REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SUCCESSION CAUSE NO.79 OF 2013

IN THE MATTER OF THE ESTATE OF:THE LATE JOSEA KISUGE OUWO.....DECEASED

AND

RISPER ODERO KISUGE.....CITOR/DEFENDANT

VERSUS

MAREN ATIENO ONYANGO.....CITEE/PLAINTIFF

RULING

[1] It is notable from the chief's letter dated 10th August 2012, addressed to the senior Principal Magistrate at Kisii that upon his death on the **28th August 1976** at the age of sixty-eight (68) years, the late **Josiah Kisuge Ouwo** (deceased), was survived by two widows i.e. Hellen Atolo Kisuge and Risper Odero Kisuge. The first widow (Hellen) had six children (i.e. five daughters and one son) with the deceased while the second widow (Risper) had eight children (i.e. six sons and two daughters.

At the time of the letter aforementioned, the first widow was deceased together with three of her children. The second widow was the surviving widow but had lost five of her children.

Ironically, although the second surviving widow stood first in priority over the rest of the beneficiaries in applying for grant of letters of administration respecting her late husband's estate which comprised of a portion of land described as **No. Kamagambo/Kabuoro/294**, she filed a citation against a daughter-in-law of the deceased, **Marren Atieno Onyango**, requiring her to accept or refuse letters of administration respecting the estate of the deceased or show cause why the same should not be granted to her (second widow/**citor**).

[2] The said daughter-in-law (**citee**) opposed the citation and at its hearing in court on 14th July 2014, the court in its ruling ordered and directed that the application for letters of administration respecting the estate of the deceased be taken out by both the citor and citee and that the order be treated as constituting the consent for filing the application.

Accordingly, the grant was issued to both of them on the **7th March 2016**, and one month thereafter on the 7th April 2016, they took out summons for confirmation of the grant on the basis of the agreed mode of distribution stipulated in paragraph four (4) of their supporting affidavit dated 7th April 2016. It was thus agreed that the material estate property i.e. land parcel No. Kamagambo/Kabuoro/294, be shared equally between the applicants/administrators and all the identified beneficiaries including, Duncan Odhiambo Kisuge, Charles Omondi Kisuge, Debora Atieno Odhiambo, Esther Awuor Ndege, Loice Oyugi, Rose Aoko Jamwaka and Rhoda Akeyo Ogur.

[3] On the 6th May 2016, however, the citee/second administrator (Marren) in response to her "own" summons for confirmation of grant, filed an affidavit of protest dated 5th May 2016, in which she raised objection to the proposed mode of distribution. Undoubtedly, the protest or objection was a clear reflection of the failure of the two administrators and the beneficiaries to co-operate and/or consult prior to the taking out of the summons for confirmation of grant.

This would mean that the summons for confirmation of grant was taken out rather prematurely. Indeed, this was done only one month after the issuance of the grant of letters of administration on the 7th March 2016 instead of the prescribed period of six months (**section 71 (1) of the Law of Succession Act)**.

[4] In essence, the present objection raises issues with regard to the proposed mode of distribution of the material estate property i.e. land parcel No.Kamagambo/Kabuoro/294 or **plot No.294**.

The affidavit in support of the summons for confirmation of grant clearly indicates that the parties had agreed to share the property equally. However, the objector (**Marren**) implies that the property was not available for distribution among all the beneficiaries as it had been given by the deceased prior to his death to his first wife **Hellen Otolo Kisuge**, who was the mother of the late Jason or Yason Onyango, who was the husband of the objector and who remained on the estate property after the death of the deceased and his first wife.

It was indicated by the objector that besides the material plot No.294, the deceased owned other parcels of land including, Kamagambo/Kabuoro/296 (**plot No.296**) which he gave to his second wife **Rispa Odero Kisuge** (the first administrator/respondent), Kamagambo/Kabuoro/295 (**plot No.295**), Kamagambo/Kabuoro/299 (**plot No.299**) and an unidentified plot at a place called Marera.

