



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT SUCCESSION CASE NO. 7 OF 2017**

**IN THE MATTER OF THE ESTATE OF THOMAS KITENGE SAMUEL(DECEASED)**

ANNAH NDULU MUSEMBI.....1ST PETITIONER

KILIOVO THOMAS.....2ND PETITIONER

VERSUS

JAMES HUNJA KITENGE.....PROTESTOR

**J U D G E M E N T**

1. This cause relates to the estate of the late **Thomas Samuel Kitenge (deceased)** who died on **6<sup>th</sup> November, 1994**.
2. The petition filed herein, indicates that the deceased died intestate leaving behind **three widows** and the children are as follows:

a) **1<sup>st</sup> House**

1. *Grace Kamenye (deceased)*
2. *Kileora Christopher (deceased)*
3. *Musee Jonathan (deceased)*
4. *Regina Syombua*
5. *Lenah Kilonzo*
6. *Samson Musembi (deceased) –husband to one of the petitioners-Annah Ndulu Musembi)*
7. *Beatrice Mutie*
8. *Charity Mwanzia*

b) **2<sup>nd</sup> House**

- i. *Eunice Wangui Kitenge (deceased)*
- ii. *Samuel Muhoya (deceased)*
- iii. *James Hunja Kitenge (protestor)*
- iv. *Alfred Ndambuki*
- v. *Bridgette Maitha (deceased)*

vi. *Faith Muthoni*

**c) 3<sup>rd</sup> House**

i. *Grace Mulatai Thomas*

ii. *James Kimanzi*

iii. *Martha Mulani*

iv. *Samuel Muthengi*

v. *Joseph Musembi*

3. The properties left behind by the deceased and in his name are as follows: -

**List of properties in the name of the deceased**

1. *Mulango/Wikililye/882.....14.8 Acres*

2. *Nzambani/Kyanika/330.....2.96 Acres*

3. *Mulango/Wikililye/75.....3.45 Acres*

4. *Mulango/Wikililye/1465 (Certificate of Official search not produced)*

5. *Two plots in Wikililye market .....11 & 12*

4. The petitioner/applicant herein vide summons of confirmation of grant dated 28/2/2020 proposed to have the estate of the deceased distributed as follows: -

a) *Nzambani/Kyanika/330-Anna Ndulu Musembi...Whole*

b) *Mulango/Wikililye/75-Anna ndulu Musembi.....Whole*

c) *Mulango/Wikililye/882 to: -*

i. *Anna Ndulu Musembi*

ii. *Grace Kamene Kilova Equal shares*

iii. *Jonathan Musee's Family*

5. The applicant (Anna Ndulu Musembi) has justified her proposal on the claims that the 2<sup>nd</sup> house are well sorted because the deceased gifted them as follows during his lifetime;

(a) *Kyangwithya/Tungutu/1553 & 1558-.....James Hunja*

(b) *Kyanguithya/Tungutu/1554 & 1557.....Alfred Ndambuki*

(c) *Kyangwithya/Tungutu/1552-.....Sammy Muhoya*

(d) *Kyangwithya/Tungutu/1555-.....Brigite Mukui*

(e) *Kyangwithya/Tungutu/1556-.....Faith Muthoni*

(f) *Mulango/Wikililye/1466:-*

(i) *James Hunja*

(ii) *Alfred Ndambuki equal share*

(iii) *Sammy Muhoya*

**(g) Kyangwithya/Tungutu/1551 & Kisasi/Mbitini/ 170- ..... Eunice Wangui Kitenge**

6. The applicant further contends that a **1/3 of Kisasi/Mbitini /170** should be given to Grace Mulati the 3<sup>rd</sup> wife whom she claims came to the life of the deceased during his sunset years.

7. She contends that her proposal reflects the wishes of the deceased.

8. She submits that the protestors have made life difficult for her after having themselves registered in the properties that belonged to the deceased.

9. James Hunja Kitenge, the protestor herein, filed a protest to

the above proposal. According to the protestor, the question of distribution was resolved through a clan meeting held on 24/10/2010.

10. The protestor in his evidence in court conceded that he has no claim over the estate of the deceased since he had already benefited from a share granted to him by his late father. He proposes to have the net estate distributed as follows: -

**i. Nzambani/Kyanika/330 measuring 2.96 Acres-Samson Musembi husband to Anna Ndulu Musembi**

**ii. Mulango/Wikililye/1465 Kileova Christopher (deceased) from the 1<sup>st</sup> house**

**iii. Mulango/Wikililye/882-.....14.8 Acres-Grace Mulatai (3<sup>rd</sup> wife) and her children**

**iv. Plot No. 11-.....Anna Ndulu Musembi**

**v. Plot No. 12-.....Grace Mulatai**

11. The protestor contends that the above mentioned assets are the only properties that comprise the estate of the deceased. He submits that their clan namely *Amutei clan* have deliberated upon the dispute and have resolved to have the estate distributed as per his proposal and has cited the minutes of the clan meeting on 24/7/2010 to back up his claims.

12. He faults the proposal made by the petitioner/applicant stating that the proposal favours the 1<sup>st</sup> house against the other beneficiaries. He contends that the properties gifted by the deceased during his life time was gift *inter vivo* and cannot be subject to distribution since the said properties already changed hands. He relies on the decision of **Re Estate of the late Gedion Manthi Nzioka (deceased) [2015] eKLR** to buttress his contention.

