



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

Succession Cause 3 of 2004

**IN MATTER OF THE ESTATE OF SILVESTER OUKO GICHANA
.....DECEASED**

DANIEL OUKO OMOKO PETITIONER

VERSUS

TABITHA NYABOKE OUKO)

AGNES NYANGATE OUKO) OBJECTORS

RULING

On 17th June, 2004, grant of letters of administration in respect of the estate of Sylvester Ouko Gichana (hereinafter referred to as “*the deceased*”) were issued to Tabitha Nyaboke Ouko, Eunice Moraa Ouko, Agnes Nyangate Ouko, Daniel Ouko Omoko and Lawrence Onkoba Ouko.

The deceased died on 3rd June, 2003. He had married five wives and two of them pre-deceased him. The five are: Kemunto Ouko (deceased), Joyce Kwamboka Ouko (deceased) Tabitha Nyaboke Ouko, Eunice Moraa Ouko and Agnes Nyangate Ouko.

The dispute that is before this court is regarding distribution of the deceased’s estate. The deceased’s estate largely consists of two parcels of land, **L.R.NO.KEBIRICHI SETTLEMENT SCHEME/702** which measures 19 acres or thereabout and **L.R.NO.NYANSIONGO SETTLEMENT SCHEME/106** which measures 8.1 hectares or thereabout (equivalent to 20.5 acres or thereabout).

Agnes Nyangate Ouko (PW1) and **Tabitha Nyaboke Ouko (PW2)** testified as the objectors. PW1 testified that three of the deceased’s wives were living at Nyansiongo Settlement Scheme/106 (hereinafter referred to as “*Nyansiongo*”) and the other two wives at Kitutu/Kebirichi/702 (hereinafter referred to as “*Kebirichi*”).

Those who were settled at Nyansiongo are Tabitha Ouko, Eunice Ouko and Agnes Ouko. The two wives of the deceased who had pre-deceased him had settled at Kebirichi.

PW1 further testified that before their husband passed away, he had sub-divided the land at Kebirichi into five portions, one for each of his wives. However, those who were living at Nyansiongo did not take possession of their portions; except herself who only cultivates the portion that was given to her. The

land at Nyansiongo had not been sub-divided by the deceased. PW1 was of the view that Nyansiongo should also be divided into five equal portions, one for each house. That would mean that each house would have a parcel of land at Kebirichi and another one at Nyansiongo.

Regarding the parcel of land at Kebirichi that she claimed to be entitled to, PW1 stated that the deceased had leased a portion thereof to one Moreka Monyenye who was still using the same and paying the rent thereof to her.

PW2 corroborated the evidence of PW1 in all material aspects. She said she had never taken possession of the parcel that was allotted to her at Kebirichi because the children of the deceased's first wife were in occupation.

Daniel Omoko Ouko, (DW1) is a son of Joyce Kwamboka (deceased), who lived at Kebirichi during her lifetime together with Kemunto Ouko (deceased) and their children. He admitted that their late father had sub-divided Kebirichi into five portions, one for each house but before he died, he altered the boundaries so that his three wives who were living at Nyansiongo could remain there and the families of the two deceased wives to remain at Kebirichi. He further conceded that his father had leased a portion of the land at Kebirichi to a third party and upon his death PW1 continued to lease it out. DW1 was of the view that the two houses at Kebirichi should be allowed to retain that land and divide it amongst themselves and the same for the three houses at Nyansiongo. If the properties were distributed otherwise, some residential houses would be destroyed and that would cause unnecessary expense, DW1 stated.

The witness added that the value of land at Nyansiongo was very high, about Kshs.600,000/= per acre compared to the value of land at Kebirichi which was about Kshs.150,000/= per acre.

In cross examination, DW1 stated that the two parcels of land were about twelve (12) kilometers apart and the deceased had told them, that is, the children of the first two wives, not to go to Nyansiongo. Nyansiongo was registered in the name of DW1 after the demise of the deceased but he was willing to transfer the land to his three stepmothers, DW1 added.

The deceased was a polygamous man and he died intestate. The distribution of the deceased's estate has to be done in accordance with the provisions of **Section 40** of the **Law of Succession Act**. Section 40(1) states as hereunder:

“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.”

