

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 505 OF 2006

IN THE MATTER OF THE ESTATE OF ELIJAH KIDIGU AGIZA . DECEASED

ROSE KIDIGU AGIZA PETITIONER

V E R S U S

PETER L. R. KIDIGU OBJECTOR

J U D G M E N T

The late **ELIJA KIDIGU SOGOMI** died on the 31.5.1990. Rose Agiza Kidigu who is a grandchild applied for letters of administration intestate and was issued with a grant on 14.11.2006. The deceased owned plot number **N.MARAGOLI/KISATIRU/492** measuring 0.6 hectares. The petitioner filed an application dated 8.2.2007 to have the grant confirmed and she was to take the entire plot. The objector Peter Kidigu filed an application 15.5.2007 seeking to have the grant revoked. Parties agreed to have the earlier grant revoked and a fresh grant to be issued to both parties. The only issue that remained was distribution of the estate. Rose Agiza filed a fresh application dated 20.4.2012 to have the grant confirmed while Peter filed his own affidavit on distribution. The matter proceeded to full hearing.

According to Peter Lumula who testified as PW1 he is also a grandchild of the deceased. His grandfather had five sons namely **ERASTUS, LABAN, JETHRO, HESBON** and **MICHAEL (MARIKO)**. The petitioner is the daughter of Hesbon. It is his evidence that his grandfather had divided the land equally amongst his five sons. Jethro sold his share to Laban and Erastus. Mariko left no family. All the five sons of his grandfather are deceased. The only dispute is the share of Mariko and he would like to have it divided equally amongst the remaining four families. He contends that the petitioner sold her father's portion as well as the portion of Mariko. The other portions are there. He denied that Mariko sold his share to Hesbon.

PW2 REBA LUMULA is the wife of Erastus. I believe is the mother of PW1. She testified that she lives on the suit land and denied that Mariko sold his share to Michael.

The petitioner testified that her late grandfather had five sons as stated by PW1. She also indicated that her grandfather had divided his land to his children and that their plot is 0.24 hectares. Her two uncles sold their shares and moved out. Jethro sold his share to Laban and Laban combined the two plots. Mariko sold his share to Hesbon (her father) and also moved to where Jethro had gone. Erastus simply remained on the portion given to him by his father. Laban and his wife are deceased but their family lives on the land. Therefore the suit land is occupied by three families and it is her evidence that there are boundaries on the land. She would like to be given the share of her father who had also bought Mariko's share. She denied that Jethro sold his land to Erastus.

The only issue for determination is the distribution of the estate. It is agreed by both parties that Jethro sold his share and moved out. According to the objector Jethro sold his share to two people namely Laban and Erastus. According to the petitioner Jethro's share was sold to Laban. The other contention is whether Mariko sold his share to Hesbon. Whereas the petitioner testified that her father bought Mariko's share, the objector and his mother denied that fact.

The land in dispute is 0.6 hectares. It is not clear whether the deceased had divided the land amongst his five sons equally or some sons got bigger portions. Assuming the land was divided equally then each of the sons got 0.12 hectares. Assuming Jethro sold his share to both Laban and Erastus equally then it

would mean the shares of Laban and Erastus are to be increased by 0.06 hectares. That would give both Laban and Erastus 0.18 hectares each. The petitioner showed a sale agreement between her father and Mariko dated 16.10.1990. Unfortunately the same was not produced. According to the petitioner's mode of distribution she wanted to give the objector 0.16 hectares and the family of Laban 0.16 hectares while her family gets 0.24 hectares.

If the court were to go by the contentions by the objector that Mariko never sold his share to Hesbon then the share of Mariko measuring 0.12 would be divided equally amongst the remaining four families. That would give each family an extra 0.03 hectares. Given the evidence of the petitioner I am satisfied that Mariko sold his share to Hesbon. The objector only wants to benefit from that share. It could also be true that the objector's father never bought any share from Jethro. As indicated herein above it is also not clear whether the shares were equal amongst the five sons. If that were to be the case then it is not clear why the petitioner would like to give the family of Laban 0.16 hectares instead of 0.24 hectares which is equal to her father's share. This is in line with her evidence that Laban bought Jethro's share. If I go by the evidence of the petitioner it would mean the objector's family only gets 0.12 hectares while the families of Laban and Hesbon get 0.24 hectares each.

Given the evidence on record and having indicated that there is strong evidence to show that Hesbon bought Mariko's share, I will proceed to distribute the deceased's estate as follows:

1. **Rose Agiza Kidigu** - - - **0.22 Ha.**
2. **Peter Lumula Kidigu** - - - **0.19 Ha.**
3. **The family of Laban Kidigu** - - - **0.19 Ha.**

According to the petitioner Laban and his wife are deceased but they left their children. The petitioner shall provide a name of one of Laban's son or daughter who shall be registered in trust for his family members. The parties herein shall also hold their shares in trust for the other family members. The grant is confirmed on the above terms. Each party shall meet his/her own costs.

Delivered, dated and signed at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E