



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**SUCCESSION CAUSE NO. 4 OF 2015**

**CORAM: D.S. MAJANJA J.**

**IN THE MATTER OF THE ESTATE OF**  
**JOHN NYAMBANE KINARA (DECEASED)**

**AND IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**ROBERT OMAE NYAMBANE.....APPLICANT**

**AND**

**PERIS NYAMBATE NYAMBANE.....RESPONDENT**

**RULING NO. 2**

1. This matter relates to the estate of John Nyambane Kinara (“the deceased”) of Nyaura Location, Kisii Central District within Kisii County who died on 21<sup>st</sup> July 1994. During his lifetime the deceased had two widows, Yuneke Mosigisi Nyambane who is now deceased and his surviving widow, Peris Nyambate Nyambane (“Peris”). Peris applied for and obtained the grant of letters of administration intestate. She later took out summons for confirmation of grant dated 3<sup>rd</sup> June 3<sup>rd</sup> 2016. Robert Omae Nyambane (“Omae”), the deceased’s son from the first house lodged a protest against the summons. The matter was heard by Karanjah J., and by a ruling dated 7<sup>th</sup> February 2017, he held as follows;

*[14] With regard to Plot No. 1585 Nyaribari Chache, no dispute arises that it belonged to the deceased. Therefore, it is available for distribution to the beneficiaries and so is Plot No. 3304 Nyaribari Chache. Since the deceased had two houses, the distribution of the two plots would be governed by section 40 of the Law of Succession Act (Cap 160 LOK) which states:*

*Where an intestate has married more than once under any system of law permitting polygamy, his person 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 the children.*

*[15] The deceased died intestate. Therefore, plots No. 1585 and No. 3304 which belonged to him ought to be shared between his two houses. In the circumstances, the suggestion by the Objector that the Petitioner is only entitled to a small portion of Plot No. 1585 and the entire portion Plot No. 3304 would be contrary to the law. However, his objection to the inclusion of Plots No. B5 and No. 9362 as forming part of the estate of the deceased is valid and is hereby sustained.*

*Moving forward, the petitioner ought to amend her summons for confirmation of grant to exclude the property unavailable for distribution and apply for the mode of distribution prescribed by S.40 of the Laws of Succession Act with regard to the property available for distribution, i.e., Plots No. 1585 and No. 3304. Thereafter, the petitioner may re-apply for confirmation of grant. [Emphasis mine]*

2. Following the aforesaid ruling and in compliance with the direction, Peris filed the summons for confirmation dated 15<sup>th</sup> March 2017 in which she proposed that the Plots 1585 and 3304 be shared equally between the two houses. Omae filed an affidavit of protest sworn on 8<sup>th</sup> May 2017 in which he claimed that certain beneficiaries had been left out of the proposed distribution and that Plot 3304 was allocated to the petitioner and Plot 1585 was allocated to the first house, save a portion thereof occupied by the petitioner, which the first house was willing

to hive off and allocate to her.

3. I heard oral testimony on the matter from Omae (PW 1) and Johnson Anyiega Oigara (PW 2) on behalf of the protestor while George Mogaka (DW 1) and Peris (DW 2) supported the petitioner's case.

4. PW 1 testified that while both houses reside on Plot 1585, the second family resides only in the homestead but cultivates Plot 3304 exclusively. He stated that before his father died he had indicated that the first house should reside on Plot 1585 and the second house should move to Plot 3304 which is arable. He stated that the second house had constructed a house on the plot but demolished it. He further testified that Peris was the one cultivating Plot 3304 and had never cultivated Plot 1585. The deceased's elder brother, PW 2, recalled that the deceased had shown each house its respective parcel of land and that the first house was given Plot 1585 where they currently reside while the second house was given Plot 3304. He stated that Peris resides in a small portion of land which the deceased left to her. He was of the view that the wishes of the deceased should be upheld.

5. The Nyaura Location chief, DW 1, recalled that he was aware that the deceased had two wives who both resided on Plot 1585. He told the court that problems began in 2012 when the deceased's first wife, Yunia passed away and her sons came to him to start the process of succession. They told him that Plot 3304 belonged to the 2<sup>nd</sup> house where they should go so he wrote a letter to that effect. He realized there was a problem when the 2<sup>nd</sup> house came to seek his assistance to commence succession proceedings. He then wrote a letter setting out all the beneficiaries. He was of the view that all the houses should share the properties equally. Peris (DW 2) stated that both houses were entitled to each of the properties and it has always been the intention of the 1<sup>st</sup> house to chase her away from Plot 1585. She denied that the deceased had divided the land between the two houses prior to his death.

6. The issue for determination in this case is whether in distribution of the property of the deceased, I should take into account the deceased's wishes that each house should be given their separate pieces of land. In resolving this issue, I must state that the deceased died without a will and as Karanjah J., observed, the property is to be distributed in terms of **section 40** of the **Law of Succession Act**. He held that, "the suggestion by the Objector that the Petitioner is only entitled to a small portion of Plot No. 1585 and the entire portion Plot No. 3304 would be contrary to the law." This matter was therefore determined and the only option is to share the property among the beneficiaries from all the houses equally. However, under **section 42** of the **Law of Succession Act**, 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.

7. The tenor and effect of **section 42** 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.

8. I have considered the evidence and I find as follows. It is not disputed that the deceased had two houses and two *shambas*. If the deceased expressed his wish that the two families should live apart, there was nothing in the evidence to show when the deceased made the decision and directed how it should be implemented. PW 1 told the court that the deceased built a structure on Plot 3304 but no evidence was led to show what kind of structure it was. Was it a home? Who lived there? Likewise, there was no evidence that the second family actually went to reside on Plot 3304 during the deceased's lifetime and or that he actually divided the land to each of his heirs and that they lived in accordance with that direction. All these questions point to the fact that the protestor has not discharged his burden of proving that the deceased made a clear, discernable and unequivocal decision that his two houses should live apart on the two properties. I therefore dismiss the protest.

9. Both Plots 3304 and 1585 must now be distributed in terms of **section 40** of the **Law of Succession Act**. When confirming the grant, the court is required to identify every beneficiary and the share the person is entitled to. The proviso to **section 71** of the **Law of Succession Act** states that:

*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.*

10. I now direct that the parties to agree on a list of beneficiaries including those of the deceased's children who are now deceased and have left behind beneficiaries and their respective shares before I confirm the grant.

**DATED and DELIVERED at KISII this 11<sup>th</sup> day of October 2018.**

**D. S. MAJANJA**

**JUDGE**

Mr Nyambati instructed by G. M. Nyambati and Company Advocates for the petitioner.

Mr Ogari instructed by B. N. Ogari and Company Advocates for the respondent/protestor.