



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.371 OF 2014

IN THE MATTER OF THE ESTATE OF SHEBAN KANYANYA NANGABO
... DECEASED

1. SAINA MAKOKHA KANYANYA PETITIONERS

2. FATUMA NYAROTSO OTENGO

AND

FATUMA OWITI KANYANYA PROTESTOR

JUDGMENT

The facts of this case are fairly straightforward and undisputed. On 14th May, 2014, *Saina Makokha Kanyanya* (widow to deceased) and *Fatuma Nyarotso Otengo* (widow to Otengo) (petitioner) petitioned for a joint grant of letters of administration intestate of the estate of the late *Sheban Kenyanya Nangabo alias Kanyanya Nangabo* (deceased) who died on 5th September, 2013. The deceased was registered as proprietor of two parcels of land namely *East Wanga/Lubinu/1829* and *East Wanga/Lubinu/1831*. Whereas the deceased was owner of Parcel No.1829, he held Parcel No.1831 in trust for his brother 'Otengo', thus explaining why there are two petitioners in this cause. A grant of letters of administration intestate was made to the petitioners on 11th September, 2014 and issued on 16th September, 2014. Thereafter, the petitioners applied to have the grant confirmed and proposed to distribute the estate so that Saina Makokha Kanyanya and Mohammed Makokha Omar Were to get 1.20 HA of East Wanga/Lubinu/1829 while Hassan Owiti Kanyanya (protestor) was to get 1.27 HA of the same parcel of land. The other beneficiaries namely, Ibrahim Katashi Otengo, Mohammed Wesonga Otengo, Philis Anzetsa Makokha, Mohamed Makokha Omar, Shaban Okumu Omar and Shikunyi Sharif Otengo Were to get various sizes of portions in East Wanga/Lubinu/1831 which distribution has no dispute.

The protestor then took out protest protesting to the mode of distribution suggested by the petitioners regarding parcel No. East Wanga/Lubinu/1829 belonging to the deceased. The deceased had died leaving behind the protestor and the first petitioner as the only known beneficiaries to his parcel of land. The protestor's protest was to the effect that since his father died living behind only the 1st petitioner, his step mother, and himself, they were the only people entitled to benefit from his estate, namely Parcel No. East Wanga/Lubinu/1829. He rejected the move to have Mohammed Makokha Omar, son to Otengo get a share of his late father's estate when he had the right to inherit his father's (Otengo) parcel of land East Wanga/Lubinu/1831.

The protest is opposed. There is a further affidavit sworn by the 2nd petitioner Fatuma Nyarotso Otengo on 29th April 2015 and another affidavit by Mohammed Makokha Omari sworn on even date.

The 1st petitioner did not file an affidavit in response to the protest. The gist of those affidavits is that the 1st petitioner did not give birth to a child and that Mohammed Makokha Omari (Otengo's son) has been taking care of the 1st petitioner and that it is the wish of the 1st petitioner that she shares her portion with Mohammed Makokha Omari. They further state that after the demise of the deceased, elders met and resolved on how the land belonging to the deceased was to be shared out. They also say that it was the wish of the deceased that Mohamed Makokha Omar to get a portion from his parcel of land.

During the hearing of the protest, Mr Nyikuli, learned counsel for the protestor urged the court to allow the protest and order that Parcel No. East Wanga/Lubinu/1829 be shared between the protestor and the 1st petitioner with the 1st petitioner having a life interest in terms of *section 35* of the Law of Succession Act (Cap 160) Laws of Kenya. Learned counsel submitted that since Mohammed Makokha Omari was son to Otengo, he could only get a share and was already provided for when he was given a portion on Parcel No. East Wanga/Lubinu/1831. Counsel submitted that under *section 35* of the Act, the 1st petitioner being widow to the deceased is entitled to a life interest in Parcel No.1829 and therefore the property should not be given to a stranger as suggested by the petitioners.