A house is defined as ***“a family unit comprising a wife, whether alive or dead at the date of death of the husband, and the children of that wife”***. According to an affidavit sworn by DW1 and whose contents are not disputed by the objectors, the children born to each of the deceased's wives are as follows:

First wife Second wife

- | | |
|-----------------------------|--------------------------|
| 1. Bosibori Ouko (deceased) | 1. Trusilla Nyaboke Ouko |
| 2. Pascaria Nyaboke Ouko | 2. Daniel Omoko |
| 3. Basibica Ouko | 3. Hellen Ouko |
| 4. Maria Ouko | 4. Mongina Ouko |

5. James Mogaka Ouko 5. Oginda Ouko
6. John Onchiri (deceased) 6. Maria Ouko
7. Onkoba Ouko
8. Samuel Ouko (deceased)

-

Third wife Fourth wife

- | | |
|-----------------------|----------------------|
| 1. Ezekiel Omari Ouko | 1. James Omwocha |
| 2. James Omwocha | 2. Samwel Bigingi |
| 3. Kennedy Ouko | 3. Peter Magata Ouko |
| 4. Joshua Ouko | 4. Fred Kebangendi |
| 5. Momanyi Ouko | 5. Jackline Gesare |
| 6. Dinnah Ouko | 6. Magrate Mongina |
| 7. Mongina Ouko | 7. Beatrice Kemuma |

8. Gladys Kwamboka

9. Sylvia Bwani

Fifth wife

1. Vincent Omwocha Ouko
2. Richard Ouko
3. Robert Ouko
4. Kibagendi Ouko
5. Jane Ouko
6. Guto Ouko

Of the first house, there are three children who are deceased. It was not indicated whether they left

behind any issues. If they did, for purposes of distribution of the estate, I will consider that the first house has eight units. The second house has six units, the third house eight, the fourth house

ten and the fifth house seven units. Those units include the three widows of the deceased. In total there are 39 units.

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 neither was it the intention of parliament that each child must receive the same or equal portion. See **MARY RONO VS JANE RONO & ANOTHER** Civil Appeal No.66 of 2002.

The court may have to consider, for example, the interests of a young beneficiary who is still being maintained or in need of more resources because of peculiar or specific circumstances. That notwithstanding, the court must try to distribute the deceased's estate as equitably as possible.

In this case, the petitioner and the objectors have lived separately for over thirty years. The first and the second houses live at Kebirichi while the other three houses live at Nyansiongo. The two parcels of land are more or less the same in acreage. It appears that the intention of the deceased was that members of the first and second house stay at Kebirichi and the third, fourth and fifth houses to stay at Nyansiongo.

In distributing the estate of a deceased person under the provisions of the **Law of Succession Act**, no distinction should be made between male and female children. In **MARY RONO VS JANE RONO & ANOTHER** (supra), Waki J. A. had this to say:

“As a member of the International Community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the international Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two international human rights covenants: the covenant on economic, social and cultural rights and the covenant on civil and political rights (both adopted by the UN General Assembly in 1966). In 1984 it also ratified, without reservations, the Convention of the Elimination of All Forms of Discrimination Against Women, in short “CEDAW”.

Article 1 thereof defines discrimination against women as:-

“ Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field.”

In this case, all the children of the deceased, sons and daughters, whether married or not, are entitled to a share of the deceased's estate. If any of the married daughters decide to forego their lawful entitlement, it will be up to them to so choose.

Having said that, my views as regards distribution of the deceased's estate are as follows:

The first house and the second house shall remain at Kebirichi. The property shall be divided into fourteen units and the first house shall get eight units thereof and the second house six units. Each of the beneficiaries shall have one unit thereof. The third, fourth and fifth houses shall remain at Nyansiongo and the property shall be divided into twenty-three units so that each beneficiary gets one unit. It is evident that the beneficiaries in the last three houses will get smaller shares than those in the first and second houses. However, the high value of land at Nyansiongo will compensate for the reduction in acreage. This mode of distribution will also ensure that the beneficiaries are not unnecessarily moved from the places where they have lived for years. DW1 should transfer the title for the Nyansiongo property to the objectors so that they can distribute the land appropriately. In any event, the transfer of the Nyansiongo property to DW1 after the demise of the deceased and before the finalization of these proceedings was not proper.

This being a family matter, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED at **KISII** this 16th day of April, 2008.

D. MUSINGA.

JUDGE.

Delivered in open court in the presence of:

Mr. Ochwangi for the objector

Mrs. Odoyo for Mr. Nyachiro for the petitioner.

D. MUSINGA

JUDGE