



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CORAM: D.S. MAJANJA J.
SUCCESSION CAUSE NO. 495 OF 2015
IN THE MATTER OF THE ESTATE OF
JOSEPH OTUNDO MENGE (DECEASED)

BETWEEN

AGNES KERUBO.....APPLICANT

AND

SERPINE NYASANI MENGE.....RESPONDENT

RULING NO. 2

1. The grant of letters of administration in the estate of Joseph Otundo Menge (deceased) were issued and confirmed on 6th March 2019. This application pits Agnes Kerubo (“Agnes”) the deceased’s second widow against Serphine Nyasani Menge (“Serphine”), the first widow. The matter in contention concerns the deceased’s property NAROK/TRANSMARA/POROKO/136 (“Plot 136”). I allowed the summons for confirmation but in my ruling dated 6th March 2019, I awarded Serphine 25% share of Plot 136 on account of her contribution to its acquisition and development as the first wife.

2. By summons dated 13th March, 2019 supported by an affidavit sworn on the same day, Agnes has sought to review the order granting Serphine 25% of the property. I allowed the application and directed that the matter be heard by oral testimony.

3. Agnes (DW 1) asserted that Plot 136 was not acquired in 1969 when Serphine was the deceased’s sole wife but in 1980 when she was already married to the deceased as evidenced by a search of the property title. She proposed that the land be shared equally between the two houses with the 1st house taking the side on the Maasai border and the 2nd house retaining the portion towards Kisii. Agnes testified that she got married to the deceased in November 1973 and had lived with him until his death in 2010. She maintained that the deceased had purchased the land at the end of 1979 and had been issued with the title in 1980. She testified that she had planted trees and tea on the land and had been cultivating the land since the deceased was alive. She told the court that the families had already divided the land equally.

4. John Ngaire (DW2) adopted his affidavit sworn on 11th April 2013 and testified that he had served as the assistant chief of Poroko sub-location since 1996. He testified that Plot 136 was within his jurisdiction and denied ever seeing the 1st respondent on the land.

5. Serphine (PW 1) testified she married the deceased in 1966 and that negotiations for the acquisition of Plot 136 began in 1969 and an agreement for its the purchase of the land was entered into in 1973 before the deceased married Agnes. She told the court that sub-division of the original Plot 102 took a long time and that the purchased portion was eventually registered in the deceased's name on 1st August 1980. Serphine also recalled that they purchased Plot 136 with proceeds from a posho mill she run and the deceased's earnings as a teacher. She stated that although the sale agreement had been drawn in 1973, it took too long to register the land as there were concerns about selling land to non- Maasais in the area. She testified that in 1971 she had planted tea with the help of her mother-in-law and the deceased which they supplied to Nyamache Tea factory under the deceased's account. She denied the claim that Agnes had planted any trees on the land and testified that when Agnes got married in 1974, she was taken to reside in Keroka and not Plot 136.

6. Since the deceased was a polygamous man and died on 13th April 2010 when the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the **LSA**") was in force, his estate was to be divided in accordance with **section 40(1)** thereof which 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.

7. Agnes urged the court to apply the provisions of **section 40** of the **LSA** while Serphine argued that the court take into consideration her contribution to the acquisition and development of the property as the deceased's first wife. It has been accepted that **section 40** of the **LSA** is not absolute as the court is entitled to take into account the circumstances of each case in order to meet the ends of justice (see **Mary Rono v Jane Rono & Another [2008] 1 KLR [G & F]**). As regards the position of the first wife's contribution, the Court of Appeal weighed in on this issue and held as follows in the case of **Douglas Njuguna Muigai v John Bosco Maina Kariuki & Another NYR CA Civil Appeal No. 131 of 2012 [2014] eKLR**;

Back to Section 40(1), the Law of Succession Act, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased's estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and in our view that failure to recognize her contribution is tantamount to discrimination.

8. In **Scolastica Ndululu Suva v Agnes Nthenya Suva NRB CA Civil Appeal No. 49 of 2017 [2019]eKLR** the Court of Appeal affirmed the trial court's decision to take into account the contribution of the elder wife in distributing intestate property in a polygamous household. It observed as follows:

[19] On our own evaluation of the evidence, we are entirely in agreement with the conclusion that the trial judge arrived at that the respondent contributed financially to the acquisition of the two properties. We are alive to the fact that what was before the learned judge was a succession cause and not a matrimonial dispute.

However, the succession cause was anchored on the matrimonial circumstances of the deceased. The fact that the deceased acquired the two (2) properties during the subsistence of his marriage to the respondent, before the appellant came into the scene, and the fact that the respondent was employed, clearly, supported her allegation that she contributed to the acquisition of the two (2) properties. It would not therefore be fair nor just to treat the appellant and the respondent equally in the distribution of the estate.

