



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CAUSE NO 14 OF 2017

IN THE MATTER OF THE ESTATE OF ISAAC MARIMA OLE OIYIE, (DECEASED)

PHYLLIS WANGUI OIYIE.....OBJECTOR/APPLICANT

VERSUS

MARY WANGUI OIYIE.....PETITIONER/RESPONDENT

JUDGEMENT

Introduction

1. The objector filed an application in which she seeks a re-distribution of the estate of the deceased subject to the contribution and development by both herself and the petitioner/respondent. She also seeks an order directing the petitioner/respondent to account for the rental income following the certificate of confirmation of the grant by this court (Kimaru,J) in favour of the petitioner/respondent in Nairobi High court, Succession Cause No. 281 of 2006 on 11th March 2014.
2. The petitioner/respondent has opposed the application. She also seeks an order to direct the objector to account for the income generated from the properties of the deceased and those that the objector has sold or disposed of. Finally, she seeks a re-distribution of the estate of the deceased subject to the contribution and development by both herself and the objector.
3. Furthermore, there is in place a ruling by this court (Onyancha, J) in Nairobi High Court Succession Cause No. 281 of 2006, Mary Wangui Oiyie (Objector) v. Phyllis Wangui Oiyie (petitioner/respondent); in which that court ruled that the petitioner and her six children were dependents of the estate of the deceased.
4. The court (Onyancha,J) in its ruling dated 17th February 2009 revoked the grant of letters of administration issued to the instant objector by the lower court in Narok Senior Magistrate's Court in Succession Cause No. 8 "B" of 1998, and in doing so the court pronounced itself as follows:

“The result is that the objector has proved her objection sufficient to lead the court to interfere with the grant. The grant is hereby revoked forthwith. A fresh but joint Grant of letters should issue to the respondent Phyllis Wangui Oiyie and Mary Wangui Oiyie. They should then call the family members from both houses (wives) to identify all the assets forming the deceased's estate as at the time of his death. they should at that stage discuss and agree on distribution. Thereafter they should seek confirmation of the new grant of letters. Costs are to the objector/Applicant to be availed from the estate first and foremost. Orders accordingly.”

5. The objector/applicant tried to challenge the ruling by Onyancha, J before me; which I dismissed on 14th March 2018. Additionally, the objector had also earlier on, tried to challenge the ruling of Onyancha, J before Ougo, J, who in her ruling dated 6th March 2015 similarly dismissed it.

Ougo, J in her above ruling stated that:

“In this regard I find that the evidence before me is insufficient to lead me to give a decision on issue of what properties form the deceased's estate at this interlocutory stage. I find that this court needs to hear the parties' viva voce and parties to avail the appropriate copies of the title documents to the said properties to enable this court make a determination of this matter on the listing of the assets forming the estate of the deceased and distribution of the same if need be.”

6. Ougo, J made it clear that the remedy for the objector in challenging the ruling of Onyancha, J, lay in appealing to the Court of Appeal and directed the matter proceeds by way of oral evidence (viva voce) to determine the assets of the estate and make a determination of the distribution of the same.

7. The immediate foregoing is the main issue raised before me for determination.

8. The objector/applicant called two witnesses in support of her case; being herself (Pw 1) and the Narok town administrator (Godfrey Kwena, Pw 2).

9. The petitioner/respondent also called two witnesses in support of her case; being herself (Dw 1) and her brother in law (Takona Ole Oiyie, Dw 2).

The case for the objector/Applicant-Phyllis Oiyie

10. The objector (Pw 1) is the second wife of the deceased; while the petitioner/respondent is the first wife. Pw 1 testified that she was married in 1976 by the deceased according to Maasai and Kikuyu customary laws, which marriage was converted into a statutory marriage in the office of the D.C. on 15/12/1997.

11. Furthermore, Pw 1 testified as follows. Pw 1 and the deceased purchased plot No 224 Narok town from one Josiah Musyoka and an agreement dated 13/3/1996 was signed by them; which was put in evidence as exhibit Pexh 4. This plot is partly developed and the development is still on-going. It was developed eleven years after the death of the deceased. She also has been paying rates for this plot.

12. It was also her evidence that she bought plot No. 226 block 6 from the mother of Koikeken Ole Mayone, which plot is situate in Lenana estate. The plot is in her name. The Narok town council approved the sale vide its minute dated 23/12/2008, a matter in respect of which she produced the letter of allocation as exhibit P exh 8 (a) and the relevant receipts and minutes of the council as exhibit 8 (b) (c) and (c). She bought and developed it eleven years after the death of the deceased.

