



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 92 OF 2015

IN THE MATTER OF THE ESTATE OF ONYAMBU MEKENYE KIROIME (DECEASED)

BETWEEN

NYABUTO MEKENYA ONYAMBU.....1ST APPLICANT

ESTHER MOKEIRA ONYAMBU.....2ND APPLICANT

AND

DUKE ELKANA ONYAMBU.....RESPONDENT

RULING

1. This case concerns the estate of **ONYAMBU MEKENYE KIROIME** (“the deceased”) who died on 27th October 2014. During his lifetime he had three wives; Martha Moraa Onyambu, Pacifica Osebe Onyambu and Esther Mokeira Onyambu, who is the only surviving wife. He left behind the following children: Eunice Bonareri Onyambu, Elizabeth Nyaboke Onyambu, Charles Mekenya Onyambu. Duke Elkanah Onyambu, Moses Okechi Onyambu, Florence Gesare Onyambu, Daniel Nyakundi Onyambu, Jane Bitengo Onyambu, Evans Omoke Onyambu, Ezra Sagana Onyambu, Shadrack Mogeni Onyambu, Nyabuto Mokenye Onyambu and Andrew Gori Onyambu.

2. The deceased left behind two properties which are now the subject of contention; **GESIMA SETTLEMENT SCHEME/56** (“Plot xx”) and **SOUTH MUGIRANGO/BOGETENGA/665** (“Plot xxx”).

3. There are two applications for confirmation of grant. The first one is dated 30th August 2018 and is filed by the advocates for the administrators while the second one is dated 22nd January 2019 and is filed by Nyabuto and Esther. When the matters came up for hearing, I referred the parties for mediation but this did not result into an agreement as the parties could not agree on the mode of distribution. I therefore heard the testimony of the eldest son in the first house, Duke Elkanah Onyambu (PW 1), the eldest son of the second house, Nyabuto Mekenye Onyambu (DW 1) and the deceased’s surviving wife, Esther Mokeira (DW 2) and Andrew Gori Onyambu (DW 3) from the second house.

4. Although the parties seem to agree that the deceased at one time divided his land between the first and second house, he later changed his mind when he married his third wife, Esther. According to Duke, the deceased gave Plot 56 to the first house and then gave 4 ½ Ha to Esther when he married her. His position is that Plot 566 was given to the second house exclusively that is to the two brothers; Nyabuto and Gori. Both Nyabuto and Gori disagree. They accept that the deceased gave Mokeira 4 ½ acres of the Plot 56 but that both the first and second houses were to share Plot 56 and 566. Gori stated that he was the only one residing on half of Plot 566 while the other half was to be taken by the first house.

5. At the hearing it emerged and it is now a matter of record that the deceased’s second wife, Pacifica and Nyabuto sued the deceased in ***Kisii HCCC No. 1 of 2012 (OS) (Basibika Osebe Onyambu and Nyabuto M. Onyambu v Onyambu Mekenye Kiriome)*** seeking orders that the court be pleased to compel, “[T]he respondent to subdivide LRS **GESIMA SETTLEMENT SCHEME/xx** and **SOUTH MUGIRANGO/BOGETENGA/xxx** into three equal shares amongst his three wives to wit; **BASIBIKA OSEBE ONYAMBU, MARTHA MORAA ONYAMBU and ESTHER MOKEIRA ONYAMBU.**” That suit was never heard and determined as the deceased died.

6. Since the deceased was polygamous man and he died in 2014 when the ***Law of Succession Act (Chapter 160 of the Laws of Kenya)*** (“the **LSA**”), the deceased’s estate is to be divided in accordance with **section 40(1)** of thereof which deals with the estate of a polygamous intestate and it provides:

40(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.

7. However, under **section 42** of the *LSA*, the court may, in distributing the property, take into account the property the deceased has already given to or settled to certain beneficiaries. It provides as follows:

42. Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

8. The tenor and effect of **section 42(a)** aforesaid is that if a deceased person had distributed his estate during his lifetime, his wishes ought to be, as far as it practicable, be respected. In *Joseph Wairuga Migwi v Mikielina Ngina Munga* NYR HC Succ. No. 404 of 2012 [2016] eKLR, Mativo J., observed that the wishes of the deceased, who had distributed his land in his lifetime and fixed clear physical boundaries which none of his beneficiaries had interfered with even after his death, should be respected. Makhandia J., in *Paul Kiruhi Nyingi & Another v Francis Wanjohi Nyingi* NYR HC Succ. No. 508 of 1999 [2009] eKLR accepted the deceased's wishes and observed that unless it can be demonstrated that the wishes of the deceased were illegal, unfair or discriminatory to the beneficiaries or some of them, his wishes should be respected. In *Re Estate of George Chumo Mibe* KRC HC Succ. No. 50 of 2012 [2017] eKLR, Mumbi Ngugi J., held that the deceased's wishes were not proved or ascertained by the evidence and that the proposed distribution reflecting the deceased's wishes was unfair to other beneficiaries.

9. I cannot say that the deceased wishes were very clear or could be ascertained as far as his children were concerned. He had not taken any overt steps to settle his wives or their children on a specific part of the land and that is why Nyabuto and his mother took the step to sue the deceased for a share. I bear in mind that in fact that Pacifica and the deceased were divorced and her inclusion in the case was an attempt to protect the interests of her children. I also find that from the tenor of the evidence, the property was to be shared by the male children of the deceased. The deceased's daughters have not renounced their interests and they too, are entitled to a share of the estate. What is not disputed is that fact that the deceased gave Esther 4 ½ acres. In the circumstances, I find and hold that the deceased gave his youngest wife 4 ½ acres of Plot 56 during his lifetime as a gift to her.

10. I therefore find and hold that since the deceased had not shared his property to his wives and their children, Plot 56 and 665 shall be distributed in accordance with **section 40** of the *LSA* Taking into account that Esther already has 4 ½ acres of Plot 56 as a gift from the deceased, she shall be excluded from the distribution of Plot 665. This means that the balance Plot 56 and Plot 665 should now be shared by all other beneficiaries equally.

11. I therefore confirm the grant dated 26th July 2018 as follows:

(a) Esther Mokeira Onyambu – 4 ½ acres of **GESIMA SETTLEMENT SCHEME/56**.

(b) The remainder of **GESIMA SETTLEMENT SCHEME/56** to Eunice Bonareri Onyambu, Elizabeth Nyaboke Onyambu, Charles Mekenya Onyambu, Duke Elkanah Onyambu, Moses Okechi Onyambu, Florence Gesare Onyambu, Daniel Nyakundi Onyambu, Jane Bitengo Onyambu, Evans Omoke Onyambu, Ezra Sagana Onyambu, Shadrack Mogeni Onyambu, Nyabuto Mokenye Onyambu and Andrew Gori Onyambu.

(c) **SOUTH MUGIRANGO/BOGETENGA/665** to Eunice Bonareri Onyambu, Elizabeth Nyaboke Onyambu, Charles Mekenya Onyambu, Duke Elkanah Onyambu, Moses Okechi Onyambu, Florence Gesare Onyambu, Daniel Nyakundi Onyambu, Jane Bitengo Onyambu, Evans Omoke Onyambu, Ezra Sagana Onyambu, Shadrack Mogeni Onyambu, Nyabuto Mokenye Onyambu and Andrew Gori Onyambu.

(d) Any subdivisions should take into account where the parties have settled and all the beneficiaries shall share the costs of subdivision equally.

(e) There shall be no order as to costs for these proceedings.

DATED and DELIVERED at KISII this 2nd day of MAY 2019.

D. S. MAJANJA

JUDGE