9. That Serphine married the deceased in 1966 is not disputed. She relied on an agreement dated 1973 in support of her case that Plot 136 was acquired during the subsistence of her marriage to the deceased and before Agnes was married. She contended that Agnes was married in 1974 after the property had been

purchased hence she was entitled to a lesser share of the property.

10. Agnes contended that she married the deceased when the property was acquired in 1980 and she therefore contributed to its acquisition. She disputed the authenticity of the agreement produced by Serphine in support of her case that the land was acquired in 1969, on the basis that the acreage and location indicated in the agreement were inaccurate. However, in her oral evidence and that of her witness DW 2, they admitted that Plot 136 had been purchased from Lelina Ole Kiptek who was the seller indicated in the disputed agreement. Though, the acreage in the agreement is erroneous as pointed out by Serphine, I find that it was more likely than not that the deceased began the process of acquiring Plot 136 much earlier than the date of registration as suggested by Agnes.

11. Undoubtedly, by the time Agnes got married, Serphine had contributed significantly to the acquisition and development of the deceased property. However, the court is entitled to take into account the fact that the Serphine left in 1992 and only returned after the deceased's death in 2010. From the documents she relied on, it appears that by the time the deceased was registered as a shareholder with the Kenya Tea Development Agency and Nyamache Tea Factory Limited, Serphine was no longer living with the deceased. When cross examined, Serphine admitted that Agnes cultivates tea on the land and took it for processing at Nyamache. Agnes testified that she had lived with the deceased throughout his life and had cultivated tea and planted trees on Plot 136. She annexed photographic and documentary evidence to her supplementary affidavit to illustrate that she continues to cultivate and supply the tea. Her contribution to the development of the property cannot be wished away.

12. I therefore find that while Serphine contributed to purchase and development of the property, Agnes also contributed to its development when she lived with the deceased until his death. I cannot, on the basis of the evidence, say that one wife contributed more than the other hence I am not convinced that sufficient basis has been laid by Serphine to depart from **section 40** of the **LSA**. Plot 136 shall therefore be divided between the two families in line with the earlier agreements regarding the other properties. There is sufficient evidence to show that the land for each family was demarcated and each family utilizes its part of the land. Consequently, the subdivision shall take into account where the parties and their respective family occupy and cultivate.

13. As the beneficiaries had agreed on a mode of distribution for all the other properties and in light of the ruling dated 6th March 2019, I allow the summons for confirmation and confirm the grant as hereunder:

SCHEDULE OF DISTRIBUTION

| Description of Property | Share of Heirs |
|---|---|
| FIRST HOUSE | |
| Plot No. 22 Nyangusu Kisii/Nyaribari ChacheB/B/Boruria 4695 Kisii/Nyaribari ChacheB/B/Boruria 3586 Kisii/Nyaribari ChacheB/B/Boruria 2614 Kisii/Nyaribari ChacheB/B/Boruria 2600 East Kitutu/Mwamangera/1312 Gekomu/Nyaribari – Plot No. 18A (Committee: 9/79A (8)) | Wilkins Rangeria and Geoffrey Kenyoni in equal shares |

| | |
|---|--|
| Gekomu/Nyaribari – Plot No. 16 (Committee: 18/63) | |
| SECOND HOUSE | |
| Majoge/Boochi/1853 Kisii Town/Block II/136 Plot No. 53/Kitutu-Keroka Market (Committee: 21/73 (B 19) Bassi/Bondonya/1799 Nyaribari Cache/B.B.Boburia/3609 Plot No. 113 – Keroka Township | Agnes Kerubo and Christopher Nyachoti in equal share (s) |
| Narok/Trans-Mara/Poroko/ 136..... | ½ share to Agnes Kerubo and Christopher Nyachoti in equal shares ½ share to Wilkins Rangeria and Geoffrey Kenyoni |
| One third (1/3) share of Kisumu Municipality/Block 7/122 | Serphine Nyasani and Agnes Kerubo |
| Barclays Bank of Kenya Shares | ½ share to Agnes Kerubo and Christopher Nyachoti in equal shares ½ share to Wilkins Rangeria and Geoffrey Kenyoni |
| Kenya Commercial Bank Shares | ½ share to Agnes Kerubo and Christopher Nyachoti in equal shares ½ share to Wilkins Rangeria and Geoffrey Kenyoni |
| Funds in Barclays Bank Account..... | ½ share to Agnes Kerubo and Christopher Nyachoti in equal shares ½ share to Wilkins Rangeria and Geoffrey Kenyoni |

14. As this a family matter, I make no order as to costs.

DATED and DELIVERED at KISII this 27th day of MAY 2019.

D. S. MAJANJA

JUDGE

Mr Abidha instructed by Abidha and Company Advocates for the applicant.

Mr Omondi instructed by Omondi, Abande and Company Advocate for the respondents/protestors.