13. It was her evidence that plot No. 462 Narok town (now plot No. 226 block 6) does not exist.

14. She also testified that she was allocated plot No. 160 block 2 by the Narok town council in 1999, that is one year after the death of the deceased. The letter of allocation dated 7th June 1999 was produced as exhibit Pexh. 7. She has been paying rates following the allotment approval by the council vide its minute dated 10/3/1999. Thereafter she developed this plot in 2002. She contracted Jojesi Contractors to develop it.

15. The petitioner/respondent (Mary) took over the above plot on 1/6/2014 and has since been receiving rent on the strength of a confirmed grant dated 29/5/2014.

16. Pw 1 used to receive Shs 74,000/= monthly for the above plot. The town council issued a notice to close the said premises on health grounds. The Kenya Power and Lighting Co., invoiced her to pay the bill for the above plot but Pw 1 refused to pay; since it was too high.

17. Pw 1 further testified that plot No. 160 block 2 is in the name of Siameto Ole Sempele. The deceased use to pay rates for this plot, a matter in respect of which she produced payment receipts as exhibit 14 (a to c). Those receipts show the payee as Isaac Ole Oiyie (the deceased herein). The receipts are dated 16th November 1997 and the deceased accepted the offer of the said plot on 3rd April 1991. It is her evidence that this plot is hers and is in her name.

18. Plot No 131 is different a plot and is in the name of the deceased. This plot is now an empty space and is situate in Relief Scheme, whose current owner is Siameto Ole Sempele.

19. Pw 1 also testified in respect of plot No. Cis-Mara/Rotian/178, which is five acres in size. Pw 1 testified that it was herself and the deceased who bought it for Shs 250,000/= with each acre going for Shs 50,000/=. She was issued with a tile deed on 15/3/2001. The deceased was the second registered owner and the title was issued to the said property on 8th February 2001 and Pw 1 was the third owner according to exhibit 16.

20. Pw 1 and the deceased took a loan from National bank in respect of which she received demand letters for the repayment of the loan, which she put in evidence as exhibits 17 and 18. She repaid the loan in respect of which she put in evidence the payment slips as exhibit 19 (I to X).

21. It was her further evidence that she was not consulted by the respondent (Mary) in respect of the confirmed grant dated 1/6/2014. Pw 1 came to know of the confirmed grant when the tenants (in plot No. 160 at Majengo) of the respondent showed her.

22. Pw 1 further testified that was the petitioner in Narok Succession Cause No 8 of 1998, a matter in respect of which she produced the grant of letters of administration as exhibit 22 and the certificate of confirmation of grant as exhibit 21. According to exhibit 20, which is the affidavit in support of the petition for letters of administration intestate, the assets of the deceased were plot Nos 224, 462, 131 all in Narok town and Cis-Mara/Rotian/178. Pw 1 did not consult the respondent as she was not there. Additionally, she (Pw 1) did not recognize as her as the wife of the deceased.

23. Pw 1 further testified that the deceased bought a motor vehicle whose registration she could not recall for shs 170,000/=. Pw 1 later sold the said motor vehicle for shs 140,000/= in a trade deal for shs 450,000/= in 2002. Pw 1 also testified that they had a posho mill; which she bought and installed at her residential premises at Lenana estate.

24. In addition to the foregoing, Pw 1 testified that they jointly with the deceased owned ordinary four (4) heads of cattle with each cow valued at shs 5,000/=. They also had 32 sheep with the value of each sheep being between shs 2,000/= and 2,500/=.

25. Pw 1 and the deceased had an agro-vet business in Narok town. When the deceased died, Pw 1 continued with the business. When the deceased died on 14th September 1998 the stock in trade was low.

26. Pw 1 also testified that plot No. Cis-Mara/Enabelibeli/Enengatia/707 was the property of the deceased, which she sold to pay fees. The deceased became the registered owner on 11th November 1991; according to exhibit D 6. It was her evidence that she did not use the magisterial confirmed grant to sell and transfer the properties of the deceased into her name

27. She testified that plot No. 23 Enabelibeli was her property which was originally allocated to George Owino; with her being the second owner.

28. She finally testified that the deceased died on 30/10/1998.

29. In addition to her evidence Pw 1 called Narok town administrator, (Godfrey Kwena, Pw 2); who has been in that position since 2013. The duties of Pw 2 in relation to this cause are as follows. He is in charge of records of the town. He also maintains the valuation rolls of all plots, which shows the rates payable. Additionally, he also keeps the minutes of the council in respect of the allocation of plots. As regards plot No. 131 block 1, Siameto Ole Sempole is the owner. It is only the original records that will show the original allottee. The council only issues letters of allotment and the commissioner of lands (now the National Land Commission) grants leases.

