



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
SUCCESSION CAUSE NO. 821 OF 2000
IN THE MATTER OF THE LATE JAIRO ELLOGA AKIBAYA.....DECEASED

RULING

These proceedings relate to the estate of **Jairo Akibaya Elloga** who died intestate on 19th October 2000 domiciled in Maragoli in Kenya.

On 6th March 2001 this court appointed all the three widows of the deceased namely Rael Kabwayi Akibaya, Joyce Muthoni Akibaya and Ezina E. Akibaya as the administratixes of the estate. The three of them were then ordered to make a list of all the beneficiaries and properties of the estate. By 23rd July 2010 one of the Administratixes, Rael Kabwayi Akibaya had died and her son Kenneth Imbahale successfully sought orders to substitute her. Joyce Muthoni Akibaya the other widow and administratix also died but this time the court did not allow an application by her to be substituted. The court relied on Section 81 of the Law of Succession Act which provides that upon the death of one or more administrators all the powers and duties of the administrators become vested in the survivors or survivor of them. The estate has been administered by Ezina Alusa Akibaya and Kenneth Imbahale Akibaya.

By a consent dated 5th June 2001 the following assets comprise the intestate estate of the deceased –

- 1. LR. North Maragoli/Mbale/398**
- 2. LR. North Maragoli/Mbale/16**
- 3. LR. North Maragoli/Lyaduywa/336**
- 4. LR. North Maragoli/Lyaduywa/1531**
- 5. LR. North Maragoli/Lyaduywa/1562**
- 6. LR. North Maragoli/Lyaduywa/1397**
- 7. LR. Kisumu/Wathorego/2572**
- 8. LR. Kisumu/Wathorego/2573**
- 9. LR. Nyandarua/Gorika/656 (Homestead of Joyce Muthoni)**
- 10. Peugeot 404 KDV 278**

11. LR Nyandarua – Ol-Jororok 181 (RK)

The record shows that on 26th March 2007 Rael Kabwayi Akibaya filed a proposal on the mode of distribution which vested almost the entire estate to her house.

On his part Samuel Eloga Akibaya, a son of the deceased by his second wife Joyce Muthoni by an affidavit dated 7th June 2006 claimed the whole of what remained of **LR Nyandarua/Gorika 656** after the deceased allegedly sold 62 acres of the 85 acre parcel.

Ezina Elusa Akibaya the surviving Administratrix disagreed with the mode of distribution proposed by Rael Kabwayi Akibaya and in an affidavit sworn on 21st July 2010 first of all deposed that **LR Kisumu/Wathorego/2572** and **LR Kisumu/Wathorego/2573** had been sold by the deceased to a Mr. Sembi and were not available for distribution to the beneficiaries. She expressed her agreement to **LR Nyandarua/Gorika/656** being succeeded by the deceased's second house and **LR North Maragoli/Lyaduywa/1397** to Kenneth Imbahale Akibaya. She then proposed that **LR North Maragoli/Lyaduywa/336** and **LR Kakamega/Mbale/16** be shared equally between Japheth Kivaya, Ronica Odoro and Gedion Amboga; **LR North Maragoli/Lyaduywa/1562**, **LR North Maragoli/398** and the Motor Vehicle be transmitted to herself and William Mudaki; while **LR North Maragoli/Lyaduywa/1531** be shared equally between James Amboga and Japheth Kivaya. As for **LR Nyandarua /Ol Jororok/181** her proposal was that it be wholly succeeded by Samuel Mutingu Akibaya. She contended that her proposed mode of distribution represents the true wishes of the deceased; That she knew his wishes being the wife who took care of him in his last days.

The contention by Ezina Alusa Akibaya that **LR Kisumu/Wathorego/2572** and **LR Kisumu/Wathorego/2573** had been disposed by the deceased was denied by the children of the first house and Samuel Mutingu Akibaya. The latter also contested that **LR Nyandarua/Ol Jororok West/181** belonged to the deceased. He annexed a Certificate of Official Search dated 30th November 2012 to his affidavit dated and sworn on 4th December 2012 showing that the land is owned by one Jacob Warutere Njeru. He also annexed Certificates of Search in respect of **LR Kisumu/Wathorego/2572** and **LR Kisumu/Wathorego/2573** which show that as at 26th November 2012 the two assets were still in the deceased's name.

