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Case Action:	Judgment
Judge:	Justus Momanyi Bwonwong'a
Citation:	In re Estate of the Late Siwanyang Ngilotochi (Deceased) [2021] eKLR
Advocates:	Ms Chebet for the Petitioners Ms Opondo holding brief for Mr Chebii for the Objector
Case Summary:	-
Court Division:	Family
History Magistrates:	-
County:	West Pokot
Docket Number:	-
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Case Outcome:	Suit allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

SUCCESSION CAUSE NO 14 OF 2016

IN THE MATTER OF ESTATE OF THE LATE SIWANYANG

NGILOTOCHI ALIAS SIWANYANG NGILOTON (DECEASED).

JEPORE SARA CHRISTOPHER.....1ST PETITIONER

SAMUEL ROTICH SIWANYANG.....2ND PETITIONER

DANIEL PKITE SIWANYANG.....3RD PETITIONER

VERSUS

TERESA CHESANG CHRISTOPHER.....OBJECTOR

JUDGEMENT

The issue before me is on the mode of distribution of the estate of the deceased. This followed the filing of the consent in which the objector agreed to withdraw the objection. The objector had alleged that the petitioners had filed the succession cause without consulting her and had also omitted to list all the properties of the estate.

The parties were unable to agree on the mode of distribution. As a result, the parties tendered oral evidence in that regard. They then filed written submissions.

The case for the objector (Teresa Chesang Christopher).

The objector called herself as the first witness (Pw 1). She adopted her statement as her evidence.

Pw 1 testified as follows. She is the 3rd widow of the deceased; who had nine (9) children with the deceased. The deceased had two other wives now widows, who similarly sired children with the deceased.

She also testified that the deceased died on 20/11/2012

She further testified that the petitioners filed the succession cause secretly excluding herself and her children.

Subsequently the grant was rectified and she was included as a co-administratrix along with the petitioners following the filing of a consent entered into with the petitioners.

As regards, the estate of the deceased, the latter left behind two parcels of land namely parcel No. West Pokot/Kishaunet/ 127 measuring 27.5 acres and parcel No. West Pokot/Siyo "A"/4258 measuring 3.5 acres.

PW 1 further testified that the deceased died without a will and he did not propose how his estate would be distributed.

Pw 1 also testified that the two parcels of land be distributed equally amongst the 23 beneficiaries so that each gets 1.35 acres. In the

alternative, the two parcels be shared equally among the three houses. She testified that the mode of distribution proposed by the two co-widows is oppressive to her and her children.

In cross examination, Pw 1 testified that the deceased died in 2002. She admitted that the parcel at Siyoi was bought by the deceased and is about 31/2 acres. She also testified that the two co-widows live in Kishaunet and that she lives at Siyoi. She also testified that she has lived in Siyo since 1986.

The objector then called Nicodemus Mnangat (Pw 2); who is her first son. Like Pw 1, Pw 2 adopted his witness statement dated 13/11/2019 as his evidence.

Pw 2 supported the evidence of her mother. Pw 2 also testified that the mode of distribution adopted by the 1st and 2nd houses is discriminatory; since they will have a bigger portion of the share of the estate of the deceased.

Furthermore, Pw 2 testified that the deceased has 21 children and two remaining widows. The second widow is now late.

In cross examination Pw 2 testified as follows. They moved from Kishaunet to Siyoi in 1989. He also testified that he was born in 1984. He further testified that he did not know when the 31/2 acres shamba at Siyoi was purchased. The disputed land as he later learned was 4 acres. Pw 2 admitted that their family (the 3rd house) have lived in Siyoi farm and the 1st and 2nd houses have lived in Kishaunet.

The submissions of the objector.

Messrs Chebii Cherop, counsel for the objector have submitted after analyzing the evidence that the objector has established that the deceased did not leave any will in respect of his estate. They have also submitted based on the evidence that the wishes of the deceased were also not established on how the estate ought to be distributed.

