



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 182 OF 2009**

**IN THE MATTER OF THE ESTATE OF ALOYSIUS GONTAGA OTUNDO THEODORE (DECEASED)**

**RICHARD MAERA OTUNDO.....PETITIONER**

**VERSUS**

**NYANGWESO OTUNDO .....1<sup>st</sup> OBJECTOR**

**DORRIS N. OTUNDO .....2<sup>nd</sup> OBJECTOR**

**CHRISTINE OTUNDO .....3<sup>rd</sup> OBJECTOR**

**AGNES M. OTUNDO.....4<sup>th</sup> OBJECTOR**

**JUDGMENT**

1. The deceased Aloysius Gontaga Otundo Theodore died intestate on 19<sup>th</sup> March 2002. The Grant of letters of administration were issued to his son Richard Maera Otundo on 30<sup>th</sup> September 2009. Subsequently, the objectors, who are widows of the deceased filed summons for revocation of grant on the grounds that they had not been consulted by the petitioner prior to filing the cause and all the assets of the deceased had not been listed. After much deliberation, it was agreed that a fresh grant be issued to the petitioner and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> objectors.

2. The Petitioner then filed summons for confirmation of the grant issued on 1<sup>st</sup> March, 2017 proposing a mode of distribution of the deceased's properties as follows:

a. Land parcel No. Central Kitutu/Mwamanwa/150 measuring approximately 2.5 acres to be shared equally among:

i. Teresa Nyangweso Otundo (to be held in trust for herself and for her children)

ii. Agnes Moraa (to be held in trust for herself and for her children)

iii. Dorris Ndeche (to be held in trust for herself and for her children)

b. Land parcel No. Central Kitutu/Mwamosioma/316 to be held in trust for the second house by:

i. Rosemary Kerubo

ii. Richard Maera Otundo

c. Land parcel No. Nyansiongo Settlement Scheme/ 415 to Rosemary Kerubo (whole share)

d. Land parcel No. Nyansiongo Settlement Scheme/ 418 to Teresa Nyangweso Otundo (whole share)

e. Land parcel No. Nyansiongo Settlement Scheme/ 421 to Agnes Moraa Otundo (whole share)

f. Land parcel No. Nyansiongo Settlement Scheme/ 424 to Dorris Ndeche Otundo (whole share)

g. Land parcel No. Nyansiongo Settlement Scheme/ 427 & 431 to Christine Mumbua Otundo (whole share)

3. That application elicited an affidavit of protest from the 3<sup>rd</sup> objector who objects to the proposed mode of distribution on several grounds. First she avers that the deceased had already subdivided his property among his wives as follows:

a. Land parcel No. Central Kitutu/Mwamosioma/150 to Teresia Nyangweso Otundo; and

b. Land in Nyansiongo to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> objectors

4. She therefore proposes that the deceased's assets be subdivided as follows:

a. Central Kitutu/Mwamosioma/316 to the 4 wives in equal shares;

b. Central Kitutu/Mwamosioma/150 to the family of Teresia Nyangweso Otundo;

c. Nyansiongo Settlement Scheme 415, 418, 421, 424, 427 and 431 to each of the four wives in equal shares; and

d. Money held by the public trustee to be shared equally between the four wives.

5. She avers that proposed mode of distribution is informed by the fact that the petitioner's mother Rosemary Kerubo is not a beneficiary of the estate as she was divorced by the deceased in the 1960s. She also avers that the deceased had already given the petitioner Land parcel No. Central Kitutu / Mwamosioma / 2790 which he sold off.

6. It was agreed that the matter would be disposed of by way of written submissions. Upon considering their submissions and depositions, I find that the issues crystallizing for determination are;

**a. Whether Rosemary Kerubo is a widow of the deceased and thus entitled to a share of his estate;**

**b. Whether the petitioner is entitled to a share of the deceased's estate; and**

**c. How the estate of the deceased is to be distributed.**

7. On the first issue, it was argued by the objectors that the petitioner's mother, Rosemary Kerubo was not a widow of the deceased. They relied on a series of correspondence which were annexed to the 3<sup>rd</sup> objector's affidavit to prove that they were the only widows of the deceased. The objectors were strongly opposed to the inclusion of Rosemary Kerubo as a widow and claimed that she got divorced from the deceased in the 1960s and was married elsewhere.

8. The petitioner opposed the claim that his mother, Rosemary Kerubo was not a wife of the deceased. He pointed out that one of the documents annexed to the objector's affidavit referred to the deceased's former wife as Kerubo Gechure yet his mother's name was Rosemary Kerubo.