[5] For purposes of this cause and for the avoidance of doubt, the suit property is **plot No.294** and not any other which may have belonged to the deceased. It is this property which was availed for distribution among the beneficiaries and this meant that the omission of additional parcels of land from this cause was perhaps deliberate as these appear not to be in dispute and have not therefore been included for distribution among the beneficiaries by the court.

Be that as it may, the objection was vehemently opposed by the first administrator/respondent on the basis of the grounds contained in a replying affidavit dated and filed herein on the 10th August 2016 after the court had on 27th July 2016 given directions that the objection be heard by way of **"viva-voce"** or oral evidence.

[6] In that regard, the plaintiff/objector testified as **PW1** and called five witnesses i.e. **Samson Kisuge** (**PW2**)**, Elly Ochieng Ngare** (**PW3**)**, Widmack Jomo Obango** (**PW4**)**, Jane Achieng Jan Onyango** (**PW5**) and **George Otieno Odira** (**PW6**).

The defendant/respondent did not testify in court but called a total of four (4) witnesses i.e. **Duncan Odhiambo Kisuge** (DW1)**, Erastus Aduk Ngira** (**DW2**)**, Charles Omondi Kisuge** (**DW3**) **and Deborah Atieno Odhiambo** (**DW4**).

Learned counsel, **MR. OLEL**, took over the matter from learned counsel, **Mr. Ojala**, and represented the objector at the hearing of the case, while learned counsel **Mr. Owade**, represented the respondent.

After the trial both parties filed written closing submissions through their respective counsel.

[7] The grounds in support of the objection and those in opposition thereto as fortified by both affidavit and oral evidence of the parties and their rival submissions clearly indicate that the basic issue for determination is whether the impugned summons for confirmation of grant should be allowed as proposed therein by the respondent. Indeed, this is the actual application being challenged herein by the objector inasmuch as it contains the proposal to have the disputed estate property i.e. plot No.294 shared or distributed equally among the beneficiaries of the estate. The fact that this was the only property availed herein for distribution and was so availed pursuant to a court order arising from a notice of citation issued by the respondent against the objector on the 19th November 2013 and the fact that the said order made on 14th July 2014, effectively granted letters of administration of the estate of the deceased to both the objector and the respondent and also the fact that the grant was issued on 7th March 2016 under the Law of Succession Act (Cap 160 Laws of Kenya) long after the death of the deceased, meant that the applicable law for purposes of distribution of the availed property to all the beneficiaries of the estate is the **Law of Succession Act**.

[8] The Act commenced on **1st July 1981**, and its preamble provides that it is:-

> **"An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estate of deceased persons; and for purposes connected therewith and incidental thereto."**

Section (2) (2) of the **Act** provides that:-

> **"The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."**

[9] Therefore, the administration of the estate of the deceased herein is not precluded from the provisions of the Law of Succession Act as implied by both the objector and respondent. It is this court's opinion that the process of administration should be viewed as a whole (i.e. holistically) rather than in part such that if a grant is issued under the Law of Succession Act and has to be confirmed under the same Act, then the distribution of the estate of property must also be under the Act otherwise it would make no sense in applying for distribution of the estate under the Act and seek application of a different regime of Law in distribution.

If the parties herein had intended to apply customary law in the distribution of the estate, then they should not have moved this court for any orders under the Law of Succession Act or they should have applied the customary process of distribution in building up consensus on distribution before moving the court for confirmation of the grant on the basis of mutual agreement rather than as provided by the Law of Succession Act with regard to intestate succession such as the present matter.

[10] And, if a proper, honest or credible agreement has to be reached, then the entire estate particularly property registered in the name of the deceased or belonged to him must be availed for distribution in the agreed manner.