It also the submission of counsel, that the evidence of the petitioners is contradictory. It is further their submission that the deceased left behind 23 beneficiaries, that is, 21 children and two widows; since the 2nd widow died during the filing of the succession cause.

Furthermore, counsel submitted based on the evidence that the three houses have the following beneficiaries/children:

The 1st house-7 children of whom one died in the course of prosecuting this cause.

The 2nd house-5 children

The 3rd house-9 children.

Counsel further submitted that the 3rd house has young school going children, which should be taken into account by the court in distributing the estate by giving them a bigger share of the estate. The beneficiaries in the other two houses are all grownups and are settled with some in employment. Counsel has submitted that the objector's mode of distribution is fair since it provides for equality in sharing the estate among the three houses or in the alternative sharing of the estate in equal shares among all the beneficiaries.

Counsel cited many authorities including sections 35 – 40 of the Law of Succession Act (Cap 160) Laws of Kenya; since the deceased was a polygamist. Counsel also cited three other authorities, which are as follows. Nyeri High Court (Nгаа, J) *Succession Cause No. 123 of 1999, Rahab Njeri Kariuki v Joyce Waruguru Kariuki & 2 others*, in which the court observed that in sharing the net estate of an intestate polygamous deceased person, the court exercises a discretion and is required to bear in mind the principles of fairness and equity and not equality among the beneficiaries.

Furthermore, counsel cited Kajiado High court (Nyakundi, J), *Succession Cause No. 71 of 2015, Judith Naiyai Ramaita & Another v James Kooote Ramaita*, in which the court observed that the provisions of section 40 of the Law of Succession Act has always been a touchy issue subject to contradictory interpretations; which controversy stems from whether the distribution of the net estate of an intestate polygamous deceased should be distributed equally or equitably.

Finally, counsel cited Nyeri High Court (Nгаа, J), *Succession Cause No. 12 of 2006, Lucy Nyaruai Gachoki v Loise Wambuo Gachoki*, in which the court also found that section 40 of the Law of Succession Act is a useful guide in the administration of the estate of a deceased person. That court then cited with approval the Court of Appeal decision in *Mary Rono v Jane Rono & Another Eldoret Civil Appeal No. 66 of 2002*, in which the central question therein was the distribution of the net estate of a deceased polygamous intestate person. It also cited the decision of the High Court (Amin, J) in *Koinange & others v Charles Karuga Koinange (1986) e-KLR*, which in turn cited Restatement of African Law vol. 2 by E. Cotran, in which that court held that inheritance under Kikuyu customary law is patrilineal and is based on distribution of a man's property amongst his wives' houses, subject to the provision that the eldest wife may get a slightly bigger share.

Counsel have therefore urged the court to distribute the estate of the deceased equally among all the children and the two remaining widows to be added as units in respective their houses.

The case for the petitioners.

The petitioners called David Loktari Siwanyang (Dw 1). Dw 1 adopted his witness statement dated 25/10/2019 as his evidence in chief. Dw 1 testified that he was a police officer and that the petitioners were his mother and brothers, respectively

Dw 1 testified as follows. The deceased and the 1st petitioner were hosted in the homestead of Kokita family in their early marriage. They later bought land parcel No. West Pokot/Kishaunet/ 127 from Wanyama Kandawala after selling the goats and cows of the 1st wife, which the deceased added some money from his pay at Nasokol girls where he was a cook. Later he married the 2nd wife namely the late Mary Chepokpro Siwanyang (mama Limakou) and they settled in Kishaunet.

Further, between 1979-1984 the deceased engaged and married the 3rd wife (the objector herein) when they were staying at Nasokol Girls secondary school and they sired two children. Later the deceased with the approval of 1st wife requested the 3rd wife to go and stay at Kishaunet. The 3rd wife refused saying that the land at Kishaunet was not productive and that she wanted her own land. The deceased then requested the 1st wife to sell her goats and cows to purchase land for the 3rd wife in Siyoi. The 1st wife agreed to so. Her goats and cows were sold at an interval until the entire amount was cleared.

