



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 166 OF 2013

IN THE MATTER OF THE ESTATE OF SHEM AYODO OYOO (DECEASED)

BETWEEN

SARAH ABONYO ANGWENY.....PETITIONER/RESPONDENT

AND

RACHAEL ONG'ONCHO AYODO.....1ST PROTESTOR

JACOB OMONDI.....2ND PROTESTOR

JOSHUA OKEYO.....3RD PROTESTOR

RULING

1. This matter concerns the estate of Shem Ayodo Oyoo (“the deceased”) died on 15th September 2004. His wife, Sarah Abonyo Angweny (“Sarah”) presented the petition for letters of administration. After the petition was gazetted and the grant of letters of administration issued, Sarah filed summons for confirmation of grant on 17th April 2014. She deposed in her affidavit in support of summons for confirmation of grant of letters of administration that the deceased was survived by three wives, Sarah, Rachael Ongoch Ayodo (“Rachael”) and Jenifer Ayodo as well as his children from his three wives. Jenifer Ayodo and her children had already been given land by the deceased prior to his death and thus made no claim to the only property subject of distribution: Kasipul/Kachieng/412 (“Plot 412”).

2. She further deposed that the deceased was survived by the following beneficiaries and proposed that each beneficiary should get a total of 2.84 acres from the estate as shown in the sketch map annexed thereto;

- a) Sarah Abonyo Angweny – Widow (portion 1)
- b) Rachael Ongoch Ayodo – Widow (portion 2)
- c) Felix Oluoch Ayodo – Son (portion 9 and 23)
- d) Alphas Ochieng’ Oyodo – Son (portion 8 and 22)
- e) Phinah Atieno Ayodo – Daughter (portion 7 and 21)
- f) Simeon Oyoo Ayodo – Son (portion 6 and 20)
- g) Lorna Ayodo – Daughter (portion 5 and 19)
- h) Isaac Ogwenyo Ayodo – Son (portion 4 and 18)
- i) Lizzy Akinyi Ayodo – Daughter (portion 3 and 17)

- j) John Odero Ayodo – Son (portions 16 and 30)
- k) Jack Omondi Ayodo – Son (portion 10 and 24)
- l) Elisha Onyango Ayodo – Son (portion 15 and 29)
- m) Risper Atieno Ayodo – Daughter
- n) Joshia Okeyo Ayodo – Son (portion 11 and 25)
- o) Rose Adhiambo Ayodo – Daughter (portion 12 and 26)
- p) Noah Simba Ayodo – Son (portion 14 and 28)
- q) Daniel Odhiambo Ayodo – Son (portion 13 and 27)

3. Sarah deposed that she applied the principle of equality to ensure that no beneficiary takes undue advantage over the other. She however contends that Risper Atieno Ayodo was left out of the distribution of the estate as she was married in 1980 long before the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** (“the **LSA**”) came into force and the applicable law would be customary law, in that regard she is not entitled to inherit as she was a married woman.

4. On 1st October 2014, Rachael filed a replying affidavit to the summons of confirmation of grant where she deposed that the proposed mode of distribution did not take into account the physical location of the homes of the beneficiaries on the ground, therefore if the same were to be adopted it would lead to eviction and relocation of some of the beneficiaries. The shares proposed in her deposition were as follows:

- A. Daniel Odhiambo/Rael Ayodo 1.815Ha
- B. Sarah Abonyo – 2.376 Ha.
- C. Jack Ayodo – 0.336 Ha
- D. Joshua Ayodo – 0.415 Ha
- E. Noah Ayodo – 1.778Ha
- F. Elisha Onyango – 2.109 Ha
- G. John Odero – 2.081 Ha.
- H. Joshua Ayodo – 0.759 Ha.
- I. Jack Ayodo – 0.641 Ha.
- J. Sarah Abonyo – 2.606 Ha
- K. Rael Ayodo – 4.229 Ha.

5. On 20th February, Nagillah J., ordered the District Land Registrar and Surveyor Rachuonyo District to make a proposal on the mode of distribution in the presence of the parties, Area Chief and the parties’ advocates. The matter was further mentioned before Wakiaga J., on 10th July 2015 and he directed the District Land Registrar and the Surveyor Rachuonyo District to visit Plot 412 and prepare a report.

6. When the District Surveyor and Land Registrar visited Plot 412 on 22nd September 2015, the parties’ advocates were not present and after discussion, the exercise aborted. When the matter was mentioned before me, I directed that the District Land Registrar and the Surveyor Rachuonyo District to visit and write a report with or without the advocates within 45 days.

7. The application came up for hearing on 29th May 2019. Mr Adiso, counsel for the objector, submitted that the deceased divided the land into two portions before his death. He adopted the finding of the report by the Land Registrar dated 14th June 2018 and filed in court on 22nd January 2019. According to the report portion A and B as per the attached map was for the 1st and 3rd houses respectively. Counsel submitted that in due course Rachael’s children built their homes on a portion of the parcel B, marked as C & D on the map. According to the report it was agreed that the permanent homesteads were to be retained and the 2nd house in exchange would get 0.8 Ha from the portion of 1st house indicated on the map as E. The map also had a sketch of the Rachael’s homestead. Mr Adiso further submitted that Sarah lives on the land as well. He prayed for the wishes of the deceased be respected.

8. Mr Nyangwencha, counsel for the petitioner, urged the court to consider the proposal that ensures that the estate which is 48 acres is

shared equally between the two houses with each beneficiary getting equal shares. He also submitted that part of the petitioner's land had been encroached and the proposed land given for compensation was unacceptable.

9. Since the deceased was polygamous man and he died in 2004 when the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the **LSA**") was in force, 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.

10. 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.

11. 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 Mibei 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.

12. The dispute in this case between the 1st and 3rd house is whether the deceased's property should be divided equally or whether the court should respect the division set by the deceased. Sarah urged this court to apply the principles of equality and ensure that all the beneficiaries get equal shares being 2.84 acres each. On the other hand, it is apparent two sons from the 1st house settled on the part reserved for the 2nd house and proposed to compensate the house with land elsewhere. That proposal was not acceptable to the 3rd house.

13. I have considered the matter and have come to the conclusion that in as much as the deceased had divided the land into two portions for the 1st and 3rd wives, there was clear encroachment on the part occupied by one family by members of the other family. Further, I also find that the distribution between the children from the first house and those from the second house would not be fair and proportionate and would not meet the test of equality and equity inherent in **section 40** of the **LSA**.

14. Consequently, I find and hold that the each named beneficiary of the deceased is entitled to an equal share of the deceased property. However, any subdivision must take into account where each beneficiary has settled. The deceased's homestead shall however be divided equally between the deceased's wives; Rachael Ongocho Ayodo and Sara Abonyo Agweny.

15. Before the grant is formally confirmed, I give the parties a chance to agree on the subdivision.

DATED and DELIVERED at KISII this 16th day of JULY 2019.

D.S. MAJANJA

JUDGE

Mr Nyangwencha instructed by Nyangwencha and Company Advocates for the petitioners.

Mr Adiso instructed by Adiso and Company Advocates for the protestors.