



**REPUBLIC OF KENYA**

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

**[CORAM: MRIMA, J.]**

**SUCCESSION CAUSE NO. 19 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE MATABO SABORA**

**alias MATABWA SABORA CHACHA (DECEASED)**

**-between-**

**GATI JOHN MOTABO.....PETITIONER**

**versus**

**MWITA MOTABO SABORA**

**JOHN CHACHA & OTHERS.....PROTESTORS**

**JUDGMENT**

1. **Gati John Motabo** petitioned for the administration of the estate of his late father, **Motabo Sabora alias Matabwa Sabora Chacha** (hereinafter referred to as '**the deceased**') sometimes in July 2012 about 13 years after the death of the deceased. In December 2012 the Protestors herein lodged an objection to the making of the Grant to the Petitioner. A consent was later entered between the parties herein and a Grant of Letters of Administration Intestate issued on 08/04/2015 to the said Petitioner, **Gati John Motabo**.
2. The Petitioner then filed a Summons for Confirmation of the Grant on 18/04/2018 (hereinafter referred to as '**the Summons**'). The Summons was opposed by the Protestors through the Replying Affidavit of **Mwita Motabo Sabora** filed on 04/07/2018. The Affidavit was filed on behalf of all the Protestors.
3. Directions were taken on the hearing of the Summons. Parties proposed and the Court agreed that the Summons be heard by way of oral evidence. To that end the Protestors were deemed as the Plaintiffs and the Petitioner deemed as the Defendant. Parties filed various Witness Statements.
4. The Plaintiffs'/Protestors' case was as deponed in the Replying Affidavit of Mwita Motabo Sabora (hereinafter referred to as '**Mwita**'). Mwita contended that the Petitioner had unlawfully omitted his name as one of the beneficiaries of the estate of the deceased. Mwita further contended that the Petitioner had only listed the children of the second wife of the deceased as the sole beneficiaries and not any of the children of the deceased from the first wife. He also contended that as a son of the deceased from the first house he was equally entitled to the inheritance just as the other children from the second house. He submitted that there was no legal justification to disinherit him. Mwita called a witness in support of his case. He was one **Joseph Mosenye Gitiro** who testified as **PW1**.
5. The Petitioner's case was that the children of the deceased from the first wife were not entitled to any inheritance from the property making the estate of the deceased. The estate property comprised of the parcel of land known as **Bukira/Buhungera/228** (hereinafter referred to as '**Plot No. 228**') and **Bukira/Buhungera/251** (hereinafter referred to as '**Plot No. 251**'). The reason being that the children from the first wife were allocated their share during the life of the deceased. That the deceased had allocated the first wife the parcel of land known as **Bukira/Buhungera/207** (hereinafter referred to as '**Plot No. 207**') where the first wife and her children lived on. The Petitioner contended that even at her demise the first wife was buried on Plot No. 207. He also testified that Mwita still lives thereon to date. He further testified that Plot No. 207 was registered in the name of Mwita on behalf of his mother and siblings.
6. The Petitioner further testified that his mother was the second wife of the deceased and that she was settled on the parcel of land known as Plot No. 228. That, unlike Plot No. 207 the parcel of land Plot No 228 was still registered in the name of the deceased as the deceased lived thereon. The Petitioner therefore contended that the first house was adequately provided for during the life of the deceased through Plot No. 207 and is not entitled to any share of Plot No. 228. The Petitioner acknowledged the sale of Plot No. 251 by the deceased long before he died.

7. The Petitioner called 7 witnesses in support of his case. They were **Joannes Nyamboha Marwa (DW1), Rioba Mwita Marwa (DW2), Zacharia Machera Igobero (DW3), Boke Lucas Mwita (DW4), Francis Sabora (DW5), Maria Owaga (DW6)** and **Beneti Rael (DW7)**.

8. DW4 testified that her husband bought Plot No. 251 from the deceased.

9. The rest of the witnesses testified in support of the position taken by the Petitioner. They variously contended that Plot No. 207 and Plot No. 228 were initially owned by the deceased and that the deceased performed all the necessary Kuria traditional rites in establishing the home for his first wife on Plot No. 207. They contended that the deceased even buried the first wife thereon.