Kenneth Imbahale Akibaya, Ezina Alusa Akibaya's co-administrator, filed his own proposed mode of distribution which differs sharply with that of Ezina and his late mother Rael Kabwayi Akibaya. He however agrees with them that **LR North Maragoli/Lyaduywa/1562** should be inherited by his uncle William Mudaki Eloga who actually paid the consideration for it. Like his mother Rael and co-administrator Ezina Alusa Akibaya he proposes that **LR North Maragoli/Lyaduywa/1397** be transmitted to himself, stating that it is he who purchased it although it was registered in his father's name.

On 21st January 2013 Samuel Eloga Akibaya who had earlier laid claim to the whole of what remains of **LR. Nyandarua/Gorika/656** swore an affidavit to which he attached Certificates of Search which shows that on or about 13th September 2000 **LR Nyandarua/Gorika/656** was sub-divided into four portions 1343, 1344, 1345 and 1346 and that 1344 and 1346 were transferred to one Josphat Waithaka while **LR Nyandarua/Gorika/1343** and **LR Nyandarua/Gorika/1345** were still registered in the name of the deceased. He proposed that 15 acres out of **LR Nyandarua/Gorika/1343** should be transmitted to himself firstly because he suffers visual disability and secondly because his customs dictate that it is the son who inherits the homestead of his parents. He also proposed that out of the 5000 Kenya Breweries shares owned by the deceased he be allocated at least 1500 because he can no longer be gainfully employed due to his disability.

Then came one Samuel Karanja Kagori who claims to have purchased 1 acre of land from Samuel Eloga Akibaya vide a sale agreement dated 16th December 2000 and prayed that the two titles be devolved to himself. A similar claim was made by one Veronica Waruguru Ng'ang'a. These "sales" by Samuel Eloga Akibaya prompted his mother Joyce Muthoni Akibaya, now deceased, to swear an affidavit dated 16th February 2013 proposing that since he had sold his share what remains should be distributed equally

amongst her, her other son and five daughters. Apparently on 1st September 2005 she too purported to enter into sale agreements with several parties including Veronica Waruguru Ng'ang'a in regard to this same property. These purchasers as well as those to who Samuel Eloga Akibaya admittedly sold portions of the land were joined to these proceedings as **Interested Parties**.

Wilson Amboga Akibaya and James Amboga Akibaya – (a son and grandson respectively of the deceased by his first wife Rael Kabwayi Akibaya) jointly filed an objection to the mode of distribution in which they alleged that **LR North Maragoli/Mbale/1228, LR North Maragoli/Mbale/1320, LR North Maragoli/Mbale/536 and LR North Maragoli/Mbale/1322** should be treated as part of the estate of the deceased. They aver that the same were fraudulently transferred as shown in a letter from Vihiga Municipal Council dated 21st July 2000. They also contended that Sammy Mutingu Akibaya is an adopted son of the deceased and does not under Maragoli culture qualify to be a beneficiary. In their objection they contend that there is a case pending in Kakamega being **HCCC No. 179 of 2009** over the alleged fraudulently transferred assets.

As the administratixes and beneficiaries of the estate could not agree on the mode of distribution the same was left to the court to determine, upon as directed on 20th February 2013, hearing the parties through viva voce evidence.

This court heard the testimonies of the parties and their witnesses between 16th July 2014 and 30th March 2017. Mr. Nyanga, Advocate appeared for the first house, (Rael Kabwayi Akibaya), Mr. Odeny for the second house (Joyce Muthoni Akibaya), Mr. Musiega for the third house (Ezina Alusa Akibaya) while Wilson Akibaya and James Abonga Akibaya acted in person. The Interested Parties (purchasers) were represented by Mr. Lore Advocate. Parties also filed submissions as directed by the court.

Having considered the evidence and submissions of all the parties I first of all make the following findings in regard to the assets of the deceased:-

(1). That the assets of the deceased were by consent of all the then administratixes and the beneficiaries listed as –

1. **LR. North Maragoli/Mbale/398**
2. **LR. North Maragoli/Mbale/16**
3. **LR. North Maragoli/Lyaduywa/336**
4. **LR. North Maragoli/Lyaduywa/1531**
5. **LR. North Maragoli/Lyaduywa/1562**
6. **LR. North Maragoli/Lyaduywa/1397**
7. **LR. Kisumu/Wathorego/2572**
8. **LR. Kisumu/Wathorego/2573**
9. **LR Nyandarua/Gorika/656 (Homestead of Joyce Muthoni)**
10. **Peugeot 404 KDV 278**
11. **Nyandarua OI-Jororok 181 (RK)**

