



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE NO. 336 OF 2008

**IN THE MATTER OF THE ESTATE OF: JOHNSTONE HANDA MUTSEMBI alias
JOHNSTONE HANDA (DECEASED)**

ADDA NDAKALA HANDA

NOAH NDUKU HANDA PETITIONERS

VERSUS

EDWARD OMWAKA HANDARESPONDENT

RULING

The late JOHNSTONE HANDA MUTSEMBI died on 28th August, 2000. He was survived by one widow and several children. The widow, Adda Ndakala Handa and one son were issued with a grant of letters of administration on 18th September, 2008. The main dispute according to the parties is how the estate should be distributed.

EDWARD HANDA is the deceased's son. It is his evidence that his father died in 2000 while he was 12 years old. His father had two wives. He comes from the second house but his mother is deceased. His father left three plots names 7956, 1572 and 1256. It is his evidence that the Petitioner is the first wife. She had one son and five daughters while his mother had four sons. It is his further evidence that his father sold a portion of land to Mutua, Musonga and Enyanga and the buyers have built houses. The deceased left sixteen (16) rental rooms in one of the plots. His proposed mode of distribution is as follows:

See his affidavit with court stamp of 25th March, 2014.

L.R NO. BUTSOTSO/INGOTSE/1572

- i. Edward Omwaka Handa - 0.7 Acres
- ii. Ezekiel Ndete Handa - 0.7 Acres
- iii. Noah Nduku Handa - 0.6 Acres

L.R NO. BUTSOTSO/INGOTSE/1256

- i. Rodgers Kombo Handa - 0.7 Acres
- ii. Festo Indimuli Handa - 0.7 Acres
- iii. Mutsembi Handa - 0.6 Acres

L.R NO. BUTSOTSO/SHIKOTI/7956

- i. Adda Ndakala Handa – 1.2Acres
- ii. Noah Nduku Handa – 1.2Acres
- iii. Edward Omwaka Handa – 0.5 Acres
- iv. Ezekiel Ndete Handa – 0.5 Acres
- v. Festo Ndimuli Handa – 0.5 Acres
- vi. Rodgers Kombo Handa – 0.5 Acres
- vii. Mutsembi Handa – 0.5 Acres
- viii. Asanga Atito – 0.25 Acres

- ix. Romona Abdalla Handa
- x. Eglay Nyakoa Handa
- xi. Naomi Mbaye Handa *Jointly 0.5 Acres*
- xii. Lina Awiti

- xiii. Adda Ndakala Handa
- xiv. Edward Omwaka Handa
- xv. Ezekiel Ndete Handa *Jointly 0.92 Acres*
- xvi. Festo Indimuli Handa
- xvii. Rodgers Kombo Handa

It is his evidence that his late father had recorded on how he wished his estate to be distributed. He would like to have the 16 rooms distributed equally amongst the two houses.

PW2 ALFONSE MUSEMBI is a brother to the deceased. He testified that the deceased had divided his estate. One permanent house and a kiosk was given to the 2nd wife while the Petitioner was given one permanent house and a semi permanent house. The deceased bought another plot at Ematia. He also confirmed that the deceased had sold land to Mutua, Musonga and Enyangala.

PW3: EVANS ANYANGA HANDA is an uncle to the deceased. According to him the deceased wrote how his estate was to be distributed. The deceased had three plots. Plot 1572 was given to Edward and Ezekiel Ndete. Plot Number 1256 was given to Edward and Ezekiel Ndete. Plot Number 1256 was given to Rodgers Kombo and Festus Indimuli. Plot Number 7956 was divided into five portions. One portion was to be old. One portion was to be given to the Petitioner and her son Noah Nduku. Edward's mother was to be given one plot.

PW4 ALEXANDER KHAYINGA MUTSEMBI is an elder brother to the deceased. His evidence is that the deceased divided his estate to his two wives.

The Petitioners did not call any evidence. Mr. Munyendo, Counsel for the Petitioner relied on the evidence on record. The 1st Petitioner filed her affidavit giving her proposed mode of distribution. This was after the court gave directions to the effect that each party give his/her proposed mode of distribution. The first Petitioner proposes to distribute the estate as follows:

(a) BUTSOTSO/INGOTSE/1572

- i. Edward Omwaka 0.7 acres
- ii. Ezekiel Ndeto 0.7 acres

(b) BUTSOTSO/INGOTSE/1256

- i. Rodgers Kombo 0.7 acres
- ii. Festo Indimuli 0.7 acres

(c) BUTSOTSO/SHIKOTO/7956

- Adda Ndagala Handa with her six children

- i. Noah Nduku Handa
- ii. Romana Abdalla
- iii. Eglay Nyakowa
- iv. Naomi Mbaye
- v. Lina Awiti
- vi. Leah Shikuku

- MUTSEMBI HANDA 0.5 acres
- The second house comprising of Edward, Ezekiel, Rodgers and Festo ...0.5 acres jointly. These ones have already benefited from 1256 and 1572.