The 3rd wife moved to parcel No. West Pokot/Siyo "A"/4258 and settled there. The 3rd wife did not complain over that parcel of land during the life time of the deceased; who died on 18/12/2002.

Dw 1 also testified that when the deceased died a cleansing ceremony was held and the issue raised was school fees for the children of the 3rd wife who were in secondary school. This issue was resolved by way of a fund raising.

Dw 1 testified that parcel No. West Pokot/Siyo "A"/4258 was initially 5 acres during the purchase and not 3.5 acres as shown in the title deed. Furthermore, a number of animals of the 1st and 2nd wife were sold to buy land at Muino comprised in West Pokot/SAiyoi/A/440, which the 3rd wife sold with the deceased to Emmanuel Komoli and the others did bother; since she was independently settled elsewhere.

After the death of the deceased on 20/12/2002, all the clan elders including Pere Tamkal, the late Loitaliman Riwo and the aunt of Dw 1 among others attended the meeting. Some neighbours namely Jacob Sokolinyang and the late Richard Lotongot als attended the meeting. Nothing was raised apart from the parcel of land at Muino in which it was agreed that each house were to take one portion as the 3rd house had already sold their portion.

In cross examination Dw 1 testified that he was told that the land at Siyoi was initially 5 acres. He also testified that the land at Kishaunet which is about 26 acres is stony.

As regards the children in the three houses, Dw1 testified that the 1st house had 7 children but one died in July 2019. The 2nd house had 7 children, but 2 died. The 3rd house has 9 children and all are alive.

Dw 1 further testified that the deceased erected boundary marks for the two parcels of land during his life time. He also testified that during the memorial of the deceased, they discussed the liabilities and assets of the deceased.

The petitioners further called Daniel Pkite Siwanyang (Dw 2). Dw 2 adopted his witness statement dated 25/10/2019 as his evidence

in chief. Dw 2 testified as follows. He is one of the administrators along with the 1st petitioner (his mother, Pw 1), Samuel Rotich Siwanyang (2nd petitioner) and Teresa Chesang Siwanyang (the objector).

Dw 2 further testified that he is the son of the deceased. The deceased had the following three wives namely:

1st wife –Jepore Sarah Christopher, her mother

2nd wife-Chepore Siwanyang, mother to Samuel Rotich Siwanyang

3rd wife-Teresa Chesang Christopher

Dw 2 further testified that the deceased had two parcels of land namely parcel No. West Pokot/Kishaunet/ 127 measuring 27.18 acres and parcel No. West Pokot/Siyo “A”/4258. He further testified that before his father died he had subdivided his parcels of land by allocating parcel No. West Pokot/Kishaunet/ 127 to the 1st and 2nd wives. He also allocated parcel No. West Pokot/Siyo “A”/4258 to the 3rd wife.

Dw 2 also testified that the 3rd wife was given parcel No. West Pokot/Siyo “A”/4258 which measured six (6) acres. However, the 3rd widow sold part of this parcel of land leaving for herself 3 acres. The parcel of land at Kishaunet was given to the 1st and 2nd houses. Dw 2 also testified that his mother gave out cows for the purchase of the land in Siyoi, which now belongs to the 3rd wife. The 3rd wife moved to Siyo upon the purchase of that land.

In cross examination Dw 2 testified as follows. In the 1st house there were 8 children and now they are 7 surviving children.

In the 2nd house, there are six (6) surviving children.

In the 3rd house there are 9 children.

Parcel No. West Pokot/Kishaunet/127 is 26 acres, while parcel No. West Pokot/Siyo “A”/4258 which is six (6) acres.

Dw 2 further testified that the deceased had shared his land and each wife has a title deed. The 1st wife got 16 acres. The 2nd wife got 8 acres. The 3rd wife got 3.5 acres.

Siyoi land was 6 acres but someone grabbed part of it leaving a balance of 3.5 acres. Dw 2 also testified that the deceased told him that the 1st and 2nd wife gave out cattle for the purchase of the land at Siyoi. The 2nd wife of the deceased is now late.

