REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 142 OF 2015

(FORMERLY MIGORI SENIOR PRINCIPAL MAGISTRATE'S SUCCESSION CAUSE NO. 363 OF 2000)

IN THE MATTER OF THE ESTATE OF SOLOMON ODWAR ANYANGO (DECEASED)

-BETWEEN-

DAN OUYA KODWAR…….....PLAINTIFF/CO-ADMINISTRATOR

-VERSUS-

SAMUEL OTIENO ODWAR…....PETITIONER/DEFENDANT/CO-ADMINISTRATOR

-AND-

MESHACK ABADE.....BENEFICIARY/CO-ADMINOISTRATOR

JUDGMENT

1. This judgment once again brings into fore the rather common sibling rivalry in polygamous families. The three parties in this cause are brothers from the same father but different mothers. Their father is one **SOLOMON ODWAR ANYANGO,** the deceased herein.

2. The deceased had three wives. The first wife was **PENINA ATIENO ODWAR**, the second one was **SILPA ADHIAMBO ODWAR** and the third one was **JENIPHER AKOTH ODWAR**. All the three wives of the deceased are also dead but it is not clear whether they survived the deceased or otherwise. The three parties in this cause are representatives of each house. **MESHACK OBADE** is from the first house while **DAN OUYA KODWAR** is from the second house and **SAMUEL OTIENO KODWAR** is from the third house.

3. The dispute in issue is a rather straight forward one. Meshack Obade (hereinafter referred to as ***'Meshack'***) and Samwel Otieno Kodwar (hereinafter referred to as ***'Samuel'***) are on one side whereas Dan Ouya Kodwar (hereinafter referred to as ***'Dan'***) is on the other side. Meshack and Samuel contend that the distribution of the estate of their father ought to be in accordance with the wishes of the deceased that each house be allocated one third of the estate land which it had all along been in occupation. Dan is however of a different view. He takes the position that since all the wives of the deceased are all dead then the estate land ought to be divided equally among the surviving children of the deceased including the families of the other deceased's children who although now dead but they also survived the deceased.

4. It is that dispute which was heard by way of oral evidence where Dan testified as the Plaintiff and called two witnesses. Samuel who was the original Petitioner testified as the Defendant and called one

witness. Meshack who had initially joined hands with Dan changed his mind and participated as a beneficiary/Interested party and supported Samuel.

5. The parties and their respective witnesses reiterated their foregone positions and mainly what they stated in their statements filed in Court. At the close of their respective cases the parties were given the liberty to file written submissions. Dan filed his written submissions through his Counsel and relied on the cases of **Mary Rono vs. Jane Rono & Another, Court of Appeal, Civil Appeal No. 56 of 2002** (unreported)and **Daniel Omoko Ouko vs. Tabitha Nyangate Ouko & Ano, Kisii HCC SUCC CAUSE No. 3 of 2004** (unreported). Meshack and Samuel failed to file their submissions even after being given two chances to do so.

6. There are some issues which were clearly admitted by all parties. They included the fact that the parties were all children of the deceased and that their respective mothers had all died. Further, that the estate of the deceased comprises of the sole parcel of land known as **NORTH SAKWA/KADERA LWALA/455** (hereinafter referred to as *'**the land***'). That the first and second house comprised of the following children:

First House (Penina Atieno Odwar – Deceased):

(a) Percila Anyango (alive and Married)

(b) Jenipher Obar (Deceased)

(c) Moses Ooko (Deceased)

(d) Roselida Mbogo (Deceased)

(e) Margaret Alum (Deceased)

(f) Meshack Abade (Alive)

***(g) Charles Onyango (Deceased*)**

Second House (Silpa Adhiambo Odwar - Deceased):

(a) Ebel Onyango (Deceased)

(b) Samson Osodo (Alive)

(c) Dan Ouya (Alive)

(d) Johnson Odondi (Deceased)

(e) Margret Adoyo (Alive and Married)

(f) Adek Odwar (Deceased)

(g) Karen Oyugi (Deceased)

(h) Joseph Ooko (Alive)

7. Apart from the dispute on the distribution of the land, there was also a dispute on the number of beneficiaries from the third house. According to Samuel, her mother who was the third wife had six children out of which two had died leaving behind four who were **Mary Awino, Margret Akinyi, Peres Auma** and **himself.** Dan and Meshack joined hands on this issue and disputed Samuel's position. They contended that Samuel was the only beneficiary from the third house. Whereas Dan and Meshack agreed that Samuel had his other sisters and a brother, they contended that it was only Samuel who was born of

the deceased and that the other children of the deceased's third wife either went back to their father's place or were married elsewhere and that they never depended on the deceased at all.

