



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISII**  
**SUCCESSION CAUSE NO 1 OF 2017**  
**IN THE MATTER OF THE ESTATE OF SAUL NYARERU BOSIRE (DECEASED)**

**BETWEEN**

**ESTHER GACHOKI NYARRU.....APPLICANT/PETITIONER**

**AND**

**ANGELINE MORARA NYARERU.....RESPONDENT/PETITIONER**

**RULING**

1. This case concerns the estate of **Saul Nyareru Bosire** (“the deceased”) who died on 8<sup>th</sup> March 2004. The deceased’s widows, **Esther Gachoki Nyareru** (“*Esther*”) and **Emily Senoi Nyareru** (“*Emily*”), petitioned this court for grant of letters of administration and were issued with a grant of letters of administration on 31<sup>st</sup> May 2005. On 2<sup>nd</sup> October 2008 the petitioners filed summons for confirmation of grant and according to their affidavit sworn on even date the deceased assets were as follows:

**ASSETS**

Matutu Settlement Scheme/605

KAD 008W

Tractor KYL 695

Barclays Bank Sotik Branch A/C No. [...]

KCB Kisii Branch A/C No. [...]

2. On 10<sup>th</sup> December 2008 Onyancha J. confirmed the grant and directed that the assets be registered in the names of Esther and Emily and to be held in trust for their children in equal shares. Esther, vide chamber summons dated 23<sup>rd</sup> November 2010 sought orders that the deceased assets be transferred to the beneficiaries and Emily be ordered to render accounts for assets she disposed. After hearing the application the court dismissed the application and on its own motion directed that the matter be transferred from Nairobi to Kisii where the assets were situated. I also note from the record that the co-administrator Emily passed away on 14<sup>th</sup> February 2014 and her daughter Angeline Moraa Nyareru (“*Angeline*”) applied to be substituted as co-administrator. The application was allowed thus the current administrators to the deceased estate are Esther and Angeline.

3. Esther filed a summons for confirmation of grant dated 16<sup>th</sup> July 2018 seeking that grant be confirmed and the estate be divided as per her proposed mode of distribution. The affidavit in support of the summons had a comprehensive list of the deceased assets. The assets listed therein included;

- a) Matutu Settlement Scheme/604
- b) Matutu Settlement Scheme/602 (“plot 602”)
- c) Barclays Bank, Sotik Branch, A/C No. [...].
- d) KCB, Kisii Branch, A/C No. [...].

- e) Shares at Pyrethrum Board of Kenya.
- f) Shares at Barclays Bank of Kenya.
- g) Tractor KWM 283.
- h) Pickup KAD 008W.
- i) Scooter timber cutter.

4. Through her replying affidavit dated 26<sup>th</sup> March 2019 Angeline deposed that the summons for confirmation of grant raised a new issue, the claim that Esther is the co-owner of plot 602 thus entitled to 18 acres.

5. I directed that the matter be heard by oral testimony and in that regard Esther testified as Pw1 while Angeline gave evidence as Dw1. Before taking the viva voce evidence, the parties agreed that the only issue in contention was the 18 acres to Esther by virtue of joint ownership of plot 602. Esther testified that she bought the shamba with the deceased whom she had married in 1962. She testified that she was working in Nairobi while the deceased worked in the Army. They obtained a loan to pay for the property and made final payments in 1976. That the deceased married the second wife in 1985 and that the second wife made no contributions towards the acquisition of the shamba. In 1977 the deceased wanted to sell the shamba and she proposed that that the deceased should give her part of the land. The deceased gave her 40 acres.

6. Angeline testified that the land in question, plot 602, measures about 58 acres. That as a co-administrator she was in agreement with all the other siblings that the whole shamba should be divided equally amongst all beneficiaries. She testified that initially Esther wanted everyone to get equal shares and her claim for 18 acres as a co-owner is merely an afterthought.

7. In her submission Esther contends that she claims a larger portion of plot 602 by virtue of her contribution towards the estate. She claims that the initial acreage was 56 hectares (133 acres) most of which was sold by the deceased only leaving 58 acres for distribution. She claims that from the 58 acres, her share was 40 acres and sold 6 acres of her portion to pay off a loan taken by the deceased. She explained that she decided to forego her full share and to settle for 18 acres only for the benefit of all the deceased children. She relied on **Succession Cause No. 16 of 2010 in the matter of the Estate of the late George Cheriro Chepkosiom (Deceased) 2017.**

8. Angeline submitted that the applicable law where the intestate was polygamous is **section 40 (1) of the Law of the Succession Act (“LSA”)** and relied on **Kisii H.C Succession Cause No. 95 of 2015 In the matter of the estate of Robert Rodgers Obwocha [2019] eKLR.** She claimed that most of the land sold to the purchasers listed in the summons for confirmation of grant was to finance university education of the children of the first house schooling at university of Baraton and USIU. She contends that at the time of the deceased death, the deceased eldest child from the second house was only 17 years while the youngest was 2 years. She relied on **Kajiado H.C Succession Cause No. 71 of 2015 Judith Naiyai Ramaita & Another versus James Koome Ramaita [2019] eKLR** where it was held that the age of the children and their station in life are factors that the court will necessarily take into account. They advanced that the fairest mode of distribution in the estate of a polygamist shall be distributed according to houses with the surviving widow being counted as an additional unit.

9. After considering the summons for confirmation of grant, the evidence and the submissions by the parties, the matter for consideration in this case would be whether Esther is entitled to 18 acres of the estate by virtue of her contribution towards acquisition of matrimonial property.

