

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
SUCCESSION CAUSE NO.32 OF 2022

**IN THE MATTER OF THE ESTATE OF JOHN MAGENA NYAIBURIA-
DECEASED**

**ROBERT MAGENA NYAIBURIA.....1ST
PETITIONER**

HELLEN CHEPNGENO.....2ND PETITIONER

JUDGMENT

1. This cause relates to the estate of the late John Magena Nyaiboria (deceased) who died on 2nd May 2004 domiciled in Makutano, Trans-Nzoia County.
2. The deceased died intestate and going by the petition for letters of administration filed, the deceased left the following dependants;
 - (i) *Mary Mansese Magena (widow) (deceased)*
 - (ii) *Grace Moraa Obaki*
 - (iii) *Loice Kwamboka Magena (deceased)*
 - (iv) *Robert Magena Nyaiboria*
 - (v) *Erick Otoigo Magena (deceased)*
 - (vi) *Samuel Ongeru Magena (deceased)*
 - (vii) *Teresia Biyaki Magena (deceased)*
 - (viii) *Sophia Kemunto Magena*
 - (ix) *Margaret Barongo Magena*
 - (x) *Jane Nyaboke Magena (deceased)*
3. The following are the listed assets comprising the estate;
 - (a) ***A parcel of land known as
Trans-Nzoia/Cherangani/254***

(b) Shares -ABSA Bank

4. The petitioner/administrator (Robert Magena Nyaiboria) listed the following liabilities;

(i) Settlement Fund Trustees (SFT) - Kshs.7929/-

(ii) Legal fees - Kshs.974,000/-.

5. Before the grant was issued, an objection was filed by Hellen Chepngeno Magena who claimed that she was a beneficiary by virtue of being married to one of the sons to the deceased herein namely Samuel Magena Nyaiboria (deceased).

The objection was later dispensed with by Hon. Mrima, J on 2/8/23 through appointment of both Robert Magena Nyaiboria and Hellen Chepngeno Magena as the administrator and administratrix respectively of the estate of the deceased herein. The two were issued with letters of administration on 18/9/23.

6. The administratrix, **Hellen Chepngeno Magena** vide summons for confirmation of grant dated 10/8/23 applied for confirmation of grant making the following proposals;

(a) Trans-Nzoia/Cherangani/254

- (i) Grace Moraa Obaki - 0.5acre
- (ii) Robert Magena Nyaiboria -9.9acres
- (iii) Lewis Nyaiboria & Lilian Gesare -9.8acrs
- (iv) Hellen Chepngeno Magena - 9.8acres
- (v) Stacy Wairimu - 0.5acre
- (vi) Sophia Kemungo Magena -0.5acre
- (vii) Margaret Barongo Magena -0.5acre
- (viii) Edna Moraa & Tracy Chelangat-0.5acre
- (ix) Edna Moraa Magena
& Tracy Chelangat Magena -4.5acres

- (x) Road reserve - 1acre
- (xi) Robert Magena
& Margaret Barongo Magena -1.6ares
Comprising homestead and grave site to hold in
trust for all beneficiaries.
- (xii) Legal fees - 1 acre

7. The same administratrix **Hellen Chepngeno** vide an amended summons for confirmation of grant dated 13/12/23 made amendments to her earlier proposal and instead proposed as follows;

(a) Trans-Nzoia/Cherangani/254

- (i) Grace Moraa Obaki - 3acres
- (ii) Robert Magena Nyaiboria - 7.3acres
- (iii) Lilian Gesare & Lewis Nyaiboria - 7.3acres
- (iv) Collins Ongeru Magena
Bruno Cheruiyot Magena } 7.3acres
To hold in trust for
 - (a) Collings Ongeru Magena
 - (b) Bruno Cheruiyot Magena
 - (c) Emmy Cherop Magena
 - (d) Caleb Sammy Toroitich
 - (e) Hellen Chepngeno Magena
- (v) Stacy Gesare - 3 acres
- (vi) Sophia Kemunto Magena - 3 acres
- (vii) Margaret Barongo Magena - 3 acres
- (viii) Edna Moraa
Tracy Chelangat } 3 acres
- (ix) Plot No.1082 at Mitume

To be sold and proceeds to be shared equally

(x) Shares at ABSA Bank

To be shared equally among all the beneficiaries.

(xi) Legal fees to be shared equally among the beneficiaries.

8. **Grace Moraa Obaki**, filed a protest against Robert Magena's proposal and her main bone of contention is that the proposed share in Kisii does not exist. She proposed that the estate be shared equally adding that she is entitled to the equal share being proposed for the daughters.
9. At the hearing of the protest, Hellen Chepngeno Magena, in a twist deviated from her proposal contained in the affidavit sworn on 13/12/23 in support of amended summons for confirmation of grant and final affidavit sworn on 27/2/25. In those 2 affidavits, she proposed for fairly equal distribution of the estate among all the beneficiaries.
10. The administratrix justified her proposal contained in her earlier affidavit sworn on 11/8/2023 as being reflective of the deceased's will. According to her the deceased intimated that the sons were to get 9 acres each while the daughters were to get half an acre each.
11. **Robert Magena Nyaiboria**, testified and supported the earlier proposal made by Hellen Chepngeno. He stated that the protestor should be satisfied with the share given to her in Kisii. He described the parcel No.as Bassi/Bondonya/1254. He stated that the parcel of land is still registered in his grandfather's name. He stated that when the protestor was chased by her

husband out of her matrimonial home, the deceased gave her the share in Kisii. He exhibited a certificate of search as Pexhibit 1 to demonstrate that the parcel exists. He conceded under cross-examination that the parcel is still subject to succession proceedings because it is still in the names of his grandfather.

