



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 257 'B' OF 2005

IN THE MATTER OF THE ESTATE OF HAMISI IDI DAMBA (DECEASED)

-BETWEEN-

MILDRED ACHITSA PETITIONER/DEFENDANT

-AND-

DIFINA BUSOLO HAMISIOBJECTOR/PLAINTIFF

JUDGMENT

Background:-

1. This judgment is in respect to the Estate of HAMISI IDI DAMBA who died on 16/10/1983 at Shiakhungu within Kakamega County. The deceased was survived by widows and several children. By an Amended Grant issued on 13/03/2013 DIFINA BUSOLO AMISI, MILDRED AMINA HAMISI, JANATSANI MUTORU HAMISI and RAMADHAN TAMBA HAMISI were granted the administration of the deceased's estate.
2. By a Summons for Confirmation of the Grant evenly dated and filed in Court on 10/10/2013, MILDRED AMINA HAMISI sought the confirmation of the grant. The application was opposed by DIFINA BUSOLO HAMISI who filed an Affidavit of Protest and Counter-Proposal which was sworn on 29/01/2014 and filed in Court on 15/02/2014.
3. Pursuant to directions made on 05/03/2014 parties agreed to dispose of the Summons for confirmation by way of oral evidence and the hearing was set for 23/10/2014. Evidence was received by the Court and Counsels later on filed their submissions hence this judgment.
4. The Objector, **DIFINA BUSORO HAMISI**, was the Plaintiff and in giving her testimony she did not call any witnesses. She testified that she was a widow to the deceased and they were blessed with ten children out of which six had passed on leaving behind only four who were:-
 - a. **Alexander Salim Shibanda Hamisi.**
 - b. **Janet Kabogo**
 - c. **Caroline Hamisi.**
 - d. **Vincent Hamisi Amisi.**
5. She further testified that the deceased had brought home other children which he had outside wedlock

including the following:-

- a. **Mildred Achitsa also known as Mildred Amina Hamisi (the Petitioner)**
- b. **Hamisi Muruli.**
- c. **Ramadhan Hamisi.**
- d. **Nelson Masinza.**

6. To her knowledge, the deceased owned three parcels of land namely:-

- a. **Kakamega/Shiakhungu/1122.**
- b. **Kakamega/Virembe/279.**
- c. **Kakamega/Shinyalu/1301.**

7. The Objector protested that the parcel of land known as Kakamega/Shiakhungu/1676 was not part of the deceased's estate since she had acquired it herself out of her share of the money she received from the deceased's employer upon the demise of the deceased. She reiterated that the proposed distribution of the estate appearing in paragraph 9 of her Affidavit in protest remained the fairest for the estate and clarified that she had not even taken any part of the deceased's property as she had graciously shared all to the deceased's children.

8. On cross-examination, she confirmed that she remained a housewife during the life of the deceased when the deceased worked as a driver with HZ Company. She further clarified that when she got her share of the money from HZ Company she added out of her savings and purchased the parcel of land known as Kakamega/Shiakhungu/1676. It was her testimony that the deceased's children who were then in School were given separate cheques towards their school fees.

9. She also confirmed that the matrimonial home was on the parcel of land known as Kakamega/Shiakhungu/1122 where she resided with her children. It was her further testimony that all what she had been receiving from the deceased's estate went into the family upkeep even though it was hardly sufficient.

10. On the re-examination, she admitted that part of money received from the HZ Company went with the purchase of Kakamega/Shiakhungu/1676.

And, with this evidence, the Objector closed her case.

11. The Defendant/Petitioner, **MILDRED AMINA HAMISI**, called two witnesses in support of her case. She reiterated the contents of her Affidavit in support of the Summons for confirmation sworn on 10/10/2013 in confirming that the deceased was survived by three widows and several children. She particularized them as follows:-

- a. **1st widow:- Esther Musima** - Deceased.
 - *Mildred Amina Hamisi* - Daughter.
- b. **2nd Widow:- Felister Andeka:-**
 - *Janason Muturi Hamisi* – Son.
- c. **3rd Widow:- Difina Busolo Hamisi.**
 - *Salim Shibanda Hamisi* - Son.
 - *Janet Kadogo* - Daughter.
 - *Caroline Kharamba* - Daughter.