10. DW1 was the Chief of Bukira North Location since 2008. He was the Assistant Chief of Kurutiange Sub-Location from 1997 until his promotion in 2008. He testified that Mwita had approached him in 1998 and requested him to intervene on his behalf to the deceased. The purpose of the intervention was that Mwita would get his share in Plot No. 228. That, DW1 approached the deceased in the company of his elders and discussed the issue. That, the deceased stated that he owned both Plot No. 207 and Plot No. 228 and had settled her first wife on Plot No. 207 and the second wife of Plot No. 228. The deceased further stated that if instead Mwita wanted Plot No. 228 then he was to first re-transfer Plot No. 207 to him. He also stated that Mwita was the only son in the first house and he had registered him in Plot No. 2017 on behalf of the first wife and her children.

11. DW3 testified on how his father was the Caretaker on Plot No. 207. He recalled that Plot No. 207 was initially owned by one **Moseti**. That, Moseti then travelled to Tanzania and stayed there for a long period. On return Moseti wanted to sell the land and it was DW3's father who organized for the deceased to buy Plot No. 207 at a price of two cows.

12. DW5's father was one **Zablon Makoba** who was a brother to the deceased. The deceased was hence an uncle to DW5. DW5 testified that his father was invited by the deceased to live on around 8.4 Hectares of Plot No. 228 since 1972. They have since then stayed there. That, when they went onto Plot No. 228 Mwita and her mother had already moved to Plot No. 207. DW6 was the wife of Zablon Makoba.

13. The second wife of the deceased testified as DW7. She narrated how the deceased acquired Plot No. 207 and settled the first wife. She contended that Plot No. 207 was gifted to Mwita by the deceased.

14. Mwita strenuously opposed the Petitioner's contention. He asserted that he bought Plot No. 207 from one **Moseti Mukira** and he remains the first registered owner. Mwita then sold a portion of Plot No. 207 to PW1. Mwita contended that despite having acquired Plot No. 207 he is still entitled to inherit from Plot No. 228.

15. At the close of the cases parties filed written submissions.

16. I have carefully considered the pleadings, witness statements, the oral evidence and the submissions. I note that the Protesters' submissions instead sought for the revocation of the Grant to the Petitioner.

17. I find the following as the emerging issues for determination in this matter: -

**(a) Whether the deceased died intestate;**

**(b) Whether Plot No. 207 was initially acquired by the deceased and subsequently registered in the name of Mwita in trust of the first house and the children thereof;**

**(c) Whether Mwita is entitled to any share of Plot No. 228;**

**(d) Plot No. 251.**

18. I will consider each issue separately.

**Whether the deceased died intestate:**

19. DW1 testified that he authored the letter dated 30/04/2012. The letter stated *inter alia* that the deceased made a will. In cross-examination DW1 clarified that he referred to an oral will as he had been so told by the children of the deceased from the second house. The letter was produced as an exhibit. None of the children of the deceased from the second house testified of any oral will.

20. Be that as it may I must nevertheless look at the law on oral wills. **Sections 9 and 10** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya state as follows: -

**9. (1) No oral will shall be valid unless-**

**a) it is made before two or more competent witnesses; and**

**b) the testator dies within a period of three months from the date of making the will:**

**Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died**

more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by Sections 18 and 19.

10. If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral shall not be valid except so far as its contents re proved by a competent independent witness.

21. As the allegation of an oral will was not vouched by any witness it cannot stand. I find that the deceased died before making any will. He therefore died intestate.

**Whether Plot No. 207 was initially acquired by the deceased and subsequently registered in the name of Mwita in trust of the first house and the children thereof:**

22. Section 42 of the Law of Succession Act, Cap. 160 Laws of Kenya provides as follows: -

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,

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

23. The law recognizes instances where one can make gifts during lifetime. Such gifts must be taken into account during distribution of the estate. There are two types of gifts. Nyamweya, J rightly dealt with the types of gifts in **Re Estate of the Late Gideon Manthi Nzioka (Deceased) (2015) eKLR** as follows: -

In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

.....For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trust or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

24. Of principal importance is that the gift must belong to the one giving it out. As stated by the Court in the above case ***‘a person cannot gift that which he or she does not own’***. I have looked at the Certificate of Official Search for Plot No. 207 which was issued on 20/03/2015 and which was produced as an exhibit. Although the green card was not produced in these proceedings the Official Search confirms that Plot No. 207 was first registered on 03/04/1075 to four people in equal shares. They are Mwita, Gati Mwita, Muraha Mwita and Nyerabu Mwita. Mwita testified that he included his wives and children in the ownership of Plot No. 207.

