



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**PROBATE & ADMINISTRATION CAUSE NO.22 OF 2012**

**PATRICK WAFULA NDINYO.....DECEASED**

**AND**

**FREDRICK SIMIYU NDINYO.....PETITIONER**

**VERSUS**

**ELECTINE NASAMBU MASENGELI.....OBJECTOR**

**JUDGEMENT**

1. The deceased herein Patrick Wafula Ndinyo died on the 5<sup>th</sup> of October 2010 at Nalondo in Bungoma at the age of 80 years.

2. He left behind 3 widows & 31 children. One of his sons Fredrick Simiyu Ndinyo moved the Court for grant of letters of administration on 18<sup>th</sup> of January, 2012. A daughter Electine Nasambu Masengeli lodged an objection on 31<sup>st</sup> January 2012 and filed a cross petition on 25<sup>th</sup> June, 2012.

On 27<sup>th</sup> November, 2012 by consent of the parties the two protagonists were made co administrators. On the 20<sup>th</sup> of August 2012 Electine filed for confirmation of the grant (hereafter referred to as Electine) making proposal for distribution Fredrick Simiyu Ndinyo (Fredo) filed a replying affidavit with counter proposals.

3. The widows were directed to file their respective affidavits two of the widows Paustina Nafuna and Selina Naliaka filed their respective affidavits where they concurred with Electine.

4. In her proposal Electine has proposed that each of the widows gets 0.5 acres and thereafter all children do share equally irrespective of their gender, having removed 5.375 acres her father held in trust for his brother and 1.6 acres the deceased sold during his lifetime.

The proposal by Electine is as follows;

- i. Paustina Nafula 1<sup>st</sup> widow - 0.5 acres
- ii. Leonida Nelima 2<sup>nd</sup> widow – 0.5 acres
- iii. Selina Naliaka 3<sup>rd</sup> widow – 0.5 acres
- iv. Electine Nasambu daughter – 1 acre
- v. Gladys Ndunyo (daughter) - 1 acre
- vi. Rodah Naswa (daughter) - 1 acre
- vii. Florian Wamalwa (son) – 1 acre
- viii. Gentrix Nasimiyu (daughter) – 1 acre

- ix. Wycliffe Chenani (son) – 1 acre
- x. Martin Sikuku (son) - 1 acre
- xi. Fredrick Simiyu (son) – 1 acre
- xii. Irene Nafuna (daughter) – 1 acre
- xiii. Joseph Sudi (son) – 1 acre

Road reserve 0.9 acres.

In submissions filed on behalf of Counsel relied on the case of

**Re Estate of John Musambayi Katumang (2014) e KLR.**

5. In his affidavit on mode of contribution Fredrick proposes as follows;

- i. 1<sup>st</sup> house – 4.0 acres

Where daughters would share

- ii. 2<sup>nd</sup> house – 7 acres with daughters & widow getting no shares

The sons sharing as follows;

Wycliffe Chenane 1.5 acres

Martin Sikuku 1.5 acres

Joseph Sudi – 3 acres

- iii. 3<sup>rd</sup> house – Plot with a house

- iv. 4<sup>th</sup> widow – Nil as she has no child.

6. Fredrick in his evidence maintained that his late father had divided his land to his sons during his lifetime having given no land to his daughters and widows.

7. Despite an opportunity to file his submissions Fredrick did not place any on the Court file.

8. He who asserts must prove Fredrick failed place any on the Court file, minutes of the meeting where he purports the deceased distributed his land: what he produced were disjointed pages of a purported meeting, a photocopy of a document that cannot possibly be relied upon. His witness Bernard agreed with the proposal citing that the deceased shared his property as follows.

- 1. Sudi got a share together with the 3 widows
- 2. Floria Approximately 3 acres
- 3. Wycliffe 2 acres.
- 4. Fred Simiyu 1½ acres
- 5. Sikuku (he did not specify)

However the witness a brother to the deceased was of the view that the daughters ought to get ½ acre each.

He also stated that though the deceased divided his property, he was sick at the time.

9. Having considered the evidence and submission filed I am of the view that the issues before me are as follows;

***1. Whether the deceased distributed his land during his lifetime.***

***2. Whether this Court an interfere with the distribution if (1) is in the affirmative.***

**3. Whether the deceased may be considered to have died intestate**

**4. If so, how is the property to be distributed to his heirs?**

10. There is no will that was left behind and the minutes of the day the deceased allegedly divided his land to some of his heirs cannot be said to have been placed before Court as the document produced was not in its original form, it was not legible, it appeared to be extracts of some meeting, disjointed and disowned by DW2 the brother to the deceased who indeed said that the deceased was sick at the time of his alleged distribution and his sons are the ones who had called for the meeting.