- *Hamisi Hamisi* - *Son.*

d. **4th Widow:- Sarah Mmbone Hamisi.**

- *Ramadhan Hamisi* - *Son.*
- *Nelson Iddi Hamisi* - *Son.*
- *Khasena Hamisi* - *Son.*

12. The Petitioner further stated that the Estate of the deceased comprised of 4 parcels of land namely:-

- a. ***KAKAMEGA/SHIAKUNGU/1122.***
- b. ***KAKAMEGA/SHINYALU/1301.***
- c. ***KAKAMEGA/VIREMBE/279.***
- d. ***KAKAMEGA/SHIAKHUNGU/1676.***

13. The Petitioner proposed that the deceased's estate be distributed as follows:-

- a. ***KAKAMEGA/SHIAKHUNGU/1122 - To the 3rd widow and her children;***
- b. ***KAKAMEGA/SHINYALU/1301 - Each of the four widows to get one shop each and the remainder of the space which the 3rd widow sold be deemed as her fallen share;***
- c. ***KAKAMEGA/VIREMBE/279 - To Mildred Amina Hamisi and Javason Muturi Hamisi in equal shares.***
4. ***KAKAMEGA/SHIAKHUNGU/1676 - To Ramadhan Hamisi and Nelson Iddi Hamisi in equal shares.***

14. On the issue surrounding KAKAMEGA/SHIAKHUNGU/1676, it was the Petitioner's position that the parcel of land was bought by the deceased during his lifetime from one DEFIKO INJEO MUTEITSI but the deceased met his death before transferring the said land into his names. She explained that upon the demise of the deceased, the family held deliberations towards the transfer of the land and accordingly wrote a letter and even attended a meeting of the Land Control Board where the family was advised to agree on how to go about the issue. She vehemently protested and stood on the fact that the Objector was all along unemployed and had no means to acquire the land in issue as the same was bought by the deceased in 1981 long before he died in 1983.

15. The Petitioner further stated that the Objector pocketed all the proceeds from the deceased's employer and did not even disclose the amount received to the other family members despite requests to do so. The Objector allegedly sold out most of the movable properties which the deceased left behind to the total exclusive of the other family members. It is further alleged that the Objector has all along been solely collecting and utilizing all the proceeds from the rental shops at Shinyalu an act which forced the other children to drop out of school and have continued to live in abject poverty.

16. On cross-examination, the Petitioner disclosed that the proposal she had made had been reached at in a family meeting but was being opposed by the Objector and her children who have all along singularly benefitted from the estate.

17. **RAMADHAN TAMBA HAMISI** testified as **DW2**. He was a son to the deceased and the fourth widow, Sarah Mmbone. He supported the proposal made by this Petitioner as reflecting the true family position and likewise took the position in respect to KAKAMEGA/SHIAKUNGU/1676 effective that the property is wrongly registered in the Objector's name. He testified that since the purchase of this land it was his mother who settled, occupied and cultivated thereon. When her mother fell ill and was taken by her family for treatment in 1984, the Objector then encroached onto the said land and began farming, he further testified.

18. He further reiterated how the family attended the Land Control Board meeting twice and formally protested to the Objector being registered as the owner of the land until when the Area Chief advised the family, which advise the family accepted and acted upon it, that the land be transferred into the Objector's name and thereafter the Objector shall transfer the same as will be agreed upon by the family. In doing so, the family lodged a restriction so as to stop any possible further dealing on the land. He vehemently denied that the land belonged to the Objector but to the family as part of the deceased's estate.