12. **Grace Moraa Obaki**, the protestor herein despite her advanced age testified and adopted her affidavit sworn on 8/4/24. She denied having been given a parcel in Kisii by her father (the deceased herein). She stated that she is a first born in the family and that the deceased only showed his children where to plough within the estate. She insisted everyone including the daughters should be given a share.
13. **Kennedy Obaki**, a son to the protestor Grace Obaki testified and supported her mother's proposal. He denied the suggestion that the deceased had divided his estate. He also denied any suggestion that his mother had been given a share in Kisii. According to him the parcel in Kisii belongs to the deceased herein and his brothers. He denied any suggestion that he was out to derive benefit from the estate insisting that it is his mother who is claiming her share despite her marriage to his father.
14. This court has considered the issues in this petition. All the beneficiaries do recognize one another and largely agree on what comprises the estate. The estate comprises Trans-Nzoia/Cherangani/254 measuring approximately 34.93acres or 14.14Ha going by surveyor's report dated 28/5/2024.

15. The administrators in this cause are in agreement vide their respective affidavits sworn on 10/8/23 and 14/11/23 that the dependants are represented by 8 units as follows;

- (i) *Grace Moraa Obaki*
- (ii) *Robert Magena Nyaiboria*
- (iii) *Lewis Nyaiboria & Lilian Gesare (on behalf of the late Erick Otoigo Magena)*
- (iv) *Hellen Chepngeno*
Bruno Cheruiyot Magena
Collins Ongeru Magena
Emily Cherop Magena
Caleb Sammy Toroitich (on behalf of the late Samwel Ongeru Magena).
- (v) *Stacy Gesare Magena (on behalf of the late Teresia Buyaki Magena).*
- (vi) *Sophia Kemunto Magena*
- (vii) *Margaret Barongo Magena*
- (viii) *Edna Moraa Magena*
Tracy Chelagat Magena (on behalf of the late Jane Nyaboke Magena)

16. This court having heard the evidence tendered and affidavits filed finds that the relevant provision applicable in this cause with respect to the distribution of the estate of the deceased herein is the provisions of section 38 of Law of Succession Act. The provisions provide as follows;

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve

upon the surviving child, if there be only one, or shall be equally divided among the surviving children”

17. The administrators contend that the deceased had divided his properties before his demise but there was no evidence of a Will adduced in this court. The allegations made by the administrator that the protestor had been given a share of a parcel in Kisii was also unsupported by any evidence. Robert Magena tendered a certificate of search with respect to a parcel of land known as Bassi/Bondonya/1254 in the name of one Gesare Nyaiboria but there is no nexus between that parcel with either the protestor or the deceased in this matter. The evidence tendered is therefore not useful in determining whether the provisions of section 42 of Law of Succession Act applies with respect to a share going to the protestor.

18. Having set out the facts in this cause and the law applicable. I find that the proposal made by Hellen Chepngeno in her affidavit sworn on 27/2/25 is legal and fair because it is hinged on law. Although the administrators later deviated from that lawful proposal, their proposal pegged on Hellen Chepngeno Magena’s affidavit sworn on 10/8/23 is not supported by law. It is a complete departure from what the law says and it is not sustainable. The same discriminates against the daughters of the deceased on account of gender which is clearly outlawed under Article 27 of the Constitution.

The said provisions state;-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).....”

19. It is not fair for the administrators to propose that they get 9 acres while daughters get 0.5acre unless the daughters have no objection. In this matter in view of the objection filed, this court finds that the estate of the deceased will be distributed in accordance with the provisions of section 38 of Law of Succession Act. that parcel known as Trans-Nzoia/Cherangani/254 shall be distributed as follows;

(i) *Grace Moraa Obaki - 4.366acres*

(ii) *Robert Magenya Nyaiboria -4.366acres*

(iii) *Lewis Nyaiboria & Lilian Gesare -4.366acrs in equal share*

(iv) *Hellen Chepngeno Magena - 4.366 acres in trust for*

(a) *Bruno Cheruiyot Magena*

(b) *Collins Ongeru Magena*

(c) *Emily Cherop Magena*

- (d) *Caleb Samy Toroitich*
- (v) *Stacy Gesare Magena - 4.366acres*
- (vi) *Sophia Kemunto Magena -4.366acres*
- (vii) *Margaret Barongo Magena -4.366acres*
- (viii) *Ednah Moraa Magena & Tracy Chelangat Magena-4.366acres equally*

(B) Shares in ABSA Bank

To be shared or sold and the proceeds be shared equally among the 8 units as described in (a) above.

20. There was a mention of a plot no.1082 Mitume but no evidence was laid before me to show plot exists but if the property exists, then the same be sold and proceeds shared among the 8 units (beneficiaries).
21. I will further direct the County Surveyor do visit parcel No.Trans-Nzoia/Cherangani/254 and carry out the sub-divisions according to the confirmation of grant save that access roads be contributed equally by the beneficiaries. The beneficiaries who have put up houses in the estate be factored in as much as possible to their respective shares. The costs of surveyor to be met equally by all the 8 units. The legal fees however will be paid by the respective beneficiaries who hired counsels to represent them in this cause. I will not make any order as to costs. Each party to pay own costs because this is a family matter.

DELIVERED, DATED and SIGNED at KITALE this14th day ofOCTOBER....., 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Robert Magena the 1st Petitioner

Hellen Chepngeno the 2nd Petitioner

Grace Moraa -Beneficiary

Duke/Chemosop- Court assistants