



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE NO.234 OF 2011**

**IN THE MATTER OF THE ESTATE OF MBISI ISENA (DECEASED)**

**WILFRED ONCHOKE OBURE.....1<sup>ST</sup> PETITIONER**

**AND**

**DAVID BIRUNDU OBURE.....2<sup>ND</sup> PETITIONER**

**RULING**

1. This succession cause concerns the Estate of **Mbisi Isena** who died intestate on 14<sup>th</sup> November, 2010. His deceased widow, Prisillah Kwamboka Isena was issued with Letters of Administration in his estate on 29<sup>th</sup> September, 2012 and the same confirmed on 7<sup>th</sup> March 2014. Through summons dated 18<sup>th</sup> February, 2013 the 1<sup>st</sup> Petitioner, and his brothers Josephat Mesa Mbisi, James Ogwoka Obure, Joseph Ombega Obure and Evans Oichoe Obure made an application to have the grant revoked on the grounds that the same had been issued by concealment of the fact that they are the sons of the deceased through his 1<sup>st</sup> wife.
2. Subsequently, the parties consented to having the earlier grant revoked and amended grant issued jointly to the 1<sup>st</sup> petitioner of the 1<sup>st</sup> house and the 2<sup>nd</sup> petitioner of the 2<sup>nd</sup> house on 24<sup>th</sup> September, 2018. They also consented to having the titles to land parcel No. Majonge/Boochi/6154, 6155 and 6156 cancelled and reverted back to the original title no. Majonge/Boochi/210 which belonged to the deceased. This court then directed the administrators to file an application for confirmation of grant listing all beneficiaries and proposing a mode of distribution for the deceased's property, land parcel no. Majonge/Boochi/210.
3. The 1<sup>st</sup> petitioner filed the application for confirmation of grant on 18<sup>th</sup> October 2018 and swore an affidavit in support on the same day. He averred that the deceased had divided the suit land between his two houses with a clearly demarcated boundary and had set apart a small portion of the land measuring 2 acres for his use which was popularly referred to as "*Emonga*." He deposed that the deceased had indicated that the portion would solely be inherited by the 1<sup>st</sup> house, for the reason that the entire dowry paid by the husband of the daughter of the 1<sup>st</sup> house had been used to resolve a land dispute involving the lower part of the suit land. He proposed that the land be subdivided in the manner in which the deceased had divided it and the remaining portion (*Emonga*) be shared between the sons of the 1<sup>st</sup> house.
4. When the matter came up for hearing the 1<sup>st</sup> petitioner testified that his father had two wives and he was the 1<sup>st</sup> born of the 1<sup>st</sup> house. He testified that there had been a prolonged court case concerning the lower part of the land which was determined in favour of the deceased. The deceased had subdivided his land measuring 12.5 acres into two portions from the road on the upper side down towards the river and given a portion of the land to his 2<sup>nd</sup> wife and the other portion to his mother. He reiterated that the deceased had an "*Emonga*" on the upperside of the land which he indicated would go to the older house. He urged the court to subdivide the land as the deceased had willed.
5. David Birundu Obure (DW 1) agreed that his father the deceased had 2 wives both of whom were deceased. He testified that the deceased had divided his land measuring 12.5 acres between his wives using beacons and had sliced of a portion for himself called *Emonga*. He testified that his brothers had annexed the *Emonga* for themselves and the dispute related to that portion of the land.
6. By consent, the Kisii County Land Surveyor visited the suit property on 18<sup>th</sup> January, 2019 and prepared a report indicating the occupants of the suit land the sizes of the portions they occupied.
7. Counsel for the 1<sup>st</sup> petitioner filed written submissions emphasizing the proposal that the suit land be subdivided according to the occupation of the land on the ground. He submits that the deceased had in his wisdom left the disputed portion of land to the 1<sup>st</sup> house as it had more sons. He contends that sharing the estate equally among all beneficiaries, as provided by the law, will create disorder as the 1<sup>st</sup> house will end up with a portion of the land occupied by the 2<sup>nd</sup> house.
8. On his part, the counsel for the 2<sup>nd</sup> petitioner opposes the surveyor's report. In his written submissions he argues that the surveyor had

indicated that the sons of the 1<sup>st</sup> house were occupying a portion measuring 2.25 hectares yet the truth of the matter on the ground was that they occupied a larger portion. He argues that the report failed to take measurements of a portion of land stretching down to the river and therefore arrived at an incorrect finding. He contends that the surveyor has contrived with the 1<sup>st</sup> house to ensure they get the disputed portion (*Emonga*) and recommends a resurvey and equal subdivision of the land to avoid disputes in the future.