19. **DW3** was **ALI IDI TAMBA**, the deceased's brother. He fully relied on his Statement dated 30/03/2015 and filed in Court on 31/03/2015 and the List of Documents thereto. He testified that he once served as the Family Chairman and recalled holding a meeting on 13/01/2014 where the issue of distribution of the deceased's estate was discussed and agreed. He produced the various documents as exhibits which included minutes of the said meeting. He was opposed to the allegation that the Objector was the owner of the land known as KAKAMEGA/SHIAKUNGU/1676 as she did not purchase the same.

20. On cross-examination DW3 clarified that the Objector had also attended the family meeting but left in protest even before signing the minutes. He also stated that when the deceased passed on the fourth widow, Sarah Mmbone went back to her home and he was not aware if she had re-married. He further stated that the shops at KAKAMEGA/SHINYALU/1302 were built by the deceased way back in 1976 when he had a white lady who supported him as well. He so stated that due to frequent internal disagreements at home, the rest of the deceased's wives left the matrimonial home leaving behind the Objector who has all along taken charge of the deceased's estate.

21. When the Petitioner closed her case, both parties filed their submissions and the matter was fixed for judgment.

Analysis and determination:-

22. On perusal of the pleadings, the evidence tendered and the submissions filed, two main issues surface for determination. They are:-

- i. *Whether the parcel of land known as KAKAMEGA/SHIAKHUNGU/1676 forms part of the deceased's estate;*
- ii. *The manner in which the deceased's estate ought to devolve.*

I will deal with each of the above issues separately.

On whether the parcel of land known as KAKAMEGA/SHIAKHUNGU/1676 forms part of the deceased's estate:

23. I have seen the Certificate of Official Search in respect to **ISUKHA/SHIAKHUNGU/1676** dated 18/05/2009. It so confirms that the property arose out of a sub-division of Plot No. 1117 and was then registered in the names of DIFINA BUSORO HAMISI. The Title Deed was issued on 18/06/1998. It also reveals that a restriction was lodged on 07/05/2002 forbidding any dealings on the land pending resolution of a complaint lodged by the family. This Certificate of Official Search was part of the Objector's Affidavit sworn on 25/10/2011 in support of her application for revocation of the grant initially issued to the Petitioner on 12/10/2006. The said Certificate of Official Search referred to the parcel of land known as ISUKHA/SHIAKHUNGU/1676 and not KAKAMEGA/SHIAKHUNGU/1676.

24. When the Petitioner herein filed the Summons for confirmation dated 10/10/2013 on the same day, she described the deceased's estate to include a parcel of land known as KAKAMEGA/SHIAKHUNGU/1676 and not ISUKHA/SHIAKHUNGU/1676. Likewise when the Objector filed her Affidavit in protest and Counter Proposal sworn on 29/01/2014 she objected to the inclusion of KAKAMEGA/SHIAKHUNGU/1676 as part of the deceased's estate.

25. I have carefully gone through the record including the parties' submissions and have not seen any evidence that the parcel of land registered as KAKAMEGA/SHIAKHUNGU/1676 is part of the

deceased's estate or is registered in the names of the Objector. A close resemblance to that property is the one described as ISUKHA/SHIAKHUNGU/1676 and as evidenced in the Certificate of Search aforesaid. This Court is therefore unable to determine whether the property registered as KAKAMEGA/SHIAKHUNGU/1676 forms part of the deceased's estate. Likewise this Court is not in a position to determine the alleged issue of irregular registration of KAKAMEGA/SHIAKHUNGU/1676 in view of the foregoing. I cannot therefore and by any means attempt to find that the parcels of land registered as KAKAMEGA/SHIAKHUNGU/1676 and ISUKHA/SHIAKHUNGU/1676 refer to one and the same parcel of land. They are not.

26. As this Court remains unaware of the ownership of KAKAMEGA/SHIAKHUNGU/1676 which is being contended to be part of the deceased's estate by one party and strenuously opposed by the other, it hereby returns the finding that there exists no evidence on record to the effect that KAKAMEGA/SHIAKHUNGU/1676 is part of the deceased's estate. I hence wish to add that the door is still wide open for parties to take up that issue once appropriate evidence is laid before Court.

