



REPUBLIC OF KENYA

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

**Miscellaneous Civil Application 2 of 2008**

**IN THE MATTER OF THE ESTATE OF: JOHN SILAS OSINDE MOTARI (DECEASED)**

**AND**

**MARTHA KEMUNTO OSINDE ..... PETITIONER**

**VERSUS**

**KENNEDY NYAUNCHO OSINDE ..... RESPONDENT**

**RULING:**

The late John Silas Osinde Motari, hereinafter referred to as “**the deceased;**” died on 20<sup>th</sup> January, 1993. He had two wives, Teresa Nyagechanga Osinde and Martha Kemunto Osinde.

Grant of Letters of Administration intestate was issued to Martha Kemunto Osinde (the Petitioner) on 20<sup>th</sup> February, 2006. The two houses are not in agreement as to how the estate of the deceased should be distributed amongst his beneficiaries. The estate comprises of three parcels of land registered as **Nyansiongo/68** (8.7 Hectares), **East Kitutu/Bonyamondo 1/99** (8.0 acres) and **East Kitutu/Bonyamondo 1/380** (1.0 acres).

On 13<sup>th</sup> November, 2008 the parties herein agreed by consent to file their respective submissions on the mode of distribution of the deceased’s estate within thirty (30) days from the aforesaid date.

The Petitioner’s advocate filed his submissions on 15<sup>th</sup> December, 2008 but the respondent’s advocate did not file any. The applicable law in this matter is the **Law of Succession Act** and not Gusii customary law:

Section 2(1) of the said Act states that the provisions of the Act constitute the law of Kenya and has universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after commencement of the Act.

**Section 40(1)** of the Act further states that:

***“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 adding any wife surviving him as an additional unit to the number of children.”***

A “**house**” refers to a family unit comprising a wife, whether alive or dead at the time of the death of the husband and the children of that wife. Section 40(1) as quoted herein above does not require that the estate of a deceased polygamous intestate be divided equally between the houses, what it calls for is consideration of the number of children in each house.

From the material on record, and particularly the petitioner’s submissions, the first house has ten children (sons and daughters) and the first wife of the deceased, making a total of eleven (11) units. The second house has seven children and the second wife making a total of eight (8) units. All together there are nineteen (19) units.

The petitioner stated in her submissions that during his life time, the deceased had demarcated parcels numbers Nyansiongo/68 and East Kitutu Bonyamondo 1/99 into two equal portions for each of his wives. He had done that in accordance with Gusii Customary Laws. The court was therefore asked to adopt that mode of distribution of the estate so that each widow will thereafter divide the share that devolves to each house amongst the family members therein. If there had been no objection raised, that would have been an acceptable way of distributing the estate. But where family members of a polygamous intestate are not able to agree on the best way of distributing the deceased’s estate, the court has to follow the relevant provisions of the Law of Succession Act, Section 40(1) being a guiding principle.

In **RONO –VS- RONO & ANOTHER** (2005) 1 E.A. 363, the deceased was survived by two widows and nine children.

The first widow had three sons and two daughters while the other widow had four daughters. The first house sought to have the estate shared in accordance with Kalenjin Customary Law, which meant that the second house was entitled to a small share since daughters are not entitled under customary law to inherit their deceased parents. The Court of Appeal held that customary law did not apply and that the applicable law was section 40 of the Law of Succession Act. See also **KURIA & ANOTHER –V- KURIA** (2004) e KLR.

In this matter, the first house has 11 units, the second house 8 units, all totaling to 19 units. Nyansiongo/68 measures 8.7 Hectares. It will be divided into 19 units and the first house will get a total of 11 units while the second house will get 8 units. 8.7 Hectares divided by 19 comes to 0.457 Hectares (per unit) which means the first house will get 5.027 Hectares and the second house will get 3.656 Hectares.

The children in each house and their respective mothers will divide the house share in accordance with the provisions of sections 35 to 38 of the Law of Succession Act. The aforesaid principle will be applied in respect of East Kitutu Bonyamondo 1/99 and East Kitutu Bonyamondo 1/380. The Grant of Letters of Administration is now ordered confirmed.

Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2009.**

**D. MUSINGA**

**JUDGE.**