11. In my view in the absence of the original and complete document and in the light of the evidence where a witness contradicts his own statement it will be unsafe to assume arrive at a conclusion that the property was indeed distributed.

12. I therefore find and hold that the deceased died intestate and since he had a polygamous set up Section 40 of the Law of Succession is applicable in this situation. Section 40 requires the net intestate Estate be divided among the houses according to the number of children in each house, and the wives considered as an additional unit.

13. The above Section has been a subject of discussions in many cases. What is clear is that it does not discriminate against any child on account of gender and in coming up with the distribution the Court ought to consider what is equitable.

14. In the celebrated case of **Rono V Rono Civil Appeal 66 of 2002 Omolo J.A.** had this to say

*“I had the advantage of reading in draft form the judgement of Waki J.A. & while I broadly agree with that judgement, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of Law that the Law of Succession Act Cap 160 of the Laws of Kenya, lays down a requirement that heirs of a deceased person must inherit equal portions of the Estate ...”*

*“My understanding of that Section is that while the net Estate is to be distributed according to houses, each house being treated as unit, yet the Judge doing the distribution still has discretion to take into account or consider the number of children in each house...”*

*“Nor do I see any provision in the act that each child must receive the same or equal portion. That would work an injustice particularly in a case of a young child who is still to be maintained, educated or generally seen through life...”*

*“What I understand Waki J. to be saying is that the circumstances of this particular case, there was no reasonable factual basis for drawing a distinction between the sons on the other hand and daughters on the other hand.”*

15. Having considered the above celebrated decision of the Court of Appeal it is my view that this Court will be going against the Constitution, the Law of Succession Act, and against all reason in the 21<sup>st</sup> century, by allowing widows and their daughters, to be disinherited by the very persons who ought to be protecting them, their sons and brothers if it were to go by Fredrick’s proposal to disregard widows and daughters.

16. From the facts of this case most of the heirs are fairly well educated and hold good jobs. The details are;

Electine Nasambu – Clinical Officer Jomo Kenyatta University

Gladys Ndinyo – Teacher

Rodah Naswa – Deputy Headteacher

Florian Wamalwa – Inspector of Police

Gentrix Nasimiyu – Ward administrator

Wycliffe Chenane – lab technologist

Fred Simiyu – Teacher

Martin Sikuku – Teacher

Irene Nafula – House wife

Joseph Sudi – Accountant

Centrine Namalwa – Farmer

17. In my view therefore there would be no reason even considering the positions the heirs hold in society to go against the provisions of Section 40, none of them need special consideration.

18. Consequently therefore I find the proposal by Electine to be most reasonable and in the circumstance and proceed to adopt the same.

19. The Estate is accordingly distributed as follows;

**i. Paustina Nafuna 1<sup>st</sup> widow – 0.5 acres**

during her life time and thereafter to be shared equally between the children of the 1<sup>st</sup> house.

**ii. Leonida Nelima Ndinyo – 0.5 acres**

during her life time and thereafter to be shared equally between the children of the 2<sup>nd</sup> house.

**iii. Selina Naliaka Ndinyo – 0.5 acres**

during her life time and thereafter to be shared equally between the children of the 3<sup>rd</sup> house.

**iv. Electine Nasambu Ndinyo – 1 acre**

**v. Gladys N. Ndinyo – 1 acre**

**vi. Rodah Waswa Ndinyo – 1 acre**

**vii. Florian Wamalwa Ndinyo – 1 acre**

**viii. Gentrix Nasimiyu Ndinyo – 1 acre**

**ix. Wycliffe Chenani Ndinyo – 1 acre**

**x. Martin Sikuku Ndinyo – 1 acre**

**xi. Fredrick Simiyu Ndinyo – 1 acre**

**xii. Irene Nafula Ndinyo – 1 acre**

**xiii. Joseph Sudi Ndinyo – 1 acre**

**xiv. 0.9 acres to cater for the road reserve.**

20. Each party to meet its costs.

DATED and DELIVERED at BUNGOMA this 23<sup>rd</sup> day of November, 2017

**ALI ARONI**

**JUDGE**