



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Morumbwa Mogongo Nyaringo - Deceased (Succession Cause 315 of 2015) [2025] KEHC 1143 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 315 OF 2015
TA ODERA, J
FEBRUARY 19, 2025**

BETWEEN

RICHARD MASESE MORUMBWA APPLICANT

AND

ESTHER KERUBO MORUMBWA RESPONDENT

JUDGMENT

1. Morumbwa Mogongo Nyariki the deceased herein died intestate on 23.12.2006 as per the death certificate filed herein. He was a polygamous man with 2 wives i.e the late Eucabeth Mora Morumbwa and Esther Kerubo Morumbwa the protester herein. Deceased was survived by the following adult sons and daughters as per letter from the Chief of Mekenene location dated 13.4.2015:

1st house

- a. Norah Bosibori Morumba
- b. Florence Nyaboke Morumba
- c. Beatrice Kwamboka Morumba
- d. Beatrice Kwamboka Morumba
- e. Tabitha Mwango Morumba
- f. Alice Moragwa Morumba
- g. Richard Masese Morumbwa

2nd house

- a. Isaac Nyaringo



2. Richard Masese Morumbwa was issued with letters of administration of the estate of the deceased on 4.2.16
3. The grant was confirmed on 9.2.2017 and the estate was distributed as follows:
 - a. Matutu Settlement scheme /374 Esther Kerubo
 - b. Matutu Settlement scheme /373 Richard Masese Morumbwa
 - c. Matutu Settlement scheme /372 & Basii /Bondonya /469 Richard Masese Morumbwa to hold in trust for his sisters
4. The protestor objected to the said confirmation and the grant was revoked on 20.6.18 and Esther Kerubo Morumbwa and Richard Masese Morumbwa were jointly issued with a fresh grant.
5. Richard filed summons for confirmation of grant dated 11.3.2020 supported by his affidavit dated on an even date.
6. Paragraphs 9 and 10 of the supporting affidavit contain the proposed mode of distribution to wit:
 - a. Land Parcel Matutu Settlement scheme /374- Esther Kerubo Morumbwa (already transferred).
 - b. Land parcel Matutu Settlement scheme /373 - Richard Masese Morumbwa
 - c. Land parcel Matutu Settlement Scheme /372 - Esther Kerubo Morumbwa & Richard Masese Morumbwa
 - d. Land parcel Basii /Bondonya /469 - Esther Kerubo Morumbwa & Richard Masese Morumbwa (to hold in trust for himself and his sisters)
7. Esther Kerubo Morumbwa objected to the same by filing affidavit of protest dated 27.1.21 on the grounds that land no. 374 is not available for distribution as it does not form part of the estate, that her son Isaac Nyaringo was left out of the succession cause and that land parcels Matutu Settlement scheme /373, 372 and Basii /Bondonya /469 are registered in the name of deceased and are thus available for distribution to all beneficiaries. Also, that her matrimonial home lies on land parcel 372 and thus she will be rendered homeless if the same is shared out.
8. The applicant filed a replying affidavit dated 29.3.21 and said that land 372 was the residue “known as “Emonga” which his father retained after sharing of his land and that he died before transferring 373 to him. he proposed that land parcels Matutu settlement scheme /372 and Basii Bondunya /469 be shared equally between the two houses and 373 to go to him.
9. The protest proceeded by way of viva voce evidence. The objector testified as PW1 and adopted her affidavit of protest dated 27.1.21 she proposed that she retains land parcel Matutu Settlement Scheme /372 while 373 and 469 can go to the 1st house. On cross examination she said that land parcels 372 and 374 are the only disputed parcels. She denied at the “will” of deceased DMFI 1 says 372 comprises of “Emonga”. She said that both houses of deceased have no equal rights of inheritance. Zablon Nyaringo Mokuia (PW2) testified herein in support of the evidence of PW1. He adopted his undated statement filed herein. He said he is a nephew to the deceased and that deceased called him to his home in the year 2006 and told him that he had shared out his land and he wanted his wishes to be honoured upon his demise. He said that land parcel Matutu Settlement Scheme /375 was the Emonga and deceased sold it before his demise. Also, that deceased had bequeathed land parcels Matutu Settlement Scheme /373 & Basii / Bondonya 469 to the 1st house and Matutu Settlement



Scheme/374 and 372 were given to the 2nd house. He said that the first house occupies and uses land 373 while the 2nd house is in occupation and use of 372. On cross-examination, he disowned his statement filed in court. Josiah Obanda Kombo (Pw3) adopted his statement filed in court on 24.11.21 and said that deceased was his cousin. In his statement he supported the evidence of PW1 in all material aspects. On cross examination he said he has two wives and he has shared his land to them equally as per their customs.

10. The applicant called 2 witnesses and he testified as Dw1 and adopted his replying affidavit dated 29.3.21 as his evidence herein. He said only two parcels are disputed that is land no. 372 and 469. He told this court that deceased settled their house on land 373 while 2nd house was settled on 374. He proposed that the disputed parcels be shared equally. He testified that land parcel 372 was the “Emonga” James Onchoke Mogo (Dw2) adopted his statement dated 1/1/21 supported the evidence of Dw1. He said he is a cousin to deceased was polygamous the 1st house resides on land 373 while the 2nd house resides on land 372 is the “Emonga”. He said that on 5.3.2007 he and other elders including Samson Ogega (Dw3) sat to resolve a dispute relating to land 372 and it was decided that land 372 be shared equally between the two houses as per the minutes dated 5.3.2007. Dw3 also supported the evidence of Dw1 and Dw2 that the disputed parcels should be shared equally between the houses.

