



**REPUBLIC OF KENYA**

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

**[Coram: A. C. Mrima, J.]**

**SUCCESSION CAUSE NO. 463 OF 2014**

**(Formerly Kisii High Court Succession Cause No. 505 of 2010)**

**IN THE MATTER OF THE ESTATE OF ESTHER NYAKERARIO alias ESTHER NYAKERARI (DECEASED)**

**-BETWEEN-**

**WAIRUNGU RIOBA TURUKA.....PROTESTOR/PLAINTIFF**

**VERSUS**

**MASERO RIOBA TURUKA.....PETITIONER/DEFENDANT**

**JUDGMENT**

1. The Petitioner and the Protestor are two of the 11 children of the deceased herein. The deceased died on 21/04/2006. Sometimes in October 2010 the Petitioner petitioned for the administration of the estate of the deceased. That was in the High Court at Kisii in **Succession Cause No. 505 of 2010**. A Grant of Letters of Administration Intestate was issued to the Petitioner on 01/02/2011.
2. On 30/09/2011 the Protestor herein, then an Objector, filed an Objection to Making of a Grant. The matter was thereafter transferred to this Court station.
3. On 06/05/2015 the Petitioner filed a Summons for Confirmation of the Grant. It was dated 04/05/2015. I will henceforth refer to the same as **'the Summons'**. On 15/07/2015 the parties herein entered into a consent revoking the grant. A joint Grant was issued in the names of the Petitioner and the Protestor, then Objector.
4. In October 2015 the Protestor filed a Summons for accounts. The said application was opposed. It was heard and a ruling rendered on 25/02/2016. The Petitioner filed a Report thereto on the accounts on 20/02/2017. The Protestor then filed a Summons for Revocation of the joint Grant on 22/03/2017 seeking several orders. The application was opposed.
5. This Court then had a conversation with both Counsels on the way forward. It was agreed that the Court do address the parties themselves on the need to deal with the Summons to enable the final determination of the matter. The Court did so on 19/07/2018. The parties then present before Court agreed to instead deal with the Summons. The Summons for Revocation of the joint Grant was deemed spent.
6. Directions were taken. The Summons was to be heard by way of oral evidence. Parties filed their respective pleadings. The Objector/Protestor was deemed as the Plaintiff and the Petitioner was deemed the Defendant.
7. The Protestor testified. He closed his case without calling any witness. The Petitioner also testified. He called their eldest brother in their family as his witness. He was **Nyawacha Rioba (DW1)**. Both parties thereafter filed written submissions in support of their rival cases.
8. The Protestor's case was straight-forward. He testified that the deceased gave birth to 11 children. The children included the parties and DW1. As the estate in this Cause is for their mother, the deceased, and their father having also died, the Protestor took the position that the estate property ought to be equally shared between all the 11 children of the deceased. The Protestor further testified that the estate of the deceased comprised of Plot No. 51 at Isebania Town which had 18 rental shops/outlets. He also testified that the property was fully developed by the deceased prior to her death.
9. The Protestor took issue with how the Petitioner administered the estate of the deceased to his exclusion and yet he was a Co-Administrator. He posited that the Petitioner had all along been collecting the sum of Kshs. 250,000/= monthly from the property and had refused to account for the money.

