



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Succession Cause 519A of 2000**

**IN THE MATTER OF THE ESTATE OF REUBEN ALUMBA NASIBI .... DECEASED**

**BENSON ANGOLO NASIBI ..... PETITIONER**

**V E R S U S**

**ROSE APWOKA .....1<sup>ST</sup> OBJECTOR**

**BERITA KAKAI ..... 2<sup>ND</sup>OBJECTOR**

**R U L I N G**

The late **REUBEN ALUMBA NASIBI** died on the 9.3.1974. The petitioner herein who is one of his sons petitioned for a grant of letters of administration and was issued with a grant on the 12.4.2001. The grant was subsequently confirmed on the 29.12.2005. The objectors herein filed their application for the revocation of the grant on the 28.9.2006 contending that the grant was obtained fraudulently through the making of false statements and that all the beneficiaries were not included. Parties agreed to argue the objection by way of oral evidence.

**BERITA KAKAI**, the 2<sup>nd</sup> objector testified that she was married to the deceased and they got four children. The deceased had two other wives namely **DORIKA AWINO** and **MELISA** who are deceased. The petitioner herein is the son of Melisa who was the 2<sup>nd</sup> wife. The 2<sup>nd</sup> objector was the 3<sup>rd</sup> wife. Her evidence is that her late husband left properties. The succession was done without her knowledge and she only came to know about it when the petitioner stopped her from cutting a tree. The petitioner told her that he had done succession and the land was his. The objector would like to be made the administrator and does not agree with the mode distribution by the petitioner. Her further evidence is that she had two sons and two daughters with the deceased. The two sons are also deceased and the two daughters are married. She had left the deceased but he went to pick from where she had been married and took her back to his homestead. The deceased died while they were living together. She denied that she has remarried. The 2<sup>nd</sup> wife **DORCAS** has two daughters who are still alive. She had a son but he died. **MELISA**, the 3<sup>rd</sup> wife had two sons, namely **BENSON**, the petitioner and one **BOAZ AMATSA**. **MELISA** also had Jackson Walumbe who is deceased.

**ROSE APWOKA (PW2)** is the 1<sup>st</sup> objector. Her evidence is that she was the wife **AMBROSE APWOKA ALUMBE** who is deceased. Her late husband was the son of the deceased herein. She had nine children with Ambrose, two daughters are still alive. She learnt about this succession cause when the petitioner stopped them from cutting a tree that was a t PW1's plot. They were not consulted when Benson filed the succession. PW1, was the third wife of Reuben. The petitioner told them to move out of the plot. The deceased left a lot of properties including plots and shops at Luanda Town. They live on the

plots. The petitioner is the one benefiting from the estate. They thought that he would distribute the estate but he didn't. She would like PW1 to be the administrator as she is the only widow. Her deceased husband was not given land by his father. Her husband had a plot but she sold it when he died and used the money to educate her children.

Three witnesses testified for the petitioner. **DW1, NASIBI REUBEN ALUMBE**, is the petitioner's son and a grandson to the deceased. His evidence is that he knows the objectors. Rose Apwoka (PW2) was the wife to a step son of his grandfather. The step son was Ambrose Apwoka. Rose was given land through her husband this being plot number **W/BUNYORE/EBUSAKAMI/2206**. Ambrose was also given plot number **W/BUNYORE/EBUSAKAMI/1969** measuring 0.4 acres. There was also a third plot and Rose sold it. DW1, further testified that Berita, (PW1) had another husband and she got a son with one **KWIYA**. Berita had two daughters with the deceased namely **SALOME** and **DAMARIS**. After the death of his grandfather Berita got another son called **MESHACK ONDIEKA** with another man. Berita re-married three times but currently lives on the land given to her by the deceased. One of Berita's daughters is deceased and the other one is alive but married. According to DW1, Berita was only a concubine to his grandfather. The deceased had two wives **MERISA AKHOYI** and **DORICAS**. Doricas was the 1<sup>st</sup> wife and she came with Ambrose, PW2's husband. Doricas had two daughters with the deceased. Melisa is the grandmother to DW1. She had three sons namely the petitioner, Boaz and Jacktone. Jacktone is deceased. The objectors were not included as they had already been given their shares.

