



**REPUBLIC OF KENYA**

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

**SUCCESSION 49 OF 2007**

**IN THE MATTER OF THE ESTATE OF MARTHA KEMUNTO**

**MOSWETA.....DECEASED**

**BETWEEN**

**CHRISTOPHER ONSOMU MOSWETA**

**BOSCO J. ONGAKI MOSWETA.....PETITIONERS**

**VERSUS**

**JOHN NYACHIRO MOSWETA.....APPLICANT/OBJECTOR**

**RULING**

1. MARTHA KEMUNTO MOSWETA (hereinafter “the deceased”) died intestate on 3<sup>rd</sup> November 1997. Grant of letters of administration intestate were issued to her sons Christopher Onsomu Mosweta and Bosco J. Ongaki Mosweta (hereinafter “petitioners”) on 15<sup>th</sup> July 2008. Prior to her death the deceased was the registered owner of Land Parcel No. Central Kitutu/Monyerero/338 (hereinafter “the suit land”).

2. The deceased’s survivors were listed in Form P & A5, filed with the petition for grant of letters of administration, as follows:

**Christopher Onsomu Mosweta**

**Alex Monyoncho Mosweta**

**Bosco J. Ongaki Mosweta**

**Andrew Nyaega Mosweta**

3. The grant of letters of administration issued in respect to the deceased was subsequently confirmed and a certificate of confirmation of grant dated 3<sup>rd</sup> March 2009 was issued wherein the suit land was distributed among the deceased’s listed survivors as follows:

**Christopher Onsomu Mosweta 0.47Ha**

**Alex Monyoncho Mosweta 0.47Ha**

**Bosco J. Ongaki Mosweta 0.47Ha**

**Andrew Nyaega Mosweta 0.47Ha**

4. Through summons for revocation annulment of grant dated 8<sup>th</sup> July 2009, the applicant/objector herein, John Nyachiro Mosweta successfully sought and obtained the revocation of the grant earlier issued to the petitioners herein when Makhandia J (as he then was) on 1<sup>st</sup> July 2011 made orders as follows:

**“The grant issued to Christopher Onsomu Mosweta and Bosco J. Ongaki Mosweta be revoked and another grant issue forthwith to Christopher Onsomu Mosweta, Bosco J. Ongaki Mosweta and John Nyachiro Mosweta.**

**Either all of them or any one of them may apply for confirmation without necessity of waiting for the lapse of the statutory period.”**

5. On 6<sup>th</sup> July, 2011, a fresh grant of letters of administration was issued in the joint names of the petitioners and the objector herein. On 4<sup>th</sup> July 2011, the 2<sup>nd</sup> Petitioner herein filed an application for confirmation of the said grant issued on 6<sup>th</sup> July 2011 and swore an affidavit of distribution of the deceased's estate in which he listed the land parcels comprising the deceased's estate as follows:

**a. Land Parcel No. Central Kitutu/Monyerero/338 and**

**b. Land Parcel No. Central Kitutu Monyerero/292 (hereinafter “No. 292”)**

6. The 2<sup>nd</sup> petitioner then proposed the distribution of the suit land in equal shares of 0.47Ha each between himself, the 1<sup>st</sup> petitioner, Bosco Mosweta and Andrew Mosweta. At the same time, the 2<sup>nd</sup> petitioner proposed that Land No. 292 measuring 0.8Ha be given to the objector herein.

7. It is the above proposed mode of distribution that precipitated the filing of objector's protest affidavit dated 21<sup>st</sup> July 2011 in which he objected to the petitioner's proposed mode of distribution on the grounds that:

**1. The application for confirmation is defective as it seeks to confirm a grant which is non-existent as no grant was made on 6<sup>th</sup> day of July 2011 as stated in the Application.**

**2. The properties set out for distribution includes Central Kitutu/Monyerero/292 registered in the name of JOHN NYACHIRO MOSWETA a first registration since 20<sup>th</sup> March 1973 and which has never formed part of the deceased's estate. Annexed and marked “JNM1” is a copy of the official search of the said parcel of land.**

**3. The proposed distribution to land parcel Central Kitutu/Monyerero/338 has left me out and two sisters, who are dependent on the deceased's estate namely: Anna Mongina and Selina Nyanganyi.**

**4. The land parcel Central Kitutu/Monyerero/338 does not exist as the subdivisions and titles created after the grant which was revoked have not been returned for cancellation by the Applicants. Annexed and Marked “JNM2” are copies of official searches.**

**5. The proposed distribution was done without consultation or consent of all the beneficiaries to the deceased's estate or at all.**

8. When the matter came up for mention on 13<sup>th</sup> February 2015, this court, differently constituted, directed that the protest affidavit be canvassed by way of oral evidence.

### **Oral Evidence**

9. PW1, the objector herein, John Nyachiro Mosweta testified that the deceased was his mother and that she had a total of 9 children (5 boys and 4 daughters) including the objector.