13. This court has considered the summons for confirmation of grant herein and the proposal made by Anna Ndulu Musembi. I have also considered the protest filed. It is evident that the deceased in this cause died intestate because no will has been tendered to show an existence of a will. It is also an uncontested that the deceased was a polygamous man with (3 wives).

14. There is no dispute that the deceased left the following

3 households: -

a) **1st House Grace Kamene (deceased widow).**

**i. Kiliova Christopher (deceased)**

**ii. Musee Jonathan (deceased)**

**iii. Samson Musembi (deceased husband to Annah Ndulu Musembi)**

**iv. Regina Syombua**

**v. Beatrice Mutie**

**vi. Charity Mwanzia**

b) **2nd House**

**(i) Eunice Wangui (widow-deceased)**

**(ii) Muhoya Samuel (deceased)**

**(iii) James Hunja Kitenge (protestor)**

(iv) *Alfred Ndambuki (deceased)*

(v) *Bridgete Maitha (deceased)*

(vi) *Faith Muthoni*

c) 3rd House

(i) *Grace Mulatai Thomas –Widow*

(ii) *James Kimanzi*

(iii) *Martha Mukui*

(iv) *Samuel Muthengi*

(v) *Joseph Musembi*

15. This Court has already listed above what can be considered as the net estate of deceased person as “**Net Estate**” is defined under *Section 3 (1) of Law of Succession Act* as;

“*free property of a deceased person*” and “*free property*” is defined as;

“*property of which deceased person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.*”

16. Going by the above, it is quite going by the evidence presented that the only properties that can be termed as “**free property of the deceased**” are: -

(i) *Mulango/Wikililye/882-.....14.8 acres*

(ii) *Nzambani/Kyanika/330-.....2.9 6 acres*

(iii) *Mulango/Wikililye/1465-.....4 acres*

(iv) *Mulango/Wikililye/75-.....3.45 acres*

(v) *Plot No. 11 at Wikililye market*

(vi) *Plot No. 12 at Wikililye market*

17. The properties mentioned by the applicant (*Anna Ndulu Musembi*) under *paragraph 7* of her affidavit in my considered view do not comprise “**free property of the deceased**” because by the time the deceased died, the same had already been given mainly to the members of the second house as gift *inter vivos*. The members have already benefited and going by the provisions of *Section 42 of Law of Succession Act* provides: -

“*Where—*

(a) *an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

(b) *property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.*”

18. The distribution of an estate of a deceased and polygamous person is provided under *Section 40 of Law of Succession Act* which provides: -

“*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.*

(2) *The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.*”

19. The only houses entitled to a share of the estate are the 1st and 3rd house. This court was told that there is a surviving widow (Grace Mulatai) who is residing in **Mulango/Wikililye/75**. It is therefore fair that the only surviving widow be left to stay where her late husband left her.

At the same time this court notes from the evidence tendered that the Applicant's house in the same parcel was burnt down which really is unfortunate and criminal. She is therefore entitled to have a share in the same property where her homestead was before it was burnt down.

20. Going by the provisions of **Section 40 of the Law of Succession Act** the grant made to Anna Ndulu Musembi, Lenah Kilonzi, James Hunja Kitenge and Grace Mulatai on 30.09.2019 is hereby confirmed as per the following mode of distribution: -

a) Land Registration No. **Mulango/Wikililye/75** to be shared equally between two houses (the 1st and 3rd house).

b)  $\frac{1}{2}$  share to be held by Grace Mulatai and to have life interest and thereafter, the share to be shared equally

by: -

**1) James Kimanzi**

**2) Shadrack Kithuku**

**3) Samuel Muthengi equal share**

**4) Martha Mukui**

**5) Joseph Musembi**

21.  $\frac{1}{2}$  share to be held by Anna Ndulu Musembi for her benefit and in trust on Regina Syombua, Lenah Kilonzo, Beatrice Mutie and Charity Mwanzia.

22. Land Registration No. **Mulango/Wikililye/1465**

1)  $\frac{1}{2}$  share to Grace Mulatai to hold in trust for: -

**1) James Kimanzi**

**2) Shadrack Kithuku**

**3) Samuel Muthengi**

**4) Martha Mukui**

**5) Joseph Musembi**

2)  $\frac{1}{2}$  share to Anna Ndulu Musembi to hold it in trust for Regina Syombua, Lenah Kilonzo, Beatrice Mutie and Charity Mwanzia.

c) Land Registration No. **Nzambani/Kyanika/330**

(i)  $\frac{1}{2}$  share to Grace Mulatai to have file interest and thereafter, to her children: -

**1) James Kimanzi**

**2) Shadrack Kithuku**

**3) Samuel Muthengi equal share**

**4) Martha Mukui**

**5) Joseph Musembi**

ii)  $\frac{1}{2}$  share to Anna Ndulu Musembi

d) **Plot No. 11 at Wikililye Market-Anna Ndulu Musembi**

e) **Plot No. 12 at Wikililye market- Anna Ndulu Musembi**

This being a family matter there shall be no **Order as to costs**.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 28TH DAY OF FEBRUARY, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**