



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PROBATE & ADMINISTRATION CAUSE NO. 213 OF 2015

IN THE MATTER OF THE ESTATE OF JOASH MANYARA MAOGA----(DECEASED)

BETWEEN

RAEL NYABOKE MANYARA.....PETITIONER/APPLICANT

=VRS=

1. DAVID KOMBO MANYARA.....1ST OBJECTOR/RESPONDENT

2. ANDREW BARONGO MANYARA.....2ND OBJECTOR/RESPONDENT

JUDGEMENT

On 12th March 2020 this court rectified the grant of letters of administration intestate issued to Rael Nyaboke Manyara on 4th January 2016, which was the subject of heated opposition by the protestors. By the rectification the court added the administrators of the estate to include Ebisiba Nyagetari Manyara, the widow of the deceased in the first house, David Kombo Manyara and Andrew Barongo Manyara both sons of the deceased and the protestors in the summons for confirmation of the grant. Thereafter this court referred the parties to the Court Annexed Mediation to see if they could agree on the mode of distribution but on 22nd September 2020 the mediator returned a report that the parties had not reached a settlement. That report was however not brought to my attention until 17th December 2020. In my ruling delivered on 12th March 2020 I had indicated that if the parties did not reach an agreement on the mode of distribution then I would write a judgement and distribute the estate based on the evidence that was adduced by the parties at the hearing and this then shall be that judgement.

It is not disputed that the deceased died intestate. It is also not disputed that he was polygamous. Indeed, the beneficiaries of his estate are agreed to be:-

“1ST HOUSE

- | | | |
|------------------------------|---|----------|
| 1. Ebisiba Nyagetari Manyara | – | Widow |
| 2. Elijah Bikundo Manyara | – | Son |
| 3. Dorcah Nyarangi Manyara | – | Daughter |
| 4. Andrew Barongo Manyara | – | Son |
| 5. Charles Omayo Manyara | – | Son |
| 6. Timothy Nyambane Manyara | – | Son |
| 7. Michael Maangi Manyara | – | Son |
| 8. Norah Mora Manyara | – | Daughter |
| 9. Peter Matara Manyara | – | Son |
| 10. Robinson Nyariki Manyara | – | Son |

- | | | |
|-----------------------------|---|-----|
| 11. Walter Kombo Manyara | – | Son |
| 12. Samuel Okiega Manyara | – | Son |
| 13. Josiah Nyamamba Manyara | – | Son |

2ND HOUSE

- | | | |
|--------------------------------|---|-----------|
| 1. Rael Nyabokey Manyara | – | Widow |
| 2. Jane Moraa Manyara | – | Daughter |
| 3. David Kombo Manyara | – | Son |
| 4. Daphine Kemunto Manyara | – | Daughter |
| 5. George Okiega Manyara | – | Son |
| 6. Geoffrey Maoga Manyara | – | Son |
| 7. Salome Kerubo Manyara | – | Daughter |
| 8. Vane Nyanchoka Manyara | – | Daughter |
| 9. Naomi Kemunto Manyara | – | Daughter |
| 10. Evaryline Kwamboka Manyara | – | Daughter |
| 11. Ruth Nyanchoka Mosioma | – | Daughter” |

In the petition the assets comprising the estate of the deceased were listed as:-

- | | | |
|--|---|-----------------|
| 1. West Mugirango/Siamani/3232 | – | 0.09 Ha |
| 2. West Mugirango/Siamani/2135 | – | 0.15 Ha |
| 3. West Mugirango/Siamani/3231 | – | 0.09 Ha |
| 4. West Mugirango/Bonyamatuta/280 | – | 2.2 Ha |
| 5. West Mugirango/Bonyamatuta/109 | – | 3.4 Ha |
| 6. Isoge/Kineni/13 | – | 40.06 Ha |
| 7. Isoge/Kineni/362 | – | 0.046 Ha |
| 8. West Mugirango/Bonyamatuta/220 | – | 2.2Ha |

The above list was however disputed by the protestors. In the further affidavit sworn by Andrew Barongo Manyara on 20th May 2019 he deposed that four of those properties were his. He named properties belonging to him as: -

- “1. West Mugirango/Bonyamatuta/109**
- 2. West Mugirango/Bonyamatuta/280**
- 3. West Mugirango/Siamani/2135**
- 4. West Mugirango/Siamani/2384”**

In the affidavit he deposed that the said properties were transferred to him by the deceased in his lifetime; that the deceased had charged the properties to Kenya Commercial Bank and pursuant to its statutory power of sale Kenya Commercial Bank had advertised the same and the deceased in the presence of all family members asked him to pay the loan to redeem the properties. He alleged that in exchange for him repaying the loans and hence redeeming the properties the deceased executed transfer forms in respect of the same in his favour. He deposed that by the time the deceased died he (Andrew Barongo Manyara) had not finished repaying the loans but when he did so he collected the

duly executed transfer forms and had the properties registered in his name. In the same affidavit he deposed that West Mugirango/Bonyamatuta/220 belonged to one Magoma Nyang'au and was not the free property of the deceased capable of being distributed to the beneficiaries. The protestors also accused Rael Nyaboke Manyara, the widow in the first house, of selling part of the property known as LR Isoge/Kineni/13 to a stranger.