10. He stated that the suit land belonged to the deceased who had, in prior to her death in the year 1994, allocated each of her sons a portion thereof and that all the children of the deceased resided on the suit land except 2 daughters namely Maria and Nyangara. He listed all the children of the deceased as follows:

**1. Yovensia Nyangara**

**2. Maria Kerubo**

**3. John Nyachiro**

**4. Christopher Onsomu**

**5. Alexander Monyocho**

**6. Bosco Ongachi**

**7. Andrew Nyaega**

**8. Anna Mongina – deceased**

**9. Selina Bonuke**

11. He added that all the sons of the deceased, except Andrew, had established their permanent home on the suit land and occupied clearly demarcated portions. He further stated that not all the portions of land occupied by the sons were of equal shares as while all the other sons had more than an acre each, his portion was only  $\frac{1}{4}$  of an acre.

12. He stated that his main ground for protesting against the petitioner's proposed mode of distribution was because he had been excluded from the benefiting from the deceased's estate and that in fact, his own brother, Andrew, had served him with an eviction letter while accusing him of being a trespasser on the suit land. He stated that he had established his permanent home on the suit land where he had resided with his family all his life. He added that even though land parcel No. 292 did not form part of the estate of the deceased as it was registered in his name as a first registration in 1973, the petitioners had included it in the list of deceased's assets that was to be distributed during confirmation of grant.

13. His case was that the deceased had prior to her death allocated each of her sons, including him, their respective portions of the suit land even though she was aware of his ownership of land No. 292.

14. He produced a copy of certificate of official search in respect to LR. No. 292 to show that it was registered in his name since 1973. He explained that contrary to the petitioner's claim that LR. No. 292 was given to him by their father, such a claim was not true because their late father died way back in 1952 when he was only 12 years before land adjudication and before he obtained registration in 1973. He proposed that he should be allocated  $\frac{1}{4}$  of an acre of the suit land where his houses are erected and be granted access to the road.

15. The objector further stated that upon obtaining grant and distribution the suit land among themselves without including him, the petitioners proceeded to land's office and secured registration of their respective portions as follows:

**i. John Nyachiro Mosweta – Central Kitutu/Monyerero/292 size 0.8Ha**

**ii. Bosco Ongari Mosweta - Central Kitutu/Monyerero/1682 size 0.47Ha**

**iii. Alex Monyoncho Mosweta - Central Kitutu/Monyerero/1683 size 0.47Ha**

**iv. Andrew Nyaega Mosweta - Central Kitutu/Monyerero/1684 size 0.47Ha**

**v. Christopher Onsomu Mosweta - Central Kitutu/Monyerero/1685 size 0.47Ha**

16. He further claimed that even though the grant issued to the petitioners was eventually revoked and a fresh grant made to him and the petitioners, the new titles earlier created from the suit land were not revoked and remain in the petitioners' names to date.

17. On cross examination, he confirmed that he was the deceased's eldest son while the petitioners are his own brothers from the same mother. He stated that he used LR. No. 292 for farming and did not reside there.

18. The petitioners' case was presented through the evidence of Bosco Ongaki Mosweta (DW1) who confirmed that he was also the son of the deceased and the objector's brother. He testified that their late father Mosweta Nyachiro had two wives one Nyanchama and the deceased herein and that he had subdivided his parcels of land to the two wives with the first family getting LR. No. 291 and 339 while the deceased (2<sup>nd</sup> house) herein got 292 and 338.

19. He confirmed that LR. No. 292 is registered in the objector's name but that he did not reside on it as he lived on the suit land. His case was that since the objector had already inherited LR No 292 from their late father, he was not entitled to inherit the suit land which should be shared between himself and his 3 other brothers, Christopher, Alex and Andrew. He added that the objector's land parcel No. 292 was bigger than the portions that the rest of the brothers were to share from the suit land.

20. He further stated that the objector did not buy LR. No. 292 as it was part of the family land, but that he (objector) had lived on the suit land since birth. He confirmed that at no time did the deceased ask the objector to vacate the suit land. He stated that at no time was land parcel No. 292 registered in the name of the deceased.

21. He further stated that the portion of the suit land occupied by the objector and where his houses stood is about 100x100ft and that his compound does not border the road. On re-examination by the court, he stated that the objector's 2 houses on the suit land were permanent.

22. At the close of the petitioners' case, parties agreed to file written submissions before judgment.

### **Analysis and Determination**

23. On careful perusal of the written submissions filed by the parties herein and upon considering the pleadings and viva voce evidence tendered during the hearing, I note that the main issue for determination is whether the objection/protest filed by the objector herein is merited and if so, what orders the court should make on the distribution of the deceased's estate.

24. The petitioners argued that the objector had already benefitted from their father's estate and should not be allowed to benefit twice from the same estate. In this regard the petitioners submitted that LR. No. 292 belonged to the deceased herein. They relied on the provisions of Section 42 of the Law of succession Act which stipulates as follows:

**“42. Previous benefits to be brought into account Where—**

**(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”**

25. The petitioners relied on the decisions in the cases of **Githinji Gitari Nyamu vs Martha Wanjiru nyamu Civil Appeal No. 195 of 2002, Rono vs Rono & Another [2005] eKLR and Justus Thiora Kinga vs Joyce Nkhatha Kinga & others CA No. 30 of 2014.**

26. The petitioners further relied on the case of **Harrisson Njiiru Kagane & Another vs Mary Gicuku & Another (2015) eKLR** in which the provisions of Section 42 of the Law of Succession Act was also discussed.