The listing herein of only one property among several others owned by the deceased is a clear reflection of greed and dishonesty on the part of both the objector and respondent and the other beneficiaries in support of either. This is sufficient evidence of their coming to court with

unclean hands each hoping that the court would **"sanitize"** their respective proposals for distribution of the **"jewel"** property i.e. plot No.294 forgetting that it is the duty of the court to apply the law and do justice to all and sundry. In this case, the court would not shy away from **Section 40** of the **Law of Succession Act** in distributing the entire immovable estate of the deceased among the lawful beneficiaries. Such a scenario would encompass the inclusion of all property legally or beneficial owned by the deceased and not availed in this cause for distribution.

[11] Section 40 (1) of the **Law of Succession Act** 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".**

This is the applicable provision of the law in the present circumstances, but it is apparent that neither the objector nor the respondent is in favour of its application herein.

They must, however, be informed that it is for the two of them to come up with a scheme of distribution which is agreeable to all of them or be ready for distribution of the estate by the court on a mode which would invariably be compliant with the aforementioned provision of the law since the deceased was a polygamous man.

[12] In a polygamous setting, a **"house"** is defined in **Section 3** of the **Act**, as a family unit comprising a wife, whether alive or dead at the date of death of the husband and the children of that wife.

Herein, the deceased had two wives i.e. the objector's late mother-in-law (first wife) and the respondent (second wife). The objector was tied to the deceased's estate through her late husband who was the only son of the deceased with his first wife.

Both wives of the deceased and their children formed two houses of the deceased and were all entitled to benefit from the estate of the deceased as provided by the law (i.e. Section 40 of the Law of Succession Act).

In **Esther Wanjiku Burugu –vs- Margaret Wairimu Burugu – Civil Appeal No.319 of 2002**, the Court of Appeal sitting in Nakuru observed that Section 40 of the Law of Succession Act does not state that the division of the estate must be equal and that it specifically states that although the estate of a polygamous person is in the first instance to be among the houses, it nonetheless specified that that would be done according to the number of children in each house.

The court was of the view that the provision negates any proposal that the division must be equal between the houses for to say so would ignore the fact that in most instances, the number of children in each house is never equal.

[13] In **Mary Rono –vs- Jane Rono & another (2005) e KLR**, the Court of Appeal stated that if parliament had intended that there must be equality between the houses, there would have been no need to provide in Section 40 of the Succession Act that the number of children in each house be taken into account (see also, **Elizabeth Chepkoech Salat –vs- Josephine Chesang Chepkwony Slat Nairobi Civil Appeal No.211 of 2012**.)

In **Catherine Nyaguthi Mbauni –vs- Gregory Haima Mbauni (2009) e KLR,** the Court of Appeal held:-

> **"Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated.**
>
> **Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own motion of what is an equitable or just decision.**
>
> **However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust."**

[14] In the same case, the court noted that a court of law cannot purport to qualify the full vigour of **Section 40 (1)** of the **Act**.

The principles set out in the cases hereinabove mentioned would apply herein if this court were to undertake the distribution of the estate among the beneficiaries where there is absence of a consent on distribution.

The proposal made herein by both the objector and the respondent cannot amount to a consent as each would be subject to approval by the court and each would have insignificant weight in the application of statutory principles.

It is therefore of utmost importance for the parties to come up with an agreed mode of distribution for purposes of a consent judgment on the case or surrender without reservation to a distribution by the court in accordance with Section 40 of the Act.

[15] In sum, the impugned summons for confirmation of grant is not only premature but cannot also be allowed on the basis of the proposed mode of distribution contained in paragraph four (4) of the supporting affidavit dated **7th April 2016** and paragraph nine (9) of the further

supporting affidavit dated **24th May 2016**.

The present objection is therefore sustained to the extent that the application for confirmation of the grant is hereby dismissed.

Each party to bear own cost of the application. Fresh summons for confirmation may be taken out upon agreement of the parties on distribution.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Delivered and dated this 22nd day of JULY, 2020]