The distribution of the deceased's estate:

27. From the foregoing analysis and upon revisiting the evidence tendered, the deceased's estate can, at this point in time, be said to comprise of the following:-

- i. ***Kakamega/Shiakhungu/1122.***
- ii. ***Kakamega/Shinyalu/1301; and***
- iii. ***Kakamega/Virembe/279.***

28. According to the Certificates of Official Search dated 18/05/2009, all the above three parcels of land are registered in the Petitioner's name as the Administratrix of the deceased's estate. The same are clear from any encumbrances whatsoever. I am however unable to find that the alleged benefits from NSSF, compensation from road accident, seven heads of cattle, power saw, posho mill and ox plough from part of the deceased's estate for want of evidence, but in any event it is proposed that all those movable properties aforesaid do devolve unto the Objector.

29. It is not in dispute that when the deceased died, he was survived by four widows and several children. The widows include Esther Musina (now deceased), Felister Andeka, Difina Busolo Hamisi (the Objector) and Sarah Mmbone. The said widows had the following children.

Esther Musina:- 1st Widow (now Deceased):-

- *Midred Amina Hamisi* - *Petitioner/Daughter.*

Felister Andeka:- 2nd widow:-

- *Javason Muturi Hamisi* - *Son.*

Difina Busolo Hamisi:- 3rd widow:-

- *Salim Shitanda Hamisi (Alexander)-* *Son.*
- *Janet Kadogo* - *Daughter.*
- *Caroline Kharamba* - *Daughter.*
- *Hamisi Hamisi* - *Son.*

Sarah Mmbone Hamisi:- 4th Widow:-

- *Ramadhan Hamisi* - *Son.*
- *Nelson Iddi Hamisi* - *Son.*
- *Khasena Hamisi* - *Son.*

30. The Court however notes that the respective ages of the children were not tendered by the parties.

31. This Court further heard the parties when they testified on their proposals towards the distribution of the estate. As the parties did not come to any consensus on the distribution, the matter is hence left in the ambit of the Law of Succession Act.

32. Given that the deceased was polygamous, then the distribution of his estate is governed by **Section 40** of the Laws of Succession Act, Chapter 160 of the Laws of Kenya (hereinafter referred to as “**the Act**”). The said **Section 40** of the Act states as follows:-

“ 40 (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 estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

33. According to **Section 35** of the Act, a widow has a life interest in the whole residue of the net intestate estate which determines upon her re-marriage to any other person. Needless to say the life interest remains subject to the power of appointment which can be exercised by the widow at any time.

34. As it is on record that the first widow, Esther Musina died, then her life interest in the estate was accordingly determined. It is also said that the two out of the three other widows who survived the deceased left the matrimonial home after the death of the deceased and their whereabouts remain unknown. They are Felister Andeka and Sarah Mmbone, the second and fourth widows respectively. I tend to believe that may be the reason why all the parties herein did not take the two widows into account in their proposed distributions.

35. **Section 3** of the Act defines a ‘wife’ as follows:-

“‘Wife’ includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and ‘widower’ shall have a corresponding meaning”.

It is therefore clear that Felister Andeka and Sarah Mmbone remain the wives to the deceased and are equally entitled to the estate of the deceased. However, given the unknown nature of their whereabouts, I will adopt the approach taken by the parties herein which effectively leaves the third widow/Objector as the one entitled to a life interest in the net intestate estate.

36. Applying the rules in **Section 40** of the Act, and taking into account the number of the children in each house and by adding the Objector as an additional unit, there shall be **one unit** in the **first house**, **one unit** in the **second house**, **five units** in the **third house** and **three units** in the **fourth house** hence making a total of **10 units** altogether.

37. If the net intestate is divided in accordance with the said formula, then each house would receive the number of units in that house multiplied by the total area of the land, and divided by the total units. In figure-form therefore, the areas would be divided as follows:-

KAKAMEGA/VIREMBE/279 (Appr. 0.9 Ha.)

1st House:-

1/10 x 2.2239 Acres = 0.220 Acres.

2nd House:-

1/10 x 2.2239 Acres = 0.220 Acres.

