



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION NO. 607 OF 2013

IN THE MATTER OF THE ESTATE OF WILLIAM SANKEI MOMBOSHI (DECEASED)

ESTHER KAKENYA MAGIRO1ST PETITIONER /APPLICANT

VERSUS

LILIAN RETETI MOMBOSHI 2ND PETITIONER

JUDGMENT

1. This cause of action relates to the estate of William Sankei Momboshi (Deceased) who died intestate on 20th November 2010. Esther Kakenya Magiro, who describes herself as the deceased's second widow and the deceased's brother Samwel Momposhi Kiserian, applied for letters of administration in the deceased's estate. They made the application when the deceased's 1st wife Lilian Reteti Momboshi had been cited in Succession Cause No. 346 of 2013 and had failed to renounce or apply for grant of representation. Subsequently, Esther Kakenya Magiro and Lilian Reteti filed an application for grant of letters of administration jointly and the same was issued on 10th March, 2015.

2. Esther Kakenya then filed summons for confirmation of grant on 12th January, 2017. She listed the survivors of the deceased as follows:

- a. Lilian Reteti - 1st widow
- b. Esther Kakenya Magiro - 2nd widow
- c. Sharon Naleke Momposhi - daughter
- d. Kelvin Lekishon Momposhi - son
- e. MSM- son
- f. MLM- daughter
- g. Felistus Maosi Momposhi - daughter
- h. Purity Naseriani Momposhi- daughter

3. She averred that the family of the deceased had met on 28th November, 2010 and had deliberated on how his assets should be distributed. The properties of the deceased were listed as follows:

- a. Plot at Masurura (Communal land)
- b. Plot Number 52, Sikawa adjudication section
- c. Plot at Kilgoris township
- d. Plot at Osagam Trading Center (Communal land)
- e. Plot number 14, A/C No. 716115

- f. Plot number 130 'B', A/C No. 715354
- g. Plot number 13, A/C No. 712955
- h. Plot number 13, A/C No. 715012
- i. Plot number 54 'B', A/C No. 713338
- j. Account number [xxxx] Kenya Commercial Bank of Kenya Limited, [xxxx] Branch.
- k. Insurance pension policy No. [xxxx]

4. Lilian Reteti filed an affidavit of protest to the application for confirmation of grant. In it she averred that Esther Kakenya was not entitled to the deceased property as she had not contributed to the acquisition of the property and had since remarried. She argued that Purity Naseria who had been listed as a beneficiary of the estate was not a daughter of the deceased and hence was not entitled to a share of the estate. She also protested the inclusion of the brother of the deceased, Samwel Kiserian as a beneficiary of the estate of the deceased and also contended that some of the deceased's properties had not been disclosed. She later on swore an affidavit on 21st December, 2017 proposing a mode of distribution for the assets of the deceased.

5. This matter proceeded by way of *viva voce* evidence. The petitioners both testified in support of their cases. Okwany J. took the evidence of Lilian Reteti and I heard Esther Kakenya when I took over the matter.

6. At the hearing, Lilian Reiterated the averments she had made in her affidavits. She testified that she got married to the deceased in 1988 and had 4 children. She stated that her co-wife Esther Kakenya had only lived with the deceased for 8 months before he died and she felt that she was not entitled to the property. Lilian told the court that she and the deceased had started from scratch and all the deceased's property had been acquired by herself and the deceased. She testified that Esther Kakenya had since remarried and her child Purity, although listed as a beneficiary of the estate as he was a man with his own family and property. She was also discontent with the mode of distribution proposed by the elders in their meeting and said that she had been coerced into signing the report due to the volatility of the situation at the time. The elders, her brother and sisters in law had accused her of the murder of the deceased who was shot dead at their home in Masurura. She testified that she was not present when the report was made and that she had signed it after the burial of the deceased but conceded that she had not been forced into filing the petition together with Esther.

7. She told the court that other than Sikawa land reference number 52, the rest of the properties were not in the name of the deceased. She stated that the money being held in the deceased's bank account had already been shared between the 2 widows but the money held by Sony Sugar and Insurance had not yet been shared. She testified that Esther resided at the shamba at Masurura which used to be her home but she had allowed her to live there for the sake of peace.

8. Esther Kakenya testified that she got married to the deceased under customary law in January 2010. She stated that she was taken to their home in Naaralong where the deceased had later on been buried when he died in November 2010. She averred that her name had been indicated as the deceased's 2nd wife in the chief's letter dated 19th February 2013 and the elders' minutes which had been signed by herself and Lilian. She produced the minutes and stated that no one including Lilian had been forced into signing it. She urged the court to distribute the deceased properties in accordance with the minutes. On cross examination she stated that she had one child when the deceased married her and that she got another child with the deceased in November. By the time the matter was heard, Esther had 4 children. She denied the claim that she had remarried stating that since the deceased had paid her dowry, tradition did not allow her to get remarried.

