



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 167 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE HARON LITABA AKHABELE(DECEASED)

SELLAH KHABERE LITABA.....1ST PETITIONER

MARGARET AYOMBA ANGUKO.....2ND PETITIONER

VERSES

JAPHETH OSILU LITABA.....1ST OBJECTOR

MARGARET MUSABI LITABA.....2ND OBJECTOR

JUDGEMENT

1. The deceased herein died intestate on the 12th day of May, 2005. Vide an amended grant by this court dated 12th February 2014 the petitioners as well as the 1st Objector were appointed as Administrators of the Estate of the deceased herein.
2. The 2nd Petitioner filed an application dated 21st July, 2014 for the confirmation of grant issued on the 12th February, 2014. The estate according to her was to be distributed to the two houses of the deceased wives who have since passed on namely the house of the then 1st petitioner and the house of Mary Wandia, who was the mother to the 1st Objector.
3. At this juncture it is worth to note that the deceased herein according to the 2nd Petitioner had the two houses with the following children.

(A) STELLAH KHABERE LITABA (WIDOW) ... DECEASED

(B) QUEEN AWINO..... DAUGHTER(DECEASED)

(C) HANNAH OLESI.....DAUGHTER.... (DECEASED)

(D) JANE NYAKINA.....DAUGHTER...(DECEASED)

(E)DORICE ONDECHE LITABA.....DAUGHTER

(F) MARGARET AYOMBA ANGUKO..... DAUGHTER

(G) MARY WANDIA2ND WIDOW...(DECEASED)

(H) JAPHET OSILU LITABA..... SON

(I) RAE LILY LITABA.....DAUGHTER

(J) LEAH AGISO LITABA..... DAUGHTER

(K) FRANCIS KHABELE..... SON (DECEASED)

4. The applicant then left the 2nd Objector arguing that she was not the deceased widow and therefore not entitled to the estate. The 1st Objector filed an affidavit of protest sworn on 3rd of June 2015 arguing that the 2nd Objector was indeed the deceased third wife and therefore had the right over the estate.

5. When this matter came up for directions the court ordered that the matter be disposed by way of oral evidence and the parties granted leave to file further affidavits and statements if they deem necessary. The Objectors were deemed the plaintiffs and the petitioners the Defendants.

6. PW1 JAPHET OSILU LITABA testified that he was the son to the deceased and Stellah Litaba was her step mother who took care of them when her mother died. He relied on his affidavits which were already on record as well as other documentary evidence. He said that his mother was called Mary Litaba who died around 1979. He went ahead and produced what he termed as the deceased wishes dated 8 November, 2004.

7. He said that the 2nd Objector was the 3rd wife to the deceased who took care of him until his demise. He went ahead to produce sets of photographs taken during the deceased funerals and others which were taken when he retired at Pan Paper mills. He said that the 2nd Objector lives with him in Kisumu after she was threatened by the Petitioners and further so as to receive medication. He denied that he was ever involved in the distribution of the estate by the petitioner.

8. On cross examination he said that he wants the estate to be distributed according to the three houses. He acknowledged that he had sold a plot at Corner Mbaya but it was sanctioned by the deceased. He said that there are other people who purchased land from the deceased and that the petitioners have sold some portion of land after the deceased had died despite the existence of a court order.

9. PW2 MARGARET MUSARI LITABA, the 2nd Objector testified that she was the deceased third wife having married her under the tenets of Bunyore customary law in the year 1979. She said that dowry was paid and she produced a written agreement to that effect. She said that they lived at Mabusi Settlement scheme plot no 1. She said that when she was married she found the deceased 2nd wife had died and had left behind 4 children who included some of the beneficiaries and she took care of them.

10. She said that the deceased build her a brick house which was still in existence to date and that she left after his death because she was threatened by the petitioner and that she has been ailing and therefore sought medication in Kisumu. She said that she did not have any child with the deceased but she had one daughter whom she already had by the time of their marriage. She identified the photographs taken during the funeral and where she featured very prominently holding the deceased photograph. She also identified the photos taken during the farewell of the deceased at his working place at Pan paper mills, Webuye.

11. She also produced her identity card which bore the name of the deceased who was her husband. On cross examination she admitted that she did not report the threats incident at the police station.