According to the Petitioner, the deceased had sold 0.5acres to Dr. Leunitah Muruli and 0.25acres to Mr. Osanya. She would like the other family to collect rent from their respective houses on plot number 7956.

As indicated herein above, the main issue for determination is the distribution of the estate. The 1st Petitioner is the surviving widow of the deceased. She had six children with her husband namely:

1. Noah Nduku (son)
2. Leah Handa
3. Romona Sungu
4. Lina Handa (Daughters)
5. Egley Handa
6. Naomi Handa

I have gone through the proposed mode of distribution by each party. The main difference relates to plot number 7956. Whereas the children of the second house would like to get a share out of that plot, the 1st petitioner contends that they were given their own plots namely 1256 and 1572 which they have leased out and moved to plot number 7956. I have gone through the purported will and I am not satisfied that it was written by the deceased or that it qualifies to be a will. The name of the witnesses seems to have been inserted later. The document does not clearly distribute the estate. I will take it that the deceased died intestate and the beneficiaries have given their proposed modes of distribution.

According to Edward, he was to get one acre out of plot number 1572 with one of his brothers. The evidence shows that the three plots left by the deceased are:-

1. Butsotso/Ingotse/1572 0.86Hectares
2. Butsotso/Ingotse/1256 0.88Hectares
3. Butsotso/Ingotse/7956 2.23Hectares

It is the evidence of PW3, Evans Handa that plot number 1572 was given to Edward and Ezekiel. These are children from the same mother. PW3 further told the court that plot number 1256 was given to Rodgers Kombo and Festus Indimuli. These two are also from the second wife. These two plots have a combined area of 1.74Hectares, that is 0.86 and 0.88 Hectares respectively. Edward proposes to distribute these two plots to himself and his three other brothers from the same mother but has included Noah Ndungu, his other brother from the first house.

It is clear that all the three plots are located in Butsotso area although the bigger plot is at Shikoti while the other two are located at Ingotse. The 2nd wife was buried on Plot number 1256 at Ingotse.

On her part, the Petitioner would like to have plot number 1256 and 1572 inherited by the children of the 2nd house while she takes plot number 7956 with her children. There is indication from the record that this same plot number 7956 had a portion sold to buyers. I do not see the need of the children of the second house having plots distributed in all the three plots. The proposal by Edward Omwaka Handa does not take into account the fact that under the Succession Act, all the children of a deceased are treated equally irrespective of their gender. The daughters from the first house have an equal claim to their

brothers from the two houses.

From the evidence herein, I do find that the proposed distribution by the 1st Petitioner is quite fair. The deceased's estate shall be distributed as follows:

1. BUTSOTSO/INGOTSE/1572

(i) Edward Omwaka

(ii) Ezekiel Ndeto *To share equally*

2. BUTSOTSO/INGOTSE /1256

(i) Rodgers Kombo

(ii) Festo Indimuli

3. BUTSOTSO/SHIKOTI/7956

(i) Edward Handa 0.5Acres

(ii) Noah Nduku Handa *To hold jointly in trust commercial houses
are built for their benefit and the benefit
of the other beneficiaries.*

4. (i) Adda Ndagala Handa

(ii) Noah Nduku Handa

(iii) Eglay Nyakowa

(iv) Ramona Abdalla

(v) Naomi Mbaye *Remainder of plot number Butsotso/Shikoti*

(vi) Lina Awiti */7956 less what was sold to purchasers*

(vii) Leah Shikuku

I do further direct that the portion of 0.5acres that is to be registered in the names of Noah Nduku and Edward Handa that is to be carved out of plot number 7956 shall strictly create a separate title for the commercial houses. The 1st Petitioner and her children shall collect rent from ten (10) rooms while Edward Handa and his brother shall collect rent from six (6) houses.

Any monies in the bank account at Kenya Commercial Bank which amount was not stated and any death gratuity shall be distributed to the widow, Adda Handa. Each party shall meet his/her own costs.

Dated and signed this **23rd** day of **February, 2015**.

Said J. Chitembwe

JUDGE

Delivered and countersigned this **19th** day of **March, 2015**

Ruth Sitati

JUDGE