9. Counsels for the petitioners filed written submissions in support of the petitioners' cases. In his written submissions counsel for the 1st petitioner dismissed the 2nd petitioner's claim that she had been forced into signing the family consent as she had no proof to back this. Counsel submitted that the 1st petitioner was entitled to inherit the property of the deceased in accordance with section 29 of the **Law of Succession Act** as she was a wife of the deceased. He relied on the case of ***In the estate of John Musambayi Katumanga Succession Cause no. 399 of 2007*** where the court emphasized the equal distribution of the estate of an intestate amongst the beneficiaries. He rejected the assertion that the 1st petitioner had remarried and urged the court to adopt the mode of distribution proposed by the family on 28th November 2010 which had been signed by both parties.

10. On the other hand, counsel for the 2nd petitioner submitted that the 1st petitioner had only been married for 8 months and had not made any substantial contributions to the acquisition of the deceased's assets. He further submitted that the 1st petitioner had since remarried and sired several children who did not belong to the deceased. It was also submitted that Samwel Kiserian had not testified in support of the interest he had in the property of the deceased and his claim should be disregarded.

11. From the averments, oral evidence and the parties' written submissions, the issues arising for determination in this succession cause are as follows;

- a. Who are the beneficiaries of the estate of the deceased;
- b. What mode of distribution should be adopted to subdivide the properties of the deceased?

12. Lilian did not dispute the fact that the deceased married her co-wife Esther. Esther testified that she got married to the deceased under customary law in January, 2010. As he died after the commencement of the Law of Succession Act, the deceased property is subject to

division in accordance with the Law of Succession Act and in particular section 40 since he died intestate and as a polygamous man.

13. **Section 40** of the **Law of Succession Act** provides;

(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.

14. The first issue in this case is to identify the deceased's spouses and number of children in each household. Esther Kakenya and Lilian Reteti filed an application for letters of administration jointly on 7th April, 2016. They listed the persons surviving the deceased as Lilian Reteti and her children Sharon Naleke Momposhi, Kelvin Lekishon Momposhi, MSM and MLM and Esther Kakenya and her child FMM, in accordance with the chief's letter annexed to their supporting affidavit and dated 19th March, 2013.

15. When she filed the application for confirmation of grant on 12th January, 2017, the Esther Kakenya included the name, PNM whom she stated was a child of the deceased. Lilian Reteti protested to this inclusion stating that PNM was not a child of the deceased and could not directly inherit from his estate.

16. From her oral evidence and the averments in her affidavit, Esther claims that she had two children with the deceased being FMM and PNM. The chief's letter included FMM as a child of the deceased but PNM was not listed thereon. According to the birth certificate produced by Esther, PNM was born on 8th May 2014 and the deceased named as her father.

17. **Section 118** of the **Evidence Act** states that there is a conclusive presumption of legitimacy where a child is born within 280 days after the dissolution of the marriage between the child's mother and father unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. In this case, it is evident that PNM was not a child of the deceased as he died on November 2010 and she was born more than 3 years after his death.

18. Esther deponed in her affidavit in response to the protest that she had been inherited in accordance with Maasai tradition and children born out of that union belonged to the deceased including PNM. It is trite that traditions are issues of fact which can only be proved by evidence at the trial and in this case no evidence was led in support of her averments. Nevertheless, the deceased having died after the commencement of the Law of Succession Act, his property was subject to division in accordance with the Act as opposed to customary law. **Section 2(1)** of the Act provides;

2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

19. The Law of Succession Act does not envisage a scenario where one becomes a beneficiary through the inheritance of a widow. I therefore find and hold that PNM was not a child of the deceased and does not qualify to benefit from his estate.

20. Lilian also contended that Esther was not entitled to the property of the deceased as she remarried after the death of the deceased. The proviso to section 35 (1) of the **Law of Succession Act** states that the interest of a widow in the property of the deceased determines upon her re-marriage to any person. Esther accepted that she had since been inherited according to Maasai tradition but stated that this did not amount to a marriage. She testified that she still resided within the matrimonial home and traditionally she was not allowed to remarry as the deceased had paid her dowry. Having asserted that Esther had remarried, it was incumbent upon Lilian to prove this fact. She however merely deponed this fact but did not adduce sufficient evidence in support of the fact that wife inheritance amounted to a remarriage in Maasai culture. It was not stated to whom Esther had gotten married, when and under what regime. I therefore find that Lilian did not discharge her burden of proof.

21. Taking all the above into account, I find that the beneficiaries of the estate of the deceased are as follows;

1st house

- a. Lilian Reteti - 1st widow
- b. Sharon Naleke Momposhi - daughter
- c. Kelvin Lekishon Momposhi - son
- d. MSM - son
- e. MLM - daughter

2nd house

f. Esther Kakenya Magiro - 2nd widow

g. Felistus Maosi Momposhi - daughter

22. Turning to the mode of distribution of the deceased's property, Esther suggested that the court follow the elders' proposal dated 28th November, 2010 which had been signed by both parties. According to the elders' proposal, the livestock was divided equally between the two widows. The deceased Plot at Masurura and the plot at Sikawa location adjudication no. 52 had not been demarcated and were to be shared equally between the widows once the deceased interest had been established.

