



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE NO. 234 OF 2000**

**IN THE MATTER OF THE ESTATE OF NYACHIEO OSINDI (DECEASED)**

**JAMES ONGUBO.....1<sup>ST</sup> PETITIONER**

**KENNEDY OGERO.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**ISAAC ONGUBO OSINDI.....1<sup>ST</sup> OBJECTOR**

**CHARLES OGERO OSINDI.....2<sup>ND</sup> OBJECTOR**

**RULING**

1. The deceased, **Nyachieo Osindi**, died intestate on 2<sup>nd</sup> December 1977. He was the registered proprietor of **Land Parcel no. Central Kitutu/Mwamanwa/820** ("land parcel No. 820") which is the subject matter of this succession cause.

2. The deceased's sons **Osindi Nyachieo** and **Thomas Mboga Nyachieo** have both passed away and the deceased is survived by his grandsons. **Maria Kerubo Mboga** who was the widow of Thomas Mboga, had applied for the grant of letters of administration in the estate of the deceased but this was objected to by **Osindi Nyachieo's** widow, **Monyenye Osindi**, on the grounds that she and her sons had been left out. It was later on agreed that the grant be issued to the deceased's grandsons **James Ongubo, Kennedy Ogero, Isaac Ongubo Osindi** and **Charles Ogero Osindi**.

3. **James Ongubo** and **Kennedy Ogero** who are the 1<sup>st</sup> and 2<sup>nd</sup> petitioners respectively who filed an application for confirmation of the grant on 31<sup>st</sup> October 2016. In their affidavit in support of the application, they aver that during the first registration, land parcel no. Central Kitutu / Mwamanwa/ 813 ("land parcel No. 813") was registered in the name of Osindi Nyachieo and his sons had been benefiting from that parcel of land. On the other hand, Land Parcel No. 820 was registered in the name of the deceased in trust for their father **Thomas Mboga** who was young at that time of registration. It is therefore their contention that the suit land should be shared equally among the sons of Thomas Mboga as follows;

<b>a. James Ongubo</b>	<b>1.3 acres</b>
<b>b. Benard Omwenga</b>	<b>1.17 acres</b>
<b>c. Willprotus Ogato</b>	<b>1.17 acres</b>
<b>d. Evans Mokuia</b>	<b>1.17 acres</b>
<b>e. Erick Bange</b>	<b>1.17 acres</b>
<b>f. Kevin Omoi</b>	<b>1.17 acres</b>
<b>g. David Manua</b>	<b>1.17 acres</b>
<b>h. Kennedy Ogero</b>	<b>1.17 acres</b>

4. The objectors are opposed to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' proposal. The 2<sup>nd</sup> objector, in his affidavit sworn on 23<sup>rd</sup> April 2019, averred that **land parcel No. 813** was not associated in any way with the estate, as their father Osindi Nyachieo had purchased the land before the first

registration. He denies the claim that the sons of **Thomas Mboga** are the only ones entitled to a share of the land parcel No. 820 and avers that before he died, the deceased clearly demarcated the land between their fathers **Osindi Nyachieo** and **Thomas Mboga**. He therefore urges the court to subdivide the suit land equally between them.

5. Directions were taken before W. A. Okwany J. for the parties to file further affidavits and statements and prosecute the protest by way of viva voce evidence.

6. **Maria Kerubo Mboga** (PW 1) adopted her statement as her evidence and in cross examination, asserted that the suit land belonged to her. She testified that the land measured 9.5 acres and had been divided into equal portions but she did not know **Osindi Nyachieo's** acreage as a demarcation that had been placed thereon was later on uprooted. She testified that the objectors had forcefully taken the lower portion of the land and were cultivating on it.

7. The 1<sup>st</sup> petitioner, **James Ongubo** (PW 2) also adopted his statement as his evidence and testified that when his father died in 1996, he did not have a title deed to his name. His grandfather, the deceased had one parcel of land which he divided between his two sons. The 1<sup>st</sup> petitioner produced a transfer form of land parcel No. 820 that had been signed by his father and the proceedings and decision in **Manga Land Case No. 221 of 1958** on a dispute between the brothers concerning the land. He testified that the land they had been living on was registered in the deceased's name and was being held in trust for his father. He further testified that the objectors' father owned his own parcel of land measuring 5 acres and had not been dependent on the land parcel No. 820 before his death. He also testified that they were cultivating the upper portion of the suit land while the objectors were cultivating the lower part which had been given to them by the church for a few years and insisted that they had no claim to the suit land.

