



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 457 OF 2005**

**IN THE MATTER OF THE ESTATE OF**

**JOSEPH NAMAYI LUKUNGO a.k.a**

**YUSUFU NAMAYI.....DECEASED**

**-AND-**

**CLEOPA AMUTALA NAMAYI..... PETITIONER**

**JUDITH WERE .....OBJECTOR/APPLICANT**

**JUDGMENT**

1. JOSEPH NAMAYI LUKONGO also known as YUSUF NAMAYI (hereafter referred to as **'the deceased'**) died on 17/08/1990 while domiciled on Kenya. Representation to his Estate was obtained on 17/11/2005 by CLEOPA NAMUTALA NAMAYI.

2. The deceased was survived by the following;

- a) REBEKA SHIRAKO NAMAYI - Widow
- b) CLEOPA NAMUTALA NAMAYI - Son
- c) RICHARD OMWANGU NAMAYI - Son
- d) BARNABAS AKHUNGU NAMAYI - Son
- e) GREGORY KWEYU NAMAYI - Son
- f) FREDRICK OSUNDWA NAMAYI - Son

3. From the evidence on record, FREDRICK OSUNDWA NAMAYI also died sometimes in 1996 leaving behind his daughter namely JUDITH WERE, the Objector/Applicant herein. However the material before me does not indicate whether the said JUDITH WERE was the only surviving child to her father neither is it disclosed whether the said FREDRICK OSUNDWA NAMAYI (hereafter referred to as **'the late FREDRICK'**) was survived by a Spouse(s).

4. I have also perused the documents presented to this Court when the Grant was petitioned for especially the letter from the Chief of East Wanga Location one JAMES R. WAMBANI dated 24/08/2005 and the Form P&A 5 (Affidavit in support of the Petition for Letters of Administration Intestate) and noted that in both documents it was indicated that the deceased was also survived by the Objector's Father when he passed on. Be that as in may, upon the issuance of the Grant by the Court on the said 17/11/2005, the Objector thereafter filed an application by way of Summons under Section 26 of the Law of succession Act contending that he was a dependant to the deceased and remained entitled to the net estate of the deceased. The Summons was supposed by the Affidavit sworn on 03/08/2006.

5. On 21/08/2006, the then Petitioner and now the Administrator of the Estate, CLEOPA WAMUTALA NAMAYI filed a Replying Affidavit to the Objector's application where he described the Objector as his daughter who was, at the moment, not entitled to any share of the estate until the grant was confirmed whereafter she would be entitled in the same footing as the other children of the Administrator.

6. The Objector in a Supplementary Affidavit filed on 10/06/2008 clarified that the Administrator was not her real father, but a brother to her deceased Father, the late FREDRICK, and contended that it was not proper for her to be treated as a child to the Administrator. These facts remain uncontested.

7. On 14/11/2011, the Administrator filed a Chamber Summons dated 10/11/2011 seeking the confirmation of the Grant issued on 17/11/2005. In the Supporting Affidavit thereto, he made a proposal on the distribution of the deceased's Estate (which comprised of the parcels of land known as EAST WANGA/ISONGO/176 and EAST WANGA/ISONGO/157) under paragraph 5 thereof as follows: -

- (a) Cleopa Namutala Namayi - Plot 176 - 5 ACRES**
- (b) Richard Omwangu Namayi- “ “ - 5 ACRES**
- (c) Patrick Nyongesa Kweyu – Purchaser –Plot 176 - 3 ACRES**
- (d) Barnabas Akhungu Namayi – Plot 176 - 6.5 ACRES**
- (e) Gregory Kweyu Namayi – Plot 157 - 4.5 ACRES**
- (f) Judith Were – Plot 157 - 1 ACRE**

8. The said Affidavit though included the Objector as a beneficiary to the deceased's Estate did not give the details on how one PATRICK NYONGESA KWEYU became a Purchaser of 3 Acres out of the property known as E.WANGA/ISONGO/176 given that the Grant was yet to be confirmed. Accompanying the Application for Confirmation was a consent signed by the following in agreement to the above proposed distribution:-

- (a) CLEOPA NAMUTALA NAMAYI**
- (b) RICHARD OMWANGUNAMAYI**
- (c) PATRICK NYONGESA KWEYU**
- (d) BARNABAS AKHUNGU NAMAYI**
- (e) GREGORY KWEYU NAMAYI**

The Objector did not approve of the distribution hence did not append her concurrence thereto. Further, it is worth-noting that the proposed distribution did not include the deceased's widow REBEKA SHIRAKO NAMAYI. It is also not clear whether the widow is still alive or not and if alive, in what circumstances was she left out.