**DW2, BENSON ANGOLO ALUMBE NASIBI**, is the petitioner. His evidence is that Rose Apwoka is his sister in-law and Berita is like his step mother. She was married to his father. He did not give Rose Apwoka anything because his late father had given Ambrose Apwoka plot number **W/BUNYORE/EBUSAKAMI/2206** and **1969**. The two plots were given to Ambrose by the deceased and when registration was done the plots were registered directly in the names of Ambrose. By that time the petitioner was only 17 years old and could not be registered as a proprietor. Ambrose was about 36 years old during the time of registration. The petitioner contends that Berita got married to several other husbands after the death of the deceased. She got married to one Boaz Indiaka and they had a child called Meshack. DW2 produced a Wedding invitation card to show that Berita had changed her name from that of the deceased. Berita had two daughters with his father. When Ambrose was given his land he moved out and went to settle on his land.

**DW3, BOAZ AMASA**, is a brother to **DW2** and a son to the deceased. His evidence is similar to that of DW2. According to him adjudication of the land was done in 1969 and he was still young by then. Berita got married five months after the death of their father. Ambrose had two sisters namely **PRISCILA** and **ROSE**. They were not given any property.

The main issues for determination are whether the objectors are beneficiaries to the deceased's estate. Whereas the objectors contend that they are the widow and daughter in-law of the deceased, the petitioner maintains that they are not entitled to inherit the deceased as the widow got remarried and the daughter in-law got her share through her late husband. The petitioner maintains that Berita got married to one Boaz Indiaka and they got a son by the name Meshack. He further maintains that his brother Ambrose was given two parcels of land by the deceased and therefore the sister in-law cannot seek to inherit the deceased. Under section 35 of the Law of Succession Act Cap 160 Laws of Kenya the interest of a surviving widow shall determine upon her re-marriage to any person. Berita maintains that she had left the deceased and got married but the deceased went for her and took her back to his homestead. The evidence on record does not show when Meshack was born. The petitioner contends that Berita got married after his father's death but there is no evidence as to when that marriage was conducted and when Meshack was born. I note that the deceased died a long time ago but Berita still lives on the estate. According to DW1 Berita is living on a plot that she was given by the deceased. It is not clear when Berita left the homestead of the deceased, got remarried, later got divorced and went back to the deceased's homestead.

It is clear from the evidence on record that Berita had children with the deceased. According to her she had two sons and two daughters with the deceased. DW1 testified that only one daughter of Berita is

alive. Although the said daughter has not come to court to claim a share of her deceased father's estate the petitioner and his brother should know that under the law of succession, all the children of the deceased are entitled to an equal share of their parent's estate whether the child is a son or a daughter. **Section 38** of the Law of Succession Act states as follows:-

**“38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”**

It should be clear to the petitioner that his step mother can still come through her daughters and claim inheritance. The daughters have not filed any document to renounce their share of inheritance. I therefore find that Berita is still the deceased's widow. There is no evidence that Berita used to be called **BERITA REUBEN ALUMBE** and has changed her name to **BERITA KHAKAYI KWEYA** as alleged by the petitioner. The invitation card produced by the petitioner does not prove that by 2003 Berita had been married by somebody else. Berita is entitled to inherit the deceased estate. Her children are also entitled to inherit the estate of their late father. The contention by DW1 Nasibi Reuben Alumbe that Berita was a concubine is not true. Indeed when his father DW2 testified he referred to Berita as his step mother. The deceased had three wives and the estate was only distributed to the family of Melisa, the 2<sup>nd</sup> wife. DW1 further contended that Ambrose Apwoka was a step son. Under the provisions of section 29 Law of Succession Act a dependant does not have to be a biological son. However, DW2 did testify that Ambrose was his brother from the 1<sup>st</sup> wife Doricas. Doricas had two daughters with the deceased also and they are alive. They are entitled to a share equal to that of the petitioner and his brothers.

