



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 11 OF 2005

IN THE MATTER OF THE ESTATE OF OMWENO ONYONI (DECEASED)

ALICE MORAA OMWENO.....PETITIONER

VERSUS

AGNES MBERA LUKA.....OBJECTOR

RULING

1. Following an application for revocation of grant by the objector, an amended grant of letters of administration was issued to the petitioner, Alice Moraa Omweno and the objector, Agnes Mbera Onyoni on 31st October 2018. The issue that now commends itself for determination is how the estate of Lucas Omweno Onyoni who died intestate in 1976 should be distributed.

2. The parties are in agreement that the deceased's sole property was land parcel no. South Mugirango/Bogetenga/2253. The petitioner proposed that land parcel no. 2253 be divided between Esther Nyangarisa and the objector whereas the objector proposed that the land be divided into 8 portions.

3. During the hearing of her application for revocation of grant, the objector stated that deceased's wife Patricia Luka had married her as a co-wife in 1982 to bear her children since she had no sons. She stated that the occupants of land parcel 2253 were herself, her children and a woman that had been brought to the land by the petitioner known as Esther. She stated that the manner in which Esther had been brought to the land was incompatible with Kisii Custom and proposed that the land be sub-divided into 8 portions, for her six children, herself and the petitioner to the exclusion of the petitioner's sisters whom she said were married.

4. The petitioner told the court that the deceased had five children. His two sons had passed on leaving her and her two sisters Peris Nyabonyi and Martha Bochere. She told the court that since their brother Tom had died without a wife, they brought Esther to their home to represent their interest according to custom. She reiterated the averments in an affidavit sworn on 21st December 2017 that she and her sisters had agreed that land parcel no. 2253 be divided into equal shares between the objector and Esther Nyangarisa and stated that they would not claim a share of the estate.

5. Upon considering the evidence of both parties on the application for revocation of grant, this court in a ruling dated 31st October 2018 found that the objector, though not a wife of the deceased was a dependant of the estate. This court also found that there was evidence that apart from the objector and her children, a lady called Esther Nyangarisa Oketch also lived on land parcel no. 2253. In order to make a determination on the mode of distribution, this court directed that a report be filed on the portions of land parcel no. 2253 occupied by the parties.

6. The County Surveyor visited the suit land and filed a report of his findings. The objector was dissatisfied by the report but failed to seek the services of a private surveyor despite being given an opportunity to do so.

7. In his report dated 20th June 2019 and filed on 1st August 2019 the County Surveyor indicated that all parties were present when he visited the site. His findings were as follows;

a. Agnes occupies 0.82 Ha

b. Esther occupies 0.9 Ha

c. There is an overlap in occupation of (Agnes & Esther) of 0.03 Ha.

8. Being the daughters of the deceased, the petitioner and her sisters are entitled to the deceased's property. They are however in agreement that Esther Nyangarisa should represent their interest in the estate of the deceased. After his death, the deceased's widow entered into a

levirate marriage with the objector who has been living on the deceased's parcel of land since then. I therefore find that both the objector and Esther Nyangarisa should have a share in deceased's estate. The deceased's land parcel no. South Mugirango/Bogetenga/2253 measuring 1.75 Ha should be distributed based on their actual occupation of the land on the ground. The portion of the property measuring 0.03Ha termed by the County Surveyor as overlapping in their occupation should go to the objector who has a smaller portion.

9. I therefore confirm the grant issued to Alice Moraa Omweno and Agnes Mbera Onyoni on 31st October 2018 as follows;

a. Land parcel no. South Mugirango/Bogetenga/2253 shall be distributed between Alice Moraa Omweno and Agnes Mbera Onyoni as follows: -

i. Agnes Mbera Onyoni - 0.85 Ha

ii. Esther Nyangarisa - 0.9 Ha

b. The parties shall each bear their own costs.

Dated, signed and delivered at Kisii this 20th day of December 2019.

R.E.OUGO

JUDGE

In the Presence of;

Mr. Anyona For the Petitioner

Miss Gogi For the Objector

Mr. Omwoyo Court Assistant