



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 548 OF 2004**

**IN THE MATTER OF THE ESTATE OF RICHARD ESENDI CHAGADWA .....  
DECEASED**

**TIMOTHY ASILIGWA ESENDI ..... 1<sup>ST</sup> PLAINTIFF/OBJECTOR**

**HERMAN LOVEGA ESENGI ..... 2<sup>ND</sup> PLAINTIFF/OBJECTOR**

**V E R S U S**

**HUDSON ESENDI KIVUNAGA ..... PETITIONER/ DEFENDANT**

**J U D G M E N T**

The late **RICHARD ESENDI CHAGADWA** died on the 9.11.1997. One of his sons **HUDSON ESENDI KIVUNAGA** petitioned this court for letters of administration intestate. The deceased's two other sons **TIMOTHY ASILIGWA ESENDI** and **HERMAN LOVEGA ESENDI** objected to the petitioner's application. On the 27.10.2008 parties appeared before Justice Fred Ochieng and agreed to have Hudson Esendi Kivunaga and timothy Asiligwa Esendi as joint administrators. A grant was issued to them on 30.10.2008.

On the 19.6.2009 Hudson filed an application for the confirmation of the grant giving his proposed mode of distribution. On the 6.11.2009 Timothy Asiligwa also filed his application for the confirmation of the grant giving his proposed mode of distribution. The matter proceeded by way of oral evidence whereby Timothy became the plaintiff and Hudson became the defendant.

Timothy Asiligwa Esendi testified as PW1. His evidence is that his late father had three wives. Each wife had children as follows:-

**1. First wife – Bilha Inziani Esendi**

- a. Tom Muliango - son
- b. Julius Luvaha - son

**2. Second wife – Esther Alividza Esendi**

- a. Timothy Asiligwa Esendi
- b. John Muhenji Esendi
- c. Herman Luvega Esendi

**3. Third wife – Rosa Musuluve Esendi**

a. Hudson Esendi.

Timothy's further evidence is that, his father left plot number **KAKAMEGA/KEDOLI/90** measuring 1.9 Hectares. He testified that the defendant filed the succession cause without involving the other families. The deceased had subdivided his land amongst his three wives. The defendant included one Reuben in his proposed mode of distribution yet Reuben was given his land by the deceased in Nandi. The defendant has encroached on the shares of other children. His proposed mode of distribution is to give each of the above six sons 0.316 Hectares. PW2, Herman Lovega Esendi testified that he is in agreement with the evidence of PW1. The two sons from the first house are all deceased and they left their children. Similarly the plaintiff's brother John Muhenzi Esendi is deceased and he left his wife Roda Muhenzi and children. He would also like to have the property distributed amongst the six sons. It is his further evidence that his late father confided to him that he sired Reuben with his cousin's wife and he bought Reuben land at Kibiloi. Reuben went to the homestead when his mother passed away. He does not live on the suit land and also PW1 does not live there. Roda lives on the land. His late mother was utilizing about 2.4 acres while first wife was using about 1.6 acres while Hudson's mother was using about 0.8 acres. There was another portion measuring 0.5 acres that was being used commonly by the family but Hudson took it.

Hudson Kivunaga Esendi testified as DW1. He is in agreement with the plaintiff's evidence in relation to the deceased's three wives. His further evidence is that the deceased left one plot. In his proposed mode of distribution he has included Reuben Chagalwa who is his brother. The deceased brought home Reuben and showed him a place to build behind the third wife's plot. He bought Reuben another plot in Nandi in the year 2002. Reuben has moved to that plot and has left him his share of the land measuring about 0.45 acres. He has also taken the share of Alfred Mwilitsa Lijodi who is the son of Julius Luvaha Esendi. The share of Alfred is 0.15 acres as he bought him a plot at Ikolomani. The deceased also had daughters but they are not claiming any share. He also denied that he has encroached on any other beneficiary's share. The deceased had divided his land to his three wives. He further denied that the deceased bought Reuben land in Nandi. DW2 Reuben Chagadwa Esendi testified that he was born out of wedlock in 1953. His father took him while he was a child and he has been living on the suit land since his childhood. When the deceased died he was living on the land. The deceased had three wives and he divided his land amongst his three wives. He was also given his own plot near the third wife. His plot was about 0.4 acres. He planted tea leaves and was contracted to Mudete Factory. At one time Timothy tried to change the contract with Mudete to his name but DW2 went to complain and the agreement was restored into his name. He denied that he was given land by his father in Nandi. Hudson bought him land in Nandi and he left his portion on plot number **KAKAMEGA/KEDOLI/90** to Hudson. He moved to Nandi in 2004. DW3 Alfred Mwilitsa Lijoodi testified that he is the son of Julius. His father had also three wives and his mother is still alive. He has lived on the suit land and when he found that they were squeezed on the land Hudson bought him land at Ikolomani in Idakho and he moved out of the suit land. He left his portion to Hudson. His other two brothers still live on the suit land. His mother by the name Lena was divorced by his father when he was only five months old.

The evidence on record shows that the deceased had three wives. A letter from the area chief dated 25.10.2004 does confirm that the deceased had three wives and the children as per the evidence of PW1. The parties are in agreement that the deceased only left plot number **KAKAMEGA/KEDOLI/90**. The only dispute is whether Reuben should benefit from the deceased's estate and how the estate should be distributed. The proposal by the plaintiff is to distribute the estate equally amongst the six sons. That proposal leaves out Reuben as a beneficiary. The proposal also does not include Alfred in the share of Julius. On his part the defendant intends to take 1.6 acres which portion shall include the share of Reuben (0.45 acres) and the share of Alfred (0.15 acres). As to whether Reuben was the son of the deceased it is clear from the evidence on record that indeed he was the deceased's son and was brought home when he was still young. PW2 acknowledges that his father confided to him that he had sired Reuben. Although the plaintiff contends that Reuben was given land in Nandi there is no evidence to support that allegation. The deceased died in 1997 and by then Reuben was still living on the suit land. I do find that Reuben is the deceased's seventh son.

The proposals by both parties do take into account the shares of their deceased brothers. None of the

proposals considers the daughters. The official search dated 17.10.2004 shows that the suit land is 1.9 Hectares. Having found that Reuben is the son of the deceased I do distribute the deceased's estate equally amongst the seven sons of the deceased. This will give each son approximately 0.27 Hectares. Hudson shall take the share of Reuben measuring 0.27 Hectares. Hudson shall also take the share of Alfred which share is derived from the portion of 0.27 Hectares meant for Julius Luvaha. According to the plaintiff Julius left two children namely Queen Kagai and Geoffrey Mwilitsa. I do find that Alfred and his other brothers should also benefit from the share of Julius and I do determine the share of Alfred to be 0.15 acres.

In the end, the deceased's estate comprising of plot number **KAKAMEGA/KEDOLI/90** shall be distributed as follows:-

- |   |                 |                       |
|---|-----------------|-----------------------|
| 1. Josphat Luvaga Muliango  | (grandson)      |                       |
| 2. Sammy Muliango   | (grandson)      | 0.27 HA.              |
| 3. Donglas Chagadwa Muliango  | (grandson)      | Jointly               |
|   |                 |                       |
| 4. Maurice Muliango   | (grandson)      |                       |
| 5. Queen Kagai  | (granddaughter) | 0.27 HA. jointly      |
| 6. Geofrey Mwilitsa   | (grandson)      | less 0.15 acres       |
| 7. Timothy Asiligwa Essendi   | son -           | 0.27 HA.              |
| 8. Rodah Muhingi – daughter in-law representing the estate of the JULIUS LUVAHA | son -           | 0.27 HA.              |
|   |                 |                       |
| 9. Herman Lovega  | son -           | 0.27 HA.              |
|   |                 |                       |
| 10. Hudson Essendi Kivunaga   | son -           | 0.54 HA. + 0.15 acres |

I do further order that the caveats registered against the title by the parties be removed and the property be distributed in the above terms. The grant shall be confirmed as herein stated and it shall be issued to Hudson Kivunaga Essendi and Timothy Asiligwa Essendi. Each party shall meet his own costs.

**Delivered, dated and signed at Kakamega this 26<sup>th</sup> day of June 2013**

**SAID J. CHITEMBWE**

**J U D G E**