12. PW3 ISSA MUSIRANGOMBE SINDAPI testified that he knew the deceased who was his brother in law having married the 2nd Objector herein in the year 1979 and paid dowry as per the agreement dated 20th September, 1982. The same was signed by his father as well as other witnesses. The agreement dated 18th May, 2003 was for the completion of the dowry.

13. On cross examination he said that he took part of the dowry after their father had died. He said that the 2nd Objector had not been married elsewhere prior to marrying the deceased although she had a child prior to marrying him.

14. PW 4 JONES OMONGO ETOLE testified that he knew the deceased having worked with him at Pan Paper Webuye. He said that he was his neighbour and he knew the 2nd Objector as his wife. He said that he knew all his wives including the two who predeceased him. That the Objector took care of the deceased young children whose mother had passed on. He said that the Objector was at home and she participated in the funeral arrangements and he identified her in the set of photos produced.

15. On cross examination he said that he did not see the dowry payment but he stayed with the deceased and the 2nd Objector for 10 years between 1978 to 1997. He however did not know where the Objector stayed now as he had not seen her for a while.

16. DW1 MARGARET AYOMBO ANGUKO testified that the deceased was her father and the 1st Objector her step brother. Her mother Stella Litaba has since passed on. She said that the 2nd Objector whom she got to know in the year 1977 was their house help and she did farm work and was paid salary. She said that she was never the deceased wife as she was staying with her at Corner Mbaya when they were young.

17. She denied that she was build a house and that the house belonged to her father. She went on to state that the 1st Objector evicted their mother from her house and the matter reported at the chief's office. She implored the court to rely on her affidavits which were already in court.

18. She further wanted the children of her sisters who were already married to benefit from the estates as they were orphans. She admitted that the 1st Objector sold some plots and that she had also sold some portion of the deceased estate.

19. She further stated that there was nothing special in the carrying of the deceased photo during the funeral since it could as well be carried by someone else and it was not indicative of the marriage between the deceased and the 2nd Objector.

20. On cross examination she admitted the objector was the one carrying the deceased photo as well as the presence of the 1st Objector. She

said that there is no evidence that the 2nd Objector was paid any salary as there was no payslip. She generally admitted that the objector was found in all the photos produced.

ANAYISIS AND DETERMINATION

21. The court after the close of the hearing ordered the parties to file written submissions. Apparently it is the Objectors Counsel alone who has managed to file. The court has perused the same as well as the attached authorities.

22. The main issue to be determined is the position of the 2nd Objector in the estate. The Petitioner stated that she was never the deceased wife and that she was simply a maid who was salaried.

23. It is not disputed that the deceased had 2 wives who have since died and had children with them although some of them have also passed away.

24. The evidence on board in my view clearly points out to the fact that the 2nd Objector by all means was the wife to the deceased despite not having any child with her. It is not in dispute that the said objector when she got married to the deceased had only one child, a girl.

25. The finding that the deceased married the Objector is based on the evidence that dowry was paid according to the Bunyore customs. The agreements were produced to that effect. PW3 the Objectors brother testified and in fact confirmed that he was given the last cow forming part of the dowry after the death of his father.

26. Secondly the Objector's national identity card produced clearly indicated her name to be **MARGARET MUSARI LITABA ID NO.6224023** and the deceased as **HARON LITABA AKHABALE ID. NO.6098752**. The same was obtained before the deceased died.

27. The other evidence which was uncontroverted was the fact that the deceased lived as husband and wife from around 1979 till his demise. Although they were not blessed with a child they nevertheless stayed as a family.

28. The set of photographs produced including the one where the deceased was being felicitated at Pan paper mills Webuye as he retired were not disputed. Those produced at the funeral of the deceased were not as well disputed. I highly doubt given the extent of the objector's involvement in the deceased funeral that she will simply do so as a neighbour or a maid.

29. In the premises, this court is satisfied that the 2nd Objector is a third wife to the deceased. She therefore has a right and a claim over her husband's estate. Although she was no longer staying in her matrimonial home, the house build for her by the deceased was and is still there to date.

30. The Petitioner's objection that she was not a wife stood on a shaky ground for although she may have known her at Corner Mbaya, while young she was married by her father and thus she is her step mother.

31. Turning to the second issue of the properties left behind by the deceased, it is apparent that the only property left behind by the deceased is land parcel no. **KAKAMEGA/MABUSI /18/1**. The other plots mentioned by the parties including those at Bunyore were not indicated in the forms filled in court. For now, the court shall only deal with the one clearly identified.

