



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 145 OF 2005**

**IN THE MATTER OF THE ESTATE OF GERISHOM AZINGALE LIHANDA – DECEASED**

**AND**

**DAVID LOGERI ANZIGALE .....APPLICANT**

**VERSUS**

**JAMES MABEI ANZIGALE.....PETITIONER/RESPONDENT**

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

1. The deceased herein Gerishom Azingale Lihanda died on 5/12/2004 and left behind the following Dependants.

**1. Japheth M. Azingale – son**

**2. James Mamei Anzigale – son**

**3. Justus Lunganyi – son**

**4. Francis Lunganyi – son**

**5. David Logedi - son**

**6. Ezekiel Guya – son – deceased**

**7. Julius Amena Anzigale - son**

**8. Seth Simali Anzigale - son**

2. He left behind the following properties Kakamega/Kegoye/1441 and 1442.

3. A Grant was issued to James Mamei Anzigale on 21/5/2005 and confirmed on 25/5/2006.

4. David Logedi Anzigale on 14/12/2010 objected to the said confirmation and filed the application for the annulment of grant. His reason was that he was not notified of the proceedings herein and that he had been threatened with eviction.

5. When the matter came up for directions the court ordered that the objection proceedings be canvassed by way of viva voce evidence.

6. **The objector PW1** testified that he was the son of the deceased and that he had already been shown his portion. He said that the portion he occupied consisted of tea bushes which he has always plucked. He discovered that the petitioner James Mamei had blocked the proceeds from the tea and that is when he found that this cause had been filed.

7. According to his evidence the deceased had divided his parcel of land number 931 into two and given to his two houses. The deceased had further filled the requisite transfer forms as well as the application to the land control board but he unfortunately died before accomplishing the same.

8. In summary he wished the court to agree with what the deceased had proposed, namely subdividing the parcel into two as he had wished .

9. On cross-examination he denied that the deceased had divided his land into 8 portions, that is to each of his sons. He conceded that there were live boundary fence separating them .

10. **The petitioner DW1** on his part testified that the deceased prior to his death subdivided his land into two portions namely Kakamega/Kegoye/1441 and 1442 and had each of the sons occupied. He said that parcel No. 1442 was occupied by David, Francis, Julius Amena and Ezekiel Guya. This was in 1980. The live fence placed since then have existed without any interference.

11. Later he sued his father at the land dispute tribunal for he wanted to cancel the sub division he had undertaken. He produced as exhibits the proceedings at the tribunal. He further testified that the wife of Musa who died in 2002 was buried where the deceased had shown him. He contended that his father was illiterate and could not have signed the conveyancing documents produced by the objector. He divided the land to his sons and not wives. All the sons got equal shares.

12. **DW2 Julius Reuben Amena** the son to the deceased supported what DW1 stated. He maintained that the deceased divided the land into 8 portions and he has been living in his portion since June 1996 when the deceased showed him.

13. He further testified that one Hezekiel who died in 1991 was buried next to the deceased as he had not been shown his portion but his family is around.

14. He said that the title deeds got lost and he reported to the police. He produced the abstracts from the police.

15. Having summarised the above proceedings the counsels on record as at the date of writing this judgment had not filed any written submissions as ordered.

16. Be it as it may, I think the issues herein are clear and straightforward. There is no doubt that the objector as well as the applicant are all beneficiaries of the estate of the deceased herein. They are all sons . The girls seemed to have been married and they have no claim over the estate of their father.

17. The parcels of lands left behind by the deceased are not in dispute. The only question is whether the deceased had sub divided it to his two wives as suggested by the objector or to his 8 sons.

18. The transfer to the objector as per exhibit No. P2 and P3 did not materialise as the deceased passed on before undertaking the same. This in my view therefore remain a moot question.

19. The exhibits No. P6 which shows the objector enjoying the use and proceeds from the tea seemed not disputed. The same is contained in land parcel no Kegoye/Wamuluma/1442. I am however unable to know which portion of the land its planted or whether it is in the entire parcel. There was no contradictory evidence however that it was enjoyed by the objector.

20. The pertinent question however is whether the land ought to have been divided into 8 portions as earlier proposed by the deceased. The applicant produced the proceedings from the Land Disputes Tribunal Exhibits O.B. 1 dated 3/6/1999 which concluded that.

**“ 1) The boundary hedges installed by the elders in 1980 sub dividing the land into 8 portions for the eight sons is upheld by the tribunal.**

**2) The original parcels number S/Maragoli/Kakamega/931 in which a sub division was done by the objector and produced two portions No. S/Maragoli/Kegoye/1441 and 1442 be nullified and fresh sub division to be done in favour of the eight sons in No. 1 above.”**

21. The matter proceeded to the appeals tribunal and the same was upheld. There was no evidence however that the matter was taken to the court for adoption.

22. All along, it appears from the proceedings that the deceased participated in the proceedings. He did not apply to review or set aside the orders.

23. Deducing from the said Tribunals proceedings as well as the evidence of DW1 and DW2 and the cross-examination of the objector, I am satisfied that the deceased subdivided his parcel into 8 portions way back in 1980. Each of the sons at least was able to be shown his boundary. The boundaries were demarcated by live fence and they seemed to have remained so at least from the period the deceased was alive and thereafter. I conclude that the deceased's intent was to sub divide the land into his sons and not wives.

24. Apparently and from the evidence on board, the objector was the only son of his mother Mauwa Maradi Anzigale.

25. Section 40 of the Succession Act Chapter 160 Laws of Kenya state that;

**“ 40(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 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.”**

26. In this regard two wives predeceased their husband. The net effect therefore is that even if the deceased had not sub divided the land to

his sons, the proper approach would have been to divide the same according to the sons. Its appreciated that some of them are deceased but I think their successors shall be able to inherit their portions.

27. In view of the above the deceased parcels of land number **Kakamega/Kegoye/1441** as is currently occupied shall be sub divided and shared equally by

**1) Japheth Mudanya**

**2) James MAMBEI**

**3) Justus Lunganyi**

**4) Seth Simali**

**Parcel Number Kakamega/kegoye/1442** to be shared by

**1) David Logedi Anzigale**

**2) Francis Musa**

**3) Ezekiel Guya**

**4) Julius Amena**

28. For those deceased their respective household or beneficiaries or successors shall inherit appropriately.

29. In arriving at the above, care should be taken so that there shall be minimum disruption to the status quo as laid down by the sub division undertaken by the deceased in 1980. The beneficiaries individually be at liberty to enter any "local arrangement" with each other in terms of actual occupation on the ground.

30. The grant therefore confirmed on 25<sup>th</sup> May 2006 is hereby set aside with all the attendant consequences. The same is confirmed as per the above findings. For avoidance of doubt the said parcels shall be shared in equal proportions.

31. Being a family dispute each party shall meet their respective costs.

**Delivered, signed and dated at Kitale this 30<sup>th</sup> day of May 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**30/5/18**

**In the presence of:**

**Athung'a for the Petitioner**

**Khisa holding brief for Dome for Objector.**

**Judgment read in open court.**