



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS - FAMILY DIVISION**

**SUCCESSION CAUSE NO. 283 OF 1997**

**IN THE MATTER OF THE ESTATE OF GODFREY JOSHUA ARGWA KOBOK (DECEASED)**

**BETWEEN**

**GLADYS AUMA ARGWA KOBOK ..... 1<sup>ST</sup> APPLICANT**

**HARRIS ODHIAMBO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ROSE ALOO ADEDE .....RESPONDENT**

**RULING**

**INTRODUCTION**

The deceased, Godfrey Joshua Argwa Kobek, died intestate on 29<sup>th</sup> April, 1996 and the Grant of Letters of Administration to his Estate was issued, jointly, to Gladys Auma Argwa and Harris Odhiambo, the deceased's wife and son respectively (hereafter 'the Applicants').

The Applicants have filed the present Summons for Confirmation of Grant Application dated 3<sup>rd</sup> February, 2016, seeking the following orders:

***(1) That the grant of letters of administration issued intestate to Gladys Auma Argwa and Harris Odhiambo on 22<sup>nd</sup> July, 1997 be confirmed.***

***(2) That the costs of this Application be provided for.***

**THE APPLICANTS' CASE**

In their Affidavit dated 3<sup>rd</sup> February, 2016, jointly sworn by them, they outlined the deceased survivors as follows:

**a) Gladys Auma Argwa – wife**

**b) Rose Aloo Adede – wife**

- c) **Harris Odhiambo – son**
- d) **Kenneth Oduor Kobek – son**
- e) **Marren Atieno Kobek – daughter**
- f) **Belinda Akinyi Kobek – daughter**
- g) **Jackline Atieno – daughter**
- h) **Eva Adhiambo – daughter**
- i) **Marvin Enos Kobek – son**
- j) **Persi Obat – mother (deceased).**

It was their contention that the deceased did not have any other dependants falling within the provisions of **Section 40 (3) (a) and (b)** of the **Law of Succession Act**, no application for provisions for dependants is pending, and no Estate is payable in respect of the deceased's Estate.

According to the Applicants, the identification and shares of all persons beneficially entitled to the said Estate have been ascertained and determined as per the Schedule of Distribution attached to their Application herein, and all the Parties have been notified of the same and they have duly consented to the proposed mode of distribution.

Further, that it is agreed that only the 1<sup>st</sup> Applicant and her children will benefit from the deceased's fixed assets as per the Schedule of Distribution herein, since the deceased had in his life time transferred to the 2<sup>nd</sup> wife and her children his other fixed asset namely, 0.5 ha piece of land known as LCR No. 12/97 Kendu Bay Central Karachuonyo/Kanyadhiang'/1890, and the same, although acquired by him, no longer forms part of his Estate and it is treated as a gift in contemplation of death under the law of succession.

That the 1<sup>st</sup> Applicant and her children have also agreed on the mode of distribution and appended their signatures to the Schedule of Distribution submitted to the Court and that the 2<sup>nd</sup> wife and her children have also been shown the mode of distribution and are agreeable to it having otherwise been provided for within the deceased's lifetime.

In the Supplementary Affidavit sworn by the 1<sup>st</sup> Applicant on 7<sup>th</sup> April, 2016, they reiterated their earlier assertions and argued that although LR No. 37/644 Nairobi West is listed in the Schedule of Distribution, the same was jointly acquired and registered as between the 1<sup>st</sup> Applicant and the deceased, long before the Objector was married to the deceased and hence, the same automatically devolves to the 1<sup>st</sup> Applicant by virtue of her being a joint tenant. That the same constitutes her matrimonial property and she lives therein and furthermore, that the same was acquired jointly without any ascertainment of their respective contribution.

The Applicants denied the assertions that the Objector's signature, as well as those of her children, were obtained deceitfully and that the same were obtained on full disclosure and an agreement was duly reached between the Parties on the proposed mode of distribution.

It was their submission that the Estate has been partly distributed and that in any event, the Objector and her son, Marvin Enos Kobek, having personally appeared before the Court on 9<sup>th</sup> March, 2016, and confirmed having signed the consent, cannot now purport to object to the proposed mode of distribution. Further, that if any of the Party herein was to be heard in this matter, the same can only be on the ground of setting aside a validly obtained consent and not through protest as in the present case.

