

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCC. CAUSE NO.1140 OF 1992

IN THE MATTER OF THE ESTATE OF ALFRED KIMANI TORONKE (DECEASED)

PATRICK LEMPERE MBOGO.....1ST PETITIONER

JAMES PARSANKA OLE MBOGO.....2ND PETITIONER

VERSUS

GRACE MBOGO KALOI.....1ST OBJECTOR

MEMUSI SIAMETO.....2ND OBJECTOR

RULING

Alfred Kimani Toronke, the deceased to whose estate these proceedings relate died on 28th October 1990. On 14th September 1992, Patrick Lempere Mbogo and James Parsanka Ole Mbogo (the Petitioners) petitioned the court to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. They were duly issued with a grant of letters of administration intestate on 17th August 1994. The grant was confirmed on 12th June 2002. The Petitioners distributed the properties that comprised the estate of the deceased using the houses of the deceased as a unit of distribution. At this juncture, it is important to point out that the deceased was married to three (3) wives. In schedule of distribution, the second and third widows of the deceased inherited land on their own behalf and in trust of their children. However, since the first widow, Phyllis Wanjiru was deceased at the time of distribution, what was to be due to her was inherited by the Petitioners. In that regard, the Petitioners each inherited 115 acres out of the parcel of land registered as LR. No. Kajiado/Osilalei/20. The 1st Petitioner, Patrick Lempere Mbogo inherited 30 acres and the 2nd Petitioner James Parsanka Ole Mbogo inherited 26 acres out of the parcel of land registered as LR. No. Ngong/Ngong/144.

It was apparent that not all dependants of the deceased were satisfied with the mode of distribution that was proposed by the Petitioners and adopted by the court. For instance, George Sanaget Toronke filed summons seeking to have the grant revoked on the grounds that the distribution adopted by the court was unfair since it discriminated against some of the beneficiaries of the deceased. However, it appeared that the said George Sanaget Toronke had a change of mind. On 31st October 2011, he filed an affidavit supporting the distribution adopted by the court.

On 22nd March 2011, Grace Mbogo Kaloi and Memusi Siameto filed summons seeking to have the grant revoked on the grounds that the distribution which was proposed by the Petitioners failed to include them as beneficiaries of the estate of the deceased. According to the submission filed, Memusi Siameto, a grandchild of the deceased died before the hearing and determination of the summons for revocation of grant. Since no one came forward to substitute him, the court presumed that his claim to the estate of the deceased had been abandoned. The court will therefore only consider the claim by Grace Mbogo Kaloi (the Objector). The Objector stated that she was the 1st born daughter of the deceased. In the distribution, the Petitioners failed to make provision for her. She therefore urged the court to provide for her as a dependant of the deceased who had been excluded from the distribution. In the affidavit in support of the application, the Objector made proposal on how the estate should be distributed so as to provide for all the beneficiaries of the deceased.

The summons was opposed. Several beneficiaries swore replying affidavits in opposition to the

application. They include: Jane Njeri Mbogo and Lucy Njoki Mbogo, the widows of the deceased, Olonana Ole Toronke, Alfred Mbokenyai Toronke, George Sanaget Toronke and Florence Kirehu, the children of the deceased. In essence, they all deponed that the mode of distribution adopted by the court was fair and should not be disturbed. They stated that the proposed distribution took care of all the beneficiaries of the deceased. They explained that the reason why the Objector was excluded from the distribution was because the deceased had settled her before his death by giving her a parcel of land measuring 120 acres at Kitengela. They further stated that the Objector was married in 1960 and therefore owned her own properties. In response to this assertion, the Objector swore a further affidavit where she denied the allegation that she had been given land by her late father. She stated that the parcel of land at Kitengela was a property that she had purchased when she was working in the United States of America. She deponed that if indeed the Petitioners had evidence that she had been given land by her late father, they should provide evidence. It was her view that she had been discriminated upon because she was a female and by the fact that she had been married at the time the deceased died.

Prior to the hearing of the summons, counsel for the parties to the dispute filed written submission in support of their respective opposing positions. The written submission was highlighted in court by Mr. Kivuva for the Objector and by Mr. Gathara for the Petitioners. This court has carefully considered the facts of this case. The issue for determination by this court is whether the Objector made a case for this court to interfere with the mode of distribution that was proposed by the Petitioners and adopted by the court. Certain facts are not in dispute in this case. It is not disputed that the Objector is the daughter of the deceased. It is further not in dispute that the Objector was not mentioned in the petition as a dependant of the deceased. It is not disputed that she was excluded from the list of beneficiaries of the properties that comprised the estate of the deceased. The Petitioners explained this exclusion. They stated that the Objector was provided for by the deceased prior to his death. In the affidavits sworn in opposition to the summons, the Petitioners stated that the deceased had given the Objector a parcel of land measuring 120 acres at Mashuru. Later in their submission, they stated that the parcel of land was in fact situate at Kitengela. The Objector on her part disputed this fact. She denied that she had been given any parcel of land by the deceased during his lifetime. She explained that she purchased the parcel of land at Kitengela. She challenged the Petitioners to produce any evidence in support of their assertion to the effect that the said parcel of land had indeed been given to her by the deceased. The Petitioners did not rise up to this challenge. They did not provide to the court any documentary evidence to support their claim that indeed the said parcel of land at Kitengela was given to the Objector by the deceased or that it was registered in the name of the deceased before it was transferred to the Objector. This court therefore holds that the Petitioners failed to establish that the Objector had been given any parcel of land as gift *inter vivos* by the deceased.

The issue for determination therefore is whether the Objector established a case for this court to interfere with the mode of distribution that was adopted by the court. As stated earlier in this Ruling, there is no dispute that the Objector is the daughter of the deceased. She is therefore a dependant of the deceased pursuant to **Section 29(a)** of the **Law of Succession Act**. This court agrees with the holding of Makhandia J (as he then was) in **In Re Estate of Solomon Ngatia Kariuki (deceased) [2008] eKLR** at page 8 where he stated as follows:

“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased’s estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father’s estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father’s inheritance because they are likely to enjoy inheritance of their husband’s side of the family.”

In the present case, it was clear to the court that the thrust of the Petitioners’ case was that since the Objector was married, and since she had property, she ought not to be considered in the distribution of the properties that comprise the estate of the deceased. This court holds that the Objector is a dependant of

the deceased, and therefore under **Section 38** and **Section 40(1)** of the **Law of Succession Act**, she is entitled to a share of the estate of the deceased.

The Objector proposed a complete redistribution of the properties that comprise the estate of the deceased. The Petitioners opposed this proposed mode of distribution. This court agrees with the Petitioners that to order a complete redistribution of the estate of the deceased would cause hardship to the beneficiaries who have already settled in their respective portions of land. The Objector is the only dependant who has a complaint. All the other beneficiaries were satisfied with the distribution. This court is of the view that it will do justice to the parties to these proceedings if it redistributes only one parcel of land so as to accommodate the Objector.

In the premises therefore, this court directs that the Objector shall inherit ten (10) acres out of the parcel of land formerly registered as LR. No. Ngong/Ngong/144 and which has now been subdivided into LR. Nos. Ngong/Ngong/48587 and Ngong/Ngong/48588. In that regard, this court directs that the said portion of land shall be excised from the above parcels of land within sixty (60) days of the date of this Ruling. Since this is a family dispute, there shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF JULY, 2014.

L. KIMARU

JUDGE