REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE NO: 241 OF 1990

IN THE MATTER OF THE ESTATE OF JASON AKWANYI.....DECEASED

GAUDENZIA ALUOCH AKWANYI.....PETITIONER

VERSUS

RISPER ALOO AKWANYI.....OBJECTOR/RESPONDENT

R U L I N G

The late JASON AKWANYI died on 10/6/1966. A grant of letters of administration intestate was issued to his son CLEMENT OMONDI AKWAYI on 15/1/1991. The grant was confirmed on 15/7/1996 and plot number N.WANGA/KOYONZO/655 was distributed to the petitioner.

Gaudenzia Akwayi, the deceased's widow filed summons for the revocation of the grant dated 18/8/1998. The grant and certificate of confirmed grant were revoked by an order of this court issued on 26/9/1999 and Gaudenzia Akwayi and Risper Oloo Akwayi were appointed as joint administrators. Gaudenzia Akwanyi filed the application dated 9/10/2001 seeking to have the grant confirmed. Agnes Achieng filed affidavit of protest she stated that he deceased was her father through one Zaina Juma Akwanyi. A second application for confirmation of the grant was filed on 14/11/2011. Both Risper Aloo Akwanyi and Gaudenzia Alouch Akwanyi swore a joint affidavit for the application. Clement Omondi responded to that application by a replying affidavit sworn on 15/2/2013. The matter proceeded by way or oral evidence.

PW1, CLEMENT OMONDI AKWANYI testified that the deceased was his father. He had three wives namely;

1. **GAUDENCIA ALUOCH** who had two daughters, one daughter, Margaret is alive.
2. **ZAINA JUMA** (deceased) She had three children but one is deceased. Those alive are Agnes and Roselida who are married.
3. **RISPA OLOO** had two children Clement and a daughter, Awino AKwani.

According to Clement, he the deceased had only one plot,land parcel number N.WANGA/**KOYONZO/655** measuring 12.4 acres. He testified that clan members met on 3/11/2009 and agreed that Clement was to take the land while the daughters were to have life interest. He is the only sons of the deceased.

PW2, RISPA ALOO is the deceased's third widow. She testified that her husband had three wives. She would like the land to be divided amongst the three wives. Her two other co-wives, Gaudenzia and Zaina Juma are now deceased.

PW3 AGNES ACHIENG is the deceased's daughter. His mother is Zaina. She has another sister who is live. PW4 AWINO AKWANYI is also the deceased's daughter. She is the daughter of PW2.

The other beneficiaries did not call any evidence. Parties are agreeable to what constitute the estate and also agree on the list of beneficiaries. The only dispute is how the estate should be distributed.

The evidence show that the deceased was polygamous. He had children from all his three wives. Although Clement contends that he is the only son and the clan members gave him the land, the law of succession does not discriminate between male and female children. Life interest to the daughters cannot be proper as the daughters have their own children who would be entitled to inherit similarly, Clement own mother, Rispa Aloo is agreeable to have the land distributed to the other wives the submissions by their advocates is that the land be distributed equally to the three houses.

The court is allowed to treat each widow as an extra unit. The first house had two daughters. If the deceased Gaudenzia is included, this house will form three units. The second house of Zaina had three children. If the late Zaina is included it will make four units. The 3rd house had two children Rispa is alive and this makes three units. The proposal by the late Gaudenzia and Rispa as per their joint affidavit is to share the land equally between **Margaret Weyene Kubanda** and **Clement**. Margaret is a daughter from the first house. This will mean that the children from the second house would not inherit. Agnes, PW3 is from the second house of Zaina. None of the witnesses testified about the deceased beneficiaries. It's not clear whether those beneficiaries left children. Margaret is alive from the first house. Her mother Gaudenzia filed the original objection and has been actively pursuing the matter until her death. Agnes, sister, Roselida did not testify and it's not clear whether she would like to be included as a beneficiary. The 3rd widow, Rispa and her two children are alive.

If the 12.4 acres of land was to be divided equally among all the three widows and their children who form a total of ten (10) units, then each of them would get 1.4 acres. The first and 3rd house would each get 3.72 acres while the second house would get 4.96 acres. Clement contends that he is the only son and the one living on the suit land. All his sisters are married.

Taking into account the fact that there are three living beneficiaries from the 3rd house, I will distribute the deceased estate as follows;-

<u>Plot Number S. WANGA/KOYONZO.655</u>

1. MARGARET KUBENDE representing the first house - 3.5 acres
2. AGNES ACHIENG representing the second house - 3.5 acres
3. CLEMENT OMONDI AKWANYI representing 3rd house- 5.4 acres

Each party shall meet his/her own costs.

Dated, delivered and signed at Kakamega this 17th day of September 2014.

SAID J. CHITEMBWE

JUDGE