



**REPUBLIC OF KENYA**

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

**PROBATE & ADMINISTRATION CAUSE NO.68 OF 2005**

**IN THE MATTER OF THE ESTATE OF SHADRACK KHAOYA MASONI.....DECEASED**

**VERSUS**

**FRED NYONGESA KHAOYA.....1<sup>ST</sup> PETITIONER**

**PETER MAFUNGA KHAOYA.....2<sup>ND</sup> PETITIONER**

**CHARLES SOITA KHAOYA.....3<sup>RD</sup> PETITIONER**

**JUDGEMENT**

1. The deceased Shadrack Khaoya Masoni died intestate on the 14<sup>th</sup> of July, 1987 domiciled in Lugulu village in Webuye Sub-County of Bungoma County. He was survived by 1 widow and several children. During his life time he had been married to 3 wives. He left behind 2 parcels of land namely

i. Ndivisi/Ndivisi/611 33.4 acres

ii. Ndivisi/Ndivisi/617 31.86 acres

2. Three of his sons, Fred Nyongesa Khaoya, Peter Mafunga Khaoya and Charles Soita Khaoya petitioned for grant of representation which was issued on the 9<sup>th</sup> of November, 2005.

3. The issue at hand is distribution of the estate which the 3 administrators do not seem to agree on. With the 1<sup>st</sup> Petitioner Fred Nyongesa pitied against the other two Peter Mafunga Khaoya and Charles Soita Khaoya.

4. It is the Case for the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner that the deceased distributed his estate before his death and that in distributing the deceased took into account the fact that one of his sons Christopher Wasike (deceased) had bought 12 acres adjacent to his fathers in 1956 which during registration was registered as part of Ndivisi/Ndivisi/611 and also that the 2<sup>nd</sup> Petitioner (since deceased) had helped his father pay off a loan. Further that in dividing the Estate the deceased gave the 2<sup>nd</sup> house where the 1<sup>st</sup> Petitioner belongs in total 17 acres from Ndivisi/Ndivisi/617. The evidence of the two is that upon dividing the land the deceased had planted boundaries demarcating each portion. Their proposal for distribution is as follows;

**Parcel No. Ndivisi/Ndivisi/611**

Rachel Wasike and Tunai widows of Christopher Wasike - 17 acres

Peter Mafunga Khaoya – 8 acres

Wilson Muchani Khaoya – 4.5 acres

Japheth M. Khaoya – 3.5 acres

**Total 33.00**

**Parcel No. Ndivisi/Ndivisi/617**

Meshack Khaoya – 3.75

Oliver Ingosi – 4 acres

John Masoni – 4.5 acres

Charles Soita – 4.2 acres

Susan Khaoya and 6 of her children 17 acres in equal shares

**Total - 33.5**

5. On the other hand it is the first Petitioner's Case that the deceased died intestate and had not distributed his property during his life time. Further that the 2<sup>nd</sup> & 3<sup>rd</sup> Petitioners alongside the clan purported to share the deceased property and only gave the 2<sup>nd</sup> house 17 acres. The 1<sup>st</sup> Petitioner proposes that the entire Estate be shared equally among the brothers. It is his argument that there is no proof that one Christopher Wasike Khaoya ever purchase 12 acres that were registered as part of Ndivisi/Ndivisi/611 as alleged, that in a case instituted by the 1<sup>st</sup> Petitioner's mother being R.M.C.C. No.18 of 1984 the Court had directed distribution within 90 days but the deceased died before effecting the order and thus no distribution ever took place. He further stated that he was not aware of any loan that was paid for by Peter Mafunga.

6. Apart from 2<sup>nd</sup> Petitioner, who said a loan was paid by Peter Mafunga, DW4 stated that his father sold land to Christopher yet no agreement was produced in evidence. DW4 on his part stated that there was no document on how the property was divided amongst the heirs.

**6 (a).** It is clear to the Court that there was a disagreement between the deceased and members of his family which made the

second widow go to Court; meaning that the deceased had attempted some sort of distribution at some point. The Court then directed the parties to settle the matter out of Court which was not concluded as the deceased died before completion of the exercise.

