



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
SUCCESSION CAUSE NO. 120 OF 2012

**IN THE MATTER OF THE ESTATE OF BWIRE ODAIRO NAMAGWA-----
DECEASED**

AND

**JOSEPHINE AWINO BWIRE & ANJELIVA ACHIENG BWIRE-----
PETITIONERS**

VERSUS

BENARD ACHIBO BWIRE & ANO. ----- APPLICANTS

RULING

1. Bernard Achibo Bwire (Bernard), Josephine A. Bwire (Josephine) and Anjeliva Achieng Bwire (Anjeliva) are the joint Administrator/trixes of the Estate of Bwire Odairo Namagwa (the Deceased). Bernard on the one hand and Josephine and Ajenliva on the other, have taken different positions as to how the Estate of the Deceased ought to be distributed and have asked this Court to carry out that task.
2. That task is, in my estimation, made much the easier by the Consent entered by the parties herein on 8th June 2015. The terms are as follows:-

By consent

1. **The list of beneficiaries filed by the firm of Ojiambo & Co. on 8th June 2015 be adopted as a common list of beneficiaries and include;**
 - a. **Atanas Onyango (Purchaser)**
 - b. **Augustine Odundo (Purchaser)**
2. **The Court on the basis of the oral Evidence received and the Affidavits in support of the Summons for Confirmation determine the question of distribution**
3. **Parties to file exchange submissions with 14 (fourteen) days.**
4. **Mention on 30th June 2015.**
3. **The Estate of the Deceased comprises of that Land parcel known and described as Samia/Bukangala”A”/543. From the Certificate of Official Search filed at the presentation of these proceedings that land measures 9.8 hectares (approximately 24.2 acres) As it is agreed by the**

parties that the purchasers' interests of Atanas Onyango (1 acre) and Augustine Makhulo (2 acres) should be recognized, the land available for distribution is 21 acres (24-3).

4. The position taken by Josephine and Anjeliva is that, in his lifetime, the Deceased had made gifts to children of the 1st and 2nd household and so they should not be considered for any further benefit. This court is asked to give regard to the provisions of Section 40 of the Law of Succession Act.
5. Bernard does not agree. His position is that the Samia/Bukangala 'A'/543 was the only land parcel owned by the Deceased and that the lands now held by the sons of the 1st house were never the property of the Deceased.
6. The Deceased died on 28th March 1998 and the law applicable to this dispute are the provisions of The Law of Succession Act as interpreted by our Courts. Secondly, the identity of the beneficiaries of the Deceased Estate is not in contention as this was settled the Consent of 8th June 2015. They are;-

Paul Odairo (Deceased)

Daniel Namagwa

Nicholas Wandera (Deceased)

Bernard Achibo

Prisca Ouma

Felistas Mayiga

Faustina Akuku(Deceased)

Maria Makokha

Salome Mudibo (Deceased)

Getrude Nyongesa

Wilbroda Egesa

James Otoro

Selina Ajiambo

Albert Owino,

Gabriel Bwire

Silvester Ouma

Chirspinus Omondi(Deceased)

Christine Awori

Rosemary Achieno

Wilmina Akochi.

Josephine Awino &

Anjeliva Achieng

The last Two are the Surviving wives of the Deceased and the rest are his children. Where the children have died, their families are taken as a unit.

7. It being agreed that the Deceased died Intestate and that he was polygamous, the distribution of his Estate is governed by the provisions of section 40 of the Law of Succession Act which reads :-
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 section 35 and 38.**
8. The Spirit of Section 40 is equal distribution of the Estate of the Intestate amongst his children. But my understanding of Josephine's and Anjeliva's argument is that equal distribution herein would work out inequity as some Children of the Deceased already benefitted from advancements made to them by the Deceased in his lifetime.
9. Section 28 of the Law of Succession Act gives The Court great latitude to correct any inequities that may be created by the principle of Equal Distribution enshrined in Section 40. Section 28 provides:-