27. In the case of **Samuel Maina Mwangi & 2 others vs Muthoni Kagiri [2013] eKLR**, the court of Appeal held:

**“We are of the considered view that the said registrations in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were tantamount to gifts given by the deceased during his life time his lifetime, ...therefore, the trial court was correct in holding that the parcels of land that were given to the appellant would be taken into account in distribution of the deceased’s estate.”**

28. In the instant case, it was not in dispute that LR. No. 292 formed part and parcel of land that was earmarked for the deceased’s house as the 2<sup>nd</sup> wife of one Nyachiro Mosweta who died in 1952 prior to the adjudication and issuance of titles. It came out clearly in evidence that the said Nyachiro Mosweta’s first family was allocated land parcels No. Central Kitutu/Monyerero/291 and 339 while the second house got the suit land 338 and 292. At the time that the 1<sup>st</sup> registration was carried out in 1973, the objector got registered as the owner of LR No. 292 while the deceased herein was registered as the owner of the suit land.

29. My finding therefore is that in line with the clear provisions of Section 42 of the Law of Succession Act, LR No. 292 should be taken into account in determining the share of the net intestate estate that will finally accrue to all the children of the deceased. The objector secured registration as the owner of LR NO. 292 purely on the basis that he was the eldest son of the deceased as this was land that would have ideally formed part of the estate of the deceased even though strictly speaking, in terms of registration, the said property does not form part of the estate of the deceased.

30. I am guided by the decision in the case of **Teresia Wambui Maruhi vs Onesmus Maruhi & Another, Nairobi Civil Appeal No. 3 of 2002** wherein it was held:

**“Where the deceased had distributed some assets inter-vivos such assets or property, though not forming part of the estate of the deceased, ought to be brought to hotchpotch and taken into account in distributing the estate of the deceased.”**

31. **Halsburys Law of England 4<sup>th</sup> Edition Vol. 20 (page 3 para 2)** states:

**“A gift inter vivos may be made in three ways:**

**1. By deed or other instrument in writing.**

**2. By delivery in cases where the subject of the gift admits of delivery: or**

**3. By declaration of a trust which is the equitable equivalent of a gift.”**

32. In the present case, the objector admitted that LR. No. 292 was part of the land that was earmarked for the deceased’s house by his late father and as I have already stated in this judgment, it forms part of a gift inter vivos which must be included in the scheme of things and taken into account in the distribution of the estate.

33. Having already received his share of the deceased’s estate inter vivos, it then follows that in an ideal situation, the objector should not get any share of the deceased’s estate as he had proposed. However, in this case, this court cannot turn a blind eye to the reality of the case at hand and make such mechanical order in the face of other compelling evidence that point to factors that may make such an order impractical, unjust and oppressive to the party against whom the order will be directed. The reality of this case is that the objector herein has resided on the suit land since birth. His testimony was that he was 12 years old as at 1952 when his father, the original owner of the land, albeit prior to the registration process, died. This scenario means that currently, the objector is an old man of about 77 years. It also came out in evidence from both sides that the objector has constructed 2 permanent houses on the suit land where he resides with his family. He was categorical that his compound occupies only 100 x 100 ft of the suit land and stated that he was only interested in the exact portion where his houses are together with access to the road. My take is that had the deceased intended that the objector vacates the suit land to his land in LR No. 292, then she could have ensured that the objector does so as soon as he secured his registration way back in 1973. To my mind, allowing the objector to occupy and establish a permanent home on the suit land, meant that the deceased intended that he occupies it even upon her death. I reiterate that under the above circumstances, it would be unjust and oppressive to order that he objector should not inherit a share of the suit land which he has occupied from birth.

34. My humble view is that this is one of those cases where the parties to the suit as brothers and members of the same family, should have sat down and agreed on the mode of distribution that would best cater for each one of them on a give and take basis considering that the objector is the eldest son. I note that the married daughters of the deceased namely YOBENSIA NYANG’ARA and MARY KERUBO have

sworn a joint affidavit dated 22<sup>nd</sup> February 2018 wherein they have renounced their interest to the suit land.

35. Having considered all the issues raised in this case, I hereby make the following orders:

**a. Land parcel No. Central Kitutu/Monyerero/338 shall be distributed as follows:**

**i. John Nyachiro Mosweta- 100 x 100 ft (i.e. the portion that he currently occupies) together with his current access to the road. The remaining portion of the suit land to be shared equally between the rest of the sons of the deceased namely: Bosco Ongaki, Alex Monyoncho, Andrew Nyaega and Christopher Onsomu.**

**ii. LR. NO. Central Kitutu/Monyerero/292 belongs to the objector herein and is not subject to distribution in this succession cause.**

**iii. Each party shall bear their own costs of the case.**

**Dated, signed and delivered in open court this 20<sup>th</sup> day of March, 2018**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

- Miss Kerubo for the Petitioners
- Omwoyo: Court Clerk