As regards Rose Apwoka it is the petitioner's contention that Ambrose, Apwoka's husband, was given his own property. The official search for plot number **W/BUNYORE/EBUSAKAMI/2206** shows that it was done on 15.4.1969 and was a first registration. Plot number 1969 was also registered on the same date as a first registration. Plot number 1969 is 0.4 acres while 2206 is 0.2 acres. The confirmed grant issued on the 29.12.2005 had several properties and they were to be distributed in the following manner:-

**W. BUNYORE/EBUSAKAMI/1972**

BENSON ANGOLO A. NASIBI - WHOLE PARCEL

**W. BUNYORE/EBUSAKAMI/1976**

BENSON ANGOLO A. NASIBI - WHOLE PARCEL

**W. BUNYORE/EBUSAKAMI/2321**

BENSON ANGOLO A. NASIBI - 0.1 ACRES  
BOAZ AMASA ALUMBE - 0.1 ACRES  
JACKSON OTIATO ALUMBE - 0.1 ACRES

**LUANDA MARKET PLOT NO. 36 - THREE SHOPS TWO DOORS**

BENSON ANGOLO A. NASIBI

**W/BUNYORE/EBUSAKAMI/1888**

BOAZ AMASA ALUMBE - WHOLE PARCEL

**W/BUNYORE/EBUSAKAMI/2147**

BOAZ AMASA ALUMBE - WHOLE PARCEL

**LUANDA MARKET PLOT NO. 35 - THREE SHOPS TWO DOORS**

BOAZ AMASA ALUMBE

**W/BUNYORE/EBUSAKAMI/2163**

BOAZ AMASA ALUMBE - WHOLE PARCEL

**W/BUNYORE/EBUSAKAMI/2222**

BOAZ AMASA ALUMBE

- WHOLE PARCEL

**LUANDA MARKET PLOT NO. 35 - THREE SHOPS ONE DOORS**

BOAZ AMASA ALUMBE

**LUANDA MARKET PLOT NO. 36 - THREE SHOPS ONE DOORS**

BOAZ AMASA ALUMBE

The widow to Ambrose maintains that her late husband was not given any land by the deceased. I have seen the official search for some of the deceased's properties, namely plot number **W/BUNYORE/EBUSAKAMI/2163(0.6 acres), 1883 (1.4 acres), 2147 (0.2 acres), 2321 (0.3 acres), 1976 (0.8 acres) & 1972 (1.6 acres)**. They were all opened on the 15.4.1969 the same date as plot numbers 2206 and 1969. I am satisfied that the two plots registered in the names of Ambrose were given to him by the deceased. **Section 42** of the Succession Act allows the property that has been given to a child during the deceased's lifetime to be taken into account in determining the share of the net intestate estate accruing to the child. That being the case the two plots given to Ambrose will have to be taken into account in determining his share of the deceased's estate.

There is no valuation of the deceased estate. Some of the properties seem to have been developed while others are empty plots. Having found that Berita is the deceased's widow I will proceed to nullify the grant issued to the petitioner herein and direct that a fresh grant be issued to the widow jointly with the 1<sup>st</sup> objector Rose Apwoka and the petitioner Benson Angolo Nasibi. The administrators to carry out valuations of the deceased's estate using the proceeds from the rent and thereafter make an application in court indicating how they wish to distribute the estate.

In the end, the application for the revocation of the grant is allowed. The confirmed grant is hereby nullified and a fresh one shall be issued as stated herein. The new administrators to administer the estate and file an application showing how they wish to distribute the estate. The estate should be valued so that the shares of each beneficiary can be determined. Any beneficiary who intends to relinquish his or her share is at liberty to approach the court and confirm the position. Each party to bear their own costs.

***Delivered, dated and signed at Kakamega this 7<sup>th</sup> day of February, 2013***

**SAID J. CHITEMBWE**

**J U D G E**