30. Furthermore, Pw 2 testified that Phyllis Wangui Oiyie is the owner of plot No. 160/block 2 and that she became the owner by virtue of a confirmed grant (exhibit 2), which was issued in the estate of the deceased Isaac Marima Oiyie. Plot No 131 block 1 is different from plot No 160 block 2 and are in different locations. Pw 2 also testified that parcel of land (plot No 131/block 2) is now registered in the name of Elizabeth Wanja Mwangi.

31. Pw 2 further testified that Plot No 224 block 6 is registered in the name of Phyllis Oiyie. In 1996 the Ownership was transferred from Jonali Musyoka Mutua to Isaac Marima Oiyie. Phyllis Oiyie became the owner by virtue of a confirmed grant, exhibit D, in respect of the estate of Isaac Marima Oiyie.

32. Plot No. 226 block 6 is the property of Phyllis Oiyie. It has outstanding arrears in the sum of shs 45,243/=.

The submissions of the objector/applicant

33. Based on the foregoing evidence, Mr. Kilele for the objector submitted that the objector contributed to the acquisition and improvement of the properties of the deceased during the subsistence of their marriage.

34. Counsel cited section 2 of the Matrimonial Property Act of 2013 which has defined monetary and non-monetary contribution as follows. Non-monetary contribution includes:

- a. Domestic work and management of the matrimonial home;
- b. child care;
- c. companionship;
- d. management of family business or property; and
- e. farm work.

“Family business” means any business which –

- a. is run for the benefit of the family by both spouses or either spouse; and
- b. generates income or other resources wholly or part of which are for the benefit of the family;”

35. Counsel also cited *PWK v JKG (2015) e-KLR*, in which a bench of five judges of the Court of Appeal pronounced itself in respect of division of matrimonial property by citing with approval *Echaria v Echaria (2007) e-KLR* stated in part that: “where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportion of financial contribution either direct or indirect towards the acquisition of the property; However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “Equality or equity.”

36. *We are of the respectful view that the principles restated by Echaria Vs Echaria are good law and contribution as the basis for distribution of matrimonial property remains valid.”*

37. Furthermore, counsel submitted that the respondent/petitioner did not tender any evidence to support her claim that she assisted in contributing and acquiring of the properties of the estate.

38. Counsel also cited the judgement of Kiage, JA, in *PNN vs ZWN, Civil Appeal No. 128 of 2014 [2017] e-KLR* amongst other authorities.

39. He therefore urged the court to dismiss with costs the petitioner's prayers.

The case for the Petitioner/Respondent-Mary oiye

40. The petitioner testified as Dw 1. Her evidence was that she was married by the deceased in 1975 under Maasai customary law. Her first child was born in 1976 and the last was born in 1998.

41. She also testified that the deceased bought two matatus (taxis) that were ferrying passengers between Narok and Enabelibeli. All the properties listed in form P. and A. 5 were bought by the deceased.

42. Dw 1 then continued to testify in respect of the properties of the deceased as follows. The son of the objector lives on plot No. 224 which is in Lenana estate.

43. Plot No. 131 block 2 is in Majengo estate and is now plot No. 160, which was bought by the deceased. She does not know when the deceased bought this plot. There are rental houses on that plot, which the deceased built in or about 1996. It was also her evidence that the objector was in Narok town, while she herself lived in Enabelibeli. The objector only did repairs and painting of those houses and she hired a contractor to do so since she had all the money. The objector did not build them. It was also her evidence that she was given those plots by the court and has been maintaining them. She further testified that those houses had water, which the deceased installed. She used to pay the water bills; which bills came in the name of the deceased Marima.

44. Dw 1 further testified that the deceased installed electricity on those plots; in respect of which she has been paying bills. She also has been receiving rent from those houses; which is between shs 40,000/= to shs 45,000/=, because tenants come and go. Before she took over the houses, the objector was paying the rates. And when she went to pay the rates, the payment receipts came out in the name of the objector. She was told by the in charge of that office not to continue paying rates until they had resolved their dispute.

45. It was the evidence of Dw 1 that she has never received a notice to close down those rental houses. She testified that those rental houses are in good condition. She also testified that there was a time the objector went to those rental premises and removed the door and the toilet man hole covers. She then reported to the police and they were replaced.

