



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.257 of 2012

IN THE MATTER OF THE ESTATE OF THE LATE DAUDI AURA WESONGA - (DECEASED)

IN THE MATTER OF THE APPLICATION

FOR VINCENT BUDUBEH AURA.....PETITIONER

VERSUS

IN THE MATTER OF AGATHA AKUMU AURAOBJECTOR

RULING

1. This cause relates to the Estate of Daudi Aura Wesonga (the Deceased) who died intestate on 2nd March 1988. This decision is in respect to Distribution of that Estate as the Joint Administrators Vincent Budubeh Aura (Vincent) and Nicholas Pima Omwanya (Nicholas) are not agreed.

2. After the taking of evidence and receipt of written submissions, the issues in contention have been considerably narrowed. The list of those who survived the Deceased seems agreed as follows:

1) House of Monica

- Agatha Akumu Aura
- Marsela Anyango
- Odesa Nekesa Aura
- Maria Auma
- Dester Were

2) House of Veronica

- The family of the late Fred Egesa (Deceased)
- Joseph Wesonga

3) House of Catherine

- Vincent Budubeh Aura
- Family of Kanothi Rai (Deceased)

Although Nicholas makes mention of a fourth wife (Margaret also known as Naluo Arua Mbenda), Vincent says nothing of her. Nothing much turns of this as it would seem that this fourth wife who had no children with the Deceased is also dead (see Affidavit of Vincent sworn on 1st November, 1996. See

also paragraph 4 of his Affidavit of 11th July 2012).

3. What is not agreed between the two Administrators are basically two issues;

a) Whether or not Bunyala/Budembi/1901 (herein after also referred to as parcel 1901) was part of the Deceased's Estate.

b) What share should the married daughters of the Deceased get.

4. A Certificate of Official Search dated 23rd July 2014 shows that Ogesa Aura Freddy was registered as Proprietor of Bunyala/Budembi/1901 on the last day of December 1987. Freddy also known as Fred Egesa is dead and is the brother of Joseph Wesonga. The position of Vincent is that Parcel 1901 was the property of the Deceased herein and the same was given to Fred to hold for himself and on behalf of his family. In effect that it was an intervivos gift from the Deceased to the house of Veronica. For this reason members of that house are not entitled to a further share.

5. In respect to the married daughters, Nicholas takes the position that each of the daughters should get a share of the Deceased's Estate, albeit smaller than that of the sons. Vincent thinks the daughters should not inherit anything.

6. In the oral testimony before Court, Vincent reiterates the claim that Bunyala/Mudembi/1901 initially belonged to the Deceased but he gave it to Fred to hold for the house of Veronica. Vincent stated that Veronica and her family always resided on plot No.1901 and she was eventually buried there on her death.

7. The evidence of Vincent was supported by that of his witness Vincent Samuli Wesonga (Wesonga). Wesonga was a step brother to the Deceased. Wesonga stated;

'Daudi pre-deceased Veronica. Veronica was buried on her land. Although the land was registered in the name of Fred, that land belongs to the Deceased'.

8. What Vincent said in respect to parcel NO.1901 is believable in view of what Marcella Anyango Musumba told Court. She was a witness on the side of Nicholas and a daughter to the Deceased. In answer to a question in cross-examination she stated;

"The Deceased built a home for Veronica on 1091 when Fred was an infant".

That evidence supports the theory of Vincent that Parcel 1091 initially belonged to the Deceased before he gave it to Fred.

9. What is unclear is whether the gift to Fred was outright or whether it was to be held in trust for all members of the house of Veronica. In view of insufficiency of evidence I am inclined to find that the gift was to Fred (Deceased). That lifetime gift to Fred was in my view a settlement to him by the Deceased. I would hold that the Estate of Fred has been adequately provided for. In doing so, I bear in mind the Provisions of Section 42 of the Law of Succession Act which reads;

"Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

10. As said, however, there is no evidence to suggest that the gift to Fred was also a gift to his brother

Joseph Wesonga.

11. As to the married daughters, Vincent has not made out a case as to why they should be disinherited. The Law of Succession does not discriminate against daughters be they married or unmarried. Section 38 of the Law of Succession is instructive. It provides;

“Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”.

12. As the Deceased was polygamous, the Distribution of his Estate ought to be guided by the Provisions of The Act which provides;-

“(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 intestate 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.

(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38”.

13. In providing for Dependants, the Court has complete discretion (see Section 27 of The Act) but that discretion needs to be exercised judiciously. The Court needs also to give regard to the Provisions of Section 28 which instructs;-

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to –

- (a) the nature and amount of the deceased’s property;
- (b) any past, present or future capital or income from any source of the defendant;
- (c) the existing and future means and needs of the dependant;
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- (e) the conduct of the dependant in relation to the deceased;
- (f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant.

14. Nicholas has proposed that the married daughters get a slightly smaller share than their brothers. That does not seem unreasonable as they may have present or future benefit from their marriage homes. I accept the proposal that the following daughters gets 1.0 hectares each from Bunyala/Mudembi/1706.

(i) Estate of Agatha Akumu Aura

(ii) Marsella Anyango

(iii) Odesa Nekesa Aura

(iv) Maria Aura

(v) Dester Were

The remainder of the Estate property (LR 1706) shall be divided equally amongst Vincent Budubeh Aura; The Estate of Kanothi Aura; Joseph Wesonga and Tom Onyango. Excluded from here is The Estate of Fred Aura as Fred had in his lifetime been settled on LR.No.1091.

15. No Order on costs.

DATED AT NAIROBI THIS 15th DAY OF JUNE, 2016.

F. TUIYOTT

JUDGE

READ, DELIVERED AND DATED AT BUSIA THIS 29th DAY OF JUNE, 2016.

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KORIR

JUDGE

PRESENT:

W Korir J.

Orwaso - Court Clerk