Dw 2 in re-examination testified that the deceased had sub-divided his land at Kishaunet between the 1st and 2nd houses before he died. Dw 2 also testified that during the memorial of the deceased there was no discussion on distribution of the land, because it had been already been sub-divided. Finally, he testified that part of the Siyoi land was taken back by the seller. The seller had sold 5 acres.

The petitioners then called **Jacob Sokolinyang Perii (Dw 3)**; who adopted his witness statement dated 25/10/2019 as his evidence in chief. Dw 3 is a village elder.

Dw 3 testified that he knew the deceased, who was his neighbour at Kishaunet. Dw 3 continued to testify as follows. The deceased had land parcels at Kishaunet and Siyoi. The land at Siyoi was purchased for the 3rd wife in 1984, and she took immediate possession. The parcel of land at Kishaunet was and is occupied by the 1st and 2nd wives. They have been living peacefully.

Dw 3 testified that the land at Siyoi is more productive than the land at Kishaunet. In order to maintain peace, each wife has lived in her parcel of land in order to avoid disputes and fights.

Furthermore, Dw 3 testified that the 3rd wife had been given a portion of land at Kishaunet, when she was first married. She declined to take it indicating that it was not productive and wanted to move to Siyoi. As a result, a parcel of land was purchased for her at

Siyoi and she has been there to date.

Dw 3 as a village elder was present when the deceased subdivided his parcel of land at Kishaunet and established the boundary between the 1st and 2nd wife using sisal plants.

The 3rd wife never raised any objection to the boundary between the 1st and 2nd wives; which boundary is still intact.

In cross examination Dw 3 testified that it is the 3rd wife who wanted to go and live at Siyoi because the land at Kishaunet is rocky. The land at Kishaunet was divided in the middle between the 1st and 2nd wife by planting sisal plants. Dw 3 admitted attending the memorial of the deceased in which the issues of the property of the deceased were discussed.

The petitioners also called **Samson Kapenguria Longoronyang** (Dw 4), who also adopted his witness statement as his evidence in chief.

Dw 4 testified as follows. He is the immediate neighbour of the deceased. The deceased had three wives namely Jepore Sara Christopher, Chepore Siwanyang and Teresa Chesang Christopher.

The 1st wife had 7 children. The 2nd wife also had 7 children. The 1st and 2nd wife settled in Kishaunet. The deceased took the 3rd wife to Nasokol where he was working; wherein they sired 2 children.

The deceased requested the 1st wife to allow the 3rd wife to occupy the land in Kishaunet, but the 3rd wife refused to live there. As a result, the deceased took cows from the 1st wife and 2nd wife, and used them to purchase land at Siyoi, where she is settled. The 3rd wife never returned back to Kishaunet.

Dw 3 testified that the relationship between the 1st and 2nd wives on the one hand and the 3rd wife on the other hand was not good since the 3rd wife used to quarrel the other wives. This caused strained relationship with the two families. Dw 3 testified that while the deceased was still alive the land at Kishaunet was divided between the 1st and 2nd wife; while 3rd wife stayed at Siyoi. Dw 4 wishes that each of those three wives should remain on their respective parcels of land for them to live peacefully.

In cross examination Dw 4 testified that the deceased divided his land into two portions but the portion of the 1st wife is slightly bigger than that of the 2nd wife. Dw 4 also testified that he was with Jacob (Dw 3) when the deceased divided his land at Kishaunet.

As regards the children, Dw 4 testified that the 1st house had 7 children and the 2nd house had had 5 children. He only knew two children of the 3rd house. The 3rd wife lived in Kishaunet for a while. It was the 3rd wife who refused to live in the reserve area (Kishaunet).

Dw. 4 further testified that the relationship between the 1st and 2nd house on the one hand and the 3rd house on the other hand was bad. The 3rd wife was quarrelsome. After the 3rd wife moved, to Siyoi, the quarrels ended. The 1st wife gave 3 heads of cattle to buy the land at Siyoi.

The submissions of the petitioners.