7. Against the above background I have come to the conclusion that an attempt to distribute the property by the deceased to some of his children was thwarted by the Court Case, the parties we directed to settle which did not happen, secondly the deceased appeared to have been sick at the time and thirdly if at all there was distribution as alleged the said distribution was unfair to others especially the second house.

8. Having arrived at the above conclusion I will then have to consider what the Law says in regard to intestate Estates.

Section 40 of the Law of Succession provides as follows;

**“Section 40 Where an intestate was Polygamous**

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.

In the celebrated case of **Mary Rono versus Jane Rono & William Rono Civil Appeal No.66 of 2002** the Court of Appeal had this to say on distribution in polygamous families.

**Waki J.A. stated**

*“while I do not doubt the discretion donated by the Act in matters where dependants seek a fair distribution of the deceased’s net Estate I think the discretion, like all discretions exercised by Courts, must be made Judicially or to put it another way, on legal and factual basis.....”*

*“more importantly, Section 40 of the Act which applies to the Estate make provision for distribution of the net estate.....”*

*“I think, in the circumstances of this Case there is considerable force in the argument by Mr. Gicheru that the Estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions...”*

**Justice Omollo J.A.** on his part agreeing with the reasoning of Judge Waki stressed the need for equity not necessarily equal shares taking all factors into account.

9. In this case no daughter has come forth to lay a claim. The Court is left with sons and where deceased, their widows and wife of the deceased. They are;

**1<sup>st</sup> House**

- I. Christopher Wasike Khaoya (deceased)
- II. Peter Mafunga Khaoya (deceased)
- III. Meshack Mwasame Khaoya
- IV. John Masoni

**2<sup>nd</sup> House**

- I. Susan Naswa Khaoya – widow
- II. Julius Mukoyani Khaoya
- III. Moses Wanakacha
- IV. Fred Nyongesa Khaoya
- V. Joseph Masoni Khaoya
- VI. Paul Namisi Khaoya
- VII. David Wanyonyi Khaoya
- VIII. Samwel Simiyu Khaoya

### **3<sup>rd</sup> House**

- I. Wilson Muchani Khaoya
- II. Japhether M. Khaoya
- III. Charles Soita Khaoya

10. In total there are 15 individuals claiming a share of a total of approximately 65.263 acres.

11. Being as fair and equitable as possible to all the sons and the surviving widow of the deceased having taken into account the circumstances of this Case I will distribute the properties as follows;

#### **Parcel No. Ndivisi/Ndivisi/611 (33.4acres)**

- I. The family of Christopher Wasike (Rachael & Tunai) 5.5 acres (as the eldest son).
- II. Julius Mukoyani Khaoya 4.52 acres
- III. Wilson Muchaami Khaoya Approximately 4.52 acres
- IV. Peter Mafunga Khaoya 4.52 acres
- V. Moses Wanakacha Khaoya 4.52 acres
- VI. Meshack Khaoya Approximately 4.52 acres
- VII. Japheth M. Khaoya Approximately 4.52 acres
- VIII. Susan Naswa Khaoya 1 acre (life interest after which the property to revert to Paul Namisi Khaoya and David Wanyonyi in equal shares)

#### **Parcel No. Ndivisi/Ndivisi/617 (31.865 acres)**

- I. Fred Nyongesa Khaoya 4.52 acres
- II. John Masoni Khaoya 4.52 acres
- III. Samuel Simiyu Khaoya 4.52 acres
- IV. Charles Soita Khaoya 4.52 acres
- V. Joseph Mamsomi Khaoya Approximately 4.52 acres
- VI. Paul Namisi Khaoya Approximately 4.5 acres (swampy area)
- VII. David Wanyonyi Khaoya Approximately 4.5 acres (swampy area)

12. The administrators to jointly engage a Surveyor for purposes of marking boundaries within the next 30 days.

13. No order as to costs this being a family dispute.

**DATED and DELIVERED this 21<sup>st</sup> day of September, 2017**

**ALI-ARONI**

**JUDGE**