



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. 253 OF 2003

IN THE MATTER OF THE ESTATE OF THE LATE EDWARD SYALO LUTILO

AND

RUBAI SYALO LUTILO 1ST PETITIONER

DAVID NGILINDA LUTILO 2ND PETITIONER

VERSUS

JOSEPHINE LUTILO OBJECTOR

JUDGMENT

1. This succession cause was fully heard by Hon. *Mohamed Ibrahim J* (as he then was) before he was transferred to another station. Hearing was in respect of distribution of the deceased's Estate in respect of three properties which were not included in the partial distribution which was done in accordance with a consent executed by the parties on 23rd April 2007 which was adopted as an order of the court on even date.

2. I took over the cause at the stage of filing final submissions. Though ample opportunity was given to all the parties to put in their written submissions, the 2nd Administrator and the interested parties did not file any. The 1st administrator filed her written submissions on 10th October, 2012. I was then left with the unenviable task of writing judgment in the matter.

3. I have thoroughly scrutinized the bulky court record. It reveals the following undisputed facts; that the deceased *Edward Syalo Lutilo* died intestate on 27th April 2002; that he was survived by two widows namely *Robai Syalo Lutilo* (1st wife), *Josephine Lutilo* (2nd wife) and several children.

4. In the first house, he was survived by the following children;

1. *David Ngilandala*

2. *Margaret Lukoye*

3. *Dorothy Lusika*

4. *Martine Barasa*

5. *Phylis Namachanja*

6. *Sylvia Sikhoya*

7. *Faith Nambobi*

8. *Susan Nanjala*

9. *Billy Busaule*

10. *Kevin Kibeu*

(See letter from the office of the chief Siroko location dated 11th November, 2003).

5. In the 2nd house, he was survived by the following children;

1. *Stella Nafula*

2. *Irene Naliaka*

3. *Pamela Lakiel*

4. *Kennedy Sudi*

5. *Joseph Wanyonyi*

6. By an order of the court issued on 16th October 2006, the two widows were appointed as joint administrators of the Estate. And by consent of the parties, the Estate was partially distributed as follows;

1. PLOT NO. 164 AT NZOIA SCHEME LUGARI

1. *David Ngilandala* *three (3) acres*

2. *Margaret Lukoye* *three (3) acres*

3. *Dorothy Lusike* *three (3) acres*

4. *Martine Baraza* *three (3) acres*

5. *Phyllis Namachanja* *three (3) acres*

6. *Sylvia Sikhoya* *three (3) acres*

7. *Faith Nambobi* *three (3) acres*

8. *Susan Nanyala* *three (3) acres*

9. *Billy Busaule* *three (3) acres*

10. *Kevin Kiben* *three (3) acres*

2. PLOT NO. 401 AT SANGO SCHEME LUGARI DISTRICT

1. *Stella Nafula* *three (3) acres*

2. *Irene Naliaka* three (3) acres
3. *Kennedy Sudi* three (3) acres
4. *Pamela Lakelly* three (3) acres
5. *Joseph Wanyonyi* three (3) acres

3. PLOT NO. 481 AT KAMWAGE VILLAGE BUNGOMA

1. *Stephen R. Mulongo* three(3) acres
2. *Newton Wanjala* three (3) acres
3. *Ben Baraza* three (3) acres
4. *David Ngilandala* six (6) acres

4. Plot at Sango Scheme bought from *Peter Baraza* measuring one and a half (1½) acres given to *Josephine Lutilo*.

COMMERCIAL PLOTS

- i. Plot No. Matunda Market M.B Block 1 (undeveloped) measuring 25 x 100ft – whole share be given to *Joseph Wanyonyi*.
- ii. Plot at Nzoia Market (undeveloped) measuring 20 x 80 ft whole share be given to *Margaret Lukoye*.
- iii. Plot No. Bungoma Municipality/218 (developed) measuring 40x80 ft whole share be given to *David Ngilandala*.
- iv. Plot at Kimwanga Market, West Bukusu/North Mateka/2021 measuring 20 x 80ft (developed) - whole share be given to *Newton Wanjala*.
- v. Plot at Kimwanga Market, West Bukusu/North Mateka measuring 20x80 ft (undeveloped) whole share be given to *Martin Baraza*.
- vi. Funds available in Account No. 10501-36206501 at Standard Chartered Bank (K) Limited Kitale be accessed by *Robai Syalo Lutilo* for payment of fees for *Kevin Kibeu* and *Billy Busaule*.