46. In respect of plot No. 224 in Narok town, Dw1 testified as follows. This plot belonged to the deceased and is in Lenana estate. The objector built a house on this plot. She then used the proceeds from the agro vet business of the deceased to build the house on this plot. The son of the objector lives on this plot. There other houses on this plot. The plot is in the name of the objector. She inherited this plot after she obtained a grant in her name.

47. In respect of land LR No. Cis-Mara/Rotian/178, Dw 1 testified as follows. It was a fifteen acres (15) shamba, which the deceased bought with Jane Keton and David Yiale, with each taking a share of five acres (5). Dw 1 produced a search certificate as exhibit D 5, in respect of this land.

48. The objector used the confirmed court grant (exhibit 21) to inherit the share of the deceased. The shamba was used to grow wheat. The objector then sold the land to a third party as shown in exhibit D 2. Dw 1 testified that she never got a share from the proceeds of that sale.

49. In respect of land reference No. Narok/Cis-Mara/ Enabelbel/Eneng'etia/707, Dw 1 testified as follows. This one and half acres (1 1/2) land was owned by the deceased. She then produced a search certificate (exhibit 6), which shows that the said land is now owned by Tobiko. Before, it was transferred to Tobiko, the land was in the name of the objector, who inherited it from the deceased by virtue of court grant. She contributed shs 10,000/- towards its purchase

50. In respect of land reference No. 260 Narok town, DW 1 testified as follows. This land belonged to the deceased, which the objector inherited from the deceased by virtue of a court grant.

51. In respect of land reference 266B Lenana estate, DW 1 testified as follows. This was the property of the deceased upon which the deceased build a house for the objector.

52. In respect of plot No. 462 block 2 Narok town, DW 1 testified as follows. It is in Lenana town and was the property of the deceased. It is the property of the deceased, which the objector inherited by virtue of a court grant. It is vacant except a toilet which is there. There is a dispute over this plot with a neighbouring land lady. Dw 1 joined the case since she was given this plot by the High court in Nairobi through a court grant.

Other plots

53. Dw 1 testified that the deceased had other plots outside Narok town. These were as follows. Plot No 23 at Enabelibeli centre and plot No. 11 at Kisiriri centre, which the objector inherited by virtue of a magisterial court grant.

Other properties of the deceased.

53. In addition to the foregoing properties the deceased had 14 heads of cattle with each valued at shs 20,000/-, 200 sheep with each valued at shs 2,000/-, 4 donkeys with each valued at shs 3,000/-, 84 goats with each valued at shs 1,500/- and a posho mill at Enabelibeli.

54. DW 1 testified that the deceased did not leave any debts.
55. DW 1 testified that she gave the deceased money to buy land at Rotian.
56. She also testified that she was never separated from the deceased. She also testified that she went away from her matrimonial home for six months and was returned by Samuel Ngatuny Ole Yenko.
57. Furthermore, it was her evidence that the deceased exchanged his pick motor vehicle for another one.
58. She further testified that the objector lived simultaneously in the house of their mother in law and her house (Dw 1). She further testified that she did not know how many rooms were in her mother in law's house. She further testified that the objector never lived in the house of their mother in law. Dw 1 also testified that she (Dw 1) gave the deceased three rooms in her house. It was her evidence that she gave the objector those three rooms so that the deceased would serve them better.
59. Dw 1 continued to testify that in 1991 the objector lived in their mother's in law's one roomed house. She then had two children, one of whom she was breast feeding. This was in 1991. Dw1 in further cross examination testified that in the same year 1991 the objector had many children; and that they were living with her at Enabelbeli.
60. DW 1 also testified that she did not know how many animals belonged to the deceased and how many belonged to the objector.
61. As regards the agro vet business, it was her evidence that she contributed shs 80,000/=, although she did not produce any documentary evidence in support thereof.
62. As regards her (Dw 1) relationship with the deceased husband, it was her evidence that it was cordial. She also testified that the objector totally controlled their deceased husband (Isaac) to the extent that he did whatever the objector told him to do. She testified that: *"If she told him to hate our mother in law, Isaac did so."*
63. Dw 1 denied that she returned to her matrimonial home after the deceased died.
64. Dw 1 also testified in cross examination that the objector still carries on farming activities on the Rotian land of the deceased. She further testified that she does not know whether the objector still carries on farming on the land at Rotian. While on the same parcel of land she testified that the objector sold the said parcel of land.
65. She denied that she has a boma at the river. She testified that that six acres' land belongs to her children.
66. Dw 1 also testified that when the deceased build the house on plot No. 224 at Lenana estate, she did not contribute any money towards its construction; since she did not have any money. She further testified that it was the objector who build that house with the money of the deceased.
67. Dw 1 continued to testify that she only knew one bank account, which the deceased had with National bank. She had also testified that the deceased had a bank account with Barclays bank, which had money.
68. In re-examination Dw 1 testified that there was a time when she lived separately from the deceased because the objector wanted to stab her with a knife. And that after six months the deceased sent two old men to arrange for her return to the matrimonial home. The vehicles the deceased left behind are no longer in existence as the objector took all of them.
69. Dw 1 also testified that she did not contribute towards the purchase of plot No. 23 at Enabelbeli.
70. Dw 1 also testified that the deceased never left any debts behind.
71. Dw 1 also testified that she owns a six acre shamba at Enabelbeli, which her father in law gave her; which shamba has not been subjected to succession proceedings.
72. Dw 1 called Robinson Takona Oiyie (Dw 2). Dw 2 supported the evidence of DW 1. He also testified that the deceased married the petitioner in 1974 and the objector in 1980. He also testified that the agro-vet business had an account with National bank of Kenya.
73. First Dw 1 gave the deceased shs 20,000/= and the second time she gave him shs 10,000/= between the years 1992 and 1993 towards the construction of the building on plot No. 160 block 2 previously known as plot No. 131 Narok town. He testified that the objector did not contribute towards the construction of this building.
74. The deceased had land at Ewaso Nyiro.
75. Dw 2 testified that the agro vet business had no debts.
76. Dw 2 testified that both the objector and Dw 1 were living in one house at Enabelbeli in 1989.
77. Dw 2 also testified that the deceased was given 6.1 acres of land by their deceased father, which currently is used by DW 1.