In their Written Submissions dated 22<sup>nd</sup> June, 2016, they contended that pointed out that the Court ought

to determine whether LR No. 1890 Central Karachuonyo/Kadhiang was acquired by the deceased or by the Objector and whether LR No. Central Karachuonyo/Kogweno Oriang/ 1728 be distributed to the family of the Applicant and/or the Objector, or exclusively to the Applicants absolutely.

They reiterated that the property LR No. 37/644 Nairobi West was jointly acquired by the 1<sup>st</sup> Applicant and the deceased and as such, it can only devolve to her absolutely, while LR No. Central Karachuonyo/Kogweno Oriang/1890 was never the property of Margaret Onyango to sell but for James Orongo. According to the Applicants, despite **Section 3 (3) (a) (i) of the Law of Contract Act, Chapter 23 of the Laws of Kenya** requiring all contracts relating to land to be in writing, the Objector has not adduced any evidence, for instance, a sale agreement, a copy of consent from the relevant Land Control Board and/or an instrument of transfer in support of her allegations that she bought the said property.

They asserted that although the said land is exclusively registered in the names of the Objector, they have adduced a consent from the Land Control Board and an instrument of transfer confirming that the land was transferred from Charles Micha Orongo to her and that the said Charles has deponed that he transferred the land to her after the same had been bought by the deceased. As such, their argument was that the Objector has not at all substantiated her claim that she bought the land from Margaret Onyango and neither has Margaret sworn any Affidavit in support of those assertions. In that regard, it was therefore their submission that on a balance of probabilities, the land was bought by the deceased and transferred to the Objector.

While citing **Section 42 of the Law of Succession Act**, it was their other submission that the said property was given to the Objector and her family as a gift and the same ought to be taken into account in the distribution of the deceased's Estate.

The foregoing notwithstanding, it was their other argument that during her last attendance in Court on 9<sup>th</sup> March, 2016, the Objector indicated that she had no objection to the confirmation and that she has not in any event, demonstrated any change of circumstances or placed any materials before the Court to warrant the re-distribution of the Estate as proposed herein.

For the foregoing reasons, she urged the Court to allow the Application and grant the orders sought therein in the interest of justice.

### **THE PROTEST**

In opposition to the present Application, Rose Aloo Adede (the Protestor) filed an Affidavit of Protest dated 24<sup>th</sup> March, 2016, a Further Affidavit sworn on 23<sup>rd</sup> May, 2016 and Written Submissions dated 15<sup>th</sup> June, 2016.

It was her deposition that she is a widow to the deceased and she has three children with the deceased, namely, Jackline Atieno, Eva Adhiambo, and Marvin Enos Kobek.

The Protestor opposed the proposed mode of distribution and contended that the same is unjust and skewed in favour of the 1<sup>st</sup> Respondent's family and hence contrary to the law. That the property namely LR No. 37/644 in Nairobi West should be distributed among all beneficiaries in accordance with the Law of Succession Act.

She rebutted the assertions by the Applicants that the property LR No. Central Karachuonyo/Kogweno Oriang/1890 was the deceased's property and contended that she solely bought the said property and the same was never given to her by the deceased. Accordingly, that LR No. Central Karachuonyo/Kanyadhiang/1728, measuring 1.3 Ha or thereabout, should be distributed among all the beneficiaries and not in the manner prescribed.

It was her contention that her signature consenting to the proposed distribution was forged as it is not the same to the one she signed. Further, that the deceased's benefits from Kenya Airways and bank balances

are not available for distribution as they had long been shared among the beneficiaries, and that the Applicants have not included certain properties, namely, LR No. Central Karachuonyo/Kadhiang/1277-0.04 Ha and LR No. Central Karachuonyo/Kadhiang/1301 – 0.18 Ha, as part of the deceased's Estate. Furthermore, that the deceased gave parcel No. 1277 to her house and she has been farming on it while parcel No. 1301 was given to the 1<sup>st</sup> Applicant's House which has been exclusively using the same. As such, the two properties ought to be distributed in that regard.

She deponed further that she got married to the deceased in 1983, while she was working with the Ministry of Information as an Information Officer and that she bought the property LCR No. 12/97 Kendu Bay Central Karachuonyo/Kadhiang/1890 using her own funds in 1986 or thereabout, from Margaret Onyango (deceased), who was the 1<sup>st</sup> wife of one James Orongo and not Charles Micha Orongo, as alleged by the Applicants. In that regard, she contended further that even though she was introduced to the seller by the deceased, she was the one who provided the funds for purchasing the said property.

The Protester asserted that at the time of signing the consent adduced herein, the 1<sup>st</sup> Applicant was in a hurry and did not leave her with a copy thereof and she even asked her to sign both on her behalf and that of her children, which she did. Furthermore, that the 1<sup>st</sup> Applicant's advocate did not explain anything to her and neither did they explain anything concerning the date the matter had been set for hearing.

It was her submission that LR No. Central Karachuonyo/Kanyadhiang/ 1728 ought to be distributed to the two families under **Section 40** of the **Law of Succession Act** and the 1<sup>st</sup> family should get 5/9 while the 2<sup>nd</sup> should get 4/9 of the property. That either way, the property should be valued and sold and the proceeds to be distributed in the aforesaid ratio to either family or either to buy out the other. That in any event, the property should be subdivided in the ratio of 5:4 and the resultant portions held in trust by the widows for their respective children under **Section 35** of the **Law of Succession Act**.

While placing reliance on the writings in **Megarry and Wade's The Law of Real Property, 6<sup>th</sup> Edition**, her other submission was that the 1<sup>st</sup> Applicant and the deceased held LR No. 37/644 Nairobi West as joint tenants, and that pursuant to **Section 91** of the **Land Registration Act**, it is trite law that any severance or partition of the joint tenancy must take place during the life time of the joint tenant and not otherwise. In the Objector's view therefore, the property does not form part of the deceased's Estate.

As regards LR No. Karachuonyo/Kogweno Oriang/1890, it was her submission that the same does not form part of the deceased's Estate as per **Sections 24, 25 and 26** of the **Land Registration Act** and the property is not a settlement by the deceased within the meaning of **Section 42** of the **Law of Succession Act** and hence, it cannot be considered as part of the Estate.

For the above reasons, the Protester urged the Court to distribute the Estate as she has suggested in her submissions.

## **DETERMINATION**

It follows, from the Parties' respective pleadings, that the key issue for determination is whether the Grant of Letters of Administration on 22<sup>nd</sup> July, 1997 ought to be confirmed. In the circumstances of the present case, it is undisputed that the deceased had two families and hence the distribution of the Estate is to be done in accordance with **Section 40** of the **Law of Succession Act** which is to the effect that:

*(1) Where an intestate has married more than once under a 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 within each house shall then be in accordance with the rules set out in sections 35 to 38.*

In the present case, the deceased had two wives who both bore children for him. Based on the materials before the Court, it will be noted that the deceased was survived by the following persons:

**House 1**

- (1) Gladys Auma Argwa – wife**
- (2) Harris Odhiambo – son**
- (3) Kenneth Oduor Kobek – son**
- (4) Marren Atieno Kobek – daughter**
- (5) Belinda Akinyi Kobek – daughter**

**House 2**

- (1) Rose Aloo Adede – wife**
- (2) Jackline Atieno – daughter**
- (3) Eva Adhiambo – daughter**
- (4) Marvin Enos Kobek - son**

The deceased's dues from Kenya Airways and cash at Bank have already been distributed to the beneficiaries and at the core of the dispute herein, is the mode in which the following properties are to be distributed:

- (1) L.R. No. Central Karachuonyo/ Kanyadhiang/1277, and 1301;**
  - (2) L.R. No. Central Karachuonyo/Kanyadhiang/ 1728;**
  - (3) L.R. No. 37/644 situate in Nairobi West; and**
  - (4) L.R. No. Central Karachuonyo/Kogweno Oriang/1890 ought to be distributed.**
- (a) As regards L.R. No. Central Karachuonyo/ Kanyadhiang/1277, and 1301,**

The Parties are in agreement that these properties should be distributed as follows:

- (1) House No. 1, comprising Gladys and her children to take the property L.R No. **Central Karachuonyo/ Kanyadhiang/1301.****
  - (2) House No. 2, comprising Rose Aloo and her children to take the property L.R No. **Central Karachuonyo/ Kanyadhiang/1277.****
- (b) As regards L.R. No. Central Karachuonyo/Kanyadhiang/ 1728,**

Based on the evidence before this Court, this property is registered in the name of the deceased. Both Parties are in agreement that the same ought to be distributed to both Houses. In that regard, the guiding law is **Section 40 of the Law of Succession Act, Chapter 160 of the Laws of Kenya.**

It follows therefore that this property is to be distributed among the two Houses herein in accordance with the number of the children while taking the deceased's wives as single units. In that regard, the property is to be distributed to both Houses herein.

