



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**SUCCESSION CAUSE NO 250 OF 2011**

**IN THE MATTER OF THE ESTATE OF YORITA NYOMENDA (DECEASED)**

**AND**

**MARIA NYANKOMBA GETATE.....APPLICANT**

**VERSUS**

**FRANCIS NYANG'AU ONGORI.....OBJECTOR**

**RULING**

1. The matter relates to the Estate of **YORITA NYOMENDA**, the deceased, who died on 20<sup>th</sup> July 1991. A grant of letters of administration was issued to Francis Nyang'au Ongori ('Francis') and Maria Nyankomba Getate ('Maria') on 27<sup>th</sup> March 2017.
2. The estate of the deceased comprise of parcel number CENTRAL KITUTU/MWAMANWA/44.
3. Maria filed an application before this court on 9<sup>th</sup> November 2017 seeking confirmation of grant and costs of the application. In her supporting affidavit she proposed that land parcel number CENTRAL KITUTU/MWAMANWA/44 be distributed equally between the co-administrators to hold in trust for the other beneficiaries.
4. Affidavits of protest were filed by Francis and the applicant's husband Andrew Gatate Ongori (now deceased) on the 29<sup>th</sup> January 2018 and 9<sup>th</sup> April 2018 respectively.
5. Francis in his affidavit of protest averred that the deceased had two sons, Andrew Gatate Ongori and the protestor. The deceased divided land parcel number CENTRAL KITUTU/MWAMANWA/44 in 2 equal portions to each of her sons. Andrew Gatate Ongori married two wives, Maria and Wilkister Kerubo (also deceased).
6. According to Francis, it is not possible to ascertain the size for land parcel number CENTRAL KITUTU/MWAMANWA/44 due to certain developments which had taken place such as the building of a school as well the creation of an adjacent road thereby reducing the original size of the deceased's land significantly. Francis proposed that the grant should be confirmed only after considering all the changes that have occurred over the years.
7. Maria filed a further affidavit on 19<sup>th</sup> April 2018 deposing that the deceased had put up boundaries dividing the land between her two sons equally. She however conceded that currently the boundaries are not well defined. She avers that the land should be divided as per the boundaries put up by the deceased. According to her the school had no effect to the size of the land as it had been established before 1970.
8. The court directed that the protest be heard by way of viva voce evidence and the parties adduced their evidence. The evidence which was produced was as follows.
9. Francis (Pw1) testified that the deceased land was divided in 2 portions and that the sizes of the portions changed because of the land where his brother Andrew Gatate Ongori had reduced owing to the construction of a road. He testified that the court should accept the wishes of the deceased. He told court that if there were further sub-divisions, it should be in his favour. He testified that his brother was given a portion of the land and subdivided his portion of the land between his 2 wives. He testified that he has kept his portion of land with a clear fence. He testified that before the road was constructed KPLC came and put the poles in plot No.43 and that led to the road running into the deceased land thus reducing the portion of land. He also testified that there is no clear boundary between plot No.44 and 45.

10. Lawrence Nyangaka Omari (Pw2) testified that he has leased land from Francis and that there is boundary dispute between Francis and Maria.

11. Maria (Dw1) testified that the deceased was her mother in law. She testified that the deceased had divided the land equally between Francis and her husband. She told court that after the sub-divisions there arose a dispute as Francis took away a piece of land that was allocated to her and demolished the boundary features and the matter escalated to Mosochi Land Tribunal. Dw1 testified that the tribunal ordered Francis to surrender the piece to her but he refused.

12. The court further directed that the Kisii County surveyor and the Land registrar visit the suit land and determine its acreage, occupants on the ground and the boundaries on the parcel.

13. According to the report by Nicodemus Nyamari, Kisii County Surveyor filed on 19<sup>th</sup> June 2019, the parcel is approximately 5.33 Hectares. The family of Francis and the 2 wives of Andrew Gatate Ongori live on the suit land.

14. A further report was filed on 23<sup>rd</sup> July 2020 by the Kisii County Survey Office where it was noted that the boundaries of the parties herein are not clearly defined. It was reported that the size of land parcel number CENTRAL KITUTU/MWAMANWA/44 is however well defined. The surveyor Philip Wafula Barasa attended court and testified that there was a boundary issue between land parcel numbers CENTRAL KITUTU/MWAMANWA/44 and 45 but the owner of the land parcel 45 had died the issue was not resolved. On cross examination he testified that rectification of the boundaries can be sorted out once the succession process is complete.

15. At the close of the oral hearing, the parties filed written submissions, which I have read through and noted the arguments made.

16. What is before me is a summons for confirmation of grant and consideration of the affidavit of protest by Francis. **Section 71 of the Law of Succession Act**, which provides as follows:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

17. It is not disputed that the deceased had 2 sons whom she equally divided her land to before she died. Although Francis contends that it is not possible to ascertain the size of the deceased properties, the survey report dated 18<sup>th</sup> June 2019 reveal that the land is approximately 5.33 Hectares.

18. However, neither the applicant nor the protestor disclosed the beneficiaries of Wilkister Kerubo (deceased), the wife to the deceased's older son Andrew Gatate Ongori. The children of Wilkister Kerubo are also entitled to a portion of Andrew Gatate Ongori share.

19. It was not disputed that the deceased had given each of her son equal portions of land parcel numbers CENTRAL KITUTU/MWAMANWA/44. However, there appears to be a dispute between Mary and Francis regarding the boundaries separating their respective occupied portions.

20. The survey report show that the size of parcel numbers CENTRAL KITUTU/MWAMANWA/44 is approximately 5.33 Hectares. Having found that the size of the land is 5.33 Hectares and that both parties have not contested the fact that the land had already been equally distributed among the Francis Nyang'au Ongori and Andrew Gatate Ongori, I see no reason why I should not confirm the grant as proposed. There was no evidence from the Kisii County Surveyor showing that a school or road had encroached the deceased land.

21. In light of the foregoing observations, I shall make the following orders:

1. The protestor's protest dated 24<sup>th</sup> January 2018 lacks merit.
2. The grant of letters of administration intestate issued to Francis Nyang'au Ongori and Maria Nyankomba Getate on the 27<sup>th</sup> March 2017 shall be determined as follows;
  - i. The estate shall be distributed equally between **Francis Nyang'au Ongori** and **Maria Nyankomba Getate**.
  - ii. Maria Nyankomba Getate shall hold the share of Andrew Getate in trust for all his beneficiaries including children from the house of Wilkister Kerubo (deceased).
  - iii. Distribution of the estate shall take into account the permanent homes of the beneficiaries.
  - iv. A certificate of confirmation of grant shall issue accordingly.
  - v. Any party unhappy with these orders has leave of 28 days to move the Court of Appeal appropriately.
  - vi. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14<sup>TH</sup> DAY OF DECEMBER, 2021**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Mr. Begi For the Petitioner**

**Mr. Nyagaka For the Objector**

**Kevin Isindu Court Assistant**