



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 512 OF 2013**

**IN THE MATTER OF THE ESTATE OF MOSES CHARLES SUNDWA (DECEASED)**

**JUDGMENT**

1. The deceased herein died on 7<sup>th</sup> July 2003. According to the letter from the Chief of Chesero Location, dated 15<sup>th</sup> February 2013, the deceased was survived by two widows – Jane M. Sundwa and Hellen S. Mbakaya, and two sons – Patrick S. Sundwa and Robert BM Sundwa, and two daughters – Eunice K. Sundwa and Sheilah M. Sundwa.

2. Representation to his estate was sought in this cause by Jane Makonjio Sundwa and Hellen S. Mbakaya, in their respective capacities as widows of the deceased, through a petition dated 12<sup>th</sup> July 2013. They listed themselves and their four (4) children, named in the Chief's letter mentioned in paragraph 1 here above, as the persons who survived the deceased. They also listed South Kabras/Chesero/1306 as the property that the deceased died possessed of. Letters of administration intestate were made to the petitioners on 31<sup>st</sup> October 2016, and a grant to that effect was issued to them on 31<sup>st</sup> May 2017.

3. The application that I am tasked with determining is the summons dated 16<sup>th</sup> February 2018, brought at the instance of Hellen S. Mbakaya, for confirmation of the grant of 31<sup>st</sup> October 2016. She identifies as survivors of the deceased the persons mentioned in paragraph 1 here above, and proposes that the estate be shared out equally between the two widows.

4. The application was served on the other administrator, Jane Makonjio Sundwa, and she filed a document, dated 14<sup>th</sup> August 2018, in objection to the proposed confirmation. She complained that she had not been consulted before the application was filed. She conceded that the deceased was survived by the six individuals named in the Chief's letter, but asked that all the survivors be consulted.

5. The two widows appeared before me on 9<sup>th</sup> July 2018, and informed me that they were yet to agree to the proposed distribution. I fixed the application for hearing on 23<sup>rd</sup> October 2018, and directed that the children be brought to court. The widows came back to court on 23<sup>rd</sup> October 2018, but without the children. I heard both under oath.

6. Jane Mukonjio Sundwa testified first. She acknowledged that the deceased was a polygamist, who had three children with her and none with Hellen Mbakaya. She proposed that the property be shared out between her two, with each widow being attached to one of the sons, so that she is attached to Patrick Murunga and Hellen Mbakaya to Robert Burudi. She stated that the two daughters were married and therefore they were not entitled to a share. On cross-examination, she conceded that she had disagreed with the deceased at some point in their marriage whereupon she left. She accused Hellen Mbakaya of having gotten married to a Philip Kona Murunga after the deceased died, and of having a son with the said man.

7. Hellen Shitiavai Mbagaya testified next. She stated that she got married to the deceased as a second wife. The deceased and Jane Mukonjio Sundwa separated. She said that Jane stayed away until after the deceased died, and that it was her who took care of her children during that period. She proposed that the subject property be shared out equally between the two widows. On cross-examination, she said that Sheila was her daughter. She conceded that after the deceased died she had a child with another man, but she said that that child was not laying stake to the estate. She denied getting married after the deceased's demise.

8. The deceased died in 2003, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation. His estate, therefore, fell for distribution in accordance with the provisions of the said Act. He died intestate, and therefore Part V of the Act applied. He died a polygamist, and section 40 of the Act governed distribution to his estate.

9. Section 40 states as follows –

*'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.'*

10. The deceased had married twice. The first wife, Jane Mukonjio, had three children (Patrick Murunga, Eunice Sundwa and Robert

Burudi), and therefore her house comprised of four (4) units. The second wife, Hellen Mbakaya, had one child (Sheilah Sundwa), and therefore her house comprised of two (2) units. The estate of the deceased ought therefore to be shared out at the ratio of 4:2, which translates to 2:1. There is a certificate of official search on record on South Kabras/Chesero/1306, dated 14<sup>th</sup> November 2012, which indicates that the same measures 1.89 hectares. The said property shall be shared between the two houses at the ratio of 2:1.

11. I shall dispose of the application dated 16<sup>th</sup> February 2018 in the following terms -

**(a) That I hereby declare that the deceased was survived by the six individuals named in paragraph 1 of this judgement, and died possessed of South Kabras/Chesero/1306;**

**(b) That South Kabras/Chesero/1306 shall be shared between the first house and the second house of the deceased in the ratio of 2:1;**

**(c) That property shall first devolve upon the widows during life interest, and thereafter to the children in each house equally;**

**(d) That grant made on 31<sup>st</sup> October 2016 is hereby confirmed on those terms;**

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

**(f) That each party shall bear their own costs; and**

**(g) That any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29<sup>th</sup> DAY OF April, 2019**

**W. MUSYOKA**

**JUDGE**