8. I have addressed my mind to that issue and do find that Samuel is the only beneficiary from the third house. I say so because in all the documents which Samuel filed in Court touching on the beneficiaries from the third house, he never mentioned any other such beneficiary apart from himself. Further Samuel did not adduce any evidence to prove that although his other siblings were not born of the deceased they still were the deceased's beneficiaries in accordance with the law. I have also had a look at the letter from the Assistant Chief dated 02/11/2014 which was relied on in determining the Summons for Revocation which provided for Samuel as the only beneficiary from the third house and which letter Samuel did not challenge. Infact Samuel only mentioned his other siblings in passing when he was testifying. Therefore for the purposes of this judgment this Court will consider Samuel as the only beneficiary from the third house.

9. I will now turn to the hotly contested issue on how the deceased's estate is to devolve. In doing so, I will ascertain whether the deceased sub-divided his land equally amongst his wives before death. According to the document of title left behind by the deceased, the land was not sub-divided among the wives but remained intact. I have equally not seen any documentary evidence on any steps which were taken by the deceased towards initiating the alleged sub-division. What came up during the hearing and as contended by Samuel and Meshack is that the deceased had apportioned each of his three wives an equal portion of the land which each held in exclusivity. To that end, they so submitted, that the deceased had clearly expressed his will on how he intended to distribute the land to his family and as such the deceased's wishes ought to be respected. In buttressing that position, Meshack albeit late in the day, produced an Affidavit which allegedly showed that indeed Dan was aware of that arrangement and that Dan had *'leased'* part of the portion of the land which belonged to Meshack's mother, the first wife. That Affidavit however was only produced long after Samuel and Dan had testified and closed their respective cases. It was also not among those documents exhibited in the cause neither was Dan examined on the same. To say the least, Dan was not accorded an opportunity to interrogate the Affidavit and as such the document's probative value is highly questionable.

10. That then brings this Court to the question as to whether the deceased had sufficiently expressed his desires to constitute a binding will on the land. There was unanimity on the fact that the deceased died without leaving behind a written will. As to the being of an oral will, **Sections 9** and **10** of the **Law of Succession Act** Chapter 160 of the Laws of Kenya (hereinafter referred to as ***'the Act'***) deal with the legal formalities of an oral will. By looking at the evidence on record and the law, it is clear that the presence of an oral will was not proved. That is also confirmed by the documents which Samuel filed in court by the time he was petitioning for the grant being a **Petition for Letters of Administration Intestate** instead.***But did the deceased pass the land to his wives as a gift during his lifetime?***

11. There are only two types of gifts in law. There are those gifts made between living persons (gifts ***inter vivos***) and those gifts made in contemplation of death (gifts ***mortis causa***). The application of the two gifts were ably and exhaustively dealt with by **Her Ladyship Nyamweya, P.** in **Re Estate of the Late Gedion Manthi Nzioka (Deceased)(2015)eKLR** when she expressed herself as follows:

> *'.....Section 31 of the Law of Succession Act provides as follows with respect of gifts made in contemplation of death:*
>
> *"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 illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him Provide that-

1. no gift made in contemplation of death shall be valid if the death is caused by suicide;

2. the person making the gift may, at any time before his death, lawfully request its return. The person making the gift may, at any time before his death, lawfully request its return"

The court is obligated to take cognizance of the gifts given by a deceased in contemplation of death if the conditions in section 31(a) to (f) are present. It must also be noted that the said conditions are cumulative and must all exist for such a gift to be valid, and that in such circumstances the gift need not be perfected. It must be note that this gift only rises where the death of the donor is contemplated, and will be retained only in the event of the donors death.

For gifts ***inter vivos,*** *the requirements of law are that the said gift may be granted by deed, an instrument in writing of 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 4th Edition Volume 20(1) at paragraph 32 to 51.***

In Halsbury Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, It is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where donor's subsequent conduct gives the done a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprises in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

Coming to the present application and protest, the Court notes that it is not stated nor was any evidence given by the 3rd Administrator as to when the said gift was made by the deceased to Joyce Mathei Nziuko. The evidence of the said gift was that it was made at a family meeting whose date is not known and which the protestors have disputed. In her submissions it is also submitted that the said gift was made by the beneficiaries mother.