3rd House:-

5/10 x 2.2239 Acres – 1.120 acres.

4th House:-

3/10 x 2.2239 Acres = 0.670 Acres.

KAKAMEGA/SHIAKHUNGU/1122 (Appr. 0.6 Ha.)

1st House:-

1/10 x 1.4826 = 0.1480 Acres.

2nd House:-

1/10 x 1.4826 = 0.1480 Acres.

3rd House:-

5/10 x 1.4826 – 0.740 Acres.

4th House:-

3/10 x 1.4826 – 0.445 Acres.

KAKAMEGA/SHINYALU/1301 (Appr. 0.06 Ha.)

1st House:-

1/10 x 0.1480 = 0.015 Acres.

2nd House:-

1/10 x 0.1480 – 0.015 Acres.

3rd House:-

5/10 x 0.1480 = 0.074 Acres.

4th House:-

3/10 x 0.1480 = 0.044 Acres.

38. Under the said formula therefore, the first house would receive a total of 0.383 Acres; the second house would receive a total of 0.383 Acres; the third house would receive a total of 1.934 Acres and the

fourth house would receive a total of 1.159 Acres from the three parcels of land.

39. Still under the formula, the third house would have to set aside a certain portion of its share where the Objector would have a life interest and the remainder, pursuant to Sections 35 to 38 of the Act, be shared equally among the children in that house. The children in the fourth house shall forthwith enjoy equal shares of their share whereas the first and second houses shall have full shares of what is due to their houses.

40. The foregoing can be mathematically translated to mean that the third house takes one-half of the estate, the fourth house takes one-third of the estate and the first and second houses take one-twelfth each of the estate.

41. By applying the above principle in light to **Sections 35 to 38** of the Act, it is clear that the proposal made by the Petitioner will not meet the test. It is hereby rejected. A look at the proposal by the Objector, the same comes closer to the above analysis and can be safely treated as being fair and just as far as the distribution of the three properties is concerned.

42. The upshot is that the now residue of the deceased's net interstate estate therefore shall be distributed as follows:-

a. **KAKAMEGA/SHINYALU/1301:**

i. The following children of the third house to get **two shop doors in equal shares:-**

- ***Alexander Salim Shibanda Hamisi.***
- ***Janet Kadogo.***
- ***Caroline Kharamba.***
- ***Hamisi Hamisi.***

ii. The following children of the fourth house to get **one shop door in equal shares:-**

- ***Ramadhan Hamisi.***
- ***Nelson Iddi Hamisi.***
- ***Khasena Hamisi.***

iii. Mildred Amina Hamisi and Javason Muturi Hamisi to share **one shop door in equal shares;**

b. **KAKAMEGA/SHIAKHUNGU/1122:**

i. ***Difina Busolo Hamisi - 0.2826 Acres – Life interest.***

ii. ***Alexander Salim Shibanda - 0.3 Acres.***

iii. ***Janet Kadogo - 0.3 Acres.***

iv. ***Carolyn Khavaiba - 0.3 Acres.***

v. ***Hamisi Hamisi - 0.3 Acres.***

(c) **KAKAMEGA/VIREMBE/279:**

i. ***Mildred Amina Hamisi - 0.445 Acres.***

ii. ***Javason Muturi Hamisi - 0.445 Acres.***

iii. ***Ramadhan Hamisi - 0.445 Acres.***

iv. ***Nelson Iddi Hamisi - 0.445 Acres.***

v. ***Khasena Hamisi - 0.445 Acres.***

43. As I come to the end of this matter, parties are once again reminded that the above distribution did not take into account the other disputed parcel of land whose ownership was not proved. A Certificate of

Confirmation of the Grant shall henceforth issue.

Orders accordingly.

DELIVERED, DATED and SIGNED at Kakamega this 23rd day of July, 2015

A. C. MRIMA

JUDGE

In the presence of

N/A For the Petitioner

Mr. Mukabwa h/b for Osango.....For the Objector

Miss Selphar Court Assistant