9. The Objector then filed an Affidavit of Protest against her proposed 1 acre out of the parcel of land known as E. WANGA/ISONGO /176 which measured 18 acres. She contended that her Father, the late FREDRICK, who was one of the deceased's children just like the rest used to occupy 4 acres of the said E/WANGA/ISONGO/176 with clear boundaries on the ground and was indeed buried on his portion of the parcel of land. She further contended that the Administrator and the other brothers to the late FREDRICK are taking advantage of the Objector's Father demise by proposing to give her only 1 acre whereas her father was on the same level of inheritance as any and all of them.

She further decried that in furtherance of the above motive, his Uncles (the other deceased's children) had collectively invaded the 1 acre of the late Fredrick's share and have been planting sugarcane thereon and to the total exclusion of the Objector.

10. In a Statement dated 25/09/2012 and filed in Court on 26/09/2012, the Administrator in support of the Application for Confirmation admitted that indeed the Objector was a daughter to his brother, the late FREDRICK and although she was entitled to claim her Father's part of the Estate, the brothers (Objector's Uncles) had agreed to allocate her 1 acre (admittedly less than what her father would have received) because she is married with children and has a stable marriage with their property elsewhere. It was also alleged that since the Objector had not taken out Letters of Administration in respect of the Estate of the late Fredrick, giving her a bigger share will be superfluous since she does not need it and she is only aiming at disposing of the same at the expense of more deserving beneficiaries. This statement was conceded to by BARNABAS AKHONGO and GREGORY KWEYU NAMAYI but not RICHARD OMWANGU NAMAYI. The reasons thereto remain unknown to the Court.

11. When this matter came up before this Court (*Thuranira, J*) on 12/03/2012, the Administrator sought for directions towards the hearing of the objection and the Court directed that the hearing be by way of oral evidence and the Administrator was to file his Statement within 21 days. However when the matter came up before Hon. Justice Dulu on 30/07/2014 parties agreed to instead file written submissions to the issues before Court and rely on the Affidavit evidence on record and it was so directed.

12. I have seen and perused the submissions of the Administrator filed on 13/11/2014 and those by the Objector filed on 29/08/2014.

13. This Court is therefore tasked with the confirmation of the Grant made on 27/11/2005 since the parties herein have not agreed on the distribution of the estate.

14. I will begin with a look at the Objector's application dated 03/08/2006 and duly filed in Court on the same day. The same is brought under **Section 26** of the Law of Succession Act (hereinafter referred to as "*the Act*".) The said section states as follows:-

***"26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or this confirmation of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's estate".***

**Section 29** of the Act defines a dependant as follows: -

***"29. For the purpose of this part, 'dependant' means : -***

***(a) The wife or wives, or former wife or wives and the children of the deceased, whether or not maintained by the deceased immediately prior to his death;***

***(b) Such of the deceased's parents, step-parents, grand-parents, grand-children step- children whom the deceased had taken into his family as his own, brother and sisters, and half-brothers***

*and half- sisters, as were being maintained by the deceased immediately prior to his death; and*

*(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”*

Pursuant to **Section 30** of the Act, such an application by a dependant can only be brought before the confirmation of the grant.

15. The Administrator in his Statement filed in Court on 26/09/2012 and consented to by his other two brothers stated that the Objector herein was long married and has her home elsewhere with children, and was in a very stable marriage. I have checked but did not get the Objector's rejoinder to that except under paragraph 6 of her Supporting Affidavit filed in Court on 03/08/2006 and in her written submissions where she states that she is a dependant under Section 29 of the Act. However, the Objector does not lay a basis for her contention of dependency. I have addressed my mind to the provisions of Section 29 of the Act. The closest the Objector comes to being a dependant may be under Section 29(b) being a grandchild to the deceased. But, there is a rider to that. The grandchild must have been maintained by the deceased immediately prior to his death.

