



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION NO 498 OF 2014

IN THE MATTER OF THE ESTATE OF MARARO SONGORO (DECEASED)

AND

GEOFFREY MAGORO OSORO.....1<sup>ST</sup> PETITIONER

HENRY NYABUTO MORARO.....2<sup>ND</sup> PETITIONER

VERSUS

PETER NYOKANGI MORARO.....INTERESTED PARTY

RULING

1. The deceased herein, **Mararo Songoro**, died on **20<sup>th</sup> July 1985**. **Geoffrey Magoro Osoro (“Magoro”)** and **Henry Nyabuto Moraro (“Nyabuto”)** in their capacity as grandchild and son respectively petitioned for letter of administration intestate of the deceased’s estate, the 2 shall hereinafter be referred to as the petitioners. The deceased was stated to have been survived by the two petitioners, **Peter Nyakangi Moraro, Rael Mocheche, Nyanchama Moraro, Nyarangi Moraro, Mellen Moraro and Jane Magoma Moraro**. The deceased had two wives **Nyanduko Mararo** and **Monica Kebiro** who are both deceased. The only assets listed by the petitioners in their affidavit in support of the application dated 17<sup>th</sup> December 2017 is **South/ Mugirango/Botabori South 828**. A grant of letters of administration intestate was issued to the petitioners on **4<sup>th</sup> October 2016**.

2. A Notice of Motion for confirmation of the said grant was filed on **11<sup>th</sup> October 2017** by the interested party, **Peter Nyokangi Moraro (“Nyokangi”)**. The affidavit in support of the motion proposed distribution of the estate to Nyokangi, Magoro and Nyabuto. Nyokangi proposed that the property, **SOUTH MUGIRANGO/BOTABORI SOUTH/828** be shared out equally to the two houses. Therefore Nyokangi to get 7 acres as the share of the 1<sup>st</sup> house of **Nyanduko Maroro** and **Geoffrey Magoro Osoro (“Magoro”)** and **Henry Nyabuto Moraro (Nyabuto)** to each get 3.5 acres being shares of the 2<sup>nd</sup> house of **Monica Kebibi Moraro**.

3. The proposed mode of distribution was opposed by Magoro through his affidavit dated 10<sup>th</sup> January 2018. He deposed that the application for confirmation of grant did not mention all the beneficiaries and neither did Nyokangi seek their consent for his proposed mode of distribution. He further deposed that the proposal by Nyokangi did not take into account the existing demarcations on the land. It was Meguro’s proposal that the land be distributed as follows; Magoro to get 5 acres, Nyabuto 5 acres while Nyokangi 4 acres.

4. Directions on the disposal of the application were taken and the hearing of the application proceeded by way of viva voce evidence. **Shem Yahoo Warungu (Pw1)** adopted his statement dated 16<sup>th</sup> March 2018 as his evidence in chief. He testified that the deceased was his cousin. The deceased had 2 wives and that his shamba was to be divided in accordance with Gusii customs requiring that each house should get 7 acres each, the land was measuring 14 acres in total. That a road passes through the deceased land and the 1<sup>st</sup> wife lived on land that is on the lower side of the road, which land is currently occupied by Nyakangi. There were two sons from the 2<sup>nd</sup> house. Joel Osoro (deceased) was a son from the second house. The deceased never invited him to have the land subdivided during his life time. That if there are daughters customarily inherit from their mother’s share.

5. **Nyokangi (Pw2)** testified that Magoro and Nyabuto are his brothers from the 2<sup>nd</sup> house. The deceased did not subdivide his property before he died. He proposed that half of the land belonged to the 1<sup>st</sup> house. That the second wife Monica Kebibi stayed on the land that is on the upper part of the road. During cross examination he told court that he was not aware that Magoro and Nyabuto had divided the upper portion of the land and that the upper portion had coffee that was being plucked by the two houses. The land has no title deed.

