



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 465 OF 1998

**IN THE MATTER OF THE ESTATE OF THE LATE WILLIAM ANYANJE
LIVELE.....DECEASED**

AND

ROSE KHAGALI ANYANJ.....PETITIONER

VERSUS

ROWENA MARY SHIGALI.....OBJECTOR

J U D G M E N T

1. The late William Anyanje Livele died on the 10th October 1997. Grant of letters of administration for his estate was issued jointly to the Petitioner and Objector, who are co-wives on the 23rd of September, 2014.
2. What remains to be determined is the distribution of the estate amongst the beneficiaries. Both the Petitioner and objector filed their respective affidavits on mode of distribution. The court ordered that before distribution is done, the matter do proceed to hearing by way of oral evidence. The Objector became the plaintiff whereas the Petitioner the defendant.
3. The Plaintiff testified and also called 2 witnesses. The gist of her evidence was that she got married to the deceased in 1983. By then, the deceased was already married to the Defendant herein as first wife and to one Joyce Nabwa who had by then passed away as the second wife.
4. The Plaintiff also testified that Joyce Nabwa was survived by two children, namely:- a) Lilian Mavisi Anyanje and b) Edgar Morgan Anyanje, while the Defendant had given birth to 10 children namely a) Nicholas Anyanje, b) Linda Isabelle Olando, c) Douglas Anyanje (deceased), d) Arthur Greene Ligale (deceased) e) Rosebella Ingado Ngoda (deceased), f) Regina Imiza, g) Allan Khayesi, h) Nelly Khavugwi, i) Emily Khashindu and i) Olive Musimbi. According to the Plaintiff, her only child is Rowland Linyole Anyanje. Regarding the deceased's estate, the Plaintiff stated that the deceased left behind the following parcels of land:-
 - a) Tiriki/Senende/793
 - b) Nyangori/Kapsotik/1014
 - c) Nyangori/Kapsotik/308

While the liabilities were David Mberesia Asega and Philip Aluda, the latter being the son to the Defendant's brother though she could not say exactly the extent of the liability to him.

5. The Plaintiff also stated that by the time the deceased died, he had built a house for the Defendant as well as a house for herself, on the upper and lower portions of L.P Nyangori/Kapsotik/308. That the gate to the triangular-shaped parcel of land is at the Defendant's home and that both of them use the same gate for access to their respective houses. The Plaintiff also stated that she accessed her house through that same gate until 2012 when the Defendant and her children denied her access and that she now had to go through other people's properties to get to her home. She also said that by going through her neighbour's properties, she has to cross 2 rivers, and she says this access route is both long and inconvenient to her.

6. Regarding distribution of the deceased's estate, the Plaintiff testified that L.P Tiriki/Senende/793 belonged to somebody else though it had been registered in the deceased's name. She also said L.P Nyangori/Kapsotik/1014 belonged to her though it was registered in the deceased's name. She said she bought it with her own money. It is a plot at Serem market and the same measures 0.026Ha. She proposes that LP Nyangori/Kapsotik/308 measuring 5.4Ha should be distributed as follows:-

a) Defendant – 3.0Ha

b) Plaintiff – 1.2Ha

c) Lilian and Edgar Anyanje – 1.2Ha jointly

7. The Plaintiff also testified to the fact that LP.No.Nyangori/Kapsotik/308 was charged to Kenya Commercial Bank, Kisumu Branch for a loan taken by one Paul Titi (now deceased) for whom the deceased stood guarantor. She stated that she was willing to pay off the balance of the loan which stands at over kshs.400,000/= in order to have the security released. She however did not produce any documents to support her claim.

8. She therefore asked the Court to order the defendant to open the access road and also have the land on which their respective homes stand demarcated accordingly.

9. PW2 was Julius Lugadiro Samuel Anyanje, a younger brother to the deceased. He corroborated the Plaintiff's evidence about the access road. He asked the Court to share out the deceased's estate equally among the deceased's children. He also said that because of the shape of LP 308 it was not possible to establish an alternative access route for the Plaintiff.

10. Joseph Damugwa Shiverenje testified as PW3. He is the village elder where the Plaintiff and Defendant live at Kapsotik. He confirmed that the Defendant has blocked the access road for the Plaintiff and that the Plaintiff can only access her home by going through her neighbours properties. He also confirmed as did PW2, that there is no possibility of opening another access road for the Plaintiff. The Plaintiff then closed her case after PW3 testified.

11. The Defendant, Rose Khagali Anyanje testified as DW1. She did not call any witnesses. Her testimony was generally in tandem with what the Plaintiff told the Court. The only difference being that she would like the deceased's estate to be shared equally amongst his (deceased's) children. She stated that LP Nyangori/Kapsotik/308 was bought by the deceased and herself in 1960. She also agreed that LP Number Tiriki/Senende/793 belonged to the family of one Meshack and that the same had been given back to that family.