78. The son of Dw 1 is using the one-acre land along the river, which is the property of the deceased (Isaac Marima).

79. Dw 2 further testified that Dw 1 and her deceased husband, separated for a period of between two to three months.

80. The deceased did not leave behind any debts and he never took loans.

81. Finally, Dw 2 testified that their father Wanga Oiyie sub-divided his shamba among his sons after the death of the deceased Isaac Oiyie.

The submissions of the petitioner/respondent

82. Mr. Mitiambo, counsel for the petitioner/respondent filed written submissions in support of the case. Counsel for the petitioner/respondent has framed three issues for determination. First, whether the objector had unlawfully disposed the properties of the deceased with intent to defraud the estate as well as the respondent and her children and should be made to account. Second, whether the court should interfere with the order made on 11th March 2014 on the issue of distribution of the estate of the deceased. Third, whether the properties left out by the objector in the schedule of assets when petitioning for a grant of letters of administration form part of the estate of the deceased.

83. It is the submission of the petitioner/respondent that the objector admitted selling a motor vehicle pick-up, livestock, stock in trade in the grove shop, land parcels No Cis-Mara/Rotian/178 and Cis-Mara/Enabelbel/Eneng'atia/707 without following the right procedure and in total disregard of the interests of the beneficiaries of the estate. Based on section 93 of the Law of Succession Act which set out the duties of an administrator and the case of *re Estate of Musa Omurwa (deceased) (2019) e-KLR*, in which this court (Majanja, J) held that the principal duty of a personal representative is to collect, and gather in the assets, identify the persons entitled to a share in the assets and eventually to distribute but not to unfairly benefit from the estate. Counsel also cited the Court of Appeal decision in *Musa Nyaribari Gekone & 2 others v Peter Miyianda & Another [2015] e-KLR*, in which the court held that section 93 of the Law of Succession Act does not protect the administrator when such an administrator dealt with the property of the deceased in a fraudulent manner.

84. Based on the foregoing authorities counsel submitted that the objector had acted fraudulently when she obtained the grant of letters of administration in respect of the estate of the deceased by concealing material facts relevant to the matter.

85. The second framed issue is whether this court should interfere with the distribution of the assets of the estate of the deceased made pursuant to the order of this court (Kimaru, J) dated 11th March 2014. Counsel has submitted that the distribution of the assets of the estate of the deceased by Kimaru, J is fair and is according to the law and should not be interfered with. In that regard, counsel has urged the court to administer substantive justice and use its inherent powers pursuant to article 159 of the 2010 Constitution of Kenya and Rule 73 of the Probate and Administration Rules to uphold the said confirmed grant by Kimaru, J.

86. Third, whether the properties omitted by the objector in the schedule of assets forms part of the estate of the deceased.

