



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 749 OF 2007**

**IN THE MATTER OF THE ESTATE OF KATIMBA IMBIAKHA .....DECEASED**

**BELIA KHAYANGA IMBIAKHA ..... PETITIONER/APPLICANT**

**V E R S U S**

**MUSA IMBIAKHA KATIMBA ..... OBJECTOR/RESPONDENT**

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

The late **KATIMBA IMBIAKHA** died on the 29.4.2007 at Ikoli sub-location. His surviving widow **BELIA KHAYANGA KATIMBA** petitioned the court for grant of letters of administration intestate. The petitioner was issued with a grant on the 28<sup>th</sup> October 2009. The objector herein is the 1<sup>st</sup> born son of the deceased objected to the petitioner's application and also sought to be made a joint administrator. The matter went to full hearing.

The objector called six witnesses. He testified as PW1. His evidence is that his father had two wives namely- **RUTH KATIMBA** and **BELIA KATIMBA** (the petitioner). His mother had three boys and seven daughters while the petitioner had seven sons and seven daughters. His late father left the following properties:-

- |                         |   |                   |
|-------------------------|---|-------------------|
| i. <b>Chesero/828</b>   | - | <b>52.5 acres</b> |
| ii. <b>Chesero/744</b>  | - | <b>3.5 acres</b>  |
| iii. <b>Chesero/747</b> | - | <b>6.0 acres</b>  |
| iv. <b>Chesero/1061</b> | - | <b>2.5 acres</b>  |
| v. <b>Chesero/1070</b>  | - | <b>8.5 acres</b>  |

It is the objector's evidence that his father subdivided his land on the 15.4.2006. Plot number 828 was divided as follows:

- First house 40 acres
- Second house 12.5 acres

Plot number 1070 was also divided as follows:

- The objector 3 acres
- The deceased 5.5 acres

The objector went on to testify that plot numbers 1061, 744 and 747 were given to the second house. The second house uses those parcels of land to date. After the subdivision boundaries were placed on the ground. He produced the agreement for the sale of plot number 1070. It is his evidence that he purchased

plot number 1070 jointly with the deceased. He is the eldest son and the petitioner was married by his father before the objector was born. He sued his father before the Land Disputes Tribunal as he had moved the boundaries. The petitioner's family also occupies plot number 828. He would like the estate to be distributed in the above manner.

**PW2, ZAKAYO KATIMBA** is a brother to PW1 and he is in agreement with PW1's proposal. According to him the land was subdivided and all what remained was the transfer of the respective portions to the concerned parties. At one time their father changed his mind and they sued him. The subdivision of the land was done in the presence of elders. **PW3 SHADRACK KATIMBA** is also a brother to PW1 and PW2 and he is in agreement with their proposals on distribution. It is his further evidence that under the Kabras culture land is divided according to the number of houses and not the number of children. The number of children does not matter. When the sub-division was done he was given 12.5 acres. **PW4 SINEMA MUTALUNGU** was stood down by the court as his identity card appeared to reflect a different person.

**PW5, SHIRANDULA BURUDI**, testified that the deceased had two wives RUTH and BELIA. On the 15.4.2006 he was present when the deceased divided his land to his children. Sisal boundary to demarcate the subdivision was placed but it has since been removed. **PW6, GODFREY CHICHI MBURU MUKWANA**, testified that the deceased had two wives and several plots. The deceased divided his estate before his death. The first wife was given about 40 acres out of plot number 828 while the second house was given 12.5 acres. By that time the first wife was deceased. The deceased's daughters were all married and were not present when the land was being divided. There was a tribunal case and the objector was given 3 acres out of plot number 1070.

The petitioner testified that the deceased had two wives, Ruth and herself. She is the second wife. Ruth had 12 children but 2 died. She remained with 3 sons and 7 daughters. One of the daughters is currently deceased. Only one daughter is not married. Belia had 15 children with the deceased. Eight daughters and five sons. Three of her daughters are not married. Her husband had four plots and a 5<sup>th</sup> plot which he inherited from his father. She further testified that her late husband did not distribute his estate before his death. The children were only shown where to cultivate but did not divide the land. The total land is about 72 acres and her proposal is to divide the land equally. There are 10 sons. She denied that the objector purchased plot number 1070 jointly with the deceased. She did not witness any planting of boundaries by the elders or the deceased. Each of the beneficiaries is using the land but the objector encroached part of her portion of land. At one time the deceased called a surveyor to demarcate the land and some 7 elders went to the home but the objector chased them away. The deceased did not proceed with the subdivision.

**DW2, JONATHAN BURUDI KUTIMBA**, testified that his father had two wives and his is from the second house of Belia. The objector is from the first house. The objector sued his father claiming to be given land and he attended the court proceedings with his father. His father died before the case was concluded and one month after his death the objector went to court and obtained ex-parte orders which enabled him to subdivide plot numbers 1070 and 828. The titles obtained by the objector were later revoked by the court. He would like the land to be divided equally.

Parties agreed to file written submissions but only the objector's counsel managed to do so. It is the submissions of counsel for the objector that the deceased distributed his estate during his lifetime. Each of the beneficiaries is satisfied with the portion given to him. The proposal by the petitioner to have the estate distributed equally will lead to displacement of some of the parties' homes.

On 17.12.2012 the court visited the estate and was able to see the properties. Part of plot number 828 is a hill and is used for grazing purposes. No one lives on plot number 1070 but it is used for cultivation. The petitioner's position is that the land be divided equally amongst the 10 sons while the unmarried daughters can be given one care each.

The main contention is whether the deceased distributed his estate before his death, if that would be found not to be the case then how should the deceased's estate be distributed and who should be made the

administrator of the estate. While the objector maintains that the deceased had distributed his estate the petitioner maintains otherwise. I have gone through the proceedings before the Malava Land Disputes Tribunal in claim number 016 of 2006. The claimants were **MUSA IMBIAKHA KATIMBA (PW1), ZAKAYO IKHABI KATIMBA (PW2)** and **SHADRACK NYONGESA KATIMBA (PW3)**. The objector claimed that their father was polygamous and he had given plot numbers **S.KABRAS/CHESERO/744, 747, 1061** and **1070** to the petitioner as his second wife. He had also given part of plot number **S.KABRAS/CHESERO/828** to the petitioner. They were against their father's decision and they wanted to be given plot 828 and part of plot number 1070. It is clear that the objector and his brother have been clamouring to be given a big portion of plot number 828. It is also clear from the evidence on record that the purported distribution of the deceased's estate on the 15.4.2006 is the objector's own invention. There never was any subdivision of the estate by the deceased. It is clear that the objector and his brothers wanted to force their father to give them land during his lifetime. The objector went on a great length to take over part of the estate after his father's death. He gave himself 15 acres from plot number 828 and a further 3 acres from plot number 1070. His two other brothers got 12 ½ acres each.

From the evidence on record I am satisfied that the deceased did not distribute his estate during his lifetime. The court visited the estate and there are no boundaries demarcating the properties. The objector's contention that he bought plot number 1070 jointly with the deceased is not true. The sale agreement that was produced by the objector shows that the seller was **DAUDI WEKANGA** while the purchase was **KATIMBA IMBIAKHA**. The land was bought on the 2.11.1992 and the objector simply signed as a witness. There were other two witnesses and the purchase price was KShs.10,000/=. There is no evidence that the objector contributed the purchase price. The plot measures 3.4 Hectares and the deceased is registered as the owner on the 10.12.1992. There was no reason as to why the objector could not have been made a joint owner.

The next issue is how the deceased's estate should be distributed. It appears from the position of both parties that the land should be distributed equally amongst the 10 sons. If that were to happen then each of the sons will get 7.2 acres as parties are in agreement that the total arrearage is 72 acres. The Law of Succession Act does not distinguish between the gender of the beneficiaries. Section of the Act provides that a deceased intestate estate can be divided according to the number of children in each house in the event that the deceased was polygamous and any surviving wife can be added as an additional unit to the number of children. There are 10 children from the first house and 14 from the second house. The petitioner would make an extra unit for the second house making them 15 units. If the court is to use that formula then the total number of units would be 25 and each beneficiary would get approximately 3 acres. The first formula would give the three sons from the first house about 22 acres while the second house would get 50 acres. If the court is to adopt the second formula then the first house will get roughly 29 acres while the second house will get 43 acres.

Since the law does not distinguish between the gender of the children I will adopt the second formula. Although both parties are not so much keen on the position of the married daughters, I do find that it is their constitutional right to inherit the estate of their deceased father and they are free to relinquish their shares to their brothers. The objector is in agreement that the petitioner's family is occupying the other small plots as well as plot 828. It will therefore be prudent to get the share of the first house from plot number **S/KABRAS/CHESERO/828** while the second house will get a portion of that land and all the other remaining plots. The objector is not entitled to any portion of plot number **S.KABRAS/CHESERO/1070**. The deceased's estate shall therefore be distributed as follows:-

1. **Plot number S.KABRAS/CHESERO/828 – 29 acres to the first house to share equally**
2. **Plot number S.KABRAS.CHESERO/828 - 23.2 acres to the second house**
3. **Plot number S.KABRAS/CHESERO/744 - 3.5 acres to the second house**
4. **Plot number S.KABRAS/CHESERO/747 - 6 acres to the second house**
5. **Plot number S.KABRAS/CHESERO/1061 - 2.5 acres to the second house**
6. **Plot number S.KABRAS/CHESERO/1070 - 8.5 acres to the second house.**

The petitioner is the surviving widow of the deceased. Due to the manner in which the objector and his

brothers conducted themselves with the sole intention of getting bigger shares I do hold that the petitioner herein be made the sole administratrix of the deceased's estate. Musa Imbiakha Katimba, Zakayo Ikhabi Katimba and Shadrack Nyongesa Katimba shall be registered on the 29 acres share on behalf of the first house. The petitioner Belia Khayanga Katimba and her son Jonathan Burudi Katimba shall be registered on the titles of the shares for the second house on their own behalf and on behalf of the other beneficiaries. Any beneficiary is at liberty to relinquish his or her share to any other beneficiary. Each party shall bear his/her own costs.

**Delivered, dated and signed at Kakamega this 25<sup>th</sup> day of July 2013**

**SAID J. CHITEMBWE**

**J U D G E**