However upon a thorough perusal of the record this court finds that **LR Nyandarua/OI-Jororok West/181** does not belong to the deceased and cannot therefore be counted as forming his estate. A copy

of Certificate of Search dated 30th November 2012 annexed to the affidavit of Samuel Mutingu Akibaya sworn on 4th December 2012 shows that the property is registered to Jacob Warutere Njeru as from 9th October 1989. Granted that on 8th January 1998 the deceased in the proceedings wrote a letter to the District Officer Ol Joro-orok concerning some property in Ol joro-orok West (see “**JAA4**” to the affidavit of James Amboga Akibaya and Wilson Amboga Akibaya sworn on Tuesday July 2015 and filed herein on 29th July 2015). That letter does not give the description of the property referred to save to state that it is a plot in Ol joro-orok West. It makes no reference to **LR Nyandarua/Ol-Jororok West 181** at all. None of the parties have tendered proof that it belongs to the deceased.

As for **LR Nyandarua/Ngorika/656** which on the list of assets is described as the homestead of Joyce Muthoni Akibaya the same no longer exists as described. Samuel Eloga Akibaya has to his affidavit sworn on 21st January 2013 annexed copies of Certificates of Official Search “**SEA – 1(a) – 1(b) – 1(c) 1(d)**” showing that **LR Nyandarua/Gorika/656** was on 13th September 2000 sub-divided with the resultant sub-divisions being Numbers 1343-1346. Annexures “**SEA – 1b**” and “**SEA 1(c)**” shows that on the same date **LR Nyandarua/Gorika/1345** and **LR Nyandarua/Gorika/1343** were registered to the deceased while **LR Nyandarua/Gorika/1344** and **LR Nyandarua/Gorika/1346** were registered to one Josphat Waithaka (see annexures **SEA – 1(d)** and annexure not marked). The deceased died on 19th October 2000 – roughly a month after this sub-division and as there is no dispute that he disposed these two parcels to the said Josphat Waithaka the two parcels now belong to him and are not the free property of the deceased. The two parcels **LR Nyandarua/Ngorika/1343** and **LR Nyandarua/Ngorika/1345** which are registered to the deceased are his free property and are what shall be taken into account when distributing the estate.

- (2). (a) **LR North Maragoli/Mbale/1228**
- (b) **LR North Maragoli/Mbale/1320**
- (c) **LR North Maragoli/Mbale/536**

In my view these are not the free property of the deceased as he had gifted them to his wife Ezina Alusa Akibaya and son Samuel Mutingu Akibaya during his lifetime.

Contrary to the allegation by Wilson Amboga Akibaya and James Amboga Akibaya that the transfer of these assets was fraudulent there is evidence that the deceased of his own free will gifted the properties. This is evidenced by the affidavit sworn by the deceased on 23rd May 2000 and also by the letter of the District Officer Sabatia dated 8th August 2000 (Annexure **JAA 1** to their own affidavit sworn on 28th July 2015) to the effect that the deceased himself appeared before the Land Board and freely sought approval to gift this property to his third wife and son. Whereas the first Board refused to give approval he was so determined that he appeared before another Board to make his application. There is no evidence at all that he acted under duress or undue influence. It is also instructive that the reason the first Board did not consider his application was because they doubted the involvement of the other family members but not because he was under an incapacity mental or physical. That said these were gifts *inter vivos* which **under Section 42 of the Law of Succession Act** shall be taken into account in determining the share of the house of Ezina Alusa Akibaya.

- (3). **LR Kisumu/Wathorego/2572** and **LR Kisumu/Wathorego/2573**. It is Ezina Alusa Akibaya who alleges that these two properties were sold to one Mr. Sembi by the deceased. The said Manjeet Singh Sembi testified on 7th September 2016. In an affidavit sworn on 1st July 2016 which he adopted as his evidence he averred that these two properties were sold to Ndugu Transport Company by the deceased at a consideration of Kshs.1.3 Million each. He further deposed that the consideration was paid in full by the year 1999 but the deceased fell ill and died before he transferred them to the company. He contended that in fact by the year 1997 the company had been given the original documents of title which later unfortunately were destroyed in a fire that burnt down their premises following the post election violence of 2007/2008. At the hearing he was cross-examined at large by advocates for the administratrix as well as the other