25. Mwita testified on 16/05/2019. He stated that he was 75 years old. He also stated that he bought Plot No. 207 in 1971 and immediately moved thereto. It therefore means that Mwita was 27 years old in 1971. He was not a minor. Mwita also stated that at the time of purchasing Plot No. 207 it was not surveyed and adjudicated until sometimes in 1975 when the exercise was undertaken by the Government. That may be the reason why Plot No. 207 and Plot No. 228 were first registered on the same day.

26. From the evidence before me I must find, which I hereby do, that there is no tangible evidence that Plot No. 207 initially belonged to the deceased. I say so on the following reasons. **First**, the first registration in 1975 was to four persons and the deceased was not one of them. **Second**, the deceased did not lodge any encumbrance over Plot No. 207 in favour of the first house even after the alleged demands by Mwita on Plot No. 228. **Third**, it was possible for Mwita who was 27 years old in 1971 to acquire property on his/her own. **Fourth**, the deceased acquired Plot No. 251 and registered it in his names in 1981.

27. **Fifth**, although customary interests in land may be regarded as overriding interests in appropriate instances such customary interests must first be proved to have existed. In this case evidence ought to have been adduced on the customs and the interests created by those customs and how they played out in the unique circumstances of this matter. Needless to say, whoever seeks to rely on a custom he/she must prove that such a custom exists. (See **Sections 107, 108 and 109 of the Evidence Act**, Chapter 80 of the Laws of Kenya and the Court of Appeal in **Njoki -vs- Muteru (1985) KLR 874**).

28. The Petitioner testified that according to Kuria customs a husband cannot visit his wife who lived in a homestead which the husband did not establish. That is called *‘Ukwimla Igisinko’*. From the record there was no corroboration on the existence of that custom. Further, the custom did not fully disclose the repercussions of non-compliance on the part of the husband or anyone who stood on its way. Although there was evidence that the deceased visited the first wife on Plot No. 207 and even attended her burial thereat that evidence taken in isolation cannot be a solid basis to impute the existence of a custom and that the said custom was duly complied with and created overriding interests. After all, Mwita stated that he allowed the deceased to visit his mother on Plot No. 207 and for the ceremonies to take place since his mother

was still married to the deceased. He was categorical that such did not impeach his ownership to Plot No. 207.

29. Having said so, I must also say that even if it was proved that there were Kuria customs which created overriding interests on Plot No. 207 still the requirements in **Re Estate of the Late Gideon Manthi Nzioka (Deceased)** (supra) were not fulfilled. I note that Plot No. 207 was registered in 1975 and the deceased died in 1999; a period of 24 years later. Since Plot No. 207 was allegedly delivered to Mwita when it was still unregistered then that ought to have been *'in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.'*

30. From the foregone I am not convinced that Plot No. 207 was initially acquired by the deceased and subsequently registered in trust of the first wife of the deceased and her children. Plot No. 207 does not therefore form part of the estate of the deceased.

**Whether Mwita is entitled to any share of Plot No. 228:**

31. There is no doubt that Mwita is a son of the deceased from the first house. As such he is a beneficiary to the estate of the deceased.

32. There are three properties in this matter. Two of them were registered in the name of the deceased. They are Plot No. 228 and Plot No. 251. There is no dispute that the deceased sold Plot No. 251 to DW4's husband. The dispute is on Plot No. 207 and Plot No. 228. As I have found that Plot No. 207 is not part of the estate of the deceased, that leaves only Plot No. 228 for distribution. All parties agree that the deceased gave a portion of Plot No. 228 to his brother one Zablon Makoba. The portion measures 8.4 Hectares. The family of Zablon Makoba has lived on that land to date. They are entitled to that portion given that they took possession since 1971 and there being no dispute to their entitlement.