Messrs Katina & Co. advocates have submitted that it is not in dispute that the petitioners and the objector are beneficiaries of the estate of the deceased in terms of section 29 (a) of the Law of Succession Act, which provides that: *“for the purposes of this part, ‘dependent’ means the wife, or wives, or former wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”*

Furthermore, counsel cited section 42 (a) of the Law of Succession Act, which states that: *“where an interstate has, during his lifetime by will, paid, given or settled any property to or for the benefit of a child, grandchild or house, that property will be taken into account in determining the share of the net intestate estate finally accruing to the child or grandchild or house.”*

Based on the foregoing provision of the law, counsel submitted that the deceased intestate had during his life time allocated land parcel No. West Pokot/Kishaunet/127 to the first and second houses; with the boundary between the two houses marked to date with

sisal plants. This was done following the decision of the objector that she had no wish or interest in land parcel No. West Pokot/Kishaunet/127. The objector was as a result allocated parcel No. West Pokot/Siyo "A"/4258.

The evidence on record shows that the deceased had land parcel No. West Pokot/Kishaunet/127 demarcated to the 1st and 2nd houses. The sisal boundary separating the two houses is still intact in respect of the said parcel of land. This is clear from the evidence of Dw 3 and Dw 4 who witnessed the demarcation by the deceased. This was done while the objector was in occupation of parcel No. West Pokot/Siyo "A"/4258. This in counsel's view demonstrates the intention and wishes of the deceased to have the three household settled. Counsel cited the estate of the late *Morogo A. Mugun alias Moroko Mukumu (2019)*, Success Cause No. 113 of 2011, in which that court (Mumbi Ngugi, J) pronounced herself as follows: "*in my view, the deceased in this case had; prior to his death, considered how he wished to have property distributed after his death.*"

Furthermore, counsel cited section 40 of the Law of Succession Act as interpreted by the Court of Appeal in *Scholastica Ndululu Sura v Agnes Nthenya Suva (2019)e-KLR*, in which that court observed that a blind application of section 40 of the Law of Succession Act, may lead to absurdity and stated that although that section "*provides for a general distribution of the estate of a polygamous deceased person, the court has a discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.*"

Based on the foregoing provision, counsel has urged this court to interpret the provisions of section 40 of the Law of Succession Act to uphold the clear intention of the deceased person by ignoring the objector's proposed mode of equal distribution among the beneficiaries or the three houses.

Counsel, therefore submitted that the deceased had distributed his estate prior to his death and the court should be guided by section 42 (a) of the Law of Succession Cause Act.

Counsel has further submitted that the objector had been given the option to settle in land parcel No. West Pokot/Kishaunet/127; but she refused alleging that this parcel of land was not productive. This is confirmed by the evidence of DW1, Dw 2, Dw 3 and Dw 4. The deceased then requested his 1st wife to sell her goats and cows to enable him buy land for the 3rd wife. Additionally, the objector was very quarrelsome as testified to by Dw 4. Following the purchase of land parcel No. West Pokot/Siyo "A"/4258 the objector went into occupation of that land without any regard to land parcel No. West Pokot/Kishaunet/127. The objector only lodged her claim after the death of the deceased. Counsel therefore submits that the objector has no basis in claiming a share in land parcel No. West Pokot/Kishaunet/127.

Based on the evidence of Dw 1, Dw 2, Dw 3 and Dw 4 counsel has submitted that the deceased had made advancement to each of the three wives by giving them their respective portions of land during his life time in terms of section 28 of the Law of Succession Act. Counsel has therefore urged the court to make a finding to that effect.

Counsel has further urged the court to adopt the mode of distribution proposed by the petitioners, since it gives effect to the wishes of the deceased. The mode of distribution proposed by the petitioners is fair; since it gives to the 1st house 17.5 acres, the 2nd house 8.75 acres of land in land parcel No. West Pokot/Kishaunet/127. The objector will still be the owner of land parcel No. West Pokot/Siyo "A"/4258 which measures 3.5 acres, which originally measured 6 acres.