It is therefore my findings that section 31 of the Laws of Succession Act is inapplicable as it has not been established that the deceased made the said gift in contemplation of his death. The said gift therefore can only treated by this Court as a gift inter vivos. In addition a person cannot gift that which he or she does not own, and the beneficiaries' mother could not gift property that belonged to the deceased without any evidence to show that the same had been gifted to her, or that the deceased had instructed her to gift the property known as Syokimau farm.'

12. By applying the above discourse to the matter before Court one cannot allege that the deceased gifted his land in contemplation of his death or that the deceased generously gifted his land to his wives when they were all alive. First no mention was made on when the deceased's wives died. Second, there is no evidence relating to the gifting of the land at all. The only evidence touching on the land was on the alleged sub-division by the said Samuel. I say so because Meshack only stated that the land was sub-divided in 1979 and that Dan was well aware of that fact. But even that evidence of Samuel was too far from being credible. Samuel was only seven years old when he *'was called by the deceased to witness the sub-division'*. Samuel further stated that the deceased only called the last-born children from each house to witness the sub-division and not the other children who were then of age and also at home by then. I find that uncorroborated piece of evidence to be highly doubtful as it is not commensurate with how a reasonably parent and husband would handle such a serious and sensitive issue.

13. As I come to the end of the discussion on whether the land was gifted to the wives or not, I wish to state that if at all it was ever proved that the land was gifted accordingly in law, then that would mean that the land passed from the deceased as the ***'donor'*** to the wives as ***'donees'*** and that the land would have effectively ceased to belong to the deceased and as such would not be part of the deceased's estate. That cannot be the position since all the parties agree that the land is the estate of the deceased.

14. I have equally considered the possibility of a trust over the land in favour of the deceased's wives but again there is no iota of evidence to that end.

15. The above analysis therefore lends credit to the position put forth by Dan. I agree that despite there being the presence of evidence of trees and sisal plants demarcating the land into three portions, that was done for the convenient use of the land which is a common practice in polygamous families but the land remained in the sole control of the deceased. Whereas such demarcations are usually very useful in the distribution of land where the beneficiaries readily agree that may not be the position when the beneficiaries are not in agreement. I therefore find that the land forms the estate of the deceased and that the same was not sub-divided by the deceased in his lifetime and that no portion was owned exclusively by any of the three wives of the deceased. In the circumstances the land shall be distributed in accordance with the Act.

16. The relevant provision would be **Section 40** of the Act. The said provision states as follows:

> ***'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 rules set out in section 35 to 38.

17. Since none of the deceased's wives are alive the provisions of **Section 38** of the Act becomes applicable. The section states that:

> ***'38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among surviving children.***
>
> The foregone is clear that the spirit of the law is equal distribution amongst the deceased children. I have carefully looked at the proposed distribution by Dan. Whereas the proposal seems to have been made in the spirit of **Section 40** of the Act, it however left out two daughters of the deceased who are married. Those are **PERCILA ANYANGO** and **MARGARET ADOYO**. Since the two married daughters do not appear as amongst those who attended the family meeting held on 03/05/2015 and in the absence of their consents or otherwise renunciation of their rights to inherit from the deceased, this Court will in the spirit of the law also take the two daughters into account in the distribution of the land. (See this Court's decision in **Migori High Court Succession Cause**

18. Consequently the grant issued in this Cause on 17/04/2015 to **MESHACK OBADE, DAN OUYA KODWAR** and **SAMUEL OTIENO KODWAR** is hereby confirmed and deceased's parcel of land known as **NORTH SAKWA/KADERA LWALA/455** shall devolve as follows: -

a) **MESHACK OBADE - 0.33Ha**

b) **DAN OUYA KODWAR - 0.33Ha**

c) **SAMUEL OTIENO KODWAR - 0.33Ha**

d) **PERCILA ANYANGO - 0.33Ha**

e) **MARGARET ADOYO - 0.33Ha**

f) **SAMSON OSODO ODWAR - 0.33Ha**

g) **CHARLES ONYANGO ODWAR - 0.33Ha**

h) **JOSEPH OOKO ODWAR - 0.33Ha**

i) **MONICA ATIENO ONYANGO - 0.33Ha**

19. Given that the parties are close family members; each party shall bear its own costs of the distribution as well of these proceedings.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of July 2016.

A. C. MRIMA

JUDGE