

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

P & A CASE NO. 99 OF 2015

IN THE MATTER OF THE ESTATE OF ATEKA KIAGE.....DECEASED

BETWEEN

JOHN ATUTI ATEKA.....PETITIONER/PROTESTOR

VERSUS

MORAA ATEKA.....OBJECTOR/RESPONDENT

JUDGEMENT

The deceased to whose estate these proceedings relate is Ateka Kiage who died on 4th November 2011 domiciled in Nyansiongo in Nyamira County. The deceased died intestate. Initially Letters of Administration Intestate were issued on 5th November 2012 to his son John Atuti Ateka. That grant was however revoked on 23rd January 2015 and subsequently on 19th February 2015 Moraa Ateka the deceased's widow and John Atuti Ateka were appointed joint administrators. They were then required to apply for confirmation of the grant either jointly or severally notwithstanding that six (6) months had not expired. An order was also made restraining any dealings in the estate before confirmation of the grant.

On 31st August 2015 Moraa Ateka filed a summons for confirmation of grant dated 27th August 2015 in which he sought to distribute the estate of the deceased comprising two parcels of land equally between his two houses. He proposed that LR NO. EAST KITUTU/BOTABORI 1/418 be distributed equally so that each house gets 0.9Ha and LR NO. EAST EKERUBO SETTLEMENT SCHEME/185 to be distributed equally between the two houses so that each house gets 9.195Ha.

The above mode of distribution was however opposed by her co-administrator John Atuti Ateka through an affidavit of protest filed herein on 23rd February 2016. In the affidavit sworn on 23rd February 2016 he deponed that Moraa Ateka had lodged the summons for confirmation without involving the first house of the deceased; that the proposed mode of distribution was not realistic because part of the estate of the deceased rightfully belonged to third parties and lastly that the mode of distribution ignored a long standing settlement and co-existence between the two houses even during the lifetime of the deceased. On 25th May 2017 John Atuti Ateka filed a further affidavit to which he proposed his own mode of distribution as follows: -

“SCHEDULE OF DISTRIBUTION OF THE CAPITAL ASSETS OF THE DECEASED

NAME OF THE BENEFICIARY	ASSET	SHARE
JOHN ATUTI ATEKA In trust for and on behalf of the 1 st House of the late Briska Moraa Ateka namely: - 1. John Atuti Ateka 2. Yunes Monchari Ateka 3. Jemimah Nyaboke Ateka 4. Margaret Kwamboka Ateka 5. George Kiage Ateka 6. Teresa Ateka 7. Rael Kwamboka Ateka	LR NO. KITUTU/BOTABORI 1/418 measuring 1.8 Hactares	1.0 Hactare

8. Beatrice Kerubo Ateka		
<p>MORAA ATEKA</p> <p>In trust for and on behalf of the 2nd House namely: -</p> <ol style="list-style-type: none"> 1. Moraa Ateka 2. Naomi Kerubo Ateka 3. Linet Kwamboka Ateka 4. Dinah Bochaberi Ateka 5. Rael Kemunto Ateka 6. Grace Kemuma Ateka 7. Judith Nyangate Ateka 8. Dorcah Gesare Ateka 9. Charles Sagini Ateka 		0.8 Hactare
<p>JOHN ATUTI ATEKA</p> <p>In trust for and on behalf of the</p> <p>(i) 1st House of the late Briska Moraa Ateka namely: -</p> <ol style="list-style-type: none"> 1. John Atuti Ateka 2. Yunes Monchari Ateka 3. Jemimah Nyaboke Ateka 4. Margaret Kwamboka Ateka 5. George Kiage Ateka 6. Teresa Ateka 7. Rael Kwamboka Ateka 8. Beatrice Kerubo Ateka <p>(ii) ALFRED TEMU</p> <p>(iii) CLEMENT MOUKO</p> <p>(iv) JOASH OMBOGA</p> <p>(v) THOMAS ONYANCHA</p>	<p>LR NO. EKERUBO/SETTLEMENT SCHEME/185 measuring approximately 18.39Ha</p> <p>(45.5 Acres)</p>	<p>8 Acres</p> <p>6 Acres</p> <p>2 Acres</p> <p>1.5 Acres</p> <p>23 Acres</p>
<p>MORAA ATEKA</p> <p>In trust for and on behalf of the 2nd House</p>		5 Acres

namely: -		
1. Moraa Ateka		
2. Naomi Kerubo Ateka		
3. Linet Kwamboka Ateka		
4. Dinah Bochaberi Ateka		
5. Rael Kemunto Ateka		
6. Grace Kemuma Ateka		
7. Judith Nyangate Ateka		
8. Dorcah Gesare Ateka		
9. Charles Sagini Ateka		

In the further affidavit he deposed that before his death, the deceased had distributed his estate and the two houses were well settled in and had substantially developed their portions and that is the manner in which the estate should be distributed. He deposed that the deceased had sold a portion of **LR EAST KITUTU/BOTABORI 1/418** lying between the portions occupied by the two houses to Ensoko SDA Church and further that the land **LR NO. EKERUBO SETTLEMENT SCHEME/185** was purchased by the deceased in partnership with Clement Mouko, Alfred Temu and Thomas Omboga in the shares set out in the schedule above and that the deceased had allotted them those portions and they had taken possession of the same. He further deposed that the deceased had in his lifetime sold and transferred a portion of the land at Ekerubo Settlement Scheme to Riatega SDA Church and had also allocated a portion measuring 1.5 acres of that land to his grandson Joash Omboga but was yet to transfer it to him. He contended therefore that the mode of distribution proposed by Moraa Ateka locks out persons who are beneficially entitled to the estate and it should be rejected and the estate distributed as proposed by himself.