The deceased died in 1990. There is no evidence on record as to how the Objector lived by then and who used to maintain her. Indeed by then her father, the late FREDRICK, was still alive. As this is a Court of law, it is not open for it to make assumptions to such a fact. In view of the said state of affairs and given the uncontested fact that the Objector is now happily married with a stable family elsewhere, this Court is not persuaded that the Objector is a dependant under Section 29 of the Act and hence makes a finding that the Objector herein is not a dependant to the deceased, in law.

16. Looking at the nature of the Objector's application alongside the Application for Confirmation and to all the Affidavits thereto, it is clear that the Objector was and remains interested in her Father's share to the deceased's estate. That being the case then her application was founded on wrong provisions of the law. That however does not invalidate her claim as it clear in the wider picture what the Objector is actually asking for. I therefore consider the error as a technical and/or procedural defect which can be safely overlooked in the spirit of Article 159(2) (d) of the Constitution of Kenya.

17. Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say such grandchildren must hold appropriate representation on behalf of their parents.

18. In this case, we are not told if the late FREDRICK was survived by his Spouse, the mother of the Objector or any other and neither are we informed if he had any other children apart from the Objector herein. It is also clear that the Objector does not hold any representation to the estate of his late father. But even with that in mind, the Administrator and the other brothers have proposed to apportion part of the deceased's estate to her on the strength of the late FREDRICK, the Objector's father.

19. The above analysis therefore takes us to the aspect of confirmation of the grant. The estate in issue is comprised of the following: -

(a) A parcel of land measuring 18 acres known as E/WANGA/ISONGO/176; and

(b) A parcel of land measuring 6 ½ acres known as E.WANGA/ISONGO/157.

I have seen an Official Search for the parcel of land known as E/WANGA/ISONGO/176 in

confirmation that the acreage thereof is 18.0 acres. However, since all the parties seem to agree on the acreage of the other parcel of land, I will proceed on the premise that the disclosed acreage of 6 ½ acres is correct. However, I have to add that it is imperative that an application for confirmation of a grant where the estate comprises of land must be accompanied by recently-conducted Official Search (es) or any such supporting documentation.

20. The prevailing situation in the case is clearly captioned under Section 35 (under Part V) of the Act where the deceased left a surviving spouse and children. In such a situation the surviving spouse is entitled to the personal and household effects of the deceased (chattels) absolutely and has a life interest in the whole residue of the net intestate estate which life interest is determined once the surviving spouse re-marries. Further, the surviving spouse having a life interest aforesaid may exercise her power of appointment of all or any part of the estate among the children, but however subject to the concurrence of the Court.

21. The deceased in this case was survived by a spouse REBEKA SHIRAKO NAMAYI and 5 children. A look at the proposed distribution by each party does not capture the said surviving spouse and there is no explanation on her whereabouts, but since all parties seems to agree on that status this Court shall proceed to deal with this matter further.

22. The spirit under Part V of the Act especially Sections 35, 38 and 40 is ***equal distribution of the intestate estate amongst the children of the deceased***. There has been though debates on whether this distribution should be equal or equitable, but the reading of the provisions of the law envisage equal distribution for the word used in Section 35(5) and 38 is “equally” and not “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms: ‘the property shall .... be equally divided among the surviving children’. This equal distribution is envisaged regardless of the ages, gender and financial status of the children. Further since all the children of the deceased in this estate are adults this Court may not have to invoke Article 53(2) of the Constitution.

23. I have considered the proposed distribution by the Administrator and his brothers and their Statement and the Objector’s proposal alongside the written submissions on record on this aspect. There is an argument that the Objector ought to get less than what her father, the late FREDRICK, would have received because she actually does not need any bigger share than one acre as she is likely to dispose it off at the expense of the more deserving beneficiaries. It is further contended that the Objector will instead inherit such property from her husband’s side. It is also on record that 3 acres of E. WANGA/ISONGO/176 was sold to one PATRICK NYONGESA KWEYU before confirmation of the grant and in circumstances and by parties which are not disclosed before this Court.