10. Before I can proceed to make a determination on the main issue I note that there is a confirmed grant dated 10<sup>th</sup> December 2008 which with provides on how the deceased’s estate should be distributed. None of the parties made an application to rectify or revoke the grant, but the applicant instead filed summons for confirmation of grant despite the existence of a confirmed grant. That notwithstanding, on 19<sup>th</sup> July 2019 both parties entered a consent, from the consent it is clear that assets listed in Esther’s affidavit dated 16<sup>th</sup> July 2018 belong to the deceased, although properties listed at paragraph 4 (h) to (j) of the said affidavit are no longer in existence. **Under Section 76 of the LSA** the circumstances in which a grant may be revoked or annulled are as follows:

***76 Revocation or annulment of grant a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***

***a. that the proceedings to obtain the grant were defective in substance;***

***b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***d. ....***

11. The court hereby on its own motion sets aside the certificate of grant issued on the 10<sup>th</sup> December 2008 on grounds that both parties when petitioning for grant concealed some of the deceased properties and the information in regard to the assets was material as it would lead to fair distribution of the deceased estate.

12. I now turn to whether Esther is entitled to 18 acres of the estate by virtue of her contribution towards acquisition of matrimonial property, plot 602. The Court of Appeal while considering the issue of whether the contribution by the first widow towards the purchase of properties by the deceased in the case of *Esther Wanjiru Githatu v Mary Wanjiru Githatu [2019] eKLR* rendered itself as follows;

**“...In the circumstances we would agree with the trial judge that there was sufficient evidence to establish that Mary contributed to the acquisition of the properties that were acquired by the deceased up to 1984, through her active participation in the family business and farming. That being the position, it was proper that Mary’s interest pursuant to her contribution be identified and set aside before the net estate of the deceased is distributed. The mere fact that the properties are registered in the name of the deceased, without mention of Mary’s interest does not change this position.**

[25] We agree with sentiments expressed by the learned judge that:

**“Granted that evidence, it would lead to serious injustice to apply section 40 blindly in this case. The section does not completely tie the hands of the court. See *Rono vs Rono & another [2005] 1 KLR 538, Rael Verukani Musi vs Racheal Indagaya Akola, Eldoret High Court P & A No. 5 of 2013, [2016] eKLR.*”**

13. In *Re The Estate of The Late George Cheriro Chepkosiom (supra)* Mumbi J stated: -

**“The provisions of section 40 of the Law of Succession Act and their implication for the first wife of a deceased person have been considered in various decisions of the High Court in Kenya. What has been the consensus is that they are unfair to a wife, married decades or more before a second or third wife, yet she is required to share the estate of the deceased equally with subsequent wives, as well as the children of the deceased. This is regardless of whether or not she had contributed to the acquisition of the property comprising the estate”.**

14. I have considered the evidence by Esther in court and note that in 1972 she issued her employer, City Council of Nairobi, with a notice of resignation. She proceeded and settled in parcel 602 where she oversaw the farming business with the intention of making the loan repayments. She argued that the deceased also had all the intentions of her managing the farm as he withdrew his power of attorney from Mr. Elizaphan Bosire Aberi and intended to appoint Esther to manage the land. I therefore find that the applicant has proved on a balance of probabilities that she made contribution towards the acquisition of plot 602 by actively managing the farm and she therefore entitled to 18 acres of plot 602 which is about 31% of the net property. The deceased property that remains for distribution in terms of plot 602 is the 40 acres. Both parties have however consented to the distribution of the 40 acres.

15. In conclusion I hereby make the following orders;

1. The grant issued to ESTHER GACHOKI NYARERU and ANGELINE NYARERU MORAA on 31<sup>st</sup> May 2005 is hereby revoked.
2. Afresh grant is hereby and to be re-issued to ESTHER GACHOKI NYARERU and ANGELINE NYARERU MORAA forthwith
3. I hereby confirm the grant of representation to **ESTHER GACHOKI NYARERU and ANGELINE NYARERU MORAA** on the following terms;
  - a) Matutu Settlement Scheme/604 measuring 1.9 acres to be held in trust for the legal heirs of Kerandi Nyakoyia (Deceased)
  - b) Matutu Settlement Scheme/602 as follows:
    - i. 2 acres to be held in trust for the legal heirs of Kerandi Nyakoyia;
    - ii. 3 acres to be held in trust for the legal heirs of Piri Momanyi;
    - iii. 4 acre to be held in trust for the legal heirs John Nyakindi Mwembi;
    - iv. 5 acres to Henry Ogega Bosire;
    - v. 6 acres to Benard Bosire Nyangau;
    - vi. 18 acres to Esther Gachoki Nyareru;
    - vii. 40 acres to be shared equally among the beneficiaries of the deceased.
  - c) Barclays Bank, Sotik Branch, A/C No. [...] to be shared equally among the beneficiaries of the deceased.
  - d) KCB, Kisii Branch, A/C No. [...] to be shared equally among the beneficiaries of the deceased.
  - e) Shares at the Pyrethrum Board of Kenya to be shared equally among the beneficiaries of the deceased.

f) Shares at Barclays Bank of Kenya to be shared equally among the beneficiaries of the deceased.

4. This being a family matter there shall be no orders as to costs.

**Dated, signed and delivered at Kisii this 27<sup>th</sup> day of September, 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Mr. Ondande h/b Mr. Ouma For the Petitioner/Applicant**

**Mr. Soire For the Petitioner/Respondent**

**Ms Rael Court clerk**