



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 229 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE SAM (DECEASED)

GNM.....1ST PETITIONER

DNA.....2ND PETITIONER

-VERSUS-

MNA.....RESPONDENT

-AND-

NSM.....PROTESTOR

JUDGEMENT

BACKGROUND

1. The deceased herein **SAM** died on 2nd July 2016. From affidavit in support of petition, the deceased had married two wives. The first **MNN** who is divorced has 8 children. The affidavit shows three being deceased now and the second wife **GNM** listed 3 children making 4 units in respect to the second house as shown in paragraph 4 of the affidavit in support of the petition as hereunder: -

a. First House

- 1. MAA (Divorced)**
- 2. DNA**
- 3. EM (Deceased)**
- 4. WMM**
- 5. ESM (Deceased)**
- 6. NKM**
- 7. NSM**
- 8. AMM (Deceased)**

b. Second House

- 1. GNM (Widow)**
- 2. JTM (Adopted)**

3. IAM (Adopted)

4. FMM (Adopted)

2. The second wife **GNM** and the first-born daughter in the first house **DNA** filed this petition for grant of letter of administration.

3. Properties of the deceased are as listed below

i. Njoro/Ngata Block [xxxx]

ii. Waitaluk/Mabonde Block [xxxx]

iii. LR No. Majoke/Bosoti/[xxxx]

iv. Nyamasage Market Plot No.[xxxx]

4. Through the firm of **Ogeto & Ogeto Advocates** the 1st petitioner filed summons for confirmation grant dated 14th June 2019 and attached affidavit in support of the summon indicating the proposed mode of distribution between the two houses as shown in paragraph 6 of the supporting affidavit.

5. In response to the summons for confirmation **DNM** representing the first house filed replying affidavit dated 10th July 2019 and proposed distribution as shown in paragraph 17 of the replying affidavit.

2ND PROTESTOR'S CASE

6. **DNA** averred that the deceased left behind two houses and that the first house was left with 6 units as the first wife was divorced; that 2 sons **ESM** and **EM** being deceased leaving behind families and **AMM** died with no family left and the second house on the other hand having one unit as set out below: -

(a) First house

1. **DNA** (daughter)

2. **WMM** (daughter)

3. **LKN** in her capacity as the wife of the late **EM** (son)

4. **JK** in her capacity as the wife of the late **ESM** (son)

5. **NKN** (daughter)

6. **SNN** (son)

(b) 2nd house

GNM

7. She further averred that the first house consists of 6 units made up of the children of the deceased and families of the ones who are now deceased and the second house is one unit made up of the widow who is the first petitioner herein as she never had any biological children with the second wife; that the chiefs letter shows they were adopted but no order has been produced to prove the same; that the birth certificates produced are forged and superimposed and cannot therefore be relied on; that the second wife's children are adoptees and there is no evidence that they all depended on the deceased for subsistence. She further averred that property **Nyamasege Market Plot No.[xxxx]** was erroneously included as part of the estate as it belongs to **MNA** by virtue of being allocated to her after the demise of her father Mr. **ABK** who purchased from **WMO** and attached copy of acknowledgment.

8. She further averred that all the deceased's properties were acquired during the subsistence of marriage between the deceased and **MNA** who immensely contributed to acquisition of the said properties without input from **GNM**; who only came after properties had been acquired and being the succeeding widow she is the only one entitled to what was acquired during subsistence with the deceased and any contrary decision is subject to justification that the surviving purported beneficiaries depended on the deceased prior to his death.

9. She further averred that the 1st petitioner connived with the deceased to sell the following properties to the exclusion of the first house.

i. Langalanga plot comprising 3 shops.

ii. Nakuru Municipality Block [xxxx](Ronda) comprising 7 rooms.

ii. Njoro/Ngata Block [xxxx] measuring 4 acres in the year 2000.

iv. Nyansara 6 acres.

v. 17 dairy grade cows.

10. She stated that the first house was resided on their matrimonial home, land parcel known as **Njoro/Ngata Block [xxxx]** since 1973 and have no other home; that her father, brothers and sister were buried on the said land **Njoro/Ngata Block [xxxx]**; she added that after the 1st petitioner was married into their home, she took her mother's matrimonial home in Ngata leaving her children destitute.

11. She urged the court not to share the deceased's property equally at the detriment of the first house and proposed distribution as per paragraph 17 of her affidavit set out as follows: -

1. Land **Njoro/Ngata Block [xxxx]** measuring approximately 14 acres to go to first house to be held by **MN** in trust for her children.