The affidavit of John Atuti Ateka was treated as a protest and directions given by this court that the protest would be heard by way of viva voce evidence. The court duly heard the parties and their witnesses and thereafter their Advocates summed up by way of written submissions with those of Oguttu Mboya, the Advocate for Moraa Ateka coming in a bit late.

The deceased in this case died intestate in the year 2011 so his estate is subject to the **Law of Intestacy** as provided in **Section 2 (1)** of the **Law of Succession Act** which states: -

“2. Application of Act

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal to, all cases of intestate or testamentary succession to the estate of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

and **Section 4 (1) (a)** which states: -

4. Law applicable to succession

(1) Except as otherwise expressly provided in this Act or by any other written law—

(a) Succession to immovable property in Kenya of a deceased person shall be regulated by the Law of Kenya, whatever the domicile of that person at the time of his death.

(b).....”

Reference to the law applicable in this case is the Law of Succession Act and the Probate and Administration Rules made thereunder. John Atuti Ateka the protestor testified that the deceased had prior to his death distributed his estate and that is the manner in which this court should distribute it. This is echoed in the submissions of Mr. Moracha his Advocate. However, it is evident that the deceased died without legally transferring the property to the beneficiaries and without leaving a will and hence intestate. **Section 34** which defines **intestacy** states: -

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

A **will** as defined in **Section 3** means:

“the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.”

Whereas the law recognizes that one can make an oral will, the same is only valid if the testator dies within a period of three months from the date of making the will – *see Section 9 of the Act*. There was no evidence even of an oral will in this case and the parties having failed to agree on a mode of distribution that would suit them and having left it to this court it can only do so under the applicable law which as I have stated is the **Law of Succession Act**.

Having considered the evidence and submissions by the Advocates carefully it is my finding that given the definitions of intestacy and free property in the case of this deceased, the only portion of land that is not available for distribution is the portion of land that he sold to Riataka SDA Church in his lifetime. That portion is said to have been hived from LR EKERUBO SETTLEMENT SCHEME/185. The rest of the assets are subject to distribution and the deceased having been polygamous this court shall be guided by Section 40 of the Act.

In respect of **EAST KITUTU/BOTABORI 1/418** although it was alleged that a portion of the land had been sold to a church it transpired from Moraa’s testimony that it is she who donated the land to that church. It would therefore fall upon her to have that portion donated from whatever share is due to her or her house. **Section 40 of the Act** is clear on how land should be distributed where the deceased was polygamous. **EAST KITUTU/BOTABORI 1/418** measures 1.8hactares or thereabouts in which case it shall be distributed equally between the two houses of the deceased in shares of 0.95hactares. Thereafter the share of each house shall be divided equally between the children of that house as listed in the petition and the affidavits of the parties with Moraa Ateka being considered as an additional unit in her own house.

As for LR EKERUBO/SETTLEMENT SCHEME/185 the search certificate issued on 2nd April 2012 indicates that as at that date the same measured 18.39hactares. John Atuti Ateka’s allegation that the land was owned jointly (or in partnership as he put it) with Clement Mouko, Alfred Temu and Thomas Omboga was not proved on a balance of probabilities. Of the three mentioned persons only Clement Mouko attended these proceedings as a witness and even then he did not tender any cogent evidence to prove that he or the two other mentioned persons aided or paid any monies towards the loan taken by the deceased to purchase the land. Their claim is not based on a trust but on contribution towards the purchase price which could be proved through evidence. No such evidence was brought to court. It was not proved that any of them are beneficiaries of the estate as creditors. It is also instructive that although it was claimed that the three of them contributed to the repayment of the loan and were allotted shares in the land long before the deceased died, the deceased obtained registration of that parcel on 22nd October 2010 just about a year before his death yet he did not give them their alleged portions. If indeed they were in joint partnership, then this would have been reflected in the register which was not the case. Moreover, it should have been at the point that he obtained registration that they should have raised their objection. As it stands they are not beneficiaries of this estate and they did not prove they are his creditors either. My finding therefore is that they are not entitled to a share of any part of that land.

As regards the alleged gift to the deceased’s grandson Joash Omboga, the law does indeed recognize gifts in contemplation of death. However, as provided in **Section 31** such gifts are only valid if: -

“31. Characteristics

A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if

(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that same illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him: Provided that—

(i) no gift made in contemplation of death shall be valid if the death is caused by suicide;

(ii) the person making the gift may, at any time before his death, lawfully request its return.”

My reading of that Section is that because of the use of the word **“and”** all the conditions or characteristics in **Section 31 (a) to (b)** must be read together and must all be fulfilled for such a gift to be valid. A gift of immovable property is not in my view the kind of gift contemplated by **Section 31 of the Act** that being contemplated being moveable property or any debt secured upon moveable or immovable property. Onyancha’s case does not also fall under the provisions of **Section 26 of the Act** as to warrant this court to make special provision for him. In the premises I find and hold that the parcel of land LR EKERUBO SETTLEMENT SCHEME/185 shall be distributed equally between the two houses of the deceased and thereafter the share of each house shall be distributed equally between the children in that house whether male or female with Moraa Ateka being regarded as an additional unit in her house. In my view the four persons having been aware

of these proceedings and therefore having had an opportunity to file their protest to the summons for confirmation and having also had an opportunity to table evidence to support their claims to the estate and not having done so this case does not fall within **Rule 41 (3)** of the **Probate & Administration Rules**, which would have required me to set aside distribution of LR EKERUBO/SETTELMENT SCHEME/185. The grant of letters of administration shall therefore be confirmed and the estate distributed as set out in this judgement and a certificate of confirmation issued.

As this is a family matter, each party shall bear his/her own costs. It is so ordered.

Signed, dated and delivered at Nyamira this 19th day of December 2019.

E. N. MAINA

JUDGE