



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 105 OF 2003**

**IN THE MATTER OF THE ESTATE OF MANESSE OTIENO ESHITUBI (DECEASED)**

**RULING**

1. On 7<sup>th</sup> May 2021, I delivered a ruling where I raised certain issues about survivors of the deceased who had not been provided for in the distribution proposed by the administrators, and I gave time to the administrators to address the matter.

2. There was the issue of Emily Mukwambo, Dorica Onindo, Rose Mukhwana, Sylipha Amambwa, Fatuma Omududu, Nerea Otieno and Florence Mung'asia. I stated that these had not renounced their share. I extended time for them to file renunciations but none have been filed, and so I shall proceed, with respect to them, in the spirit of *Christine Wangari Gichigi vs. Elizabeth Wanjira Evans & 4 others* [2014] eKLR (Nambuye, Ouko & Mohammed JJA) and *In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR (Gitari J), and make provision for these daughters since they have not renounced their right or entitlement to a share in the estate.

3. Then there is the issue of the daughters who have died, that is to say the late Margaret Namai, the late Lorna Mukhwana, the late Rosalinda Lukale and the late Dina Okoth. These are not available to waive or renounce their rights or entitlements. However, under section 41 of the Law of Succession Act, Cap 160, Laws of Kenya, their children are entitled, by way of representation, to the shares that should have accrued to them. It is for this reason that I had extended time to the administrators to disclose any children of the late daughters of the deceased, and to get the said children to renounce their rights or entitlement, accruing to them under section 41, where such children were minded to do so.

4. I have seen on record, an affidavit by Johnstone Namayi Otieno, sworn on 20<sup>th</sup> August 2020. He discloses that the late Donah Mukhwana Otieno was survived by two children, Stanley and Patrick; the late Dinah Okoti Otieno was survived by one child, Hellen Mukabana; and the late Margaret Namayi Otieno, was survived by two children, Hassan and Asmin. He alleges that he had visited the grandchildren mentioned, the children of the late daughters of the deceased, and claims that they had all waived or renounced their rights accruing to them under section 41 of the Law of Succession Act. He has attached copies of their national identity cards. I shall take him by his word, and I shall not make provision for them based on that.

5. He has also talked of a widow of the deceased, known as Repher Anyolo Otieno, and has disclosed her children, being four married daughters and one son. He avers that an unidentified petitioner would take care of the grandson, Festo Akwera Otieno. There would be no basis for anyone to take care of another. The entitlement to the house of Repher Anyolo Otieno should devolve upon that house in terms of section 40 of the Law of Succession Act, to be distributed in that house according to section 35 of the Law of Succession Act.

6. Although the late Rosalinda Lukale was a daughter of the deceased, and I had directed that there be disclosure of her survivors, Johnstone Namayi Otieno, in his affidavit, has not done so. Consequently, I shall invoke *Christine Wangari Gichigi vs. Elizabeth Wanjira Evans & 4 others* [2014] eKLR (Nambuye, Ouko & Mohammed JJA) and *In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR (Gitari J), to make provision for her estate, to devolve upon her children, and in the event that she has none, to whoever else is entitled in law to the same.

7. There was the issue of disclosure of the survivors of the late George W. Wanguba. I directed the administrators to make a disclosure on the survivors. Johnstone Namayi Otieno, vide his affidavit of 17<sup>th</sup> August 2021, has made the disclosure. The late Wycliffe Wanguba Otieno is said to have been survived by two widows, six daughters and two sons. It is said that his estate will be allocated three acres, to be devolved to the two widows, Janet Andalo Mbiya and Millicah Bulimo Wanguba.

8. Let me now go on to the distribution of the estate. The deceased died a polygamist, in 1991, after the Law of Succession Act had come into force in 1981. The estate, shall, therefore, be distributed in accordance with the provisions of the Law of Succession Act, for section 2(1) of the Act makes it of universal application to estates of persons dying after its commencement. There are exceptions with respect to intestate succession, set out in sections 32 and 33 of the Act, but these do not apply to property within Kakamega. Section 2(1) of the Law of Succession Act ousts the application of African customary law, and subjects intestate estates, not falling with the exceptions, to the full application of Part V of the Act. Since the deceased died a polygamist, section 40 of the Act shall apply to his estate.

9. Section 40 provides that the estate is first of all divided into houses based on the number of wives that the deceased had. The deceased herein had five wives, and, therefore, his estate comprises of five houses. Under section 40(1), the assets are initially shared between the houses according to the number of children in each house, with the surviving widow, if any, being treated as an additional unit. Under section 40(2), the property or share devolved to each house is then distributed amongst the members of that house, according to the provisions in

sections 35, 36 and 38 of the Law of Succession Act, depending on the circumstances or composition of the house. Section 35 applies where the house comprises of a widow and her children, the property would devolve to the widow to hold during lifetime and thereafter to her children in equal shares. Section 36 applies where the widow in the house has no children. She will be entitled to 10% of the net intestate estate devolved to that house absolutely, and should hold the remainder during life interest. Section 38 applies where there is no widow in the house, but there are children. If the child is just one, he or she will take absolutely. If there are more than one child, then they will share equally.

