



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
SUCCESSION CAUSE NO.134 OF 2004

IN THE MATTER OF THE ESTATE OF OTSIENO OBATSA OTSIENO(DECEASED)

WILLIAMS MULUKALA OTSIENOPETITIONER/APPLICANTS

KENNETH ASIKO OTSIENO

VERSUS

HANNINGTON OTSIENO YONAMOBJECTOR/RESPONDENT

R U L I N G

1. Otsieno Obatsa Otsieno (**the Deceased**) died intestate on 25th October 2014. The Deceased was a Marachi man married to Margaret Otsieno (Margaret), Teresina Adhiambo (**Teresina**) and Mathilida Adhiambo (**Mathilida**).
2. There has emerged a dispute as to the distribution of his estate which pits the house of Mathilida against the other two houses. The Estate of the Deceased comprises of 3 land parcels being Marachi/Elukhari/463, Bukhayo/Malanga/663 and Bukhayo/Malanga/681. They measure 6.2 hectares, 2.20 hectares and 1.21 hectares respectively.
3. Teresina, Hannington Otsieno Yonam (**Hannington**) and Christopher Echesa (**Christopher**) gave oral evidence in support of the position of their two houses. It is that at the time of his demise, the Deceased had settled each of his wives in separate pieces of land. Margaret on parcel 463, Teresina on parcel 663 and Mathilida on parcel 681. That the Deceased built houses for his wives on their respective pieces of land. They also told Court that prior to moving to parcel 681, Mathilida had resided on Margaret's piece. That she later, in 1970, relocated to parcel 681.
4. Williams Mulukala Otsieno, Kenneth Asiko Otsieno and Janayi Owona Obatsa led the house of Mathilida in opposing the distribution suggested by the first two houses. The first two are sons of Mathilida while Janayi is the brother to the Deceased. They took the position that the Deceased had not formally divided his estate amongst his children in his lifetime. The testimony of Kenneth was that at the time of the death of at the Deceased, their mother Mathilida resided on parcel 463 but after his death Hannington built a house for her on parcel 681 and moved her there. It was also their testimony that prior to the death of the Deceased, he had given Hannington a gift in life being Marachi/Elukhari/470 measuring 1.9hactares. However, sufficient evidence was not placed before Court on this alleged gift. For that reason, the allegation will not influence the outcome hereof.
5. It is common ground that the three houses are comprised as follows:

1st wife

1. Hannington Otsieno

2. James Obatsa
3. Mary Mukele
4. Jessica Mukele

2nd wife

1. Jackline Otsieno
2. Stella Wainga
3. Gabriel Otsieno

3rd wife

1. Sarah Otsieno Odinga
2. Racheal Otsieno
3. Jane Otsieno
4. Selina Otsieno
5. Williams Otsieno Mokello
6. Leonard Kimutai Obatsa
7. Kenneth Otsieno Asike
8. Lilian Obatsa
9. Robert Haron Obatsa

It is also common ground that the girls have renounced any claim to their Deceased's property.

6. Given the sizes of the three parcels, and the number of sons in each house the proposal by the houses of Margaret and Teresina would mean that the sons of these two houses will get much bigger portions than their brothers of the third house. Hannington and James of the first house would get a total of 6.4 hectares and Gabriel of the second house would get 2.20 hectares. On the other hand, William, Kenneth, Leonard and Robert of the third house would have to share parcel 681 measuring 1.21 hectares. It is therefore easy to see why there is no agreement.
7. Although there was no consensus as to whether Mathilida was settled by Deceased on land parcel 681 prior to his death, nothing much turns on this. Even if it were to be taken that the Deceased had settled his three wives on the three separate parcels, there was no evidence that he had formally shown and allocated land to any of his sons.
8. The assumption by the first two houses is that according to the culture of the Marachi, children inherit from the land held by their biological mother, i.e property is divided according to houses. But the law governing distribution of The Estate of a polygamous intestate who died after 1st July 1981 (The commencement date of Law of Succession Act) is to be found in Section 40(1) of The Law of Succession which provides that:-

“40. (1) 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 children.”

9. There is a string of judicial decisions (notably **Rono –vs- Rono & Another** (2005) 1 KLR 538) that the law applicable to the distribution of an Estate of a polygamous intestate is Section 40 of The Law of Succession Act.
10. Although two of the Deceased three wives are now dead, they died after him and therefore survived him. That is of significance because according to Section 40 any wife surviving a Deceased is added as an additional unit to the number of children. My order of distribution is as follows:-
 - a. The acreage of the three parcels of land shall be added up into one total and that total shall be divided into 10 equal units. The first house shall get 3 units, the second 2 units and the third 5 units.
 - b. To minimize disruption on the ground, each beneficiary shall get his share, in as far as is possible, on land that he has already set up a home or developed.
11. There shall be no order as to costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 7TH DAY OF OCTOBER 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

..... APPLICANTS

..... OBJECTOR