10. The Petitioner prayed that the property of Plot No. 51 Isebania (hereinafter referred to as '**the Plot**') be sold and the proceeds be equally shared among the surviving children. He also demanded his share of the arrears of the rental income.
11. The Petitioner's case was contrary to that of the Protestor. The Petitioner admitted that the Plot was exclusively owned by the deceased. He however contended that at her death the deceased had put up a semi-permanent house which the Petitioner and his other 5 brothers demolished and put up the current rental shops/outlets at their own cost. They further contended that the Protestor never took part in the development of the Plot and that the property thereon was not built by the deceased.
12. The Petitioner and DW1 posited that the Protestor had been given his share of their father's inheritance which he sold and went to live in Tanzania while the 6 brothers solely developed the Plot. They further posited that the foregone was the reason why the other brothers did not participate in the protest.
13. DW1 stated that he was not entitled to any share of the Plot as he did not develop it but his 6 brothers. The 6 brothers are the Petitioner, **Mwita Rioba, Gati Rioba, Stephen Rioba, Turunya Rioba** and **Ngocho Rioba**. The Petitioner produced various documents including a Plot Card in support of his case.
14. The Petitioner prayed that the protest be dismissed with costs.
15. I have carefully perused the Summons, the response, the evidence, the exhibits and the submissions tendered. I have understood the respective cases. The dispute is on the distribution of the Plot.
16. There is consensus that the Plot was registered in the name of the deceased. There is as well no dispute that the deceased had 11 children including the parties and DW1. It is also not in doubt that the estate of the deceased comprised of only the Plot. Further, there is consensus that the father to the parties herein had distributed his property to his 4 wives and some children prior to his death. Some of the children who benefited from the property of their father were DW1 and the Protestor. It is also admitted that the estate of the father of the Petitioner, the Protestor and DW1 remains unadministered.
17. It is important to note that the estates of the deceased and her husband are different. Even the beneficiaries of those two estates are not the same. Therefore, whatever property the Protestor may have been allocated to him by their father cannot be a subject in the estate of the deceased herein. That property can only be considered in the administration of the estate of their father under **Section 42** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya.
18. Since the husband to the deceased herein is also dead then the Plot can only devolve under **Section 38** of the **Law of Succession Act**. The said provision provides for equal distribution among the children. The said distribution is however subject to the provisions of **Section 42** of the **Law of Succession Act** in appropriate cases.
19. There is however an important issue which was raised by the Petitioner in this matter. It is the contention that 6 brothers out of the 11 children of the deceased exclusively developed the Plot to its current status. That is not only a strong submission, but also one worth appropriate consideration.
20. Whereas dealing with the property of a deceased person without Court sanction may be tantamount to intermeddling with the estate of that deceased person, the circumstances of each case must be considered in isolation. In this case it is alleged that 6 brothers developed the Plot. One of the 6 brothers was the Administrator of the estate and all the 6 brothers were likely to be beneficiaries to the estate of their mother, the deceased herein. The contention is supported by DW1.
21. **Article 10** of the **Constitution** provides several national values and principles of governance. They include *human dignity, equity, social justice, equality, human rights, integrity, transparency, accountability* among others. Applying the said national values and principles of governance to the case at hand, it will be an affront to the **Constitution** to deny a beneficiary's innocent investment into an estate.
22. In such a case the improvement or investment made by some of the beneficiaries to the estate of the deceased on the estate ought to be considered at distribution. However, that must be weighed against several issues. Such issues may include the nature of the improvement, whether the investment is ascertainable, whether the improvement was necessary to maintain or sustain the estate, whether other beneficiaries were denied such an equal opportunity to invest in the estate, the effect of the investment on the distribution, whether the beneficiaries acted in bad faith or whether the beneficiaries stole a match from the other beneficiaries among other considerations.
23. On analysis, if a Court arrives at a verdict that an investment made by some of the beneficiaries on the estate was innocently entered into, is ascertainable and was not detrimental to the estate and to the eventual distribution, then the value of the investment or part thereof, depending on the circumstances of each case, ought not to be part of the estate. Instead it ought to be considered as the sole entitlement of the concerned beneficiary.
24. In this case the Petitioner stated that the deceased left a semi-permanent house on the Plot at death. There was however no evidence to that end. The Petitioner further stated that the 18 rental units on the Plot were put up by himself and his other 5 brothers. Again, the alleged investment was not proved. No approved plans were produced. There was also no evidence of carrying out the constructions. No statutory permits were produced. Occupation certificates were not availed. The averment fell short of legal proof.
25. Therefore, by placing the position taken by the Petitioner and the other position taken by the Protestor side by side I am inclined to find for the Protestor. I hence find and hold that the Plot and the developments thereon formed the estate of the deceased.
26. Having so found, and in line with **Section 38** of the **Law of Succession Act**, the estate ought to be shared equally among the 11 children

of the deceased unless any of them denounces such entitlement or a beneficiary passed on without leaving behind any dependants. Only DW1 expressly clarified before Court that he was not interested in the estate of the deceased.

27. In his submissions, the Petitioner prayed that if this Court finds that the Protestor was entitled to the estate then the share of the Protestor be ascertained and that the Petitioner be accorded the opportunity to buy the Protestor's share.

28. I must also consider the issue of the rental income from the Plot. It is agreed that there are 18 rental shops/outlets on the Plot. The Protestor claimed his share from a monthly income of Kshs. 250,000/=. That income was not proved.

