



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Succession Cause 741 of 2007**

**IN THE MATTER OF THE ESTATE OF SYPHROSE KHAYATI.....DECEASED**

**PASILIDAH NASIMIYU MUKASIA.....PETITIONER**

**V E R S U S**

**FRANCIS MULUNDA MULUNDA.....OBJECTOR/RESPONDENT**

**R U L I N G**

The late SYMPHROSA KHAYATI died on the 7<sup>th</sup> of August 2001 at Shikutse sub-location. Her daughter, PASILIDAH NASIMIYU MUKASIA petitioned this court for grant of letters of administration intestate. A grant was issued to her on 24<sup>th</sup> April 2008. The deceased was a registered owner as a co-proprietor of half share of plot number **SOUTH KABRAS/LUKUME/921** measuring 6.4 Ha.

The objector, **FRANCIS MULUNDA MULUNDA** is the co-proprietor of the other half share of plot number 921. He filed an affidavit in protest to the confirmation of the grant. He further testified that he used to live with the deceased while the petitioner was married elsewhere. The deceased left him the land and she had sold part of it. According to the objector, the deceased sold **three (3)** acres to **Mukongolo Catholic Church** and another portion to one **Maina Luvonga**. He witnessed the sales but only the sale agreement for the three acres was produced. The

objector concedes that the deceased owned a half share of the land and the petitioner is the deceased's daughter. The deceased was the objector's grandmother and reiterates that the land was left for him.

The petitioner testified that the deceased her mother. They were five daughters from the deceased but she is the only one alive. She found that the objector had started selling the land. She would like to get her mother's share so that she can distribute the land to herself and the children left by her sisters. The area chief gave her a letter before filing the succession cause. There is a school on the plot and according to the petitioner, it is the objector who sold the land to the school.

**DW2, ZAKARIA MINJENDI MWALATI**, is the chief of Lukume location. His evidence is that the petitioner is the deceased's daughter. He gave a letter to the petitioner to start the succession cause. There is **Kongolo Primary School** and **Kongolo Catholic Church** on the ground. He signed the sale agreement for the church and by then the deceased was alive. It was Symphrose who sold to the church three acres of land. The school took possession of the land while the deceased was alive.

Counsel for the objector filed written submissions contending that the deceased sold three to the church and another 0.3 Ha. to Maina Luvonga making a total of 1.5 Hectares. this left the deceased's share to be 1.7 Hectares according to the petitioner.

The pleadings herein show that the objector sold part of the land and caused the land to be divided. This led to the creation of plot numbers **S. KABRAS/LUKUME/1583** and **1584**. That sub-division seems to have been done after the deceased's death. The record has only one official search for plot number **583** which is about 5.15 Hectares. The original title was closed on 21.11.2008 and this is after the deceased had died on 7.8.2001 and before the grant had been confirmed. I do find that that sub-division was irregular.

With regard to the sale of part of the land (0.3 Ha.) to John Luvuga, no documentary evidence has been produced. The court cannot conclude that the deceased sold land to the said John Luvuga. I do find that the deceased sold three acres of land only to the Kongolo Catholic Church. There is a sale agreement and DW2, the area chief did testify that the deceased was alive when the church bought the land and that it is the deceased who sold the three acres to the church.

The official search for the original plot number 921 show that the objector owned  $\frac{1}{2}$  share while the deceased also owned a  $\frac{1}{2}$  share. The title was registered on 10.7.1975 and it is 6.40 Ha. I do find that the deceased was entitled to 3.2 Hectares of the suit land. Having sold three acres, the remainder of the land shall form part of the net intestate of the deceased. The claims by the objector that the land was left to him by the deceased is a mere wishful thinking. The deceased left her daughter and grandchildren.

The deceased's estate comprising 3.2 hectares from plot number 921 shall be distributed as follows:-

**PLOT S. KABRAS/LUKUME/921 ( $\frac{1}{2}$  share)**

**MUKONGOLO PRIMARY SCHOOL - 3 acres**

**PASILIDA NASIMIYU MUKASIA - all the remainder to hold in trust for herself and the children of her deceased sisters**

Since the objector irregularly sub-divided the land, I do order that the sub-division of the original plot number **S. KABRAS/LUKUME/961** be nullified and the plot restored to its original position. Thereafter the deceased's estate be carved out and distributed as herein above stated. The remainder of the original plot number 961 after taking out the deceased's estate shall be registered in the names of the objector, **FRANCIS MULUNDA MULUNDA**. That is to say the objector shall take his  $\frac{1}{2}$  share measuring 3.2 Hectares and shall be at liberty to transfer his share to the people he sold to. Each party to meet his/her 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**