



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO 296 OF 2014

IN THE MATTER OF THE ESTATE OF NYANGATE NYANGATE (DECEASED)

BETWEEN

MAYIEKA NGANG'ATE.....OBJECTOR/PETITIONER

AND

PAMELA NYAKERARIO.....RESPONDENT/PETITIONER

RULING

1. This cause relates to the estate of Nyangate Nyangate (“the deceased”) who died intestate on 7th August 1980. On 4th October 2016, the grant of letters of administration for his estate was issued to Pamela Nyakerario Nyang’ate (“Pamela”) and Mayieka Nyang’ate (“Mayieka”) who are the daughter and son of the deceased respectively. The deceased’s only property, CENTRAL KITUTU/ MWABOSIRE/317 (“Parcel 317”).
2. Thereafter Pamela filed summons for confirmation of grant on 24th October 2017 and sought to wholly have parcel 317 claiming that the deceased had allocated land to all his other beneficiaries. She deposed that parcel Central Kitutu/ Mwabosire/318 (“parcel 318”) was allocated to Mayieka, Central Kitutu/ Mwabosire/319 (“parcel 319”) to Isaboke and Central Kitutu/ Mwabosire/286 (“parcel 286”) to Onkoba Gisemba. In due course, Sabina Kwamboka Onkoba (“Sabina”) and Mayieka both filled an affidavit of protest against confirmation of grant and mode of distribution. Sabina deposed that although the parcel 317 was the registered in the deceased’s name, the deceased and the deceased’s brother Onkoba Gisemba, who is the registered proprietor of parcel 286, had exchanged their respective portions of land. The two families who occupied the interchanged parcels of land had hoped that during succession they would rectify the situation through transfers.
3. I directed that the objection be resolved by oral testimony. The evidence at the hearing was as follows. Mayieka (Pw2) told court he is the deceased’s eldest son while Pamela is his sister. He testified that the deceased gave him parcel 318. That although his uncle Onkoba Gisemba owns plot L.R 286, he cultivates the said land with Jemimah Ariri Isaboke who is his brother’s wife while Onkoba Gisemba occupies L.R 317. Pamela lives on his land and his brother Isaboke also gave Pamela land (parcel 319) and therefore Pamela utilizes both parcel 318 and 319. Sabina stays in parcel 317 with her children and that her husband was buried on that land. He told court that Sabina is to lease parcel 286 to them. On cross examination he told court that the deceased did not allocate land to Pamela whilst he was alive.
4. Daniel Isaboke (Pw1) testified that Onkoba Gisemba was his step grandfather and had married Sabina. That parcel 317 belonged to the family of Nyang’ate Nyang’ate but the same is now occupied by Sabina after land was interchanged. Pamela stays on parcel 318 and 319. Onkoba Gisemba committed a felony and ran away from home, so Nyangate and his sons planted tea plantations and trees in 1960. He recalled that before Onkoba Gisemba died, he requested the Nyangate family that since they had planted tea plantations on his parcel of land then he will occupy 317. He moved his wife Sabina together with his family from Naivasha in 1994 to parcel 317. When Onkoba Gisemba died he was buried in 317. Sabina occupies parcel 317 with the exception 32 feet close portion which is occupied by his mother Jemima Ariri Isaboke.
5. Sabina Onkoba (Pw3) told court no one else stays on parcel 317. She testified that she married Onkoba Gisemba under customary law and they had six children. Onkoba Gisemba was the brother of the late Nyangate Nyangate and both had land when she got married. She was to take the land of Pamela and was therefore placed on Pamela’s land. She has not lived in her husband’s land parcel 286 as Mayieka and Isaboke have planted and pluck the tea therefrom. She stays in Nyangate’s land but will give her children parcel 286.
6. James Mokaya Magaki (Pw4) relied on his statement filed in court. Charles Nyangate (Pw5) told court that the shamba of Nyangate has been occupied for 20 years by the family of Onkoba Gisemba who built on the shamba. Pamela was given a shamba of Mayieka and Isaboke.
7. Pamela Nyakerario Nyangate (Dw1) testified that the deceased was her father. She told court that parcel No. 286 was the shamba of

Onkoba Gisemba who is deceased. Sabina planted trees while Mayieka have planted tea on Parcel No. 286. Sabina and her children have lived on parcel 317 from 1994. She also confirmed that she has also been living on parcel 317 together with her children. She told court that Jemimah has also planted trees in Parcel No. 317. Mariam Mayieka (Dw2) adopted her statement filed in court on the 24th October 2018. She testified that they stay in grandfather's home but began building in 2013. The house was completed in 2015 whilst the matter was in court.

8. It not in dispute that during his lifetime the deceased had 2 sons. Mayieka and Isaboke Nyang'ate (deceased). He also had daughters; Pamela, Billiah Mungina Ngoko and Tabitha Kwamboka Mareri (deceased). The following facts were also not in dispute;

- That parcel 317 is registered in the name of the deceased.
- Sabina settled on parcel 317.
- Isaboke Nyangate and Mayieka are the proprietors of parcel 319 and 318 respectively, the said parcels of land were given to them by the deceased while he was alive.
- Mayieka and the family of Isaboke Nyangate (Jemima Ariri Isaboke) have been living cultivating and utilizing parcel 286 registered to Onkoba Gesemba.

9. After considering the evidence, the parties' submission and the law, this court is being called upon to determine whether Pamela is entitled to parcel 317 in light of the alleged agreement between the family of the deceased and the family of Onkoba Gisemba. It must be understood that the jurisdiction of this court in succession matters is limited to adjudicating and distribution the estate. **Section 3 of the Law of Succession Act ("LSA")** the LSA defines estate as "*the free property of a deceased person*". "Free property", in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. The primary duty of this court would be to distribute the estate of the deceased to the rightful beneficiaries and it is of paramount importance that the estate must be identified.

10. From the evidence adduced the only asset of the deceased capable of distribution is parcel 317. The deceased was polygamous with two wives; however his first wife who is deceased did not have any children. The estate of the deceased would therefore only devolve to his beneficiaries who are from the second house. **Section 42 (a)** of the LSA provides that *where 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 that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.*

11. It is undisputed that Mayieka and Isaboke Nyangate were given parcel 318 parcel 319 each measuring 3 acres. I note that parcel 317 measures 2.2 acres. Taking into account that the deceased during his lifetime gave Mayieka and Isaboke Nyangate land, I find that parcel 317 should wholly devolve to **Pamela Nyakerario Nyangate.**

12. The grant of letters of administration intestate made to Pamela Nyakerario Nyang'ate and Mayieka Nyang'ate issued on the 4th October 2016 is hereby confirmed as follows;

- i. **Pamela Nyakerario Nyang'ate** shall inherit **Central Kitutu/Mwabosire /317** -whole
- ii. **The deceased during his life had bequeathed his sons parcels number 318 and 319 which are not the subject of this matter.**

Each party to bear its costs.

Dated, signed and delivered at Kisii this 27th day of September 2019.

R. E. OUGO

JUDGE

In the presence of;

Miss Kerubo h/b Mr. Ogari For the Objector

Respondent/Petitioner In person

Ms. Rael Court/clerk