



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**SUCCESSION CAUSE NO. 501 OF 2009**

**IN THE MATTER OF THE ESTATE OF NICHOLAS MAISIBA (DECEASED)**

**CHARLES MOKAYA OTWORI.....PETITIONER**

**VERSUS**

**WILKISTER MORAA OTWORI**

**JOHN KEBASO OTWORI**

**GRACE MORAA OTWORI**

**GEORGE MORARA OTWORI**

**GRACE KERUBO OTWORI**

**RISPER KWAMBOKA**

**OTUORI OMORI ERICK.....OBJECTORS**

**AND**

**RONALD ONYANGO OBONYO.....INTERESTED PARTY**

**RULING**

1. **Nicholas Otwori Maisiba** (“the deceased”) died intestate on 29<sup>th</sup> December 2003. The deceased had two parcels of land namely **West Kitutu/Bomatara/ 1824** and **West Kitutu/ Daraja Mbili/ 1208** which are the subject of this cause. It is not contested that the deceased was a polygamous man. His first wife **Marisera Nyatichi Otwori** and his second wife **Wilkister Moraa Otwori** are now both deceased. **Charles Mokaya Otwori** applied for letters of administration in the deceased’s estate which was opposed by **Wilkister Moraa Otwori**. She contended that he had not sought her consent to file the application and had left out some of the deceased’s beneficiaries. **Ronald Onyonka Obonyo** also filed an application to be enjoined as an interested party on the grounds that he had purchased land parcel **West Kitutu/Bomatara / 1824** from two of the deceased’s sons **Charles Mokaya Otwori** and **Reuben Manyange Otwori**.

2. The letters of administration in the estate of the deceased were issued to **Charles Mokaya Otwori, Wilkister Moraa Otwori** and **Ronald Onyonka Obonyo** on 26<sup>th</sup> July 2011. Later on, **Charles Mokaya** and **Wilkister Moraa** passed away and a fresh grant was issued to **Reuben Otwori** and **Ronald Onyonka Obonyo** on 14<sup>th</sup> December, 2018.

3. What is now pending the determination of this court is the distribution of the deceased’s estate. The interested party, **Ronald Onyonka Obonyo** filed summons for confirmation of grant on 15<sup>th</sup> April 2019. He and his co-administrator **Reuben Manyange Otwori** swore affidavits on 15<sup>th</sup> April 2019 in support of the application. **Ronald** proposes that land parcel no. **West Kitutu/Bomatara / 1824** be registered in his name and land parcel no. **West Kitutu / Daraja Mbili / 1208** be subdivided among the deceased’s beneficiaries as follows;

**HOUSE A**

a. **Morine Mokaya** – 0.0475 Ha.

b. Grace Moraa Otworu – 0.0475 Ha.

#### **HOUSE B**

c. Reuben Manyange Otworu – 0.02375 Ha.

d. George Morara Otworu – 0.02375 Ha.

e. John Kebaso Otworu – 0.02375 Ha.

f. Erick Omori Otworu – 0.02375 Ha.

4. **John Kebaso Otworu** opposes that mode of distribution. He wants the two parcels of land shared equally between the two houses and the beneficiaries in each house sub-divide their share equally within their respective houses. He lists the deceased's beneficiaries as follows;

#### **1<sup>ST</sup> HOUSE**

a. Marizera Nyatichi Otworu (deceased) widow

b. Grace Moraa Otworu

c. William Nyangaresi Otworu (deceased)

d. Charles Mokaya Otworu (deceased)

e. Mourine Mokaya Otworu

#### **2<sup>ND</sup> HOUSE**

f. Wilkister Moraa Otworu (deceased) widow

g. Reuben Manyange Otworu

h. George Morara Otworu

i. John Kebaso Otworu

j. Erick Omori Otworu

k. Grace Kerubo Otworu

l. Risper Kwamboka Otworu

5. In order to distribute the deceased's estate the first task is to establish the deceased's assets and his beneficiaries. The only asset listed by the petitioner in form P & A 5 is land parcel **no. West Kitutu / Bomatara / 1824** measuring 0.51 Ha. The interested party in his list of documents filed on 12<sup>th</sup> April 2012 availed a copy of the title which indicates that the land is registered in the deceased's name.

6. No documentary proof has been furnished to prove that land parcel **no. West Kitutu/ Daraja Mbili / 1208** is registered in the deceased's name. However, all parties agree that the parcel of land forms part of the estate.

7. As for the deceased's beneficiaries, it is agreed that he was survived by the following children;

#### **1<sup>ST</sup> HOUSE**

a. Grace Moraa Otworu

b. Mourine Mokaya Otworu

#### **2<sup>ND</sup> HOUSE**

c. Reuben Manyange Otworu

d. George Morara Otworu

- e. John Kebaso Otwor
- f. Erick Omori Otwor
- g. Grace Kerubo Otwor
- h. Risper Kwamboka Otwor

8. Since the deceased was a polygamous man and left no surviving spouse, his estate was subject to division under **section 40 and section 38** of the **Law of Succession Act (“the Act”)**. Those provisions provide as follows;

*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.*

*38. 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 be equally divided among the surviving children.*

9. The interested party avers that he purchased land parcel **No. West Kitutu/Bomatara / 1824** from Charles Mokaya Otwor (deceased) and Reuben Manyange Otwor. He states that the deceased had gifted his two sons the land which they subsequently sold to him on 19<sup>th</sup> November 2007. I concur with the courtin ***In re Estate of The Late Gedion Manthi Nzioka (Deceased)[2015] eKLR*** which held as follows;

*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 of resulting trusts or the presumption of. Gifts of land must be by 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 complete 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.*

10. The interested party herein has not adduced any proof that the deceased gave Charles Mokaya Otwor (deceased) of the first house and Reuben Manyange Otwor of the 2<sup>nd</sup> house land parcel **No. West Kitutu/Bomatara / 1824** and I therefore find that no such gift was made to them.

11. That being said, I take cognizance of the fact that both houses participated in the sale and the interested party has been in possession of that parcel of land since he purchased it with no complaint from the beneficiaries of the deceased’s estate. For the foregoing reasons, I allow the summons for confirmation of the grant and confirm the grant as hereunder;

**SCHEDULE OF DISTRIBUTION**

SHARE OF HEIRS	DESCRIPTION OF PROPERTY
1. Grace Moraa Otwor 2. Mourine Mokaya Otwor 3. Reuben Manyange Otwor 4. George Morara Otwor 5. John Kebaso Otwor 6. Erick Omori Otwor 7. Grace Kerubo Otwor 8. Risper Kwamboka Otwor	<b>West Kitutu/ Daraja Mbili / 1208 in equal shares</b>
Ronald Onyonka Obonyo	<b>West Kitutu/Bomatara / 1824 absolutely</b>

12. Each party shall be their own costs.

**Dated, signed and delivered** at Kisii this **9th** day of **August 2019**.

**R.E.OUGO**

**JUDGE**

**Mrs. Kebungo h/b Mr. Masese For the Petitioner**

**Mr. Sagwe For the Objectors**

**Mr. Masese For the Interested Party**

**Rael Court clerk**