Issues for determination

87. I have considered the entire evidence, the submissions of both counsel, the authorities cited by them and the applicable law. As a result, I find the following to be the issues for determination.

- 1) Whether the objector and the petitioner/respondent contributed and/or improved the properties of the estate of the deceased.
- 2) Which properties are available for distribution.
- 3) Whether the objector should render accounts of the properties of the estate.
- 4) Whether the petitioner/respondent should render accounts of the properties of the estate.
- 5) What are the appropriate final orders?

Issue 1

88. The issue as to whether the objector and the respondent contributed and/or improved the properties of the estate is both an issue of fact and law.

89. I have considered the evidence of the objector (PW 1) and her witness (Pw 2) and that of the petitioner/respondent (DW 1) and her witness (Dw 2). As a result, I find as credible and cogent the evidence of the objector that she was married by the deceased in 1976 according to Maasai and Kikuyu customary laws, which marriage was converted into a statutory marriage on 15/12/1997. They remained so married until the death of the deceased in 1998. I find as a fact that during their marriage the deceased and the objector jointly bought from Josiah Musyoka plot No. 224 Narok town. This is clear from the sale agreement dated 13/3/1996 this plot is partly developed. It was developed eleven (11) years after the death of the deceased.

90. I further find that the objector bought and developed plot No. 226 block 6 in Lenana in Narok town eleven (11) years after the death of the deceased. The objector bought this plot from the mother of Koikeken Ole Mayone and the Narok town council approved the sale vide its minute dated 23/12/2008. I also find that the objector bought this plot eleven (11) years after the death of the deceased. This parcel of land was not the property of the deceased and is not part of the estate of the deceased.

91. I also find that the objector also acquired plot No. 160 block 2 by a virtue of a confirmed grant in respect of the estate of the deceased. And the Narok town council approved the acquisition vide its minute No 10/3/1999. The objector developed it in 2002 and employed the services of Jojesi contractors to develop it. Furthermore, I find that the respondent took over this plot on 1/6/2014 due to a confirmed grant dated 29/5/2014 and has been receiving rent in the sum of shs 74,000/= per month. I find that the objector paid rates to the town council, which she produced as exhibit 14 (a to c). This plot is in her name. This plot formed part of the estate of the deceased.
92. I also find that the deceased owned land parcel No. Cis-Mara/Rotian/178, which was a shamba that the deceased bought with two other people and he got his share of five (5) acres. I further find that the objector completed paying for the purchase price of this land. This parcel of land formed part of the estate of the deceased.
93. I find that the objector obtained a confirmed grant (exhibit 20) in Narok magistrate's court succession cause No. 8 "B" of 1998 I find that the objector did not consult the petitioner/respondent for she was not at home and she did not recognize her as the wife of the deceased.
94. I further find that land reference No. Cis-Mara/Enabelibeli/Enengatia/707 was the property of the estate of the deceased which the objector inherited by virtue of the confirmed grant issued to her by the magisterial court at Narok. The objector sold this land and used the proceeds to pay school fees.
95. I also find that plot No 131 in Narok town is in block 1 and not block 2 and that plot No 23 at Enabelibeli is the property of the objector, whose first owner was one George Owino and the objector is the second owner.
96. I further find that plot NO. 131 Narok town is in Relief Scheme and is in the name of the deceased according to the objector; but according to the town administrator (Pw 2) this plot is in the name of Siameto Ole Sempete. This plot is undeveloped.
97. I find that Plot No. 462 block 2 Narok town, is in Lenana estate. There is a dispute over this plot with a neighbouring land lady. Dw 1 joined the case since she was given this plot by the High court in Nairobi through a court grant.
98. I find that the estate of the deceased had movable properties which are as follows. I find that the objector contributed to their acquisition. A motor vehicle, whose trade in value was shs. 140,000/- to which the objector added her own money in the sum of shs 450,000/- and proceeded to buy another vehicle.
99. There was a posho mill, which the objector bought. The deceased and the objector had four ordinary cattle with each animal valued at shs. 5,000/-. They also had 32 sheep which they co-owned with the deceased.
100. The deceased had agro-vet business in Narok town, whose stock in trade was low by the time the deceased died. The deceased had a loan which was advanced to him by National bank, Narok branch. She repaid the loan and then proceeded to close the account. In terms of section 2 of the Matrimonial Property Act of 2013, objector contributed by way of management and companionship with the deceased.
101. I finally, find that the deceased did not have any plots at Kisiriri and Enabelibeli.
102. In the premises, I find that the estate of the deceased had the following assets:
- 1) Plot No. 160 block 2 in Narok town.
 - 2) Land parcel No. Cis-Mara/Rotian/178 and
 - 3) Mara/Enabelibeli/Enengatia/707.
 - 4) A motor vehicle, whose trade in value was shs. 140,000/
 - 5) the agro-vet business in Narok town.
103. I further find the following properties were co-owned by the deceased and Pw 1:
- 1) Four ordinary cattle with each animal valued at shs. 5,000/-.
 - 2) 32 sheep and
 - 3) plot No. 224 Narok town.
104. The estate had the following liabilities: (1) a loan with National bank, Narok branch.
105. I further find the following to be disputed properties: 1) Plot No. 462 block 2 Narok town which is in Lenana estate. There is a dispute over this plot with a neighbouring land lady. 2) Plot No. 131 Narok town which is in Relief Scheme and is in the name of the deceased according to the objector; but according to the town administrator (Pw 2) this plot is in the name of Siameto Ole Sempete. This plot is undeveloped. These properties are not available for distribution.