2. **Waitaluk/Mabonde Block [xxxx]** measuring approximately 8 acres to go to **MN** to hold in trust for her children

3. **LR No. Majoge/Bosoti/[xxxx]** measuring 10 acres **GN** to have 2 acres and **MN** 8 acres

12. In the distribution schedule attached to affidavit in support of summons for confirmation the proposed mode of distribution as follows: -

	<u>1st House</u>	<u>2nd House</u>
1. Land Njoro/Ngata Block [xxxx]	7.75 acres	6.25 acres
2. LR No. Majoge/Bosoti/[xxxx] measuring	5.55 acres	4.45 acres
3. Waitaluk/Mabonde Block 8/Nyabomo/[xxxx] acres		3.56 acres
4. Nyamasege Market Plot No[xxxx] (50 by 100)-To be sold as it cannot be divided.		

13. I note that the consent in respect to above distribution is signed by **GNM** alone.

14. **JTM** swore an affidavit dated 4th September 2019 stating that he is the first born in the second house and that he grew up with his father until he died and that he was taking care of him; that the deceased took him to school and he took care of the deceased when he was sick under instructions of his mother until he died in their hands.

15. He further stated that **IAM** and **FMM** are his siblings; that his father took care of them until his demise and it would be wrong for anyone to impute that they are not his children; that they are the legal children of the deceased from the second house.

16. **NA**, the mother of 2nd petitioner filed affidavit dated 25th November 2019 sworn by **M** where she stated that the property was acquired by her and the deceased; and the 1st petitioner came in to deplete all the matrimonial properties with children who are not biological children of the deceased.

1ST PETITIONERS CASE

17. In response the 1st petitioner filed replying affidavit dated 23rd September 2019. She stated that the 2nd petitioner declined to sign affidavit in support of summons for confirmation saying she did not accept the mode of distribution.

18. 1st petitioner averred that her mode of distribution is at variance with the 2nd petitioner's proposal and urged this court to determine mode of distribution as per Succession Act; that as per **Section 40 of Succession Act**, property should be distributed among houses according to the number of children in each house who are counted as units in each house and since there are 5 units in the first house and 4 in the second house, the ratio should be 5:4 respectively. She urged this court to follow her proposed ratio and distribute the estate as per paragraph 6 of her affidavit.

19. She denied that property number 3 was purchased by the father to 2nd petitioner's mother; that what 2nd petitioner has stated are lies but instead it is the deceased who purchased it from the seller. And that it was already developed and that she signed the agreement as a witness at the time of purchase. She attached the agreement.

20. She further denied that she did not contribute to the acquisition of the property and stated that she witnessed the deceased acquiring and increasing his estate. She denied knowledge of property alleged to have been sold by her and her late husband as listed in paragraph 12 of the 2nd petitioner's affidavit.

21. She averred that the court should disregard the 2nd petitioner's mode of distribution in paragraph 17 of her affidavit and follow paragraph 6 of her affidavit.

22. In respect to matrimonial home, she averred that each house has its matrimonial home; that each house has a house in its compound.

LKN' S PROTEST

23. **LKN** said she swore affidavit of protest dated 8th December 2020. She averred that she was the wife of **EMM** (deceased) a son from the first house and that they were blessed with three children. She listed the 3 children in paragraph 3 of her affidavit. She averred that her first born son is 18 years old now and they are capable of jointly holding her husband's entitlement from the estate in trust for themselves and her two children under 18 years.

24. She further averred that the 1st petitioner has given a ratio of 5:4 in respect of units without giving identities and shares of persons beneficially entitled to the estate. She further averred that from the 2nd petitioner's affidavit dated 10th July 2019, she does not recognize them as beneficiaries of the estate of the deceased. She is also opposed to entire share of 1st house being held by **MNA**; that dependents of **EMM** have not been consulted and consented to the mode of distribution. She averred that the first house has 7 units including **MNA** as she has not renounced her right to the estate; that one **AMM** is deceased with no children reducing the units to 6.

25. She restated her averments in her submissions dated 27th January 2021 through **S.N. Otinga Advocates**.

NSMS PROTESTOR

26. **NSM** a son of the deceased filed protest and submission in respect to his protest through **Wambua K. & Company Advocates**. His ground of protest is that he was not involved in filing of succession petition and that the deceased had already distributed his property among his children, wife and former wife. He said he left out Nyamsege Market Plot No.[xxx] as it was not his property.