Rael Nyaboke Manyara proposed to distribute the estate as follows: -

“1ST HOUSE

- (i) West Mugirango/Bonyamatuta/220 – 2.2 Hectares
- (ii) Isoge/Kineni/13 – 20.03 Hectares
- (iii) West Mugirango/Bonyamatuta/109 – 3.40 Hectares
- (iv) West Mugirango/Siamani/3231 – 0.09 Hectares
- (v) West Mugirango/Siamani/3232 – 0.09 Hectares

2ND HOUSE

- (i) Isoge/Kineni/362 – 0.046 Hectares
- (ii) Isoge/Kineni/13 – 20.03 Hectares
- (iii) West Mugirango/Bonyamatuta/280 – 2.2 Hectares
- (iv) West Mugirango/Siamani/2135 – 0.15 Hectares”

This court had directed the protestors to file their proposed mode of distribution but upon the advice of the lead Counsel acting for them they refused to do so stating that the property was theirs and nobody could dictate the manner of its distribution to them. The manner of their proposed mode of distribution is however discernible from the testimony of Andrew Barongo Manyara more especially during cross examination.

The law is that the deceased having died intestate the distribution of his immovable property is subject to the **Law of Succession Act** (see **Section 4 (1) (a) of the Law of Succession Act** which states: -

“(1) Except as otherwise expressly provided in this Act or by any other written law—

(a) succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, whatever the domicile of that person at the time of his death;.....”

The power of this court to determine the dispute before it is more specifically derived from **Section 47 of the Law of Succession Act**. The **Section** states: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

The Law of Succession Act therefore gives power to this court to inter alia hear disputes relating to the estate of deceased persons, to grant letters of administration or to appoint legal representatives and to revoke or confirm the grants issued and to determine the mode of distribution if not agreed. The number of cases in which courts have done the above is legend.

The Act also provides guidance to the courts on the manner of distribution of the estate. In the instant case where the deceased was polygamous, guidance is found in **Section 40 of the Law of Succession Act** which states: -

“(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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

Having demonstrated that I indeed have the requisite jurisdiction to deal with the issues arising in this cause and having pointed out the applicable law I now proceed to distribute the estate of the deceased. Before I distribute the estate however, I must first settle the issue of the assets because **Section 34 of the Law of Succession** makes it very clear that the estate of the deceased comprises his free property. **Section 3 of the Act** defines "free property" as ".....the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." Only the free properties of the deceased in this case are open to distribution to the beneficiaries enumerated earlier in this judgement.

So what are those free properties? Having considered the evidence adduced by the parties and indeed all the material placed before the court I am persuaded that LR West Mugirango/Bonyamatuta/220 which Rael Nyaboke Manyara proposed to distribute to the first house was not the free property of the deceased. In his further affidavit sworn on 20th May 2019 Andrew Barongo Manyara annexed a certificate of search "Annexure ABN2" which indicates that the property belongs to one Magoma Nyangau who was registered as its proprietor on 13th July 1976 and a title deed issued to him on 28th August 2007. As there is no evidence to rebut that evidence this court finds that the property belonged to the said Magoma Nyang'au but not the deceased and is not open for distribution.

In regard to property LR West Mugirango/Siamani/2384, that was not included in the list of the assets belonging to the deceased and it will not be treated as such.

That leaves the disputed properties as: -

- (a) West Mugirango/Bonyamatuta/109.
- (b) West Mugirango/Bonyamatuta/280.
- (c) West Mugirango/Siamani/2135.
- (d) Kineni SS/362 which is registered to Kineni Farmers Co-operative Society.