33. I will now deal with the devolution of Plot No. 228. The deceased was polygamous. He had two wives. The first wife was **Mosena Motabo** who died long before the deceased. Mosena had six children with the deceased. Mwita is the only son. Two daughters died and three are still alive. They are **Chacha Motabo, Matongoi Motabo** and **Waikuru Motabo**. The second wife is DW7. She survived the deceased. DW7 had two sons who are the Petitioner and one **Nyangi Motabo**. Nyangi Motabo died and left behind his wife one **Christine Gimunta Nyangi** and children.

34. As the deceased was polygamous the distribution of his estate shall be in accordance with **Sections 35 and 40** of the **Law of Succession Act**.

35. **Section 40** of the **Law of Succession Act** provides as follows: -

**(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.**

36. The first house has four children while the second house has two children and the surviving wife (DW7). The beneficiaries are 7 in number. The portion occupied by the family of Zablon Makoba must first be excised. It is agreed that the portion measures 8.4 Hectares. According to the Certificate of Official Search dated 28/03/2012 which was produced as an exhibit Plot No. 228 measures 27 Hectares. The remainder thereof shall be 18.6 Hectares.

37. In accordance with **Sections 35 and 40** of the **Law of Succession Act**, the beneficiaries are entitled to equal shares of the remainder of Plot No. 228, that is 18.6 Hectares. I note that the three daughters of the deceased from the first house were not taken into account in the proposed distributions by the Petitioner and Mwita. I did not as well see any dispositions that they are not interested in the estate property. Since the law recognizes both sons and daughters as children I find that not taking the daughters into account as possible beneficiaries of an estate without the express renunciation of their entitlements amounts to discrimination. It is in contravention of **Article 27** of the **Constitution**. I will take the three daughters into account in this distribution. That brings the number of beneficiaries to 7. The 7 beneficiaries are therefore equally entitled to the 18.6 Hectares.

38. I have also noted that there is a party described by both parties as a purchaser. He is one **Samwel Moronge Zablon**. It is not clear how he purchased the portion of Plot No. 228. However, in view of the Petitioner's submissions on the last paragraph on page 4 that *'In conclusion, we humbly urge Your Lordship to find that the Objector is not entitled to share in Title Number BUKIRA/BUHURINGERA/228 as should be shared among the family members of RAEL BENETI MOTABO and the family of [ZABLON] MAKOKA as was distributed by the deceased'*, it comes out that the said Samwel Moronge Zablon is the representative of the family of Zablon Makoba.

**Plot No. 251:**

39. As said, there is no dispute that Plot No. 251 belongs to Boke Lucas Mwita.

40. In the end, the following orders do hereby issue: -

**(a) The Grant of Letters of Administration made to Gati John Motabo on 08/04/2015 is hereby confirmed.**

**(b) The parcel of land known as Bukira/Buhungera/207 is not part of the estate of Motabo Sabora *alias* Matabwa Sabora**

Chacha, the deceased herein.

(c) The parcel of land known as Bukira/Buhungera/251 shall be registered in the name of BOKE LUCAS MWITA.

(d) The parcel of land known as Bukira/Buhungera/228 shall devolve as follows: -

(i) The portion of 8.4 Hectares occupied by the family of Zablon Makoba shall be registered in the name of ZABLON MAKOBA.

(ii) The remainder thereof shall be equally shared between Beneti Rael *also known as* Beneti Motabo, John Gati Motabo, Christine Gimunta Nyangi, Chacha Motabo, Matongoi Motabo, Waikuru Motabo and Mwita Motabo *also known as* Mwita Motabo Sabora.

(iii) Christine Gimunta Nyangi shall hold the share on her own behalf and on behalf of the children of Nyangi Motabo.

(e) A Certificate of Confirmation shall issue forthwith.

(f) Each of the beneficiaries above shall meet the costs of sub-division of their respective portions as well as the costs of these proceedings.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 15<sup>th</sup> day of October 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Omonde Kisera** Counsel instructed by Messrs. Omonde Kisera & Company Advocates for the Petitioner.

**Mr. Sigei**, Counsel instructed by Messrs. Abisai & Company Advocates for the Protestors.

**Evelyne Nyauke** - Court Assistant