9. Despite his assertions, a look at the petitioner's Form 5 shows that the objectors are the only widows he listed as surviving the deceased in line with a letter he obtained from the assistant chief. Further, Rose Kerubo did not swear an affidavit attesting to the fact that she was a widow of the deceased. I am therefore unconvinced that Rose Kerubo was a wife of the deceased and answer the first issue in the negative.

10. I however disagree with the objectors' claim that the petitioner is not entitled to a share of the deceased's estate. The objectors conceded that the petitioner was the child of the deceased. It is however their contention that petitioner is not entitled to the estate since the deceased bequeathed him Land parcel No. Central Kitutu/Mwamosioma/2790 which the petitioner sold off. In essence the objectors were claiming that the deceased made a gift *inter vivos* to the petitioner before he died.

11. In *Re Estate of The Late Gedion Manthi Nzioka (Deceased) Succession Cause No. 122 of 2010 [2015]eKLR* the court 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.*

12. Other than a certificate of official search showing that Land parcel No. Central Kitutu/Mwamosioma/2790 belonged to the petitioner; no proof was adduced by the objectors in support of their claim that the deceased had gifted that parcel of land to him. Moreover, the certificate

of official search shows that Land parcel No. Central Kitutu/Mwamosioma/2790 was registered in the name of the petitioner on 10<sup>th</sup> May 2011 after the death of the deceased on 19<sup>th</sup> March 2002.

13. This leaves the last issue for determination which is the mode of distribution of the deceased's estate. The 3<sup>rd</sup> objector averred that the deceased had during his life time subdivided his land among his four wives. For the wishes of a deceased person to be preserved, it must be shown that the deceased took steps to fulfill them.

14. On this, the court in **Joseph Wairuga Migwi v Mikielina Ngina Munga Succession Cause No. 404 of 2012 [2016] eKLR** held;

*The deceased in this case not only expressed his wishes but took crucial steps which left no doubts as to what his intentions were and long before he died he not only divided his land as stated above, but he also settled each wife in their respective portions.*

15. In this case, the objectors have not shown that the deceased apportioned his property as they claim. Being a polygamous man and having died intestate the deceased's property is subject to division pursuant to **Section 40** of the **Law of Succession Act** which 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.*

*(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.*

16. The surviving children of the estate of the deceased were identified by the petitioner as comprising;

- a. Four children from the 1<sup>st</sup> objector
- b. Five children from the 2<sup>nd</sup> objector
- c. Four children from the 3<sup>rd</sup> objector;
- d. Six children from the 4<sup>th</sup> objector; and
- e. Two children from Rosemary Kerubo

17. The deceased is also survived by 3 wives therefore the estate should devolve to 24 units.

18. The assets of the estate have been identified as follows;

- a. Land parcel No. Central Kitutu/Mwamanwa/150 measuring approximately 3.04 Ha.
- b. Land parcel No. Central Kitutu/Mwamosioma/316 measuring approximately 2.7 Ha.
- c. Land parcel No. Nyansiongo Settlement Scheme/ 415 measuring approximately 0.6 Ha
- d. Land parcel No. Nyansiongo Settlement Scheme/ 418 measuring approximately 0.046 Ha
- e. Land parcel No. Nyansiongo Settlement Scheme/ 421 measuring approximately 0.046 Ha
- f. Land parcel No. Nyansiongo Settlement Scheme/ 424 measuring approximately 0.023 Ha
- g. Land parcel No. Nyansiongo Settlement Scheme/ 427 measuring approximately 0.023 Ha
- h. Land parcel No. Nyansiongo Settlement Scheme/ 431 measuring approximately 0.023 Ha

19. Taking all factors into consideration, I confirm the letters of administration issued on 1<sup>st</sup> March 2017 in the following terms;

- a. Land parcel No. Central Kitutu/Mwamanwa/150 shall be shared equally between the 1<sup>st</sup> objector's house and the 4<sup>th</sup> objector's house;
- b. Land parcel No. Central Kitutu/Mwamosioma/316 shall be shared equally between the 2<sup>nd</sup> objector's house and the 3<sup>rd</sup> objectors house;
- c. Land parcel No. Nyansiongo Settlement Scheme/ 415 shall be shared equally between the children of Rosemary Kerubo;

- d. Land parcel No. Nyansiongo Settlement Scheme/ 418 shall be shared equally between the 2<sup>nd</sup> objector's house;
- e. Land parcel No. Nyansiongo Settlement Scheme/ 421 shall be shared equally between the 3<sup>rd</sup> objector's house;
- f. Land parcel No. Nyansiongo Settlement Scheme/ 424, 427 and 431 shall be shared equally between the 4<sup>th</sup> objectors house; and
- g. The money held by the public trustee shall be shared equally between the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> objectors.

20. Each party shall bear their own costs.

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

**A. K NDUNG'U**

**JUDGE**