Andrew Barongo Manyara claimed ownership of the properties listed as (a) (b) and (c). He stated that the deceased "willed" or sold them to him at a family meeting held on 2nd February 1997 (Annexure "ABM 1A"). However, during cross examination he conceded that there was nothing to that effect in the typed minutes. It was also his evidence [see paragraph 5 of the further affidavit - that at the meeting the deceased told the first house to take the big property (meaning the larger of his immovable property)] and use it to pay the outstanding loan. At paragraph 6 of the same affidavit and also in his testimony he stated that on 20th July 1998 the three properties were advertised for sale by the bank as the deceased could not repay the loan. The advertisement was attached to the affidavit as annexed "ABM 2". He stated further (see paragraph 8 of the further affidavit) that when the properties were advertised the deceased gave an undertaking to the bank that he (Andrew Barongo Manyara) would pay the outstanding loan and tasked the bank with transferring the properties to him. At paragraph 9 of the affidavit he deposed that the deceased in fact executed transfer documents in respect of those properties so that upon discharge they could be transferred to him. It was also his evidence that although by the time the deceased died on 1st June 2000 the loan was still outstanding he subsequently repaid the loan in full and was given the transfer documents which facilitated the transfer of the properties to himself in 2003. Rael Nyaboke Manyara annexed search certificates which confirmed that the transfers of the properties took place as follows: -

- (a) West Mugirango/Bonyamatuta/109 was transferred to Ebisiba Nyagetari Manyara (the mother of Andrew Barongo Manyara) on 17th April 2003.
- (b) West Mugirango/Bonyamatuta/280 was transferred to Andrew Barongo Manyara on 17th April 2003.
- (c) West Mugirango Siamani/2135 was not registered in the name of Andrew but in the name of the deceased.

Other properties that were registered in the name of Andrew Manyara were **West Mugirango/Siamani/3231** on 13th February 2003 and **West Mugirango/Siamani/3232** on 13th March 2003. It is instructive to note that Andrew Barongo Manyara did not produce the transfer forms allegedly executed in his favour by the deceased. He was also hard pressed to prove that it was he who in fact redeemed the properties. He could have produced bank statements or deposit slips to prove he paid monies into the loan account but he did not. It is also noteworthy that the minutes of the family meeting do not have anything to show that the deceased "willed" the properties to Andrew Barongo Manyara or the first house as he alleged. He who asserts must prove and as Andrew Barongo did not prove his allegations on a balance of probabilities I am not persuaded that the properties belong to him. Andrew Barongo Manyara and his co-protestor were emphatic that the deceased died on 1st June 2000 but not on 2nd November 2015 or 8th January 2015 as averred by Rael Nyaboke Manyara. In the further affidavit, Andrew Barongo Manyara annexed a certificate of death to confirm the deceased died on 1st June 2000. The estate of the deceased being subject to the Law of Succession Act the beneficiaries could only wait for a legal representative(s) to be appointed and for the grant to be confirmed before they could deal with the estate of the deceased. As stated earlier in this judgement the estate is subject to the **Law of Succession Act** and **Section 55 (1) & 82 (b) (ii) of the Law of Succession Act** make it succinctly clear that unless and until the grant has been confirmed there can be no division or disposal of immovable property. **I do therefore find that the transfers and/or change of ownership of the properties that occurred after the death of the deceased were done unlawfully and are null and void. Accordingly, the titles issued to ANDREW BARONGO MANYARA and his mother EBISIBA NYAGETARI MANYARA were issued unlawfully and this court directs that the same be and are hereby cancelled and the ownership thereof reverted to the estate of the deceased.** The above mentioned order shall also apply to property ISOGE/KINENI/362 which according to the certificate of search filed by Rael Nyaboke Manyara was registered in the name of Kineni Farmers Co-operative Society on 2nd December 2010 which is ten years after the death of the deceased. The properties shall then be distributed as follows in accordance with **Section 40 (1) & (2) of the Law of Succession Act:** -

1ST HOUSE

1. LR West Mugirango/Bonyamatuta/109	–	3.4 Ha
2. LR West Mugirango/Siamani/3232	–	0.09 Ha
3. LR West Mugirango/Siamani/3231	–	0.09 Ha
4. LR Isoge/Kineni/13	–	20.03Ha
5. LR West Mugirango/Siamani/2135	–	0.075 Ha
6. LR West Mugirango/Bonyamatuta/280	–	<u>1.1 Ha</u>
TOTAL ACREAGE	–	<u>24.785 Ha</u>

2ND HOUSE

1. LR Isoge/Kineni/362	–	0.046 Ha
2. LR West Mugirango/Siamani/2135	–	0.075 Ha
3. LR Isoge/Kineni/13	–	20.03 Ha
4. LR West Mugirango/Bonyamatuta/280	–	<u>1.1 Ha</u>
TOTAL ACREAGE	–	<u>21. 251 Ha</u>

As I stated in the body of the judgement **LR WEST MUGIRANGO/BONYAMATUTA/220** was not the property of the deceased and it is not open for distribution. The properties that devolve to each house shall then be distributed equally between the children taking care to treat the widow in that house as a separate unit. A certificate of confirmation to issue.

As regards the costs of the proceedings, parties shall bear their own this being a family matter. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED ELECTRONICALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 4TH DAY OF MARCH 2021.

E. N. MAINA

JUDGE