



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.519 "A" OF 2000

IN THE MATTER OF THE ESTATE OF REUBEN ALUMBE NASIBIDECEASED

AND

ROSE APWOKA

BERITA KAKAI.....APPLICANTS

VERSUS

HELLEN AYOKO BENSON ANGOLO

BOAZ AMASA ALUMBE.....PROTESTORS

JUDGMENT

This succession cause relates to the estate of the late Reuben Alumbe Nasibi (herein referred to as the deceased). After the death of the deceased his son Benson Angolo Nasibi had filed this cause and was issued with a grant of letters of administration that were confirmed on 3rd November 2005. A widow to the deceased Berita Kakai and a sister in law to the deceased Rose Apwoka filed a protest against Confirmation of grant to the said Benson Angolo. The court thereafter revoked the grant and ordered a fresh grant to be issued to Rose Apwoka and Berita Kakai. The two proceeded to file their own proposal for mode of distribution of the estate. Benson Angoko died before the application was heard and he was substituted as petitioner, by his wife Hellen Ayoko Benson and brother Boaz Amasa Alumbe. The two filed a protest against the mode of distribution proposed by Rose Apwoka and Berita Kakai and suggested their preferred mode of distribution of the estate. The parties in the case gave viva voce evidence. The two protestors Hellen Ayoko Benson and Boaz Amasa testified as PW1 and 2 respectively while the applicants Berita Kakai and Rose Apwoka testified as DW1 and 2 respectively. The applicants called one witness, Christine Salome Alumbe, DW3 who is a daughter to Berita Kakai.

BACKGROUND TO THE CASE:

The background to the case is that the deceased had three wives, namely Dorcas Alumbe(deceased), Melisa Akhoyi (deceased) and Berita Kakai. The first wife had three children namely:

Ambrose Apwoka (deceased husband to Rose Amadi Apwoka)

Priscilla Asiko Namodi

Rose Alili

The second wife had the following children:

Benson Angolo Nasibi (deceased)

Boaz Amasa Alumbe (2nd protestor)

Jackton Otiato Alumbe (deceased)

Joyce Wandu

Celifer Anami

Omalia Alumbe

The third wife had the following children:

Damaris Apwoka

Salome Alumbe

THE PROTEST:

The protest is based on the grounds that the husband to Rose Amadi Apwoka, Ambrose Apwoka had been given two parcels of land by the deceased before the deceased died, i.e. L.R. No. West Bunyore/Ebusakami/2206 and West Bunyore/Ebusakami/1969. That during registration of land in 1969 the two parcels of land were registered in the name of Ambrose. Therefore that the family of Ambrose Apwoka is not entitled to anything of the remaining estate of the deceased.

Further that Berita Kakai is not entitled to anything from the estate of the deceased as she remarried after the death of the deceased to one Boaz Indieka with whom she sired a son by name Meshack Indieka.

REPOSNE BY APPLICANTS:

Rose Apwoka denied that her husband was given two parcels of land by his father. She stated that her husband was working as a police officer in Uganda and that he bought the stated parcels of land. Therefore that the two parcels of land were not part of the estate of the deceased. That her husband was buried at a place where he bought a different parcel of land.

Berita Kakai on the other hand denied that she remarried after the death of the deceased. She testified that her son Meshack was fathered by Boaz Indieka after the deceased died but that her son lives at his father's home.

The Applicant's proposed mode of distribution is as follows:

(i) *Berita Kakai:*

(a) *West Buyore/Ebusakami/2163 - 0.6 acres*

(b) *Luanda Market Plot No.36 - half the plot*

(ii) *Rose Amadi Apwoka (on behalf of the late Ambrose Apwoka)*

(a) *West Bunyore/Ebusakami/1972 - 1.0 acres (whole)*

(b) *West Bunyorre/Ebusakami/2321 - 0.3 acres (whole)*

(c) *Luanda Market Plot No.36 - half the plot*

(iii) *Benson Ongolo Alumbe:*

(a) *West Buyore/Ebusakami/1888 - 0.7 acres*

(b) *West Bunyore/Ebusakami/2222 - 0.1 acres*

(c) *Luanda Market Plot No.35 - half the plot*

(iv) *Boaz Amasa Alumbe:*

(a) *West Bunyore/Ebusakami/1888 - 0.7 acres*

(b) *Luanda Market Plot No.35 - half the plot*

(v) *Rose Alili*

West Bunyore/Ebusakami/1972 - 0.6 acres

(vi) *Priscilla Asiko Namodi:*

West Bunyore/Ebusakami/1976 - 0.8 acres (whole)