Mr Minishi, learned counsel for the petitioners, has on his part, supported the petitioner's proposed mode of distribution. He relied on the affidavit sworn on 29th September, 2014 in support of the summons for confirmation of grant and two further affidavits sworn on 29th April, 2015. Learned counsel agreed with Mr Nyikuli that there are two relatives, the protestor a son and 1st petitioner, widow to the deceased. He also readily agreed that the 2nd petitioner, her children and those of her co-wife are entitled to inherit Parcel No. East Wanga/Lubinu/1831. His only point of departure was that Mohammed Makokha Omari is entitled to a portion on Parcel No.1829 to hold jointly with the 1st petitioner, a wish that was expressed by the deceased and that he had expressed that wish in writing. He therefore urged the court to dismiss the protest and allow the summons for confirmation and distribution of the Parcel No. East Wanga/Lubini/1829 as proposed by the petitioners.

The deceased's only estate is that comprised in Parcel No. East Wanga/Lubinu 1829. He died intestate and left behind two surviving beneficiaries in the name of the protestor and the 1st petitioner. The 1st petitioner has proposed to share that parcel of land into two portions one to herself and Mohammed Makokha Omari measuring 1.20 HA, and 1.27 HA to the protestor. The protestor has opposed this saying that Mohammed Makokha Omari should inherit his late father's land and leave them alone. In supporting this proposition, the petitioners argue that the 1st petitioner did not give birth and Mohammed Makokha Omari is the one taking care of. It is not in dispute that the deceased died intestate and that is why the petitioners petitioned for a grant of letters of administration intestate, and indeed had the grant issued as such. The submission that the deceased had expressed a contrary wish on how to share his estate cannot make sense. I have seen what the 2nd petitioner and Mohammed Makokha have annexed in their affidavits as "a will." That document is not in the language of the court and is therefore unhelpful. Furthermore if there was a will, then the petitioners would not have petitioner for a grant of letters of administration intestate but probate.

The deceased died leaving behind two surviving beneficiaries, a son and widow. These are the people who are entitled to as beneficiaries of his estate. The 1st petitioner did not bear children and for that reason one has to look at *section 35* of the Act which provides as follows:-

"Where intestate has left one surviving spouse and child or children.

- 1.) *subject to the provisions of section 40, where an intestate has left surviving spouse and child or children, the surviving spouse shall be entitled to*
 - a). *the personal and household effects of the deceased absolutely;*
 - b) *a life interest in the whole residual of the intestate estate provided that, if the surviving spouse is a widow that interest shall determine upon her*

remarriage to any person.”

Section 40 of the Act is in the following words:-

“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.”

The deceased was a polygamous man who had two wives, the 1st petitioner and the protestor’s mother. That being the case the deceased’s only known estate is Parcel No. East Wanga/Lubinu/1829. In accordance with section 40 of the act, the estate is to be shared to the two houses. Given that each house has one unit, that is the protestor and the 1st petitioner, the land has to be shared out equally between them. However, the petitioner being a widow should only have a life interest and upon re-marrying or termination of the life interest upon demise, the portion will revert to the protestor in the order of priority in terms of section 35 of the Act.

Counsel for the petitioners has argued that elders had met and agreed how the deceased’s property should be shared. However, it is agreed that the deceased died intestate without a will. Having died on 5th September, 2003, the law applicable is the law of Succession Act and section 2 thereof is clear and provides as follows:-

“S.2 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 application 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.”

This being the applicable law, elders have no place in the administration and distribution of the deceased’s estate. For the above reasons, the protest herein succeeds and is allowed as follows:-

- 1. The deceased’s estate namely Parcel No. East Wanga/Lubinu/1829 be shared equally and registered in the joint names of Saina Makokha Kanyanya and Hassan Owiti Kanyanya with Saina Makokha Kanyanya having a life interest over the land.*
- 2. Parcel No. East Wanga/Lubinu/1831 be shared out as proposed by the petitioners.*
- 3. Each party do bear their own costs.*

Dated and delivered at Kakamega this 26th day of January 2016.

E. C. MWITA

JUDGE