7. There was no agreement regarding the mode of distribution of three other commercial plots namely Kitale Municipality LR No. 2116/25/IV (developed); Kitale Municipality Residential plot No. 10/94/58 (undeveloped) and Plot No. Matunda market M.B Block 1/4018 (developed). Viva voce evidence was tendered to determine how the said properties should be distributed.

8. In support of her case, the 1st administrator (1st wife) testified and called one witness *Julius Syango Murunga*, a clan elder. He supported the first administrator in her proposal that she should be allowed to inherit Kitale Municipality LR No. 2116/25/IV exclusively because it was acquired and developed by the deceased with her contribution both financially and in the form of labour before the deceased married the 2nd administrator in 1978. The plot is developed with sixteen rental rooms. The rental income was by then Kshs. 57,000. She proposed that the 2nd administrator inherits the other two properties exclusively. The Matunda Market plot (MB Block 1/4018) was also developed with a house. None of the parties disclosed the size of the house and whether it was for residential or commercial purposes.

9. The 2nd administrator in her evidence urged the court to find that she was entitled to a share of Kitale Municipality LR No. 2116/25/IV. She proposed that both widows share the property in equal shares and that she also inherits the Matunda market plot exclusively. She also claimed that the undeveloped Kitale residential plot did not vest in the Estate as the deceased had not completed paying the purchase price of Kshs. 270,000. There was an outstanding balance of Kshs. 100,000 or thereabouts.

10. The 1st administrator was in agreement that there was an outstanding balance of the purchase price for the Kitale undeveloped residential plot in the sum of about Kshs. 100,000 but maintained that the plot belonged to the Estate.

11. I have considered the evidence on record in its entirety and the submissions filed by the 1st administrator. The law at *Section 40* of the *Law of Succession Act Chapter 160* of the *Laws of Kenya* provides the mode of distribution where a deceased person died intestate and was in a polygamous union. It provides that the Estate was to be distributed among houses taking into account the number of children in each house and adding the surviving spouse as an additional unit. This is so irrespective of whether any of the surviving spouses had contributed to the purchase or development of any of the properties due for distribution.

12. Both administrators and PW2 claimed that the remaining three properties should be distributed in accordance with the Bukusu customs but none of them availed evidence to prove what those customs entailed.

In the absence of such evidence and any consent between the parties, the court has no alternative but to distribute the three properties in accordance with the law or in the manner which in its view is fair and just. It is not contested that the 1st house has ten children while the 2nd house has five children. This means that if *Section 40* of the *Law of Succession Act* (the Act) was applicable in this case and each of the surviving spouses was added as an additional unit, the distribution would be based on the ratio of 11:6.

13. However in my view, *Section 40* aforesaid may not be applicable in this case given that the distribution this court is called upon to do is only between the widows of the deceased and not between the two houses.

A “house” is defined under *Section 3* of the Act as “...a family unit comprising a wife, whether alive or dead at the date of the death of the husband and the children of that wife”. The children of the deceased are not part of the distribution the court is supposed to carry out having had their share of the Estate distributed to them in the partial distribution that was ordered by the court on 23rd April, 2007.

14. I have given due consideration to the evidence adduced by the two administrators regarding their proposals on the distribution of the three remaining properties. I note that it is not disputed that the Kitale Municipality plot is developed with sixteen rooms while the Matunda market plot is developed with a house. The parties did not however avail to the court any evidence regarding the value of those properties.

It is also not disputed that the purchase price for the undeveloped residential plot at Kitale was not fully paid. There was an outstanding balance at the time the witnesses testified in court. PW3 also claimed that the property does not belong to the Estate. I have looked at the schedule of assets in form P&A 5 and noted that the said property is not included as part of the deceased person’s Estate.

This creates some doubt whether it is an asset that is available for distribution.

15. In view of the foregoing, I am unable to undertake the task of distributing the three properties without knowing their current market value and without evidence confirming that the Kitale undeveloped plot actually belongs to the Estate. I therefore direct that the parties file valuation reports on the current market value of the three properties and evidence proving that the Kitale undeveloped plot belongs to the Estate.

The valuation shall be done by a registered valuer to be agreed upon by the administrators within 30 days of today's date. In default, the court shall appoint an independent valuer. The cost of the valuation shall be made out of the Estate. There shall be a mention on 13th March 2017 to receive the valuation reports and for final orders on distribution.

16. Given the nature of the dispute in this cause, I shall make no order as to costs.

It is so ordered.

C. W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 31st day of January 2017

In the presence of:

Mr. Nyandoro for the 2nd Administrator and Holding brief for Ms Ndenda for the 1st Administrator.

Mr. Lobolia Court Clerk.

No Appearance for all the Interested Parties though duly notified.