10. For avoidance of doubt, sections 35, 36, 38, 40 and 41 are hereby set out in *verbatim*:

**“35. Where intestate has left one surviving spouse and child or children**

*(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—*

*(a) the personal and household effects of the deceased absolutely; and*

*(b) a life interest in the whole residue of the net intestate estate...*

*(2) ...*

*(3) ...*

*(4) ...*

*(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*

**36. Where intestate has left one surviving spouse but no child or children**

*(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—*

*(a) the personal and household effects of the deceased absolutely; and*

*(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and*

*(c) a life interest in the whole of the remainder:*

*Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.*

*(2) ...*

*(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.*

37. ...

**38. Where intestate has left a surviving child or children but no spouse**

*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.*

39. ...

**40. Where intestate was polygamous**

*(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.*

*(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.*

**41. Property devolving upon child to be held in trust**

*Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate. "*

11. The deceased had married five times, and, therefore, he had five houses. The first house is of the late Phoebe Nyapola, there are six children. So the first house comprises of six units. The second house is of the late Grace Angulu, and there are eight children, meaning that it has eight units. The third house is of the late Jerita Masava, who has six children, and, therefore, it has six units. The fourth house is of the Mwanaida Nechesa. She is still alive, and has one child, so the house has two units. The fifth, and last, but not least, house is of Repher Anyolo Otieno. She is alive, and has six children, and, therefore, the house has seven units. For the purpose of distribution, the ratio should work out to 6:8:6:2:7.

12. Am told that some of the daughters of the deceased have renounced their share, and some of the grandchildren, being children of some of the dead daughters, have also waived their rights or entitlements under section 41 of the Act. That should have an effect on the ratio of 6:8:6:2:7. The daughters who have renounced their rights are Fridah Obulemire Otieno, Christabel Lubanga Otieno, Rosabellah Naomi Ambetsa and Caroline Otieno. The grandchildren, whose mothers, being daughters of the deceased, and are themselves dead, who have renounced their rights under section 41, are the children of the late Dona Mukhwana Otieno, the late Dinah Okoti Otieno and the late Margaret Namayi. The daughters who did not renounce or waive their rights are Emily Mukwambo, Dorica Onindo, Rose Mukhwana, Sylipha Amambwa, Fatuma Omududu, Nerea Otieno and Florence Mung'asia. The numbers of those who have renounced their rights, according to the houses are as follows: the first house – one, the second house – one, the third house – one, the fourth house – nil, and the fifth house – three. That then means that the configuration of the ratio changes to 5:7:5:2:4.

13. The deceased died possessed of only one asset: Marama/Lunza/247. Since the parties have been unable to agree on distribution, I shall subject the said asset to distribution in the strict terms of section 40 of the Act, going by the principle stated in *Justus Thiari Kiugu & 4 others vs. Joyce Nkatha Kiugu & another* [2015] eKLR (Visram, Koome & Otieno-Odek JJA), *In re Estate of Juma Shiro – Deceased* [2016] eKLR (Mwita J) and *In re Estate of MM (Deceased)* [2020] eKLR (Gikonyo J), using the ratio 5:7:5:2:4.

14. The final orders are as follows:

**(a) That the grant herein is hereby confirmed, so that the administrators are approved or confirmed as such to complete administration in the terms to be spelt out in this ruling:**

**(b) That Marama/Lunza/247 shall be distributed amongst the five houses of the deceased according to the ratio of 5:7:5:2:4;**

**(c) That the share devolving to the first house shall be shared equally between the estate of the late Wycliffe Wanguba Otieno, Joseph Swaka, Morris Asumwa, Dorica Onindo and Rose Mukhwana;**

**(d) That the share due to the second house shall devolve equally between Fredrick Charande, Wilson Afugwa, Livingstone Otinga, Johnstone Nandwa Otieno, Harrison Kamoya, Emily Mukwambo and the estate of the late Rosalinda Lukale;**

**(e) That the share devolving to the third house shall be distributed equally between Johnstone Namai Otieno, Reuben Kadhai Otieno, Jonah Namai, Sylipha Amambwa and Fatuma Omududu;**

**(f) That the share due to the fourth house shall devolve to Mwanaida Nechesa, to hold during life time, and thereafter to her son, Ishmael Okune Otieno, absolutely;**

**(g) That the share due to the fifth house shall devolve to Repher Anyolo Otieno, during her life time, and thereafter to her children, Alexander Amukambwa Otieno, Festo Akwera Otieno, Nerea Otieno and Florence Mung'asia Otieno, equally;**

**(h) That the share due to the estate of the late Wycliffe Wanguba Otieno shall devolve upon his widows, Janet Andalo Mbiya and Millicah Wanguba, to hold in trust for their children: Flora Athangu Wanguba, Mary Wanguba Otieno, Beatrice Anjalina Wanguba, Benson Wanguba Otieno, Stephen Jackson Akwera Wanguba, Carolyne Shitandi Wanguba, Jackline Merina Wanguba and Clarice Eshuchi Wanguba;**

**(i) That a certificate of confirmation of grant shall issue accordingly;**

**(j) that each party shall bear their own costs; and**

**(k) That any party aggrieved by these orders, is hereby granted leave of twenty-eight days to move the Court of Appeal, appropriately.**

15. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18<sup>th</sup> DAY OF February, 2022

W. MUSYOKA

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Miss. Rauto, instructed by Rauto & Co., Advocates, for the fourth administrator.**

**Johnstone Namai Otieno, administrator, in person.**

**Ishmael Otieno, administrator, in person.**

**Festo Otieno, administrator, in person.**