



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 375 'A' OF 1987

IN THE MATTER OF THE ESTATE OF WERABUKAYA TISA (DECEASED)

IBRAHIM WERABUKAYA.....PETITIONER/RESPONDENT

VERSUS

PAUL MAKOKHA.....APPLICANT

JUDGMENT

1. This court on the 23rd December, 2013 upon application by the petitioner distributed the estate of the deceased herein in land parcel No. Kakamega/Lukume/157 as follows:-

Mackay N. Otisa	-	2.8 Ha.
Ibrahim Werabukaya	-	2.8 Ha.
Andrew W. Otisa	-	2.8 Ha.
Grace Nafula Makokha	-	2.8 Ha.
David L. Weabukaya	-	2.8 Ha.
Berita Museve	-	3.0 Ha.

2. The applicant herein thereafter filed an application dated 24th April, 2014 seeking that the court reviews, sets aside and/or varies orders of confirmation of grant made on 23/12/2013.

3. It was the case for the applicant that the deceased was polygamous. That before he died he had distributed his land to his three wives and fixed boundaries to the respective parcels. That the estate should therefore be distributed to the houses of the three wives as follows:-

Marckay N. Otiso	
Ibrahim Werabukaya	- 15 Acres
Andrew W. Otiso	
Grace Nafula Makokha	- 16 Acres
David L. Werabukaya	
Berita Museve	- 11 Acres

4. The applicant was represented by **Miss Rauto** advocate while the petitioner was acting in person. The application proceeded by way of *viva voce* evidence wherein the applicant testified as PW1 and called one witness, David Lumbasi Werabukaya, PW2. The petitioner testified as DW1 and called one witness, Mackay Otiso DW2.

5. The facts which are not in dispute are that the deceased herein had three wives – Wayeta, Fatuma and Saina. That Wayeta had one son who is deceased but left behind a wife, Berita Museve. Fatuma had two sons who were Samuel Makokha (deceased) (who was father to the applicant) and David Lumbasi. Saina had 3 sons who are the petitioner, Andrew Otisa and Mackay Otisa.

6. In his evidence in court the applicant stated that the deceased herein had distributed his land to his three wives way back in 1965. He produced a document, P.Ex 1, from the deceased indicating so. That the deceased had placed boundaries on the land. That the wives were supposed to re-distribute their shares to their sons. That since the time of distribution all the beneficiaries have been living on their respective parcels. That the boundaries fixed by the deceased are still there. That some of the sons of the deceased have given their shares to their sons. That some of the beneficiaries such as the petitioner have sold out their portions to buyers who are residing on the land. That there are also graves on the land. That any re-distribution will affect other people. That the estate should be distributed as per his proposal. In cross-examination he stated that the deceased herein died before he was born. That he was told that it is his grandfather who put the boundaries.

7. The evidence of the applicant was supported by his father's sibling brother, David Lumbasi, DW2 who supported the proposal by the applicant on the same reasons stated by the applicant.

8. The petitioner on the other hand testified that his father never left behind any will. That he followed the due process in filing the petition and in distribution of the estate. That his mode of distribution that was accepted by the court was fair as he shared out the land equally to the sons of the deceased each of whom got 2.8 Ha. except Berita Museve who was allocated 3.0 Ha. His sibling brother, Mackay Otiso DW2 supported his mode of distribution.

9. The petitioner admitted in cross-examination that there are boundaries on the land. He however denied that the boundaries were fixed by his father. He said that the boundaries were put by the brothers themselves after the death of their father so as to avoid quarrels. DW2 said that he has sold part of his share to a person called Charles Masai. He said that the parcels of land have boundaries but that he does not know who fixed them. He confirmed in cross-examination that during the confirmation of grant only siblings from his mother were present in court.

10. Miss Rauto submitted that the applicant's evidence showed that the deceased distributed the land to his sons and fixed boundaries. That to adopt the mode of distribution proposed by the petitioner would mean that some people would pull down their houses to pave way for the new boundaries. That the petitioner did not give any reason why the land should be shared out equally despite confirming that there are boundaries on the ground. That equal distribution will interfere with the current boundaries. That in the premises the equitable way is to share out the estate as proposed by the protestor. Counsel referred to the case of **In re Estate of John Musambayi Katumanga (Deceased) (2014) eKLR** where it was held that equal distribution does not always work justice and the court is left with discretion to consider the circumstances of each case before distributing an estate equally. Counsel urged the court to adopt the applicant's proposal.