**(c) Pertaining to L.R. No. 37/644 situate in Nairobi West,**

It is uncontested that this property was jointly owned by the deceased and Gladys Auma Argwa and hence she is entitled to the same by virtue of being a joint tenant.

**(d) In regard to L.R. No. Central Karachuonyo/Kogweno Oriang/1890,**

Both Parties lay claim to this property. Whereas the Protestor asserts that this is her property, the Applicant challenges those assertions and avers that the same was the deceased's property since he was the one that bought it. The question for this Court to answer is therefore whether the property is the Protestor's or it constitutes the deceased's Estate. In that regard, it is uncontested that the title to this property is registered in the name of the Protestor. The Court is therefore guided by the provisions of **Section 26 of the Land Registration Act** which is to the effect that:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.**

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The effect of this provision is that the issuance of a certificate of registration is conclusive proof of ownership. The foregoing provision was re-affirmed by the Court in **VEKARIYA INVESTMENTS LIMITED VS KENYA AIRPORTS AUTHORITY & 2 OTHERS, PETITION NO. 263 OF 2011**, where Majanja J. opined thus:

**“[27] The petitioner being the holder of a title is entitled to rely on the indefeasibility conferred by statute to protect its right to property. This is the effect of section 23 of the *Registration of Titles Act (Repealed)* and its successor section 26(1) of the *Land Registration Act, Act No. 3 of 2012*. Section 23(1) of the *Registration of Titles Act* which reads as follows, “*The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.*”**

**[28] *The title document is conclusive proof of ownership and the owner thereof is entitled to exercise and enjoy all the incidents that ownership confers. The principle of indefeasibility was summarised in Dr Joseph N K arap Ng’ok v Justice Moijo ole Keiuwa and Others Nairobi Civil Application No. NAI 60 of 1997(Unreported) where the Court of Appeal stated thus, “Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.” (See also Wreck Motors Enterprises v The Commissioner of***

***Lands and Others Nairobi Civil Appeal No. 71 of 1997 (Unreported), Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Nairobi Civil Appeal No. 185 of 1997 (Unreported).***”

In the instant case, the Respondents have relied on the Affidavit by one Charles Micha Orongo, who admits that he was only involved in the transfer of this property to the Protestor, and not its sale or giving its possession between the deceased and his father. Based on the evidence before this Court, it will be noted, from the Consent dated 5<sup>th</sup> February, 1997, it is indicated that the nature of consent sought was in regard to a transfer by way of sale and the property was to be sold to the Protestor. No other evidence has been adduced by the Respondent in support of the assertions that the property was bought by the deceased. In the absence of such evidence, this Court is unable to hold that the property was bought by the deceased and gifted to the Protestor. On that basis therefore, it is the Court’s holding that the property does not form part of the deceased’s Estate.

**DISPOSITION**

Based on the above analysis, the Court distributes the estate as follows:

- (1) House No. 1, comprising Gladys and her children shall hold the property L.R No. Central Karachuonyo/ Kanyadhiang/1301.**
- (2) House No. 2, comprising Rose Aloo and her children shall hold the property L.R No. Central Karachuonyo/ Kanyadhiang/1277.**
- (3) L.R. No. Central Karachuonyo/Kanyadhiang/ 1728 is to be distributed among the two Houses equally.**
- (4) L.R. No. 37/644 situate in Nairobi West is to vest to Gladys Auma Argwa, by virtue of being a joint tenant with the deceased.**
- (5) L.R. No. Central Karachuonyo/Kogweno Oriang/1890 is to vest solely to Rose Aloo Adede.**
- (6) Any of the parties is at liberty to apply**
- (7) The administrator shall file confirmation of grant amended and according to the above distribution of the estate.**

**DATED AT NAIROBI THIS 10<sup>th</sup> DAY OF NOVEMBER, 2016**

**M. W. MUIGAI**

**JUDGE**

**In presence of:-**

Ms. Mwaniki holding brief Mr. Makumi for the Applicant