12. Regarding the access road, she said that the same was closed because the Plaintiff sometimes comes home in the night. She stated that another access road for the Plaintiff can be opened. Of her 3 deceased children, the Defendant stated that Douglas Anyanje died without issue, while Arthur Green Ligale was survived by 2 children, a boy and a girl, and further that her daughter Rosebelle Ligado who died in 2014 left behind 6 children, though the children live with their father. She asked the Court to

include the children of Arthur Greene in the distribution of the deceased's estate. She also told the Court that she was not aware of plot 1014. She also admitted to closing the access road on the Plaintiff and was not aware how the Plaintiff has been getting to her home. She also confirmed that adjacent to plot 308, there are other people's farms. She also stated that she has thought about an alternative route for the Plaintiff although she had never told her about it.

13. At the close of the hearing and on the application of the Plaintiff, the Court visited the scene during which it was established that the Plaintiff has no access to her home and that she has to cross 2 rivers on the lower part of the parcel to access her home.

14. At the close of the hearing parties agreed to file and exchange final written submissions which they did. I have carefully read through the rival submissions. The Defendant proposes, as she did in her evidence in chief. That the deceased's estate be shared equally among the children of the deceased save that the deceased's son who died without issue be excluded and also that the deceased's daughter who died in her own matrimonial home be excluded as beneficiaries. The Defendant also proposes that the two parcels of land 308 and 1014 be shared equally among the children of the deceased. The Defendant says nothing about the access road.

15. The Plaintiff proposes that having bought LP 1014 with her own money the same ought to be given to her absolutely. The Plaintiff submits that the Defendant has laid no claim to the said parcel of land. The Plaintiff also prays that provision be made for an access road to her home.

16. From all the evidence and submissions the only issue for determination is one of distribution. It is not disputed that LP Tiriki/Serende/793 though registered in the name of the deceased has been given to the family of Meshack Asega. Meshack's son, David Mberesia Asega is therefore the beneficiary of the said parcel of land.

17. There is also no dispute regarding LP No.Nyangori/Kapsotik/1014. The Plaintiff testified she bought the same and the Defendant said she knew nothing about it and does not want it. She asked the Court to give that whole parcel to the Plaintiff. The above being the position, the land parcel Nyangori/Kapsotik/1014 shall devolve to the Plaintiff absolutely.

18. With regard to LP Nyangori/Kapsotik/308, there is no doubt that this is the family land where the matrimonial homes of both the Plaintiff and Defendant are situated. From the evidence on record, the deceased had provided one gate to this family land and also provided an access road leading to the home of the Plaintiff in this case. The route that is proposed by the Defendant touches the river bank.

19. In my considered view, such an access for the Plaintiff would neither be safe nor convenient. Accordingly, I rule that the access road as established by the deceased shall remain a permanent access road to the family land being LP Nyangori/Kapsotik/308.

20. As to the actual shares of the said parcel of land among the deceased's beneficiaries, it is noted that the deceased was survived by the Defendant and Plaintiff who are the widows and the following children:

1. Nicholas Anyanje (son)
2. Allan Khayesi Anyanje (son)
3. Edgar Morgan Anyanje (son)
4. Rowland Linyole Anyanje (son)
5. Linda Isabel (daughter)
6. Rosebella Ingado (daughter) – deceased

7. Regina Iminza (daughter)
8. Nelly Khavugwi (daughter)
9. Emily Khashindu (daughter)
10. Pauline Musimbi (daughter)
11. Lilian Mavisi Anyanje (daughter)
12. Douglas Anyanje

21. The law of succession Act (cap 160) recognizes all surviving children of a deceased as beneficiaries. The law also provides for the mode of distribution of assets where there is more than one house. Section 40 covers this situation. It states “40(1) Where an intestate has married more than once under any system of law that permits polygamy his personal and household effects and the residue of the net intestate 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 be in accordance with rules set out under sections 35-38”.

22. From the above it is clear that where there is more than one house, the Court in determining the distribution of assets has first to consider the number of children in each house. Then it has to add the name(s) of the surviving spouse, just like each of the children in that house. In as much as possible, distribution of assets should be equal. A house with more surviving children will naturally have a bigger share to inherit.

23. Since the only parcel of land to be distributed is plot No.Nyangori/Kapsotik/308 measuring 5.4Ha the same is to be distributed equally amongst the surviving beneficiaries who in this case are 11 as two are deceased. This means that each of the 11 beneficiaries shall have 0.49Ha. The Plaintiff’s son and the Defendant’s youngest son shall inherit the respective homesteads of their mothers after their mother’s life interests in the same. Therefore confirmation of grant shall be done in accordance with this distribution. It is also ordered that the access road to the Plaintiff/Objector homestead be retained as was the position before the demise of the deceased herein.

24. Each party shall bear her own costs.

Judgment delivered, dated and signed in open Court 29th day of October 2015.

RUTH N. SITATI

J U D G E

IN THE PRESENCE OF:

M/S AKINYI H/B MRS MULESHEPLAINTIFF/OBJECTOR

M/S RAUTO (ABSENT)DEFENDANT/PETITIONER

MR. OKOIT - COURT ASSISTANT