(vii) Rosebella Omuchilo:

West Bunyore/Ebusakami/2147 - quarter (¼) share

(viii) Celifer Anami:

West Bunyore/Ebusakami/2147 - quarter (¼) share

(ix) Omalila Alumbe:

West Bunyore/Ebusakami/2147 - quarter (¼) share

The widow Berita Kakai stated that she lives on land parcel No. West Bunyore/Ebusakami 2163 where the deceased left her while that the 2nd applicant Rose Apwoka lives on land parcel No. West Bunyore/Ebusakami/1972. That their mode of distribution is fair as it caters for all including daughters. Further that Ambrose Apwoka was only given one parcel of land by his father, though she does not know what number it was.

Proposed mode of distribution by protestors:

The protestors have proposed the following mode of distribution:

a. Benson Angolo A. Nasibi – West Bunyore/Ebusakami/1972 - Whole parcel

West Bunyore/Ebusakami/1976 - Whole parcel West Bunyore/Ebusakami/1972 - Whole parcel West
Bunyore/Ebusakami/2321 - 0.1 acres Luanda Market Plot No.36 - 3 shops, 2 doors

(all to be held by Hellen Boaz Angolo)

b. Boaz Amasa Alumbe - West Bunyore/Ebusakami/2321 - 0.1 acres

West Bunyore/Ebusakami/2147 - Whole parcel West Bunyore/Ebusakami/1888 - Whole parcel Luanda Market/Plot
No.35 - 3 shops, 2 doors

c. Jackton Otiato Alumbe - West Bunyore/Ebusakami/2321 - 0.1 acres

West Bunyore/Ebusakami/2163 - Whole parcel West Bunyore/Ebusakami/1972 - Whole parcel West
Bunyore/Ebusakami/2222 - Whole parcel Luanda Market/Plot 35 - 3 shops, 1 door

Luanda market Plot No.36 - 3 shops, 1 door

d. Berita Kakai Nil

e. Rose Apwoka **(previously provided with**

Parcel West Bunyore/Ebusakami/2206 - Whole parcel and Bunyore/Ebusakami/1969) – Whole parcel

f. Rose Alili Nil

g. Priscilla Asiko namodi Nil

h. Rosebella Omuchilo Nil (deceased)

i. Joyce Wande Nil

j. Celifer Anami Nil

k. Omalila Alumbe Nil

l. Damaris Apwoka Nil

m. Salome Alumbe Nil

The 1st protestor Hellen Ayoko Benson in her evidence stated that Berita Kakai lives at the home of Boaz. That she has been given land there. That Priscilla from the first house was given two parcels of land and sold them. That Rosebella is deceased while Rose Alili, Joyce Wande, Celifer and Omalila are married and should not get anything. That Jackson Otiato died while young but they have proposed to give him his share.

Boaz Amasa stated in his evidence that Berita remarried after the death of the deceased but that she later went back to the home of the deceased. The witness further said that Priscilla died in 2016. He said that he has no evidence to prove that his father gave his brother Ambrose Apwoka the contested two parcels of land.

DETERMINATION:

In his ruling over revocation of grant delivered in court on 7th February 2013, Justice Said J. Chitembwe held that there was no evidence that Berita remarried after the death of her husband and consequently that she is still a widow of the deceased.

The Judge also held that the two plots, West Bunyore/Ebusakami/2206 and - - 1969 were given to Ambrose Apwoka by his father and that the two plots have to be taken into account on determining his share to the deceased's estate. The judge advised the administrators of the estate to do a valuation of the estate to enable a fair distribution of the estate. However the applicants filed the current summons for confirmation of grant before doing a valuation of the estate. The protestors also did not do a valuation on the estate. It is now over 4 years since when the parties were advised to do a valuation. It is my conclusion that the parties have deliberately refused and/or declined to do a valuation on the estate. The matter has been pending in court for 17 years. Litigation has to come to an end. The court will proceed to distribute the estate without a valuation report since the parties have declined to provide one.