8. The 1<sup>st</sup> respondent, **Charles Ogero Osindi** (DW1) testified that his grandfather the deceased had subdivided land parcel No. 820 between his sons, with his father, **Osindi Nyachieo**, getting the lower side and his uncle getting the upper part. His father had also purchased land parcel No. 813 which was registered around the year 1969. He denied the claim that land parcel No. 820 was being held in trust for **Thomas Mboga** or that the land had been a gift inter vivos. He testified that he lived on land parcel No. 813 but also occupied 2 acres of land parcel No. 820 while PW 1 had 7 ½ acres.

9. **Zebedeo Ayako Ongubo** (DW 2) affirmed that **Osindi Nyachieo** had purchased the land parcel No. 813 where he had resided but also cultivated a portion of the suit land. He also confirmed that the deceased who was his uncle and his sons had once been engaged in a dispute which was resolved by the court in **Manga**. He testified that by the time the deceased died, **Osindi Nyachieo's** widow was cultivating the suit land. In cross examination, **Zebedeo** testified that the church had given the son who dug the grave of the deceased a portion to cultivate on. He stated that they had attempted to have the land divided in half since the younger brother **Thomas Mboga** had a bigger portion but the petitioners had been opposed to that.

#### **DETERMINATION**

10. Parties filed their respective submissions in support of their positions which I have considered alongside their affidavits and oral evidence. The issues arising for determination are;

- a. **Whether the deceased transferred the land parcel No. 820 to Thomas Mboga Nyachieo as a gift inter vivos;**
- b. **Whether the objectors are entitled to a share as beneficiaries of the estate of the deceased; and**
- c. **How the estate of the deceased is to be distributed.**

11. The deceased herein died on 2<sup>nd</sup> December 1977, before the enactment of the Law of Succession Act ("the Act") in 1984. **Section 2 (2)** of the Act provides that such estates are subject to customary laws. It stipulates;

***2(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.***

12. During his life time, the deceased had two wives but the parties are in agreement that the deceased's second wife **Nyabate Nyachieo** left the deceased's home and the deceased's only wife at the time of his demise was **Kerubo Nyachieo**, the mother of **Thomas** and **Osindi**.

13. The only property held by the deceased when he died was land parcel No. 820. The petitioners who are the sons of **Thomas Mboga Nyachieo** contend the deceased was holding the land in trust for their father and had executed a transfer form in his favour. They argue that since the deceased died before the transaction was completed the land remained a gift inter vivos.

14. That argument is challenged by the objectors who contend that when land parcel No. 820 was registered on 14<sup>th</sup> February, 1969, **Thomas Mboga** was already married to the late **Maria Kerubo** and was mature enough to have the land registered in his own name. They also dismiss the transfer document produced by the petitioners as it was not registered as required.

15. In **Re Estate of The Late Gedion Manthi Nzioka (Deceased) Succession Cause No. 122 of 2010 [2015]eklr** **Nyamweya J.** described gifts inter vivos thus;

*"In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death: ...*

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

In Halsbury Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, **except in circumstances where donor's subsequent conduct gives the donee] a right to enforce the promise.** A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprises in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.” [ *Emphasis added*]

16. The petitioners produced a transfer form in respect of land parcel No. 820 executed by the deceased as a gift in favour of Thomas Mboga on 23<sup>rd</sup> September 1976. The transfer form was not registered as is required for a gift to be complete, however the above excerpt from the **Halsburys Laws of England** it is stated that a donor's subsequent conduct may give the donee a right to enforce a promise where a gift is incomplete. In **Re Estate of Phyllis Muthoni Minoti (Deceased) Succession Cause No. 117 of 2015[2018] eKLR** the court held;

[5] *The person claiming that the deceased made a gift inter vivos only that titles were not deduced during her lifetime should show such conduct of the donee which give intended donee right to enforce the gift herein. See Halsbury's Laws of England, 4<sup>th</sup> edition, volume 20(1) para 70 that:-*

*The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor's assent, expends money in building a house, the donee can call on the donor or his representatives to complete the gift.*

17. The objectors did not dispute that the deceased had signed the transfer form in favour of Thomas Mboga their only concern was that the transfer document was not registered. In this case, the deceased not only signed the transfer form but also gave Thomas Mboga possession of the land. That in my view was sufficient proof that the deceased gave land parcel No. 820 to Thomas Mboga as a gift *inter vivos*.