Analysis and Determination –

11. The applicant indicated that the deceased had left what he called a will, P.Ex 1, stating how he desired his estate to be distributed. However the document is nowhere close to a will. It does not comply with writing of wills as stated in Section 11 of the Law of Succession Act. The document is thereby dismissed. I find that the deceased died intestate. The court will therefore distribute his estate according to the law of intestacy.

12. The applicant testified that the deceased had fixed boundaries on the parcels of land. This evidence was supported by his uncle PW2. The petitioner on the other hand stated that it is the brothers who fixed the boundaries after the death of the deceased to avoid conflict among themselves.

13. The applicant stated that he was born after the death of the deceased. His evidence that the boundaries were put by the deceased was hearsay. His witness PW2 did not shed any light on the boundaries. I thereby find no evidence that the boundaries were put by the deceased. That only leaves the evidence of the petitioner as the only believable evidence that the boundaries were put by the brothers after the death of their father to avoid quarrels.

14. The petitioner supports equal distribution of the property among the beneficiaries, except the share of Berita Museve which is slightly more than the share of the others. According to him the distribution of the estate in that manner is fair to all the parties.

15. The applicant on the other hand proposed that the estate be distributed in accordance with houses since the deceased was polygamous.

16. The deceased was a polygamous man. Two of the widows – Wayeta and Fatuma were said to be deceased while Saina is alive. The applicable law in distribution of property of a polygamous household is Section 40 of the Law of Succession Act that provides that:-

“(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.”

17. Distribution of property according to houses in polygamous households has been followed by courts, for example, in **Irene Mabuti Gitari –Vs- Zacharia Njega Gitari, Kerugoya HCCA No. 42 of 2015 (2017) eKLR** and **In re Estate of Juma Shiro, Kakamega Succession Cause No. 676 of 2014 (2016) eKLR** where distribution of estates of the deceased persons in those cases was done in accordance with the said Section. In the premises I hold that the estate of the deceased herein should be distributed in accordance with

Section 40 of the Law of Succession Act.

18. According to the supporting affidavit of the applicant, Wayeta who is deceased had one son who though deceased left a wife Berita Museve. Fatuma had two sons namely Samuel Makokha (deceased) and David Lumbasi. Saina had 3 sons namely Ibrahim Werabukaya (the petitioner), Andrew Otisa and Mackay Otisa.

19. Section 40 of the Law of Succession Act requires the court to consider a surviving spouse as a unit to the household. Wayeta's house therefore has one unit. Fatuma's house has 2 units while Saina's house has 4 units including the widow. The estate should therefore be distributed in the ratio of 1:2:4.

20. The estate comprises of 17 Ha. The distribution in accordance with the houses is therefore as follows:-

Wayeta's house - 2.428 Ha.

Fatuma's house - 4.857 Ha.

Saina's house - 9.714 Ha.

21. Section 71 of the Law of Succession Act requires that the court identifies the respective identities and shares of all persons beneficiary entitled to the estate before the grant of letters of administration is confirmed. After the shares of each house has been ascertained each house is supposed to share their identity equally. In that case in the house of Wayeta Berita Museve will get 2.428 Ha. In the house of Fatuma the protestor's father (Samuel Makokha) and David Lumbasi will get 2.428 Ha. each. In the house of Saina, Ibrahim Werabukaya, Andrew Otisa, Mackay Otisa and Saina herself will get 2.428 Ha. each.

22. In view of the above the estate of the deceased is to be distributed as follows:-

Berita Museve - 2.428 Ha.

Paul Makokha - 2.428 Ha.

David Lumbasi Werabukaya - 2.428 Ha.

Ibrahim Werabukaya - 2.428 Ha.

Andrew W. Otisa - 2.428 Ha.

Mackay N. Otisa - 2.428 Ha.

Saina (to provide full name) - 2.428 Ha.

23. Orders accordingly. Each party to bear its own costs.

Delivered, dated and signed at Kakamega this 29th day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Petitioner/Respondent

No appearance for the Applicant

Petitioner/Respondent - Absent

Applicant - Absent

Court Assistant - Polycap

30 days right of appeal.