There has been no appeal on the court's findings that Berita is still a widow of the deceased and that Ambrose Apwoka was given two parcels of land by the deceased. I therefore maintain that to be the court's position on the two issues.

The protestors are members of the family of the second wife, Melisa. Their proposed mode of distribution is only to members of their household excluding those members from the first wife and the third wife. They have even gone to the extent of proposing to give several properties to a deceased member of their household Jackson Otiato Alumbe who left behind no issues. Further more, they have not made any provisions for the daughters despite the judge in the above referred to ruling observing to them that under the law of succession, all children of the deceased are entitled to an equal share of their parent's estate whether the child is a son or a daughter. The Judge quoted section 38 of the Law of Succession Act that provides that:

'where an intestate has left a surviving child or children but no spouse, the intestate estate shall, subject to the provisions of section 41 and 42 devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

Jackson Otiato Alumbe is not a surviving child and is therefore not entitled to inherit any part of the deceased's estate. The daughters of the deceased, whether married or not, are entitled to inherit from the estate of their deceased father.

There was no evidence that one of the daughters, Priscilla was given any land by the deceased as alleged by Hellen Ayoko PW1.

The proposed mode of distribution by the protestors is unfair since it excludes members of the 1st and 3rd households. I find the mode of distribution proposed by applicants to be a fair one save that it did not take into account that Ambrose Apwoka had already been given two parcels of land by the deceased and neither did it take into account that some of the beneficiaries are now deceased. I will therefore interfere with the proposed mode of distribution by the applicants so as to take into account what has already been given to the family of Ambrose Apwoka.

Berita in her evidence in court stated that Rose Apwoka lives on land parcel No. West Bunyore /Ebusakami/1972. This was not challenged. It is my considered view that Rose should get a portion of the said land where her home stands while taking into account that her husband had previously been given land by his father totaling to 0.6 acres. Rosebella Omuchilo and Priscilla Asiko Namodi were said to be deceased. There was no evidence that they have any issues. They are thereby not entitled to anything as they are not surviving children of the deceased. I therefore distribute the estate as follows:

(i) Berita Kakai:

(a) West Bunyore/Ebusakami/2163 - 0.6 acres

(b) Luanda Market Plot No.36 - half the plot

(ii) Rose Amadi Apwoka:

(a) West Bunyore/Ebusakami/1972 - 0.4 acres

(b) Luanda Market plot No.36 - half the plot

(iii) Hellen Ayoko Benson Angolo:

(a) West Bunyore/Ebusakami/1888 - 0.7 acres

(b) West Bunyore/Ebusakami/2222 - 0.1 acres

(c) Luanda Market plot No.35 - half the plot

(iv) Boaz Amasa Alumbe:

(a) West Bunyore/Ebusakami/1888 - 0.7 acres

(b) Luanda Market plot No.35 - half the plot

(v) Rose Alili:

West Bunyore/Ebusakami/1972 - 0.6 acres

(vi) Joyce Wande:

West Bunyore/Ebusakami/1976 - 0.6 acres

(vii) Celifer Anami:

(a) West Bunyore/Ebusakami/2147 - 0.2 acres

(a) West Bunyore/Ebusakami/2321 - 0.3 acres

(b) West Bunyore/Ebusakami/1976 - 0.2 acres

(viii) Omalila Alumbe:

West Bunyore/Ebusakami/1972 - 0.6 acres

Salome Alumbe DW3 stated that she was agreeable to the mode of distribution proposed by her mother Berita Kakai. That her mother was to hold her share on her behalf and on behalf of her children. I therefore order that Berita Kakai will hold the share given to her on her behalf and in trust of Christine Salome Alumbe and Damaris Apwoka.

Orders accordingly.

Each party to bear his/her own costs.

Delivered this 28TH day of June, 2017

J. NJAGI

JUDGE

In the presence of:

Odenyfor Applicants absent

Shifwoka for Protestors

PaulCourt Assistant

Helle AyokaPlaintiff

Boan AmasaPlaintiff