106. I find that the evidence of the petitioner/respondent to be incredible that the deceased did not leave any debts behind. This evidence flies in the face of the credible and cogent evidence of the objector which is that the deceased had a loan with National bank, Narok branch, which the objector repaid. The objector produced documentary evidence namely the loan repayment slips as exhibit 19 (I to x) and the demand letters from the advocates of the bank; which letters were put in evidence as exhibit 17 and 18.

107. I further find as incredible the evidence of Robinson Takona Oiyie (Dw 2) that the deceased did not take any loans and that he did not leave behind any debts in view of the above cogent and credible evidence of the objector that the deceased took a loan from National bank, Narok branch.

108. I further find as incredible the evidence of the petitioner/respondent in cross examination that she did not separate from the deceased. She contradicted herself by testifying that she was separated from the deceased for six (6) months and was returned to her matrimonial home by one Samuel Ngatuny Ole Yenko. She did not call Samuel Ngatuny Ole Yenko to support her evidence that she was so returned. Furthermore, her witness (Dw 2 Robinson Takona Oiyie) materially contradicted her in testifying that the deceased was separated with the respondent for a period of between two to three months. I find that the evidence of Dw 2 was equally incredible.

109. Still in cross examination the petitioner/respondent testified that her relationship with the deceased was cordial. If it was that cordial, why was it necessary for her to be returned by the said Samuel Ngatuny Ole Yenko. One may also ask as to why they were separated with the deceased if they were in cordial relationship.

110. I find as credible the evidence of the objector that when she was married in 1976, the petitioner/respondent was not at home. I also find as credible the evidence of the objector that the petitioner/respondent only attended the funeral of the deceased and returned to her matrimonial home four years after the death of the deceased, that is, in 2002.

111. I do not agree with the objector that marriage per se whether statutory law (monogamous) or customary law (which permits polygamy) is the basis of sharing the estate. What has to be proved is contribution and/or development to the estate of the deceased.

112. I further find that the evidence of the petitioner/respondent is incredible. In this regard, the respondent testified that: "*Phyllis totally controlled Isaac to the extent that Isaac did whatever Phyllis told him to do. If she told him to hate our mother in law, Isaac did so.*" The respondent paints a picture of the deceased as that of a hate robot. One would also have expected her to use her cordial relationship with Isaac Marima Oiyie (deceased) to stop him from being used by Phyllis as a robot.

113. I also find as incredible that the petitioner/respondent contributed to the purchase of land reference NO. Cis-Mara/Rotian/178. She did not produce any documentary evidence in support of her claim. I find that she did not contribute to the purchase of that land. I equally find it incredible that the petitioner/respondent contributed shs 80,000/- towards the agro-vet business of the deceased; when she was separated from the deceased.

114. I also find as incredible the evidence of Robinson Takona Oiyie (Dw 2) that the deceased had plots at Ewaso Ngiro, which he acquired through letters of allocation. He did not produce those letters of allocation. Even the respondent did not list those plots in her schedule of the assets and liabilities of the deceased when she applied for the grant of letters of administration in her summons for the grant of letters of administration of the estate.

115. I therefore find that the petitioner/respondent has totally failed to prove that she contributed to the acquisition and development of the properties of the deceased as required by law in *PWK v JKG, supra*, in which the Court of Appeal held that contribution and/or development are the bases of sharing the estate of the deceased to the surviving spouses.