27. He further stated that he has encountered discrimination from his mother who is colluding with his sister the 2nd petitioner to deny him a portion of his father's estate; and that his consent was not sought during issuance of grant and cited authorities to support the position that issuance of grant must be accompanied by consent duly signed by persons entitled to the estate. In his affidavit dated 18th January 2021 which was filed in support of his application dated 18th January 2021 seeking to be allowed to use a portion of LR Njoro/Ngata Block [2021] (Kirobon) pending hearing and determination of this petition; he averred that he has been denied use of family land and the respondent caused him and his wife arrested for a charge which was later withdrawn.

2ND PETITIONERS SUBMISSIONS

28. The second petitioner filed submissions dated 30th January 2020. She restated averments captured above and identified 2 issues for determination one being method of distribution of the deceased's estate and the position of the adopted children of the 1st petitioner (2nd house).

29. She submitted that it is not disputed that the deceased left behind 2 houses and that he died without leaving a will and therefore his estate will be regulated by the law intestate of succession; that they concede that **Section 40 of the Succession Act Cap 160** will apply and quoted provisions of the above section; she submitted that the deceased and her mother who is divorced acquired property with the deceased during the subsistence of the marriage. She questioned whether the 1st petitioner and her family will benefit from the property she did not contribute and which was acquired by the deceased and the respondent before the deceased married first petitioner. She cited provisions of **Section 8 of the Matrimonial Property Act No.49 Of 2013** which provide that matrimonial properties acquired by a man and first wife shall be retained equally by the man and first wife only if they were acquired before the man married another wife and matrimonial property acquired after he has married the second wife will be shared between him and the wives taking into account contribution of the man and each of the wives.

30. She further submitted that properties **Njoro/Ngata Block [xxxx] (Kirobon)** and **Waitaluki/Mabonde Block [xxxx]** were properties owned by the deceased and her mother before the 1st petitioner was married; and further the 1st petitioner has not shown the court how she got married. She urged court to distribute the deceased's property per her replying affidavit dated 10th July 2019.

31. On adopted children, the 1st petitioner submitted that the evidence adduced is not sufficient to prove that the subjects are the deceased's adoptees. She cited **Section 156 of the Children's Act Cap 41** which provide that an adoption order has to be made in favour of a parent or guardian adopting a child and submitted that an adoption order has not been produced in respect of the 1st petitioner's children; she submitted that the said adoptees are not entitled to the deceased's property without an adoption order.

1ST PETITIONERS SUBMISSIONS

32. The 1st petitioner restated her averments and urged the court to determine the beneficiaries of the deceased and the estate to be distributed. She submitted that **EMM** died earlier before 20th November 2019 and left behind no family; that he did not leave behind 3 children as alleged; she questioned why the alleged wife has not come to court as beneficiary. She submitted that a scrutiny of the birth certificates show they were issued the same day. She submitted that the said 2 sons of the deceased died without families and they cannot be counted as units and urged the court to find that the 1st house has 5 units. She also prayed that rent received by **MNA** be counted as part of the estate and be distributed as part of the estate.

33. She further submitted that no evidence has been adduced to prove that **MNA** contributed to the acquisition of the property. She urged this court to distribute the estate of the deceased as per application for confirmation dated 14th June 2019.

34. On argument that the 2nd petitioner's mother contributed to acquisition of the property, she urged court to find that this is a succession matter not a matrimonial cause and also the issue cannot be determined by affidavits and without oral evidence being adduced, the court will apply accepted mode of distribution.

35. She also challenged affidavit in respect of the children as belonging to **ESM**.

ANALYSIS AND DETERMINATION

36. There is no dispute that the deceased **SAM** left behind two houses. The first house being his divorced wife and 6 children three of them now deceased. It is not also disputed that of the 3 deceased children one **AM** a daughter, left behind no family. In her submissions the 1st petitioner challenged existence of the children left behind by the two deceased son **EM** and **ESM**.

37. It is also not disputed that the 1st petitioner never had any biological children with the deceased and her 3 adopted children whose entitlement to the estate is being challenged by the 2nd petitioner.