29. The Petitioner stated that each of the rental shops/outlets yielded Kshs. 5,000/= monthly. He further stated that the 6 brothers have each been collecting Kshs. 15,000/= from the shops/outlets monthly since 2010. The Petitioner testified that the shops/outlets are small in size. They measure about 10 feet by 18 feet. I must agree with the Petitioner that such outlets in Isebania Town are not likely to yield the proposed rental income of Kshs. 250,000/= monthly. I will settle for the rent as stated by the Petitioner.

30. I must also remain alive to the fact that the said monthly rent of Kshs. 5,000/= per shop is gross income. The amount is subject to National Government and County Government taxes, maintenance costs, administration costs among other expenses. I also remain alive to the fact that such structures require massive maintenance costs over time and that at times the shops may be vacant. For purposes of avoiding protracted contentions and in order to strike a delicate balance between the parties I will settle for a modest figure of Kshs. 2,000/= per shop as the net monthly rental income. That will translate to Kshs. 36,000/= monthly for the 18 units. Each of the 10 siblings was entitled to Kshs. 3,600/= monthly. The Petitioner and the 5 brothers would be entitled to Kshs. 21,600/= monthly. The balance of Kshs. 14,400/= would be the share of the remaining 4 siblings.

31. The 4 siblings would be entitled to an annual income of Kshs. 172,800/=.

32. The Petitioner stated that he started collecting rent from 3 shops on the Plot in 2010. It was however not clarified which month in 2010 did the Petitioner start receiving the rental income. Striking a further balance, the rental income shall start running from January 2011. That will be a period of 9 years to December 2019. The total net income for the 4 siblings over that period was Kshs. 1,555,200/=. Since the amount was received by the 6 brothers each shall bear Kshs. 259,200/=. Each of the 4 remaining brothers shall be entitled to a cumulative sum of Kshs. 388,800/= up to December 2019.

33. I believe it is now clear how the Plot shall devolve. I am further alive to the fact that the parties herein are close family members. They will remain as such even beyond this matter. I will once again invite the parties to a family meeting to attempt a possible amicable settlement.

34. To that end, the following final orders do hereby issue: -

**(a) The Grant of Letters of Administration made to Wairungu Rioba Turuka and Masero Rioba Turuka is hereby confirmed.**

**(b) The parties shall convene a meeting to be presided over by elders or the Area Chief over the distribution of the Plot No. 51 in Isebania Town. The meeting shall be held within 90 days of this judgment. The resultant agreement shall be filed in this matter and shall form the Court's judgment on the distribution of the Plot No. 51 in Isebania Town.**

**(c) In the unlikely event of the meeting not convened or the meeting being convened but failure to reach any consensus the Plot No. 51 in Isebania Town shall be distributed as follows: -**

**(i) The Plot shall equally devolve unto the 10 remaining children of the deceased;**

**(ii) The Plot shall be valued. The costs of the valuation shall be equally borne by all the 10 beneficiaries. Alternatively, such costs shall be offset from the other beneficiaries' respective shares if settled by one or some of the beneficiaries;**

**(iii) Each of the 10 children of the deceased shall be entitled to a tenth (1/10) of the value of the Plot;**

**(iv) The Petitioner and the 5 other children of the deceased who are willing to buy the shares of the rest of their siblings shall have the first priority to buy their siblings' shares as valued;**

**(v) If the Petitioner and the 5 other children of the deceased are not able to buy the other siblings' shares, then other interested buyers shall be jointly considered by all the beneficiaries;**

**(vi) In the event of failure to find any willing buyer then the Plot No. 51 in Isebania Town shall be sold and the proceeds thereof be equally shared among the 10 remaining children of the deceased herein;**

**(vii) Regardless of the mode of settlement arrived at, the Petitioner and the 5 brothers who have been receiving rental income from the shops/outlets on the Plot shall each refund the sum of Kshs. 259,200/=. The 4 remaining brothers shall each receive the sum of Kshs. 388,800/= in settlement of the rental arrears up to December 2019.**

**(d) Each party shall bear its own costs of these proceedings.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 11<sup>th</sup> day of December 2019.**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Kerario Marwa** Counsel instructed by the firm of Messrs. Kerario Marwa & Co. Advocates for the Petitioner/Defendant.

**Mr. Abisai** Counsel instructed by the firm of Messrs. Abisai & Co. Advocates for the Petitioner/Defendant.

**Evelyne Nyauke** – Court Assistant