Nyakina Osoro on 25<sup>th</sup> May 1976 before his demise show that the objector was in fact the first registered owner of land parcel No. 268 which was registered in his name on 2<sup>nd</sup> August 1976 before the demise of his father. These properties would therefore not fall for administration in this cause as they did not belong to the deceased at the time of his death.

17. The parties also agree that the deceased divided land parcel No. 2301 among the beneficiaries but give contradictory evidence on how the deceased apportioned the land. The objector insisted that the deceased distributed his land parcel no. 2301 among all his sons and in the same breath stated that his brother Samson Nyakina had no share in land parcel No. 2301 since the deceased had already given him land parcel No. 268. The 4<sup>th</sup> respondent on the other hand told the court that the deceased had sub-divided land parcel No. 2301 amongst his three sons from the first marriage and his stepmother to the exclusion of his elder brothers who had already been given their parcels of land.

18. It is therefore not clear from their contradictory evidence how and whether the deceased in fact sub-divided land parcel No. 2301. The copy of the green card of land parcel No. 2301 shows that the title to the land passed to Duncan Osoro, Daniel Gesicho Osoro, Wilson Nyabayo Osoro and Jerusa Moige Osoro pursuant to the revoked grant issued after the deceased had passed away. There was no registered transfer or deed in writing by deceased which would be inferred as a *gift inter vivos* with respect to land parcel No. 2301. Moreover, the respondents left out the second house when they subdivided land parcel No. 2301 initially and cannot now purport to be upholding the deceased's wishes.

19. Since the deceased herein died intestate on 21<sup>st</sup> October 1998. His estate was subject to division under the **Law of Succession Act. Section 40** thereof provides;

*40(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.

20. The Act also provides that any gifts given by the deceased during his lifetime should be taken into account when distributing the property. **Section 41** of the Act provides that;

42. Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

21. Having found that the deceased bequeathed the objector and Samson Nyakina Osoro land parcel no. 268 and land parcel no. 453 respectively during his lifetime, I find that they are not entitled to a share of land parcel no. 2301. The objector conceded during cross examination that the deceased had asked him to stand for the second house during succession which in my view meant that the objector had a duty to protect the interest of the second house and ensure they got an equitable share of the estate. This has not been the case so far. The revoked grant shows that the second house was completely sidelined from the process.

22. The parties testified that their step mother had left the home for ten years. They are all in agreement that she had four children who are entitled to the estate. Further, 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. (See **Mary Rono v Jane Rono & Another [2005] eKLR, In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR, Peter Karumbi Keingati & 4 others vs. Dr. Ann Nyokabi Nguthi & 3 others (2014) eKLR**)

23. Taking all the above into account, I find that other than the objector and Samson Nyakina the deceased's land parcel No. 2301 should be divided equally among all his surviving children and his widow Jerusa Moige Osoro in accordance with the Act, taking into account the portions the beneficiaries occupy currently in the said parcel of land. Unless any of the beneficiaries expressly forfeit their share of the estate, I confirm the grant issued to JERUSA MOIGE OSORO and MISHAEL OGOTI OSORO on 27<sup>th</sup> September 2018 in the following terms;

NAME	DESCRIPTION OF PROPERTY	SHARE OF HEIRS
Jerusa Moige Osoro Daniel Gesicho Osoro Duncan Omari Osoro Wilson Nyabayo Roseline Osoro Junes Osoro Martha Osoro Marisellah Osoro	2/3 of Land Parcel No. Bassi/Bogetario11/2301	shall be shared equally among the named beneficiaries of the 1 <sup>st</sup> house
Peter Gesimba Osoro Simon Nyabate Osoro Ayibu Osoro Magoma Osoro	1/3 of Land Parcel No. Bassi/Bogetario11/2301	shall be shared equally among the named beneficiaries of the 2 <sup>nd</sup> house

24. This being a family matter each party shall bear their own costs.

**Dated, signed and delivered at Kisii this 25<sup>th</sup> day of February 2020.**