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

- a. **The nature and amount of the deceased's property;**
 - b. **An past, present or future capital or income from any source of the dependant;**
 - 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 provisions for the dependant.(my emphasis)**
10. Have Josephine and Anjeliva provided this Court any ground/s to intervene by fiat of the provisions of Section 28? The onus was on the two to prove on, a balance of probabilities, that the Deceased, in his lifetime, gave gifts or advancements to some of his children and it would therefore be inequitable for those children to now take up any shares or shares equal to the shares of the other children.
11. Emerging from the evidence of both sides of the divide, the Deceased had in his lifetime given land to his sons Paul, Patrick and Nicholas. Daniel Namagwa (OW1), the Eldest surviving son of the Deceased and a witness for Bernard said as follows in his testimony

"I reside on formerly community land as a son of Bwire"

Bernard himself said

"The families of Paulo, Daniel, Nicholas have got the community land, so they will not get part of the Estate"

There is some consensus by the parties that as the families of Paulo, Daniel and Nicholas have benefitted from lifetime advancements, they do not deserve a share of the Deceased's Estate.

12. The contention surrounds the position of Bernard. There is evidence that Bernard has 2 acres that previously belonged to one Were Ngami. How did he acquire this land? OW1, Bernard's own witness, said

"Bernard took some Community land"

Later,

"Bernard never bought the land, he got the land by virtue of being a family member and a son of the Deceased."

In re-examination, the witness testified

"The land on which Achibo occupied originally belonged to Were Ngami"

He then concluded,

"Were moved out of the land because the land belonged to our clan called Bangari"

As for Bernard, he testified;

"I got the land where I reside because of my relationship with Were Ngami."

And in answer to a question posed by Court he said,

"The land I got from Were was a gift."

13. My evaluation of this evidence is that Bernard has 2 acres of land outside the Estate land. He resides on this land. The 2 acres originally belonged to Were Ngami who moved away because the land belonged to the Clan of the Deceased. Also emerging from the evidence of Bernard's own witness is that Bernard got this land by virtue of being a family member and a son of the Deceased. It seems to me that the Deceased advanced these 2 acres, which had reverted to his clan, to Bernard. That was an advancement made during the lifetime of the Deceased.

14. I have already said that there seems to be an accord that Daniel and the families of the Late Paul and the late Nicholas need not benefit from the Deceased's net estate as they already hold land given to them by the Deceased during his lifetime. What The Court must then determine is whether, given that Bernard had benefitted from 2 acres, he ought to get a share of the net Estate of the Deceased. If this court were to include Bernard as a Dependant, then using the formula of Section 40 of the Act, the Estate of the Deceased would have to be divided equally in 19 units. Notice that the Court has, in obedience the provisions of Section 40, included the two surviving wives as additional units. The net land available for distribution is 21 acres and so each unit would get 1.1 acres. I take a view that it would be patently unfair for Bernard, who already holds 2 acres, to take another 1.1 acres equal to the size of his siblings entitlements.

15. That said, it may be just that Bernard gets some land, however small, from his father's Estate also because in her testimony to Court, Anjeliva was agreeable to him getting the portion where his mother was buried. For that reason I make an order that Bernard gets 0.25 acre and the remainder being 20.75 be shared equally in 18 units. Each unit shall therefore get 1.15 acres. For the sake of clarity, the Estate of the Deceased is Distributed as follows:-

1. Atanas Onyango (purchaser) – 1 acre
2. Augustine Makhulo (purchaser) – 2 acres
3. Josephine Awino – 1.15 acres
4. Anjeliva Achieng – 1.15 acres

5. Bernard Achibo Bwire- 0.25 acre
6. Prisca Ouma – 1.15 acres
7. Felistus Mayiga – 1.15 acres
8. Family of Faustina Akuku - 1.15 acre
9. Maria Makokha – 1.15 acres
10. Family of Salome Mudibo – 1.15 acres
11. Getrude Nyongesa – 1.15 acres
12. Wiproda Egesa – 1.15 acres
13. James Otoro – 1.15 acres
14. Selina Ajiambo – 1.15 acres
15. Albert Owino – 1.15 acres
16. Silvester Ouma – 1.15 acres
17. Family of Chrispinus Omondi – 1.15 acres
18. Christine Awino – 1.15 acres
19. Rosemary Achieno – 1.15 acres
20. Wilmina Akochi – 1.15 acres

Any beneficiary is at liberty to renounce his/her entitlement.

16. No order on costs.

Dated, signed and delivered at Busia this 24th day of November 2015.

F. TUIYOTT, J.

J U D G E

In the presence of:-

Oile – Court Assistant

..... for Petitioners

..... for Objectors