Counsel has urged the court to take into account the circumstances of the case in particular the circumstances that led to the purchase of land parcel No. West Pokot/Siyo "A"/4258. Those circumstances were that the objector refused to occupy land parcel No. West Pokot/Kishaunet/127 and that she voluntarily moved out to go and occupy the parcel of land at Siyoi in 1984. Furthermore, the objector has never shown interest in the land at Kishaunet. The objector only turned up to complain after the death of the deceased. She should not now complain since she sold part of her original 6 acres, leaving the balance of 3.5 acres.

Counsel has therefore urged the court to depart from the provisions of section 40 of the Law of Succession Act, which mandates the court to distribute the estate in equal shares to all the beneficiaries.

Issues for determination.

I have considered the entire evidence and the submissions of both counsel including the authorities they cited.

As a result, I find the following to be the issues for determination.

- 1) Whether the deceased established his wishes on how his two parcels of land were to be subdivided.
- 2) Which mode of distribution is fair"

Issue 1

After considering the entire evidence, I find as credible the evidence of the petitioners; which was that the deceased had intended to settle the objector on land parcel No. West Pokot/Kishaunet/127. He did this after consulting the 1st wife. The objector refused to settle on this said land because it was not productive. Consequently the deceased then used goats and cattle of the 1st wife and bought for the objector the land at Siyoi. The objector moved there voluntarily in 1984. She settled there without any protest until the death of the deceased in 2002. After the death of the deceased, the objector now turned up to lay claim over the land at Kishaunet.

I further find as credible the evidence of Dw 4 that while the deceased was alive he demarcated the land at Kishaunet between the 1st and 2nd wife by planting sisal plants along the common boundary; which is still there to date. This demarcation was witnessed by the village elder (Dw 3) and Jacob (Dw 4).

I further find as credible the evidence of Dw 3 that the objector had been given her parcel of at Kishaunet, but she refused because it was rocky. The deceased then bought land for her at Siyoi, which was more productive than the one at Kishaunet.

It therefore follows that the objector cannot now turn back and claim land at Kishaunet; which she had refused. She is estopped from doing so.

Furthermore, I find as credible the evidence of Dw. 4 that the relationship between the 1st and 2nd house on the one hand and the 3rd house on the other hand was bad. The 3rd wife was quarrelsome. After the 3rd wife moved to Siyoi the quarrels ended. The peace that followed thereafter should be maintained. This can only be done by each house living on its respective parcel of land in terms of the wishes of the deceased.

I have also considered the submissions and authorities cited by both counsel. I find as persuasive the authorities cited by counsel for the petitioners and I have found them to be good precedents. I find the authorities cited by counsel for the objector are distinguishable from the instant cause in that the deceased herein had established his wishes during his life time at the request and with the consent of the objector; which is lacking in those authorities.

In the circumstances, I find that the deceased established his wishes on how his two parcels of land were to be divided during his life time.

I therefore find that the deceased established his wishes before he died. The answer to the first issue is in the affirmative.

Issue 2

I find as credible the evidence of Dw 4 that the 1st house (wife) has 7 children and the 2nd house (wife) also has 7 children. I find that the 3rd house (3rd wife) has 9 children.

The proposed mode of distribution of the objector is that the two parcels be divided equally among the three houses or among all the beneficiaries.

The proposed mode of distribution of the petitioners respects the wishes of the deceased. I therefore approve it.

The proposed mode of distribution of the objector ignores the established wishes of the deceased, and I therefore do not approve it. Moreover, the objector is estopped from coming up with any mode of distribution; having been satisfied with the way the deceased had settled his three wives; since twenty years have lapsed following the death of the deceased. I therefore invoke the doctrine of

estoppel to bar her from raising her claim.

The estate of the deceased will be distributed in accordance with the proposed mode of distribution of the petitioners.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT KAPENGURIA THIS 17TH DAY OF JUNE 2021.

J. M. BWONWONG'A

JUDGE

In the Presence of

Ms Chebet for the petitioners

Ms Opondo holding brief for Mr Chebii for the objector

Mr. Juma and Hellen, court assistants.



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