32. From the attachments to the various affidavits on record it appears that the deceased may have sold some portion of the land to some parties. On the same breath some of the beneficiaries may have sold some of the said parcels to third parties. Obviously and for whatever reasons any sale not undertaken by the deceased or without the consent of the deceased is voidable. On the same breath any sale after the death of the deceased is void for all intent and purposes except with the consent of this court.

33. Consequently, this court was not invited to make any determination on the purchasers. Suffice to state that the estate shall be distributed to the actual and known beneficiaries pursuant to the provision of Section 40 of the Succession Act. Once the beneficiaries have received their portions then the third parties can pursue them independently and separately.

34. Section 40(1) of the Succession Act provides as follows.;

“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.”

35. The court has however perused the wishes of the deceased which he wrote on **8th November, 2004** titled **“USHUHUDA WANGU KWA MAISHA YANGU”**, translated as his life history. The deceased has explained his birth, marriages and acquisition of properties. He explained how he purchased the Mabusi land and other plots.

36. He went on to state that he had sold 2 acres to **Catholic Church (St. Marks Nzoia)** and has subdivided an acre thereof into some commercial plots. The deceased went ahead and distributed the land as hereunder;

(1) SAMMY LITABA KHABELE10 ACRES

(2) JAPHET OSILU.....10 ACRES

(3) HARUN LITABA.....9 ACRES

37. This was in regard to the sons. He went ahead to distribute further as follows

“(1) MAMA SELAH NA WATOTO WAKE EKARI TATU (3 ACRES) NA PLOTI.

(2) MAMA MARY WANDIA EKARI TATU (3 ACRES) NAYO ITAPEWA WASICHANA WAKE KAMA RAEK KHANDILI EKARI MOJA NA NUSU PLOTI PIA LEAH AGISO EKARI MOJA NA NUSU NAP LOTI.

(3) MAMA MARGARET MUSARI EKARI TATU (3 ACRES) NA PLOTI MOJA.”

38. He concluded that he shall be buried at Plot No 1 Mabusi.

39. With the above directions by the deceased, although it does not constitute a will in the right sense of the word it gives direction on what he wanted to be done. The said document was not objected to by any of the parties herein.

40. There was the evidence by the petitioner that most of the deceased children have died and that their children are orphans. In other words, there was need to consider the grandchildren of the deceased in the distribution. The Objector on his part argued that the said grandchildren were in their various homes where their mothers had gotten married to and thus they should be provided there.

41. There was no evidence tendered to suggest that the deceased in any way supported any of his grandchildren during his lifetime or at least the estate supported any of them thereafter. In the premises that assertion by the petitioner is disallowed and the estate ought to be distributed to the deceased beneficiaries in terms of the provided hierarchy.

42. In light of the uncontested direction by the deceased dated 8th November, 2004, I find the same ought to be sustained with slight modification. The modification shall apply to the portions which the deceased gave to his wives. Since they have died except the 2nd objector, their portions shall be inherited by his daughters from the two houses. In other words, the daughters from the house of mama Selah and Mama Mary Wandia shall inherit what was due to their mothers.

43. Further if there are any child or children left by their deceased sisters then they shall be provided for from their portions.

44. For the purchasers except St Marks Catholic Church which the deceased directed, the rest will have to pursue whoever they purchased land from. This in effect meant that the estate is not liable as any sale not sanctioned by the deceased or this court was improper for want of a full grant from this court. The beneficiaries will have to content with their creditors for that matter.

45. In the premises land parcel number KAKAMEGA /MABUSI/18 shall be distributed as hereunder.

(A) TEN ACRES TO SAMMY LITABA KHABELE

(B) TEN ACRES TO JAPHET OSILU

(C) 3 ACRES AND ONE PLOT TO THE HOUSE OF SELLAH

KHABELE LITABA

(D) 3 ACRES AND ONE PLOT TO THE HOUSE OF MAMA

MARY WANDIA

(E) 3 ACRES TO MARGARET MUSARI LITABA

(F) 2 ACRES TO ST MARKS CATHOLIC CHURCH NZOIA

46. Being a family feud each party shall bear their respective costs.

Dated, signed and delivered via Zoom at Kitale on this 5th day of May, 2020.

H. K. CHEMITEI

JUDGE

5/5/2020

