



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D.S. MAJANJA J.**

**SUCCESSION CAUSE NO. 70 OF 2006**

**IN THE MATTER OF THE**

**ESTATE OF OLOTUNO OLE KORTOM (DECEASED)**

**BETWEEN**

**MAMURA OLOTUNO KORTOM.....APPLICANT**

**AND**

**NOLPARAKWO KORTOM.....1<sup>ST</sup> PROTESTOR**

**SAMUEL KORTOM OLOTUNO.....2<sup>ND</sup> PROTESTOR**

**RULING**

1. This matter concerns the estate of Olotuno Ole Kortom (deceased) of Naronyo Sub-location, Osupuko Location within Transmara Sub-County of Narok County and who died on 24<sup>th</sup> December 1984. In his lifetime he married four wives; Kilaangu Enol Kortom, Nolparakwo Olotuno Kortom, Nalakite Olotuno Kortom and Kamunte Olotuno Kortom. His estate, which is in dispute, comprises the property; TRANSMARA/OSUPUKO/1 measuring about 73.5 Hectares (“the Osupuko land”).
2. The petitioner, Mamura Olotuno Kortom (“Mamura”) applied for and obtained a grant of letters of administration dated 21<sup>st</sup> September 2006. The grant was revoked by the court on 10<sup>th</sup> July 2015 since not steps had been taken to apply for confirmation. I reinstated the grant but on 1<sup>st</sup> August 2018, I revoked it and re-issued it to Mamura and Samuel Kortom Olotuno. I directed the administrators or any of them to apply for confirmation.
3. Mamura applied for confirmation of grant through the summons dated 11<sup>th</sup> July 2016. Nolparakwo Kortom filed an affidavit of protest and I directed the matter proceed for hearing by oral evidence. After hearing the testimony of Mamuka, I informed that parties that I would issue directions which I now do.
4. The Osupuko land is registered in three names; the deceased and his two sons; Mamura and Olonyeyiye Ole Kortom (“Olonyeyiye”). Mamura and Olonyeyiye contended that they are the absolute owners of their respective shares of the property and that the only share of the Osupuko land available for distribution to the deceased’s beneficiaries was the 1/3 share in the name of the deceased.
5. Nolparakwo, the protestor speaking on behalf of the other family members, contended that Mamura and Olonyeyiye held the 2/3 share on in trust for and behalf of the family hence the entire property was available for the distribution. She also pointed out Mamura was also holding another property, TRANSMARA/POROKO/32 (“the Poroko land”), on behalf and in trust for the family.
6. The jurisdiction of this court in succession matters limited to adjudicating and distribution the estate of the deceased which under section 3 of the *Law of Succession Act* (“LSA”) is the, “*free property of the deceased.*” In this case, the only property in the deceased’s name is the 1/3 share of the Osupuko land. I have no jurisdiction to determine whether the 2/3 share of the Osupuko land registered in the name of Mamura and Olonyeyiye and the Poroko land is held in trust for the other members of the family. That is a matter to be determined by the Environment and Land Court.
7. Since the deceased was polygamous man and he died in 1984 when the *LSA* was in force, the deceased’s estate is to be divided in

accordance with **section 40(1)** thereof which deals with the estate of a polygamous intestate and it 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.

8. However, under **section 42** of the **LSA**, the court may, in distributing the property, take into account the property the deceased has already given to or settled to certain beneficiaries. It provides as follows:

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.

9. The effect of these provisions is that the final distribution of 1/3 share of the Osupuko land will be affected by whether the Environment and Land Court finds that Mamura and Olonyeyie were trustees for the other members of the family or not. If it is the former, then the whole property may be distributed in line with **section 40(1)** of the **LSA**. If the beneficiaries lose their case, then the court determining the application for confirmation may consider that the shares given to Mamura and Olonyeyie were gifts which ought to be taken into account in the final distribution. Either way a determination of the status of the 2/3 share of the Osupuko land and the Poroko land is necessary before final distribution can be made. I therefore decline to confirm the grant at this stage.

10. These proceedings are stayed pending the filing of appropriate proceedings in the Environment and Land Court for that purpose by the protestors and or other members of the family within the next **thirty (30) days**.

**DATED and DELIVERED at KISII this 27<sup>th</sup> day of MAY 2019.**

**D.S. MAJANJA**

**JUDGE**

**Mr Anyona instructed by Asati, Anyona and Company Advocates for the petitioner.**

**Mr Ombachi instructed by Ombachi and Company Advocates for the protestors.**