beneficiaries. It is my finding that he did not adduce evidence on a balance of probabilities that the two properties were in fact sold to Ndugu Transporters. Granted that his own documents were destroyed in a fire but what about records kept by the bank and the Advocates who drew or attested the sale agreements? Were their copies destroyed in the fire too? I find that difficult to believe. He did not demonstrate that he wrote to his bank for records to show that such payments were made from their account. It is not enough to say that banks do not keep statements for that long. He should have demonstrated that he made an attempt to get statements from the bank but did not succeed. Ezina Alusa Akibaya also alleges not to have copies of the sale agreements. This is surprising given that she has meticulously kept the records of all the other transactions that were of benefit to her more so the affidavit in which the deceased gifted her the properties set out above. My finding is that the only reason she does not have any record of this sale is because none took place. Sections **107 and 108 of the Evidence Act** place both the burden and incidence of burden of proof on Sembi and Ezina Alusa Akibaya as it is they who desire this court to give judgment in favour of Sembi. They have not discharged that burden. Accordingly I find that both **LR Kisumu/Wathorego/2572** and **LR Kisumu/Wathorego/2573** are the free property of the deceased which shall be distributed to his beneficiaries as will be set out shortly.

In effect therefore the intestate estate of the deceased comprises the following assets

- 1. LR. North Maragoli/Mbale/398**
- 2. LR. North Maragoli/Mbale/16**
- 3. LR. North Maragoli/Lyaduywa/336**
- 4. LR. North Maragoli/Lyaduywa/1531**
- 5. LR. North Maragoli/Lyaduywa/1562**
- 6. LR. North Maragoli/Lyaduywa/1397**
- 7. LR. Kisumu/Wathorego/2572**
- 8. LR. Kisumu/Wathorego/2573**
- 9. LR Nyandarua/Gorika/1343**
- 10. LR. Nyandarua/Gorika/1345**
- 11. Peugeot 404 KDV 278**
- 12. Shares/Dividends**

Distribution

This court heard the parties and their witnesses on this issue. It has also considered their respective proposals on the mode of distribution as well the submissions of their Advocates. Wilson Amboga Akibaya and James Amboga Akibaya feel discriminated by the act of the deceased gifting what they consider to be prime properties to only two beneficiaries. As I have stated Section 42 of the Law of Succession Act recognizes that an intestate can during his lifetime or by will gift property to a child, grandchild or house. What the deceased did is therefore legal. Having stated that, Section 42 requires that such previous benefits must be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house. In determining the share due to Ezina Alusa Akibaya and Samuel Mutingu Akibaya we shall take into account that which the deceased had already gifted them. Before we do that however Wilson Amboga Akibaya and James Amboga Akibaya were also of the view that Samuel Mutingu should not be a beneficiary. They contend that since he is an adopted son

Maragoli culture does not recognize him as an heir of the deceased. My view on this is that the deceased having died in the year 2000 his estate is subject to the Law of Succession Act – see Section 2(1) of the Law of Succession which states –

“1. Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

Although these two objectors contend that Samuel Mutingu is an adopted son, the deceased himself in the letter dated 8th January 1998 which they annexed as **Annexure “JAA4”** (to affidavit filed on 29th July 2015) refers to him as his son. In any event even were he an adopted child he qualifies as an heir under Section 3(2) of the Act which states –

“2. Reference in this Act to “child” or “children” shall include In relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

3.and a child as defined by sub-section (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”

This definition of child puts Samuel Mutingu Akibaya on the same footing as Wilson Amboga Akibaya but on higher preference to James Amboga Akibaya who is a grandchild. Samuel Mutingu shall for the purposes of these proceedings be treated as a beneficiary on equal footing with the other children of the deceased. It in fact emerged from the evidence that he was a child born out of wedlock and was not adopted as alleged by these two beneficiaries.

Samuel Eloga Akibaya the son of the deceased by his second wife Joyce Muthoni Akibaya testified and later submitted that he should be given a bigger portion of the estate being visually impaired and being the youngest son in that family. The law does not recognize those two grounds as entitling him to a bigger portion of the estate. The law under Sections 35 to 41 of the Law of Succession Act provides that the children be treated equally irrespective of their sex and abilities or in this case disability.

It was also alleged that part of the estate should be transmitted to the interested parties or purchasers. The so called purchasers have filed an affidavit of protest through **Joseph Muchai Mindu** and have annexed agreements of sale entered between themselves and Joyce Muthoni Akibaya (now deceased). Unfortunately however the law does not recognize their agreements. **Section 82** of the Law of Succession Act at **Proviso (ii)** prohibits the sale of immovable property before confirmation of the grant. By entering into the sale agreements, if we can call them that, these so called purchasers were abetting intermeddling with the estate of the deceased which is an offence under Section 45 of that Act. By entering into sale agreements with persons who had no interest to pass to them they took a risk for whose consequences they must bear. They can however seek to recover the purchase price from the person they paid it to or from the estate of that person. However as far as the estate of Jairo Akibaya Eloga is concerned they have no claim and are not entitled to the shares they seek.

