



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 184 OF 2002**

**IN THE MATTER OF THE ESTATE OF NDETI NTHIWA KAUMBA – DECEASED**

**JOSEPH KAMULA NTHIWA.....1<sup>ST</sup> PETITIONER**

**VERSUS**

**NDETI NTHIWA.....2<sup>ND</sup> PETITIONER**

**PAUL NDETI NTHIWA.....OBJECTOR**

**RULING**

1. The 2<sup>nd</sup> Petitioner and Objector herein filed a protest to the confirmation of the grant to the estate of the late **Ndeti Nthiwa Kaumba** on the ground that the remaining parcel of land belonging to the deceased should not be shared equally between the two houses as the objectors house should get three acres over and above the other household represented by the 1<sup>st</sup> Petitioner herein.

2. Parties agreed to canvass the protest by way of viva voce evidence. However on the 9/11/2016 the parties recorded a consent before Hon Justice E. Ogola whereby a portion of the land was hived off to certain persons who had bought from the deceased as follows:-

- (i) *Benjamin Musila* - 5.75 acres
- (ii) *Muli Nzyoka* - 2.5 acres
- (iii) *Kitila Musyoka* - 1.0 acres

The remaining 27.5 acres was now left to be shared between the two houses represented by the 1<sup>st</sup> Petitioner on the one hand and the 2<sup>nd</sup> Petitioner on the other hand.

**Protestor's case**

3. Paul Ndeti Nthiwa testified and stated that their late father Ndeti Nthiwa Kaumba who died on 8/8/1999, had two wives namely **Nunguya** and **Nthuka**. He further stated that the house of Nthuka had a son by the name of Munyao Nthiwa who had been involved in a court case which forced the family to dispose three acres to defray legal costs and as a result it had been agreed by the family that come the division of the property the house of Nunguya was to get three acres more than the household of Nthuka so as to act as compensation and therefore the house of Nunguya was to get 16.75 acres while the house of Nthuka was to get 10.7 acres.

4. Kimuyu Ndeti Nthiwa reiterated what the 2<sup>nd</sup> Petitioner had stated and added that he was present during the family meeting called by their late father over the sale of three acres and in which the house of Nunguya was to be compensated with an extra three acres during the eventual distribution of the family land.

**1<sup>st</sup> Petitioner's case**

5. Joseph Kamula Nthiwa testified that the deceased herein Ndeti Nthiwa Kaumba had two wives and that the remaining parcel of the land measuring 27.5 acres should be shared equally between the two households. He further denied knowledge of any family meeting in which three acres had been agreed to be sold to defray legal fees for a family member one Munyao Nthiwa and that the house of Nunguya was to be compensated with three acres during subdivision of the family land. He further stated that if any such land was sold then it was a joint

responsibility in which all family members would share.

### **Submissions**

6. It was submitted for the protestors that they have established that the deceased had directed in a family meeting that the first house of Nunguya was to be compensated with an extra three acres that had been used to defray legal costs of a son of the second house of Nthuka. It was finally submitted that the 1<sup>st</sup> Petitioner was not present during the family meeting and therefore he should not be allowed to challenge the resolutions reached pursuant to directions of the family patriarch Ndeti Kaumba.

7. It was submitted for the 1<sup>st</sup> Petitioner that the Protestors did not manage to prove the existence of an agreement to the effect that the household of Nunguya was to be compensated with an extra acres as no agreement was produced in support of the allegation and further no other family members apart from the protestors were called to confirm the assertion. It was finally submitted to the 1<sup>st</sup> Petitioner that the proposal to share the 27.5 acres of land to be shared equally between the two households was reasonable.

### **Determination**

8. I have considered the evidence of the protestors and the 1<sup>st</sup> Petitioner herein as well as the submissions of their learned counsels. It is not in dispute that pursuant to the consent entered on the 9/11/2016, the parties herein have already taken care of the purchasers who had bought land from the deceased herein thereby leaving the only family land measuring 27.5 acres to be shared and or distributed between the two households of the deceased. The issue for determination is whether or not the said property (land) measuring 27.5 acres should be shared equally.

9. The deceased herein had died intestate without writing a will and had married two wives. He was therefore polygamous. The evidence herein showed that he had married two wives namely Nunguya and Nthuka which are now the two houses embroiled in this dispute. As the deceased was polygamous I find the estate should be administered pursuant to the provisions of Section 40 of the law of Succession Act. The same provides as follows:-

*40(1) Where in intestate has married more than once under any system of law permitting polygamy. This personal and household effects and the residue of the net intestate estate shall, in the first instance 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 affects and the residue of the net intestate estate within each household shall then be in accordance with the rules set out in Section 35 to 38.*

The 1<sup>st</sup> Petitioner has proposed that the property be shared equally between the two houses. I note from the evidence of the protestors that none of the other family members were called to corroborate their claim that three acres had been sold to defray legal expenses for one of the family members who has since passed on and to confirm that indeed the deceased had directed that the first house should be compensated with an extra three acres. It is noted that at the time the said three acres were being sold, the family land was still intact and not yet subdivided and it would follows that the sale of the three acres was to bail out one of the family members out of some legal trouble. I sense the feeling on the part of the Objectors that the three acres had been sold as a result of a problem caused by a son from the house of Nthuka and that the problem should not be shared as a family. There is no dispute that the alleged miscreant Munyao Nthiwa was a member of the family of the deceased and as such the family would obviously share the responsibility stemming from the conduct of the said family member.

10. Looking at all the rival claims, I find the proposal fronted by the 1<sup>st</sup> Petitioner that the property be shared equally between the two houses to be reasonable in the circumstances. Suffice to add that the second house of Nthuka has more units as compared to the first house of Nunguya. I am of the considered view that the remaining property shall be shared equally between the two houses.

11. In the result, I find the Protestors protest is without merit. The same is rejected. The Administrators are hereby directed to proceed and file for confirmation of grant in which the estate shall be distributed equally between the two houses. This should be done within the next 45 days. As parties are members of one family I make no order as to costs.

Orders accordingly.

**Dated and delivered at Machakos this 23<sup>rd</sup> day of May, 2018.**

**D. K. KIMEI**

**JUDGE**

**In the presence of:**

Nzilani for Makundi - for the 1<sup>st</sup> Petitioner

Muthama - for the 2<sup>nd</sup> Petitioner & Objector

