No. 2785

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO. 91 OF 1996

IN THE MATTER OF THE ESTATE OF BENSON MAIRURA OMBUNA…… DECEASED

AND

IN THE MATTER OF CONFIRMATION OF LETTER OF ADMINSTRATION

AND

IN THE MATTER OF SECTION 7 RULES 40 & 41 OF THE LAW OF SUCCESSION ACT CAP 160 LAWS OF KENYA

BETWEEN

BIRITA KWAMBOKA MOGENI
JANE NYANCHERA OMBUNA.....APPLICANTS
ANNE NYANCHAMA OMBUNA
CAREN NYAMOITA NYAIRO

-VERSUS-

EVANS HEDSON OMBUNA.....1st RESPONDENT
VERONICA NYABOKE MAIRURA.....2nd RESPONDENT

RULING

The issue in dispute in this cause is about distribution of the estate of **Benson Mairura Ombuna** – deceased. The deceased passed on the 11th September, 1995. At the time of his death he was a polygamously married having been married to two wives, **Margaret Kwamboka Ombuna** and **Alice Bosibori Ombuna** – both also now deceased. In this ruling, the house of **Margaret Kwamboka Ombuna** shall be referred to as the 1st house whereas that of **Alice Bosibori Ombuna** shall be referred to as the 2nd house. The deceased begot children with both wives. From the 1st house these were the issues:-

- **Florence Nyamoita Nyaboga**
- **Joyce Nyaboke Otoki**
- **Evans Hedson Ombuna**
- **Esther Mbaka**
- **Zepha Mwango Nyamari**
- **Dinah Asati Ombuna.**

From the 2nd house, the following were the issues:-

- **Birita Kwamboka Mogeni**
- **Jane Nyanchera Gekombe**
- **Duke Mairura Ombuna (deceased)**
- **Anne Nyanchama Rayori**
- **Caren Nyamoita Nyairo**

Following the passing on of the deceased a grant of letters of administration intestate was sought and obtained jointly by Alice Bosibori Ombuna and Evans Hedson Ombuna on or about 7th May, 1996. Subsequently the same was confirmed on 27th January, 1998. On the 19th February, 2010 the said grant was however, by consent of the parties revoked and a new grant issued in the joint names of Evans hedson Ombuna, Birita Kwamboka Mogeni and Duke Mairura Ombuna. Since then the grant has not been confirmed as the two houses have been unable to agree on the mode of distribution. The 2nd house represented by the objectors have come up with their mode of distribution. They propose that the estate be distributed according to the houses, taking into account the current places of residence of the respective parties, as settled by the deceased and where necessary taking into account the values of the respective properties.

The 1st house represented by the 1st respondent and his sister **Florence Nyamoita Nyaboga** did not agree with the above proposal from the 2nd house. They counter proposed that the distribution of the estate be in

accordance with the houses and number of units in each house as provided for by section 71 of the **Law of Succession Act** and **Rules** 40 and 41 of the **Probate and Administration rules**.

The 2nd respondent, **Veronica Nyaboke Mairura,** the wife of Duke Mairura Ombuna, a son of the deceased from the 2nd house also opposed the proposal of the objectors. Her husband however passed on 15th July, 2009. She was however amenable to the distribution according to the houses and each of the two houses getting equal share in the distribution.

When the cause came up for hearing before me on 2nd March, 2011 parties agreed in principle that:-

a. The estate of the deceased be distributed in accordance with the Law of Succession Act.

b. The two plots at Kereri namely A1 and A2 should revert to the estate of the deceased for purposes of distribution.

c. The expenditure incurred by the petitioner with regard to the estate shall be chargeable to the estate.

d. The cause to be determined on the basis of the affidavits on record and written submissions to be filed and exchanged by the respective counsel.

The respective counsels duly filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

From the pleadings and the written submissions of the parties herein it is common ground that the estate of the deceased consisted of the following assets.

- **Mwongori settlement scheme/70 measuring 33.8 hactares**

- **Nyaribari/Keumbu/737 measuring 7.1 hactares**

- **Central Kitutu/Mwambundusi/364 measuring 0.8hactares**

- **Central Kitutu/Mwamosioma/738 measuring 0.116hactares**

- **Kisii Township/Block III/245 measuring 0.0325hactares**

- **Chepnyali/Township/Plot No. 126**

- **Nyambunwa Plot 1**

- **Kereri 1A and B**

It is also common ground that the estate of the deceased should be distributed in accordance with the **Law of Succession Act**. I do not think that they had any choice in the matter really following their disagreement. I think that the point of departure is their interpretation and understanding of the relevant provisions of the **Law of Succession Act** applicable to their case. In this regard their respective advocates have not been of much help either.

