



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 4 OF 2015

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

-AND-

IN THE MATTER OF PETITION FOR LETTERS OF ADMINISTRATION INTESTATE

AND

IN THE MATTER OF PERIS NYABATE NYAMBANE.....PETITIONER

VERSUS

ROBERT OMAE NYAMBANE.....OBJECTOR

RULING

1. After the passing on of the late John Nyambane Kinara (deceased) on the 21st July 1994, his second widow, **Peris Nyabate Nyambane** (Petitioner), applied for and obtained grants of letters of administration intestate respecting his estate. The grant was issued after a period of time on the 7th January 2015 and later, on the 14th April 2016, the Petitioner took out summons for confirmation of the grant.

2. However, **Robert Omae Nyambane** (Objector), the second son of the deceased with his first widow, Yunuke Mosigisi Nyambane (now deceased) filed an affidavit of protest to the summons for confirmation of grant dated 3rd June 2016.

On 29th November 2016, directions were given by the court for the protest to be heard by way of oral or “viva-voce” evidence.

3. In that regard, the Objector **PW 1** testified that the Petitioner was his step mother and that he belonged to the first house of the deceased. That at the time of the death of the deceased he left behind a total of seventeen (17) children. Eleven of the children belonged to the first house while the remaining six belonged to the second house. That, some of the children in both houses have since passed on and apart from the children the deceased was also survived by his two widows but the first widow passed away in the year 2012. The deceased also left behind immovable property in the form of two parcels of land described herein as plot No. 1585 and No. 3304 both situated at Nyaribari-cache in Kisii.

4. The Objector testified that Plot No. 1585 belonged to the first house while Plot No. 3304 belonged to the second house. However, the Petitioner was in occupation of part of Plot No. 1585 measuring 130 x 80ft whereas she is only entitled to a portion thereof measuring 50 x 100ft while also fully entitled to Plot

No. 3304. That, another Plot No. B5 at Menyinkwa Market belonged to an uncle Johnson Oigara and another Plot No. 9362 belonged to the Objector's brother. These two extra plots did not form part of the estate of the deceased.

5. The Objector produced a demand notice from Kisii County Government respecting Plot No. B5 (P.Ex 1) and a copy of the green card respecting Plot No. 9362 (P.Ex 2) together with search certificates for Plots No. 1585 and 3304 and contended that the Petitioner is only entitled to 50 x 100ft of Plot No. 1585 rather than half of its size.

6. The Petitioner's case as reflected in her testimony was that the deceased had not distributed his property amongst his wives and children at the time of his death. His first house consisted of twelve children but three are now deceased. His second house consisted of six children. He did not write a will prior to his death and therefore his property was shared equally among all his dependants.

She (petitioner) proposed to have the immovable property of the deceased shared equally among his two houses although the current dispute relates only to Plot No. 1585 which she had been sharing equally with her co-wife (now deceased).

7. The Petitioner contended that Plot No. 5 at Menyinkwa Market belonged to the deceased even though there has been concerted efforts by some relatives to sell it to third parties. She produced necessary receipts and card (D.Ex 1 a-b) showing that the property belonged to the deceased. She also produced a search certificate (D.Ex 2) to show that the property was registered in the name of Johnson Oigara. She contended that the property was fraudulently sold to a third party before she filed the present succession cause.

8. With regard to Plot No. 9362 the Petitioner testified that it was already in the possession of the deceased when he married her in 1970. She was tilling the land until she was asked to vacate by her step-children. She contended that the property was never purchased by a person called Paul Nyamweya but was purchased by the deceased from a person called Alloys, whose name appears in the search certificate (D.Ex 3). She further contended that the Objector had no problem with her until his mother died. It was thereafter that he started causing trouble even though the deceased treated his entire family equally.

9. It is evident from all the foregoing evidence that the bone of contention in the distribution of the deceased's estate is centered on a part of Plot No. 1585 and the entire portions of Plot No. B5 Menyinkwa Market and Plot No. 9362 at Nyaribare Chache.

As for Plots No. B5 Menyinkwa Market and No. 9362 Nyaribare Chache, the issue is whether the two belonged to the deceased as at the time of his death, hence available for distribution to the beneficiaries.

10. In her supporting affidavit to the summons for confirmation of grant, the Petitioner classified the two plots as belonging to the deceased and therefore forming part of his estate.

The Objector disputes the classification of the two plots as part of the estate of the deceased and to buttress the fact, he produced a rate demand notice from the Kisii County Government dated 9th January 2017, (P.Ex 1) showing that the rate payer for Plot No. B5 Menyinkwa Market was one Joseph Nyaochi Aminga.

The Petitioner also produced a demand notice from the predecessor of the Kisii County Government (i.e Municipal Council of Kisii) dated 9th November 2009 (D.Ex 2). It shows that the rate payer was one Johnson A. Oigara.

11. It is notable that the name of the deceased is not mentioned in any of the demand notices. However, a payment receipt No. 57642 (D.EX 1(b)) from Gusii County Council does mention the name of the deceased, John Nyambane Kinara. The relevant payment was apparently in relation to the allocation of a plot at Menyinkwa to the deceased and Johnson Anyega Oigara by the Gusii County Council on 8th November 1988. The demand notice issued in 2009 (D.Ex 2) was in the name of the said Johnson A.

Oigara as the rate payer.

However, whereas the name of Johnson Oigara appears in the two documents i.e the allocation letter dated 8th November 1988 [D.Ex 1(a)] and the demand notice issued in 2009 (D.Ex 2), the demand notice did not confer absolute ownership of Plot No. B5 Menyinkwa to him. Neither did the allotment letter in as much as it related to another plot referred to as Plot No. Isolated Menyinkwa rather than Plot No. B5 Menyinkwa Market.

12. The demand notice issued this year 2017 in the name of Joseph Nyaochi Aminga (P.Ex 1) did not also confer absolute ownership of the Plot B5 Menyinkwa Market to him.

Nonetheless, it would appear that at various points in time both Johnson Oigara and Joseph Nyaochi Aminga were beneficial owners of the plot to the exclusion of the deceased.

Indeed, the Petitioner acknowledged herein that the plot is not in the name of the deceased although she alleged without proof that it was fraudulently sold to a third party. If that was the case, then the matter should have been referred to the right authority for investigations.

13. Suffice to say that Plot No. B5 Menyinkwa Market did not belong to the deceased as at the time of his death and is therefore unavailable for distribution as part of the deceased's estate.

The same fate would befall Plot No. 9362 which was conceded by the Petitioner is lawfully registered in the name of one Paul Nyambane Kinara although it was at one time registered in the name of Alloys Nyangoto Ayore.

The search certificate dated 24th October 2013 (D.Ex 3) and a copy of the green card dated 30th August 2016 (P.Ex 2) establish as much.

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 the provisions of S.40 of the Law of Succession Act (Cap 160 LOK) which states that:-

“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 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 of 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 to apply the mode of distribution which is proportional as prescribed by S.40 of the Law 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.

Ordered accordingly.

[Read and signed this 7th day of February 2017].

J.R. Karanjah

Judge

In the presence of

Mr. Ogari for Objector

Mr. Sagwe holding brief for

Nyambati for Petitioner

CC Njoroge