6. **Jetiro Maaka Kenyanda (Pw3)** adopted statement dated 14<sup>th</sup> May 2018 as his evidence in chief. He testified that he was well conversant with the Kisii traditions and that where a man is polygamous he will give an equal share of his estate to each house. He testified that the deceased had two wives and each should be entitled to equal share of the land. That the 1st wife Nyanduko Mararo lived on the lower part of

the shamba while the 2<sup>nd</sup> wife Monica Kebibi stayed on the upper side of the land near the road.

7. **Magoro** (Dw1) testified that Nyabuto and Nyokangi are his uncles. He lived with his father Joel Osoro Mararo on the upper side of the land and that the land had physical boundaries. After finishing his studies at the university he needed to establish his home and approached both Nyabuto and Nyokangi. Nyokangi went to the land tribunal claiming that the land had already been subdivided. He testified that they all along had lived peacefully. That it was selfish for Nyokangi to claim 7 acres while he has his own share and only wants extra land for his own son. That he has already developed his portion as he has put up a house and a maize and sugarcane farm. On cross examination he testified that there was coffee on the upper side of the land but the coffee is no longer on the parcel.

8. **Obadia Osoro Mogosi** (Dw2) testified that the deceased had divided his land to his two wives. That in 1996 he was called by Geoffrey Osoro the son of the late Joel Osoro to his home to assist him and his Uncle Henry Nyabuto share the land, the land was shared equally between Geoffrey and his uncle Henry. He has not heard of any dispute within the family.

9. **Rael Mocheche Otieno** (Dw3) testified that she is the daughter of the deceased from the 2<sup>nd</sup> house. The deceased had 7 children from the second house, five daughters and two sons. The deceased also had a daughter from the 1<sup>st</sup> house. She recalled that in 1963 her late father divided the land for the two wives. The 2<sup>nd</sup> wife occupied the upper side measuring 10 acres and the 1<sup>st</sup> wife the lower side measuring 4 acres. In 1996 Geoffrey called the wazee to come and assist him divide the land so that he could get his father's share. This was done and the land was done equally amongst the two and they have lived peacefully.

10. **Mellen Bosibori** (Dw4) and **Jane Magoma Nyaitondi** (Dw5) both adopted their statements dated 10<sup>th</sup> September 2018 as their evidence in chief. Their evidence was similar to that of Rael. Mellen recalled that their step mother wanted the land equally between the two wives. Jane recalled that their step brother Nyakangi wanted the land subdivided equally between the two wives.

11. **Nyabuto** (Dw6) testified that the deceased had two wives and had divided his land to his two wives at the time of his death. There was no problems in regard to the living arrangement after his death. The 2<sup>nd</sup> house had 7 children but Priscilla and Joel Osoro are now deceased. Nyokangi filed a claim with the tribunal but they appealed the tribunal's decision at the High Court and the decision by the tribunal was set aside.

12. At the close of the hearing both parties filed written submissions. The objector in his submission has argued that the 1<sup>st</sup> petitioner is the grandson of the deceased and therefore has no locus standi to be a party in the proceedings, that being a grandson amongst other grandsons and daughters he has no special legal standing to directly have a beneficial interest in the grandfather's estate. That it is only the objector and the 2<sup>nd</sup> petitioner who should share the deceased's estate between them as representative of the 2 houses (wives) of the deceased. That the objector adduced through his witnesses cogent and uncontroverted evidence to the effect that under Gusii customs the division of the property in a polygamous marriage is in accordance to the number of wives equally notwithstanding the number of children in each house. That the 2 houses should share the deceased's asset equally. That the petitioners are not seeking a distribution in accordance with section 40 of the **Law of Succession Act (Chapter 160 of the Laws of Kenya) ("the Act")** as it is clear that they subscribe to Gusii custom. That the witnesses agreed that under Gusii customs the distribution of the matrimonial property in a polygamous home is per the houses (wives) and not the children. The petitioners submitted as follows; that there 4 issues for determination. The 1<sup>st</sup> is who the beneficiaries. On this issue it was submitted that there are 8 beneficiaries as per the chief's letter. Dated the 16<sup>th</sup> December 2014 and P& A form 5, the objector being one of them. The 2<sup>nd</sup> issue is whether the law applicable is that of the Abagusii customary proprietary laws or the Act Cap 160. It was submitted that the deceased died in 1985 after the Act was in operation. The cause was filed in 2014 and therefore the estate has to be determined as per the Act, noting that the date of commencement of the said Act is 1<sup>st</sup> July 1981. The petitioner opposed the objector's contention to divide the deceased's estate as per the Abagusii customs stating that the said customs are in conflict with the Act and the provisions of the Constitution. That the Gusii customs the objector relies on are repugnant to justice and morality. The 3<sup>rd</sup> issue was on the mode of distribution. For this issue it was submitted that the deceased demarcated his land between his two wives with distinct boundaries on the ground. The objector was to get 4 acres of the land and the petitioners 10 acres which was allocated to the 2<sup>nd</sup> house. That alternatively the deceased's children listed in P & A 5 should get equal shares in accordance to section 40 of the Act. On the 4<sup>th</sup> issue on who bears the costs it was submitted that the objector should bear the costs as he has opted to file the objection contrary to his father's wishes.