9. From the evidence adduced and arguments and depositions presented by the parties, a few issues are not in contention. It is agreed that the deceased was a polygamous man with two houses and was survived by the following beneficiaries;

**1<sup>st</sup> house**

- a. Wilfred Ombega Mbisi
- b. Joseph Ombega Mbisi,
- c. James Ogwoka Obure,
- d. Josephat Mesa Obure
- e. Evans Oichoe Obure
- f. Monica Makumba

**2<sup>nd</sup> house**

- a. David Birundu Obure
- b. Pius Omwoyo Mbisi
- c. Joyce Moraa Mbisi
- d. Margaret Nyanchama Momanyi
- e. Beatrice Kemunto Onchari
- f. Rose Bochere Enock

10. Being a polygamous man, the deceased property was subject to division in line with **section 40** of the **Law of Succession Act Cap 160 ( 'the Act ' )** which 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.*

*(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.*

11. The court is however required to take into account the circumstances of each case in its application of **Section 40** of the Act. (See **Mary Rono v Jane Rono & Anor Civil Appeal No. 66 of 2002 [2005] eKLR**). In the present case it is not disputed that the deceased divided his sole property land parcel no. Majonge/Boochi/210 between his two houses long before he died. Section 42 of the Act provides that subdivisions made by a deceased during his lifetime ought to be taken into account in the distribution of his estate. The provision stipulates 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;*

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

12. The Kisii County Surveyor has availed a sketch map of the portions occupied by the two houses following a survey in which both houses were represented. The 2<sup>nd</sup> house has opposed the survey report through their written submissions contending that the survey was inaccurate but no attempt was made to prove these assertions through evidence. Submissions cannot be relied on by a party to prove his claim. That was the finding of the Court of appeal in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another CA NRB Civil Appeal No. 240 of 2011 [2014] eKLR** where it held;

*Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.*

13. The sketch map accompanying the survey report divides the suit land into three sections. It shows that the 1<sup>st</sup> house occupies section 'A' which measures 2.25 hectares, the 2<sup>nd</sup> house occupies section 'B' measuring 2.35 hectares while the 1<sup>st</sup> petitioner cultivates section 'C' measuring 0.7 hectares. The deceased daughters have filed affidavits renouncing their right to a share of the deceased property, leaving the sons of deceased to inherit his property. The 1<sup>st</sup> house has five sons namely Wilfred Ombega Mbisi, Joseph Ombega Mbisi, James Ogwoka Obure, Josephat Mesa Obure and Evans Oichoe Obure. The 2<sup>nd</sup> house on the other hand has two sons being David Birundu Obure and Pius Omwoyo Mbisi. All sons attended the survey of the property by the county surveyor and as already observed above, none have formally disputed that the survey is a reflection of the occupation of suit land by the beneficiaries on the ground.

14. The distribution of section 'A' and section 'B' of the sketch is not in issue. The sticking point between the parties is the subdivision of section 'C' (*Emonga*). I am inclined to allow the more equitable proposal by the 1<sup>st</sup> petitioner that the disputed portion of land be inherited by the 1<sup>st</sup> house which has more sons as compared to the 2<sup>nd</sup> house. The deceased's land parcel Majoge/Boochi/210 shall therefore be shared between the 1<sup>st</sup> house and the 2<sup>nd</sup> house with each house getting the area they presently occupy as set out in the survey report.

15. There shall be no orders for costs as this is a family matter.

**Dated, signed and delivered at Kisii this 13<sup>th</sup> day of June 2019.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Onyancha For the 1<sup>st</sup> Petitioner**

**Mr. Abobo For the 2<sup>nd</sup> Petitioner**

**Rael Court Clerk**