



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

PROBATE & ADMINISTRATION NO. 192 OF 2010

IN THE ESTATE OF:

MARTIN JOSEPH WANDERA.....DECEASED

BETWEEN

1. MARY CONNIE TEBINO

2. LUCIA MAKIO OCHIENG JOINT ADMINISTRATORS

AND

JACKSON BARASA.....OBJECTOR

RULING

1. There are two competing proposals for the distribution of the estate of the deceased herein. The proposal of Lucia Makio Ochieng is that the estate of the deceased be divided into two equal parts according to the two houses whereas that of Mary Connie Tebino has a different formula of distribution.

2. Both proposals are flawed. The proposal by Lucia Makio Ochieng does not factor the number of beneficiaries in each house. If adopted, it will result in some injustice. Prior to the coming into force of the Law of Succession Act, this was the preferred mode of distribution in most African communities. However, elders used to factor the number of children in each house. On the other hand, the proposal by Mary Connie Tebino, has not provided for the children in the second house.

3. Section 40 of the Law of Succession Act provides:

(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.

Section 35 of the Law of Succession provides:

(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:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of

appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(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.

Section 38 states:

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.

4. There are ten units assuming that the affidavit of Mary Connie Tebino is accurate. If Martin Deporre Dindi was survived by children, then the units will be eleven. The estate of the deceased will therefore be divided in equal proportions among the children and the widow.

5. The joint administrators are given a period of six months to ensure distribution has been successfully done. Failure to do so, the confirmed grant herein shall be revoked.

DELIVERED and SIGNED at BUSIA this 26th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE