



REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 150 of 2010

MOHAMMED NAMBWAYA TONDI APPELLANT

V E R S U S

RAMADHAN MIRIKAU 1ST RESPONDENT

ASMAN BUTITI NAMBWAYA 2ND RESPONDENT

(Appeal against the judgment of [MR. B.O. OCHIENG, SRM] in Butere Senior Resident Magistrate's Court, Succession Cause No. 88 of 2003)

J U D G M E N T

This is an appeal from the judgment of Hon. B.O. Ochieng, SRM in Butere Succession Cause No.88 of 2003. The judgment of the trial court dismissed the appellant's application seeking to stop the confirmation of the grant in respect to the estate of **KATOLI MAKOKHA NAMBWAYA**. The appellant's grounds of appeal are that the trial court shifted the burden of proof, the court did not take into account the provisions of the Law of Succession Act and that the estate was distributed in accordance to customary law instead of the written law of succession.

Parties agreed to file written submissions but only the appellant complied. The submissions by the appellant expound on the above grounds. The main contention is that the deceased was survived by six sons and eleven daughters. The estate ought to have been distributed equally amongst the deceased's children or in the alternative equally amongst the six sons as the daughters were not claiming any part of the estate. The appellant further contends that the trial court relied on the evidence of the respondent to the effect that boundaries were fixed on the ground.

From the proceedings before the Butere court the deceased was survived by three widows, namely:-

1. Mariam Waswa Nambwaya
2. Mwanarabu Bwakali Kitoly
3. Mwanarabu Wesonga Kitoly

He was also survived by six sons, namely:-

1. Ramadhan Milkau
2. Asman Butiti Nambwaya

3. Mohammed Tondi Nambwaya
4. Gideon Oleyi Nambwaya
5. Wilson Alala Nambwaya
6. Rajab Opeso Nambwaya

The deceased also had eleven daughters, Amida, Auma, Rukia, Fatuma, Flora, Zainabu, Mwanaidi, Mwanaisha, Asmin, Fatuma, and Mwanakombo. The deceased's estate comprise of two plots namely – **N/WANGA/NAMAMALI/188** measuring 11.5 acres and **N/WANGA/NAMAMALI/189** measuring 5.5 acres. The appellant objected to the mode of distribution proposed by the respondent but the trial court dismissed that objection. The trial court resolved that the deceased's estate be distributed equally among the three households by taking into account the physical demarcation already existing on the ground. The court also directed that each of the three households get its share as it occupied on the ground. The widows were to later distribute to their children.

The appellant contends that the decision of the trial court was based on customary law as opposed to the law of succession act. The appellant maintains that **Section 40** of the Law of Succession Act was not followed and the estate ought to have been distributed equally. The proceedings before the lower court show that the dispute was also deliberated before the Matungu Land Disputes Tribunal. The appellant testified before that tribunal and stated that before his late father died he had divided his land whereby 8 acres was given to the younger wife and 4 acres each to the other two wives. The tribunal advised the parties to file a succession cause and have surveyors demarcate the acreage of each family. The upper portion was to be shared amongst three sons namely – **RAMADHAN MIRIKAU, SULEIMAN** and **RAJAB**. The lower portion was to be shared amongst the three other sons namely – **MOHAMED NAMBWAYA TONDI** (the appellant), **SHABAN** and **ASMAN**. During the hearing of the objection the respondent produced a sketch map prepared by the lands office showing the demarcations on the ground.

The trial magistrate held that there were demarcations on the ground and distributed the property as per the existing boundaries. Up to this moment the share of each beneficiary is not known. The survey was to be done and the shares ascertained. I do find that this appeal is premature as the survey has not been done to determine whether the portions for each beneficiary are equal or disproportionate. Even if the shares are not equal the court can determine the degree of disproportionality and make a decision. As of now the court cannot conclude that the distribution proposed by the respondent was unfair. In his application for the confirmation of the grant dated 20.2.2006 the respondents proposed to share the estate to all the beneficiaries. In the affidavit sworn by Asman Butiti Nambwaya on the 29.11.2004, it is indicated that the portion for each beneficiary was to be demarcated on the ground and the acreage ascertained. This has not been done as the appellant objected to that proposal. I do find that the appellant is the main obstacle to the distribution of the estate. Each of the beneficiaries should wait until when the demarcation is done. I do order that the respondent carry out a demarcation exercise as per the decision of the Butere court and file a report in court after the demarcation. The appeal lacks merit and the same is hereby dismissed. Parties herein are brothers and each shall meet his own costs.

Delivered, dated, and signed at Kakamega this 20th day of March 2013

SAID J. CHITEMBWE
J U D G E