116. In the instant case I find on the evidence that the petitioner/respondent did not contribute to the acquisition and development of the properties of the estate. She therefore cannot harvest where she did not plant. She is not therefore entitled to any share in the estate of the deceased; except for the properties she obtained under the authority of this court (Kimaru, J).

117. Furthermore, I find that the objector/applicant contributed to the acquisition and development of the properties of the estate during the subsistence of their marriage until the death of the deceased in 1998.

118. I further find that the objector contributed to the agro-vet business of the deceased in managing the same and by virtue of her companionship with the deceased in terms section 2 of the Matrimonial Property Act of 2013.

119. I find on the evidence that the following properties are not available for distribution. Plot No. 131 Narok town is in Relief Scheme, which Pw 2 testified is in the name of Siameto Sempele and which is equally claimed by the objector as part of the estate of the deceased. According to the evidence of Pw 2 there are cases of double allocation of plots in Narok town and that one may be in possession of an allotment letter for a plot that does not exist on the ground.

120. I further find that plot No. 462 block 2 Narok town, is the subject of a court case between the objector and the petitioner/respondent on the one hand and a neighbouring landlady, on the other hand.

121. The following plots namely:

- 1) Plot No. 462 block 2 Narok town which is in Lenana estate (there is a dispute over this plot with a neighbouring land lady); and
- 2) Plot No. 131 block 1 Narok town which is in Relief Scheme and is in the name of the deceased according to the objector (Pw 1); but according to the town administrator (Pw 2) this plot is in the name of Siameto Ole Sempele. This plot is undeveloped. These

properties are in law not available for distribution; since the duty of a succession or probate court is to distribute properties that are available for distribution and not to settle disputes between the beneficiaries of the estate and non-beneficiaries. The settlement of such disputes is the duty of the ordinary courts that exercise competent civil jurisdiction. It was the duty of the objector or the petitioner/respondent to establish the ownership of the disputed plots as being part of the properties of the estate of the deceased. This is the position in law according to section 93 of the Law of Succession Act which set out the duties of an administrator. The court held to be the position in the case of *re Estate of Musa Omurwa (deceased)*, *supra*, in which this court (Majanja, J) held that the principal duty of a personal representative is to collect, and gather in the assets, identify the persons entitled to a share in the assets and eventually to distribute but not to unfairly benefit from the estate

122. In view of the foregoing finding, I find the objector is only entitled to distribute the available properties including the livestock among her children and/or dependents. A certificate of a confirmation of grant is hereby issued to the objector as the administratrix of the estate of the deceased. These properties include the following: Plot No. 160 block 2 in Narok town.

123. Plot No.224 in Narok town is already the property of the objector by virtue of the confirmed grant by this court (Kimaru, J)

Issue 3

124. In view of my findings that the objector is to distribute the available properties of the estate of the deceased, since they jointly acquired them with the deceased and in addition to contributing to their development. She therefore is not under any obligation to render accounts of the estate while she was in control.

Issue 4

125. I find that the petitioner/respondent is not under an obligation to render accounts of the estate, while she was the administratrix of the estate of the deceased from 2014 to date. This is because the certificate of confirmation of grant issued to both the objector and herself by this court (Kimaru, J) in Nairobi High court, Succession Cause No. 281 of 2006 on 11th March 2014 was not challenged by the objector by way of an appeal and has not been revoked. Once a court has been made an order, it has to be respected and complied with by the parties to the suit. I therefore find that the objector was abusing the court process in challenging the order of Onyancha, J, first before Ougo, J, and thereafter before me. Litigants and their advisers risk being condemned to pay costs in re-opening settled issues for re-litigation.

126. Similarly, the objector is entitled to the rest of the properties of the estate of the deceased, both immovable and movable properties and is therefore not under any obligation to account for the same. This excludes the properties acquired by both parties under the authority of the order of this court (Kimaru, J). It also excludes the properties that are in dispute or whose ownership was not established by way of evidence. These properties include Plot No. 462 block 2 Narok town and Plot No. 131 block 1 Narok town which is in Relief Scheme.

127. The petitioner/respondent is not entitled to any share of the properties of the estate; since all the properties of the estate were acquired by the objector and the deceased when she (the petitioner/respondent) was away from her matrimonial home.

Issue 5

128. The objector is free to distribute the properties of the estate to her children; which include plot No. 160 block 2 in Narok town.

Judgement signed, dated and delivered in open court at Narok this 5th day of October 2020 in the presence of Mr. Kiptoo holding brief for Mr. Mitiambo for petitioner/respondent and Mr. Kilele for the objector.

J. M. BWONWONG'A

JUDGE

05/10/2020