38. I consider the following as being issues for determination: -

1. Who are the beneficiaries of the deceased and what ratio of distribution should be adopted?

2. Whether all the properties listed by the 1st petitioner are subject to distribution.

39. Issue is whether the 3 children listed by 1st petitioner should be listed as units for the 2nd house to make 4 units. The 2nd petitioner's argument is that the 3 adopted children of the 1st petitioner should be excluded as there is no prove that they were adopted and that they relied on her father.

i. Who are the beneficiaries of the deceased and what ratio of distribution should be adopted?

40. The 2nd petitioner challenged the inclusion of the 1st petitioner's 3 sons in the list of beneficiaries arguing that there is no document produced to prove that they were legally adopted by the deceased. The 1st petitioner on the other hand argued that the 2 sons and a daughter were adopted by the deceased and that he is the one who maintained and educated them. She produced registration documents in respect of her 3 children.

41. On perusal of chief's letter dated 20th December 2016, I note that he has indicated that the second house has 3 adopted children. I also note that in the registration certificates attached to the 1st petitioner's affidavit dated 23rd September 2019 has the deceased's name as the father of the 3 children. The 2nd petitioner has not demonstrated that the documents are not genuine. If they were a forgery, she should have taken action to report to the relevant authorities for action to be taken against the 1st petitioner.

42. Even though I have not seen adoption order, there is no doubt that the children lived with the deceased and he took parental responsibility of them. From the foregoing I find that they are children adopted by the deceased and the 1st a petitioner and they are entitled to benefit from his estate. The units for the 2nd house are therefore 4.

43. In respect to the first house, the 1st petitioner wants the court to declare that the deceased two sons **ESM** and **EMMe** never left behind any family and the units in the first house should be reduced by three being the said 2 deceased sons and the deceased daughter. The wife of **EMM**'s wife **LKN** however filed an affidavit stating that she was his wife and her deceased husband left behind 3 sons and attached their birth certificates. I have perused the birth certificates and note names recorded as parents are **EMM** and **LKN** in respect to the 3 children. No evidence of forgery has been adduced; there is no evidence indicating that the 1st respondent has lodged any complaint to the relevant investigative authorities concerning the authenticity of the birth certificate. These are documents from a government office whose authenticity have not been challenged. I therefore have no reason not to believe the contents. I find that the deceased's son **EMM** left behind a wife and 3 children who should inherit his share of the estate.

44. I also note that **JK** swore affidavit dated 15th November 2015. She averred that she had two children namely **MMS** and **MMS** with the deceased's son **ESM**. She attached their birth certificates. I have perused the birth certificates and confirmed that she is named as the mother and the deceased's son **ESM** is the father. Authenticity of the two documents have not been challenged. I therefore find that the deceased's son **ESM** left behind a family, wife and two children who should inherit his share in the estate of the deceased.

45. From the forgoing I find that the 1st house' s units should only be reduced by one being the deceased daughter **AM**.

ii. Whether all the properties listed by the 1st petitioner are subject to distribution.

46. The 2nd petitioner testified that some of the deceased's property were sold by 1st petitioner together with the deceased. She however never produced any documents to confirm that. On the property which she allowed was given to her mother by her father, the 1st petitioner produced sale agreement to confirm the deceased purchased it and she signed the agreement as a witness. The property therefore forms part

of the estate of the deceased.

47. On matrimonial home, 1st petitioner averred that each house is occupying a matrimonial home. None of the other parties who have filed affidavits raised the issue.

48. From the foregoing I find that properties of the deceased are as listed by 1st petitioner in the affidavit in support of summons for confirmation.

49. FINAL ORDERS

- 1. The estate of the deceased to be distributed according to houses depending on the units in each house; the 1st house being 6 units and the 2nd house being 4 units; therefore, a ratio of 6:4.**
- 2. Properties listed in paragraph 6 of affidavit in support of summons for confirmation to be subjected to be distributed between the two houses in the ratio of 6:4.**
- 3. Families of the 2 deceased sons to be a unit in the 1st house each; in respect to EMM his wife LKN and son to hold his share in trust for themselves and the two minor children and in respect of ESA his Wife JK and her two children MMS and Mark Mandere to be one unit.**
- 4. Proceeds from lease of the deceased property to treated as part of the estate.**
- 5. Each party to bear own costs.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 6TH DAY OF MAY, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mr. Ogeto Counsel for 1st Petitioner

Mrs. Mbeche Counsel for 2nd Petitioner

Wambui Counsel for Protestor Nathaniel

Mr. Otunga Counsel for Protestor Lydia