On the title deed issued to one **Francis Mbugua Karanja** and which is annexed to the affidavit of Samuel Eloga Akibaya dated 16th May 2013 I note that the same does not have a land reference number and cannot under any circumstances be genuine and it must be cancelled. In any case one would wonder how he obtained title to the land yet the proprietor was deceased and the grant was yet to be confirmed.

Having made the above findings I now turn to distribution. In so doing and as I have already stated I have taken into consideration the proposals made by all the parties in their affidavits as well as in the submissions. I have also taken into consideration the provisions of Section 40 of the Act which apply to an intestate who was polygamous and Section 42 which requires that previous benefits to the beneficiaries

be brought into account. In the premises I distribute the estate as follows:-

1. **LR North Maragoli/Mbale/398** – to be succeeded by **Wycliff Akibaya** as per the affidavit of Kenneth Imbahale Akibaya sworn on 7th February 2014.
2. **LR North Maragoli/Mbale/16** – to be succeeded by the house of **Rael Kabwayi Akibaya** to be shared equally among the children of that house.
3. **LR North Maragoli/Lyaduywa/336** to be succeeded by **Kenneth Imbahale Akibaya** as there is consensus that he paid the consideration for it though it was registered in the deceased's name.
4. **LR North Maragoli/Lyaduywa/1531** to be succeeded by the house of **Rael Kabwayi Akibaya** and thereafter to the children of her house in equal shares.
5. **LR North Maragoli/Lyaduywa/1562** – There is consensus that this land belongs to William Mudaki Elloga the deceased's younger brother as he is the one who purchased it. The same shall therefore be succeeded by him.
6. **LR North Maragoli/Lyaduywa/1397** to be succeeded by the house of **Rael Kabwayi Akibaya** to be shared equally among the children of that house.
7. **LR Kisumu/Wathorego/2572** and **LR Kisumu/Wathorego/2573** to be sold and the proceeds shared equally between all the beneficiaries (this includes Ezina Alusa Akibaya and other children of the deceased irrespective of their house but shall not include grandchildren who however shall get the share of their parent if deceased). These two parcels would be uneconomical to sub-divide between the houses.
8. **LR Nyandarua/Gorika/1343** which measures 14.04ha and where the homestead of Joyce Muthoni Akibaya is situate shall be succeeded by her house to be shared equally among the children of that house or as shall be agreed by the children of that house. This is in view of the affidavit of concession purportedly sworn on 16th May 2013 by two of the children of that house namely Anne Muchimbi Akibaya and Juliet Wanjiru Akibaya. In determining the share of Samuel Eloga Akibaya it shall also be taken into consideration that during the deceased's lifetime he had gifted to Samuel Eloga four (4) acres of land which he sold. His share shall be less than those of other beneficiaries.
9. **LR Nyandarua/Gorika/1345** which measures 5.67ha shall be shared equally between the houses of **Rael Kabwayi Akibaya** and **Joyce Muthoni Akibaya**. Their respective shares shall then be distributed equally among the children of the houses.
10. **M/V KDV 278** to be sold and the proceeds distributed equally among the three houses.
11. Shares if any and the Dividends to be shared equally among the three houses (particulars of the shares to be supplied by the two administrators of the estate) and thereafter in equal shares to the children of each house.

It is noted firstly that the properties gifted to Ezina Alusa Akibaya and Samuel Mutingu Akibaya to wit **LR North Maragoli/Mbale/1228**, **LR North Maragoli/Mbale/1320** were developed and their value cannot compare to the properties which have been vested to the other houses by this court. Secondly it is noteworthy that whereas **LR Kisumu/Okore/35** is not included in the agreed list of assets the same was a National Housing Corporation house which belonged to the deceased but which Ezina could not account for leading to the conclusion that she disposed of it. Thirdly it is to be noted that the deceased had daughters who shall be entitled to succeed the shares allocated to their respective houses in equal shares with the sons of the deceased. Fourthly the deceased has grandsons who shall not be treated as children of the deceased and shall only be entitled to the shares due to their parents if they are deceased. The property of the deceased is to devolve to his children in equal shares.

As for the costs of the proceedings each party shall bear their own.

It is so ordered.

Signed dated at delivered at Kisumu this 18th day of October 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Gesicho for Odeny for 2nd house

Mr. Otieno Oyoo for Nyanga for 1st house

Ezina Akibaya

Wilson Amboga Akibaya

Rebecca Akibaya

Serah Sidera – Court Assistant