23. The elders stated that the plot known as T/Mara/Ololchani section 32,33 & 34 within Kilgoris Township and the developments thereon belonged to Lilian Reteti and she should have it. The Plot at Osagam Trading Center was awaiting demarcation and should be divided equally between the two widows upon confirmation of the county council.

24. As for the deceased sugarcane plantations, the elders proposed that Esther Kakenya gets Plot number 14, A/C No. 716115 which was to be shared with landlord. Whereas Plot number 130 'B', A/C No. 715354 should be shared between Lilian Reteti and the landlord. The elders proposed that the other farms being, Plot number 13, A/C No. 712955, Plot number 13, A/C No. 715012 and Plot number 54 'B', A/C No. 713338 be divided equally between the two widows.

25. The monies in Account number 1110xxxxxx Kenya Commercial Bank of Kenya Limited, [xxxx] Branch and the insurance pension policy No. [xxxx] would then be subdivided between the two widows equally.

26. Lilian opposed the elders proposal and suggested that the deceased properties be shared as follows:

a. Plot at Kilgoris township remain with Lilian Reteti

b. Plot at Osagam Trading Center be divided between the widows into half after processing the title

c. Sikawa adjudication section 52 and the land parcel at Masurura devolve to Lilian Reteti entirely as Esther had not contributed to the acquisition of this properties.

d. Plot number 14, A/C No. 716115 devolve to Esther Kakenya

e. Plot number 130 'B', A/C No. 715354 devolve to Lilian Reteti

f. Proceeds from, Plot numbers 712955, 715012, 713338, 715050, 715353 and 715356 be divided equally between Lilian Reteti and her four children and Esther Kakenya and FMM.

g. Other properties left out devolved to Lilian Reteti and her children.

27. The parties did not avail documentation to prove the deceased's title to the listed properties. Lilian testified that title to Sikawa location adjudication no. 52 had been issued to the deceased but did not produce a copy of the same. The elders' minutes indicated that this parcel of land was to be divided between the deceased and Samwel Kiserian. The deceased's portion of that parcel of land is what should then devolve to the estate of the deceased.

28. Since none of the deceased properties have titles, the administrators of the estate are duty bound to process titles to the properties. It is also admitted that the deceased livestock and the monies held in the deceased bank account have been shared equally between the two widows.

29. I have considered the suggestions given the parties and bearing in mind the provisions of section 40 and section 35 of the Law of Succession Act and the fact that some of the deceased's children are minors and in need of sustenance, I proceed to distribute the deceased properties as follows:

a. Plot known as T/Mara/Ololchani section 32, 33 & 34 within Kilgoris Township and the developments thereon shall devolve to Lilian Reteti of the 1st house. She shall hold a life interest in the property and upon her death or remarriage the land shall be shared equally between Sharon Naleke Momposhi, Kelvin Lekishon Momposhi, MSM and MLM.

b. Plot at Osagam Trading Center shall be divided equally between the 1st house and the 2nd house. Lilian Reteti of the 1st house shall hold a life interest in her share and the parcel of land shall revert to and be shared equally between Sharon Naleke Momposhi, Kelvin Lekishon Momposhi, M.S.M and MLM upon her death or remarriage. Esther Kakenya of the 2nd house shall hold a life interest in her share which shall revert to FMM upon her death or remarriage;

c. Plot Number 52, Sikawa adjudication section and the land parcel at Masurura shall be shared between the 1st and the 2nd house in the ratio of 5:2 in favour of the 1st house;

i. Lilian Reteti of the 1st house shall hold a life interest in the property and upon her death or remarriage the land shall be shared equally among Sharon Naleke Momposhi, Kelvin Lekishon Momposhi, MSM and MLM.

- ii. Esther Kakenya of the 2nd house shall hold a life interest in her share which shall revert to F.M.M. upon her death or remarriage;
- d. Plot number 14, A/C No. 716115 shall devolve to Esther Kakenya;
- e. Plot number 130 'B', A/C No. 715354 shall devolve to Lilian Reteti
- f. Proceeds from, Plot numbers 712955, 715012, 713338 shall devolve to Esther Kakenya;
- g. Proceeds from 715050, 715353, 715356 shall devolve to Lilian Reteti;
- h. Insurance pension policy No. [xxxx] shall be shared between the 1st and 2nd house in the ratio of 5:2 in favour of the 1st house.
- i. This being a family matter, each party to bear their own costs.

Dated, signed and delivered at Kisii on 2nd day of May 2019.

R.E. OUGO

JUDGE

In the presence of;

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|-------------------|------------------------------------------|
| Ochwangi | For the 1st Petitioner |
| Mr. Anyona | For the 2nd Petitioner |
| Rael | Court clerk |