18. Having answered the first issue in the affirmative, the question then is whether the objectors are entitled to a share of the estate of the deceased. They argue that they are entitled to 2 acres of land parcel No. 820 which was given to their father, Osindi Nyachieo, by the deceased and which they have occupied for a long time. They reject the claim that the deceased gave their father land parcel no. 813 and state that the land was purchased by their father from a relative.

19. The petitioners dispute this. They referred the court to proceedings and the decision of the court elders in **Manga Land Case No. 221 of 1958.**

20. From his evidence before the court elders in **Manga Land Case No. 221 of 1958**, it is evident that the deceased had subdivided his parcel of land between his two sons and what the elders were called upon to resolve, was a boundary dispute between the two brothers. The court elders erected a fresh boundary giving the younger son, **Thomas Mboga** the larger portion. It is not clear whether the court elders' boundary was implemented or whether the dispute involved land parcel No. 820 as those proceedings took place on 5<sup>th</sup> September, 1958 before land parcels No. 813 and 820 were registered on 14<sup>th</sup> February, 1969. The only fact the proceedings prove is that the deceased intended to give his younger son Thomas Mboga a larger portion of his land.

21. The petitioners have explained that when the deceased died, his eldest grandson was required to mark the grave site in exchange for a cow according to Abagusii Customary Law. The son of Osindi Nyachieo performed the ritual but the family was unable to give him a cow as required by tradition. They decided to allocate the objectors a small portion of land parcel No. 820 to cultivate for a number of years in order to recover the equivalent of one cow. That it was out of this arrangement that the objectors claimed to be beneficiaries of the estate of the deceased.

22. This argument was backed by the evidence of PW 2 and the responses of DW 1 and DW 2 during cross examination. PW 2 testified that the deceased's original parcel of land which was the subject of the dispute before the court elders at Manga consisted of both parcel No. 813 and land parcel no. 820 although Osindi Nyachieo had purchased a small portion of land parcel No. 813. He conceded that the objectors cultivate the lower portion of land parcel No. 820, but states that Osindi Nyachieo was not a dependent of the land before he died. He testified that the objectors had been given the land by the church according to tradition and were supposed to stay on the land for 3 years to take out their cows as per Abagusii custom.

23. At first, DW 1 had testified that the deceased had sub- divided land parcel No. 820 between the two brothers but later on admitted during cross examination, that the land they were in occupation of had been given to his elder brother, Christiano, by their uncles for marking the deceased's grave site. DW 2 also confirmed this during cross examination when he testified that the son who had dug the grave was given a shamba by the church which he used to cultivate according to tradition.

24. As the standard of proof is on a balance of probabilities, I am inclined to believe the petitioners' that it was in fact the deceased who gave **Osindi Nyachieo** most if not the entire land parcel No. 813 and thus did not disinherit him. There is no proof that **Osindi Nyachieo** was

dependent on land parcel No. 820 during his life time but there is overwhelming evidence that one of the objectors' siblings was given a portion of land parcel No. 820 to cultivate for a number of years in exchange for the cow he was to be given by the family for marking the deceased's burial site.

25. I therefore find that the sons of **Osindi Nyachieo** cannot claim a portion of land parcel No. 820 against the deceased as he gave that entire parcel of land to **Thomas Mboga** as a gift *inter vivos*. The objectors may have a claim for the 2 acres they have been in occupation of but their recourse does not lie in this cause.

26. In the end, I allow the application for confirmation of grant dated 31<sup>st</sup> October, 2016. **Land parcel No. Central Kitutu/Mwamanwa/820** will be shared between the sons of **Thomas Mboga Nyachieo** as follows:

- a. James Ongubo      1.3 acres
- b. Bernard Omwenga   1.17 acres
- c. Willprotus Ogato   1.17 acres
- d. Evans Mokuia      1.17 acres
- e. Erick Bange        1.17 acres
- f. Kevin Omoi         1.17 acres
- g. David Manua        1.17 acres
- h. Kennedy Ogero     1.17 acres

27. I confirm the grant issued to **James Ongubo, Kennedy Ogero, Isaac Ongubo Osindi** and **Charles Ogero Osindi** on 8<sup>th</sup> March 2016 in the above terms. Each party shall bear his own costs as this is a family matter.

**Dated, signed and delivered at Kisii this 24<sup>th</sup> day of October 2019**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**James Ongubo & Kennedy Ogero Present**

**Charles ogero & Isaac Osindi Present**

**Mr. Anyona For the Objectors**

**Rael Court clerk**