Determination

11. I have carefully considered the objection filed by Esther Kerubo the replying affidavit, the summons for confirmation of grant, the proposed mode of distribution and the evidence adduced herein by both parties.
12. It is not disputed that in his life time the deceased owned land parcels Basii/Bondunya/469 (0.65 Hectares) number Matutu settlement scheme /31 (12.74 Hectares) which he subdivided into 4 portions i.e Matutu settlement scheme /372(2.2 Hectares), 373(3.8 Hectares), 374 (3.5 Hectares) and 375(2.8 Hectares). Deceased registered land parcel 372 and 373 in his name while 374 was registered in the name of Esther Kerubo his 2nd wife and a title deed was issued to her. 375 was registered in the name of Victor Kiswanya Ogeto a buyer. Deceased settled the 1st house on land parcel 373 and he passed on before transferring the land to the applicant and there is consensus that the same be distributed to that house.
13. The parcels available for distribution are Matutu Settlement Scheme /372 and Basii/ Bondunya /469 which are both registered in the name of deceased.
14. It is not disputed that the both houses of deceased are entitled to inherit his properties.
15. The only issues are:
 - a. Whether land parcel no. Matutu Settlement Scheme /372 is residue land “Emonga” or the objector was settled there by the deceased.
 - b. What is the mode of distribution of land parcel Matutu Settlement Scheme /372 and land parcel Basii/ Bondunya /469?

Whether land parcel no. Matutu settlement scheme /372 is residue land “Emonga” or the objector was settled there

16. The objector proposes that she inherits land number 372 while the 1st house takes 469 as her matrimonial home lies there and deceased left it to her. The Applicant on the other side says land 372 is “Emonga” and ought to be shared equally. PW3 supported the evidence of objector but PW2 recanted his evidence on cross examination and so his evidence and no probative value. Dw2, Dw3 supported



the evidence of Dw1 that the two parcels should be shared equally between the two houses as per Gusii customary law and that no house was lying on land parcel 372. Dw2 and Dw3 said they sat as elder and decided that the land no. 372 be shared equally between the two houses. Pw3 on cross-examination admitted that he also has two wives and has shared out his land equally between his wives as per their customs. I have seen the further affidavit of objector dated 14.10.19 in which she refers to an annexed “Will” and its English translation EKM 1 and 2 respectively. Paragraph 3 of the same says “culturally the mzee’s perceived land should be 372”. I find that deceased was a very organized and wise man as he settled his wives before his death and even transferred land no. 374 to his 2nd wife nothing would have stopped him from transferring land parcel no. 372 to the objector if he intended to gift it to her. This coupled with the firm evidence of Dw1, Dw2, Dw3 and PW3 displaces the evidence of the objector that land parcel 372 was not “Emonga” and that her house lies there. I find that land parcel no. Land parcel Matutu Settlement Scheme /372 is residue land otherwise known as “Emonga” under the Gusii customary law which deceased left for his own use upon sharing out his property to his heirs.

What is the mode of distribution of land parcel Matutu settlement scheme /372 and land parcel Basii/ Bondonya /469?

17. On sharing of the “Emonga” PW1 proposed to take the whole of it while Dw1 proposed that it be shared equally between the two houses. Pw3 said that under Gusii customary law the property of a polygamous man is shared equally between the houses. This was the position espoused by Dw2 and Dw3. Though PW1 disapproves the sharing of land parcel no 372 equally. Gusii customary law provides for equal sharing of property amongst the wives of a deceased. Article 27 of the [Constitution](#) of Kenya also provides for Equality and non-discrimination to wit; “(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

Section 40 (1) of the [Law of Succession Act](#) provides that “40. Where intestate was polygamous

- (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.

18. The deceased had two wives who rank equally under section 40 of the [Law of Succession Act](#) it is fair and just that the two parcels of land forming part of his estate be shared equally between his two houses. I proceed to distribute the properties as follows:

Land parcel Matutu Settlement Scheme/ 372 - to be shared in equal shared between Esther Kerubo Morumbwa (to hold on her own behalf and in trust for her son Isaac Nyaringo in equal shares) and Richard Masese Morumbwa (to hold in trust for himself and in trust for

- a. Norah Bosibori Morumbwa
- b. Florence Nyaboke Morumbwa
- c. Beatrice Kwamboka Morumbwa
- d. Tabitha Mwango Morumbwa
- e. Alice Moragwa Morumbwa in equal shares)

Land parcel Basii /Bondonya 469 to be shared equally between Esther Kerubo Morumbwa to hold on her own behalf and in trust for her son Isaac Nyaringo in equal shares) and Richard Masese Morumbwa (to hold in trust for himself and in trust for

- a. Norah Bosibori Morumba



- b. Florence Nyaboke Morumba
- c. Beatrice Kwamboka Morumba
- d. Tabitha Mwangi Morumba
- e. Alice Moragwa Morumba

In equal shares:

19. Each party will bear his own costs this being a family matter.

T.A ODERA

JUDGE

19.2.25

Delivered Virtually in the presence of:

Mr. Maronga holding brief for Mr. Gichana for the Objector

N/A for Applicant/ Respondent

Maronga: I am holding brief for Gichana for the Objector

Respondent - Absent

Court Assistant - Oigo