13. After considering the submissions by parties, the evidence and the law the issue arising law applicable in distributing the deceased estate to its beneficiaries. I am mindful of the fact that the deceased died in 1985 after the Act was already in force. **Section 2(1) of the Act** provides as follows:

***2(1) Except as otherwise expressly provided in the 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.***

14. The commencement date for the Act was 1<sup>st</sup> July 1981 and it therefore follows that the estate of the deceased will be subject to the Act. Since he died intestate the distribution of his estate will be in accordance to provisions of **Section 38 of the Act** as the deceased wives Nyanduko Mararo and Monica Kebibi are also deceased and the deceased is only survived by his children. **Section 38 of the Act** which provides as follows:

***38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.***

15. From the evidence presented before court it is clear that Magoro is the deceased grandson and therefore not a direct heir to the deceased estate. Magoro's father, Joel Osoro Mararo was however entitled to inherit the deceased estate. In **Christine Wangari Gachigi v Elizabeth Wanjira Evans and 11 Others NKU CA Civil Appeal No. 221 of 2007 [2014]eKLR**, the Court of Appeal stated as follows:

*Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death.*

The Court went further and held that:

*We affirm the learned trial Judge's decision that the beneficiaries of the estate of the deceased herein comprised all the deceased's children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court.*

16. It is not in dispute that the 1<sup>st</sup> wife lived on the lower part of the land while the 2<sup>nd</sup> wife on the upper part of the land when the deceased was alive. Pw2 on cross examination testified that the second wife Monica Kebibi lived on the upper part. Pw3 told court "Nyanduko stayed in the lower part of the shamba and Kebibi stayed on the upper side near the road". The children from the 1<sup>st</sup> house have settled on the upper portion of the land and established their homes thereon. It emerged during at the hearing that the interested party, Nyokangi, has his home where his mother was given land by the deceased, the lower part. **Section 42** of the Act specifically states that:

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.

17. I have considered that the deceased during his life time settled his 1<sup>st</sup> wife and family on the lower part of his land measuring 4 acres while the 2<sup>nd</sup> wife was settled on the upper part measuring 10 acres. There is no good reason advanced to disturb the status of the parties. They have lived in their respective portions from the time the deceased allocated them their respective portions. In conclusion I therefore confirm grant in the following terms;

a) The grant is confirmed on terms that **SOUTH MUGIRANGO/BOTABORI SOUTH/828** shall be inherited by **GEOFFREY MAGORO OSORO, HENRY NYABUTO MORARO and PETER NYOKANGI MORARO** in the following shares;

**i. GEOFFREY MAGORO OSORO 5 acres.**

**ii. HENRY NYABUTO MORARO 5 acres.**

**iii. PETER NYOKANGI MORARO 4 acres.**

b) Since this is a family matter the parties shall bear their own costs.

**Dated, signed and delivered at Kisii this 3<sup>rd</sup> day of October, 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**1<sup>st</sup> and Petitioner Present in person**

**2<sup>nd</sup> Petitioner Present in person**

**Interested Party Present in person**

**Mr.Anyona h/b for Mr. Nyariki For the interested party**

**Ms. Rael Court clerk**