It is also common ground that the deceased was polygamous and he was survived by two widows all of whom have since passed on. In this case, therefore the provisions of the **Law of Succession Act** applicable are sections 27, 28 and 40. In applying these provisions of the law and in particular section 40, this court cannot ignore what is obvious on the ground. It would appear that before the deceased passed on he had settled the two houses on two separate parcels of land, whereas the 1st house was settled on **Nyaribari Chache/Keumbu/737** measuring 7.1 acres, the 2nd house was settled **on Mwongori Settlement Scheme/70** measuring 33.8acres. The 1st house consists of 6 children whereas the 2nd house consists of 5 children. The 2nd house has taken the position that by the deceased settling the two houses on separate and distinct parcels of land, he had evidenced his desire to have the two houses live separately and that wish ought to be respected. I do not buy that proposition. It could have perhaps applied to his wives had they been alive. It cannot apply to his children. His widows having passed on the distribution we are involved in here revolves around his children. None of them can claim superiority to others. If that argument was to be taken to its logical conclusion, it will reek injustice to the 1st house. The 2nd house consisting of 5 members will end up having 33.8 acres of land at the expense of the 1st house with 6 members but with only 7.1 acres of land.

Section 40 of the **Law of Succession Act** provides interlia:-

"… where an intestate has married more than once under any system if 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…".

As I have indicated elsewhere in this ruling each party in this cause has given different interpretation to this provision. It must be apprecated that the said provision of the law does not provide the that the net estate be divided equally between the units. Indeed under section 27 of the **Law of Succession Act**, this court has a complete discretion in the division and distribution of the estate, guided by the number of units and such other matters as enumerated under section 35 (4) and 42 of the same **Act**.

Commenting on section 40 aforesaid, **Omolo JA** stated interlia in the case of **Rono –vs- Rono (2005) 1KLR 538**; the Court of Appeal observed

"…My understanding of that section is that while the net intestate is to be distributed according to houses, each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provision in the Act that says each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the act does not provide for that kind of equality…".

From the schedule of the mode of distribution, it is not in dispute that the 1st house ought to take **Nyaribari Keumbu/737** measuring 7.1 acres in its entirety. This conclusion is based by the schedules on the modes of distribution filed by both parties. Should the 2nd house in turn get the entire of **Mwongori settlement scheme/737** which measures 33.8 acres? I do not think so. I have already said elsewhere in this ruling that such holding would reek injustice on the 1st house. In any event, unlike **Nyaribari/Keumbu/737**, there is no agreement by the parties as to how it should be shared. To put the members of the 2nd house on the same footing as the 1st house, I will first knock off 7.1 acres from 33.8 acres of **Mwongori Settlement Scheme/70** and specifically reserve them for the 2nd house. The remaining 26.7 acres shall be distributed according to the houses. However, since the wives of the deceased have all passed on and the children of the deceased are all equal in the eyes of the law, I will distribute the aforesaid remaining acreage of **Mwongori Settlement Scheme/70** being 26.7 acres equally among the 11 children of the deceased. In total therefore there are 11 units. Those units of course include the 2nd respondent who will take her husband's share from the 2nd house. Of course and as already stated in applying the provisions of section 40 of the **Law of Succession Act**, it was not intended that there must be equality between houses and nor was it the intention that each child must receive the same or equal portion. It is in this light that I have opted for this kind of distribution with regard to **Mwongoni Settlement Scheme/70**. Of course the court may have to consider the interests of a disadvantaged beneficiary in need of more resources because of her peculiar and disadvantaged position. For instance, if such beneficiary is young and still in need of maintenance. This is where I see the 2nd respondent coming from. However there is nothing on record to suggest that she is so disadvantaged or in need of special consideration and or care. She will definitely take up her husband's share in the 2nd house in respect of the reserved 7.1 acres and the subsequent 26.7 acres..

The foregoing notwithstanding all the other remaining assets of the estate of the deceased shall be distributed equally and across the board amongst the 11 children of the deceased from both houses save for Kereri 1A and B. Kereri 1A as agreed between the parties shall go to 1st house whereas Kereri 1B shall go to the 2nd house.

In the upshot the grant shall be confirmed in the manner following:-

- **Mwongoni Settlement Scheme/70: 7.1 acres thereof will go to the 2nd house to be shared equally between the five children of that house. The remaining 26.7 acres shall be shared equally among the ten surviving children of the two houses and the 2nd respondent representing the deceased son of the 2nd house.**

- **Nyaribari/Keumbu/737: To be shared equally among the children of the 1st house.**

- **Central Kitutu/Mwambundusi/364: To be shared equally between the two houses.**

- **Central Kitutu/Mwamosioma/738: To be shared equally among the two houses.**

- **Kisii Township/Block III/245: To be shared equally among two houses.**

- **Chepnyalil/Township Plot 126: To be shared equally among the two houses.**

- **Nyabuna Plot No. 1: To be shared equally among the two houses.**

- **Kereri Plot 1A to be shared equally among the beneficiaries from house 1.**

- **Kereri Plot 1B to be shared equally among the beneficiaries from house 2.**

In carrying out the above mandate regard should be had on the settlements on the ground so that unnecessary destruction, damage and movements are minimized and or avoided at all costs.

On costs, this being a family dispute, it is best that each side bears its own costs.

Ruling dated, signed and **delivered** at Kisii this 4th day of May, 2011

ASIKE-MAKHANDIA

JUDGE