24. The Objector has come to this Court claiming what was due to her late father who died long after the death of the deceased. The foregone argument by the Administrator and his brothers would hence amount to discrimination which is contrary to Article 27 of the Constitution. This Article specifically prohibits discrimination of any person on the basis of race, sex, marital status or culture. Article 27(3) of the Constitution specifically provides that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”.

25. It is therefore imperative not to lose focus herein that the real issue of determination is what would lawfully devolve to the beneficiaries, who are the Administrator and his brothers including the Objector’s father. Needless to say, what the beneficiaries will inherit will eventually be rolled out to their dependants including their spouses and children. The argument therefore that the Objector is married elsewhere and is in a stable marriage and will inherit such property thereat does not hold and as I stated above amounts to discrimination and is a way to cloud the actual issue herein. However, that argument still remains disingenuous in that if this Court confirms the grant and eventually any of the brothers to the Objector’s father die, their estate would be inherited by their children regardless of race, sex, marital status or culture. In a similar fashion, their sons who are married would equally benefit from the property that their wives would inherit from their parents and in that case there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such a son or daughter is entitled to inherit the property comprised in the estate of their deceased parents. Time has now

come for the ghost of retrogressive practices and beliefs that are discriminatory against women and which have a tendency of once in a while rearing its ugly head to be forever buried in the books of annals. This is the position enshrined in Article 27 of our Constitution and has been so held in various judicial decisions.

26. The record also reveals that the deceased had during his lifetime shared out his land to all his children, including the Objectors father, and even demarcated it on the ground with clear boundaries and that all the deceased's children have been using their clear respective shares and that is why when the Objector's father passed on he was buried on his share of the land which the Objector now claims.

27. The estate is comprised of a total of 24 ½ acres of land. Since the widow is not in play, this would devolve to the deceased's surviving children who were 5 equally. This will therefore translate to about 4.9 acres each. This seems to have been the general understanding as contained in the Administrator's proposal where the other children are proposed to have 5 acres, 4 ½ acres, 6 ½ acres and 4 ½ acres. It appears therefore that part of the share of the Objector's father is what has been subject of sale to the said PATRICK NYONGESA KWEYU and the rest taken over by the other brothers.

28. I therefore find that the Objector's proposal that 4 acres, which is even less than what the late FREDRICK would have actually inherited, do devolve to her to be fair and reasonable. However given the fact that there has been no full and sufficient disclosure of the status and dependency of the said FREDRICK OSUNDWA NAMAYI, the said 4 acres shall not directly devolve to the Objector herein, but the Objector's father FREDRICK OSUNDWA NAMAYI and shall be subject to lawful administration. Since the said PATRICK NYONGESA KWEYU was not a son to the deceased and given that the parties herein did not reveal how he came into the Estate, he can only lay a claim to the one who sold the land to him.

29. Therefore having considered the law on the matter and all the proposals on the distribution of the estate that have been placed before me, I am disposed to distribute the estate of the deceased as follows and I make the following orders:-

**A: 1. E/WANGA/ISONGO/176**

- a) CLEOPA NAMUTALA NAMAYI - 5.0 ACRES
- b) RICHARD OMWANGU NAMAYI - 5.0 ACRES
- c) FREDRICK OSUNDWA NAMAYI - 4.0 ACRES
- d) BARNABAS AKHUNGU NAMAYI - 4.0 ACRES

**2. E/WANGA/ISONGO/157**

- a) BARNABAS AKHUNGU NAMAYI - 1.5 ACRES
- b) GREGORY KWEYU NAMAYI - 5.0 ACRES

**B:** A Certificate of Confirmation of the Grant do issue forthwith.

**C.** The Lands Registrar and the Surveyor, Kakamega County to ensure compliance and by taking into account where the respective parties herein are settled on the said parcels of land with a view of minimal possible disruptions; if any and to issue separate titles to those distinct portions of land as indicated in A hereinabove.

**D.** As the parties are a family, each party do bear its own costs of these proceedings as well as the costs of the distribution of the estate herein.

Orders accordingly.

DATED AND SIGNED THIS 27<sup>th</sup> DAY OF January 2015

**A. C. MRIMA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29th DAY OF January 2015.**

**RUTH N. SITATI**

**JUDGE**