



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 396 OF 2009**

**HELLEN INAMANI MWAKHA ..... PETITIONER**

**V E R S U S**

**ANDREA ASHIRIBWA MUHATIA**

**LEONIDA ATAMBA ANYULA**

**OBJECTORS**

.....

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

The late **JAPHETHA MUHADIA KUNDUKUVI** died on the 19.5.2005. His first born daughter **HELLEN INAMANI MWAKHA** filed this succession cause and was issued with a grant of letters of administration on the 9.12.2009. The objector herein **ANDREA SHILIBOHA MUHATIA** is one of the deceased’s sons. The objection was fully heard. The objector’s evidence is that his late father had two plots namely plot number **ISUKHA/MURANDA/639** and **1029** respectively. The deceased had two wives. The first wife (**KHASOA**) used to live on plot number 639 while the second wife (**SYLVIA**) lived on plot 1029. According to the objector the first wife had two sons and five daughters while the second wife had two sons and two daughters. It is the objector’s evidence that the first wife buried on her plot as well as the deceased while the second wife was also buried on her plot. He would like to have the estate distributed in that manner so that all the children of the first wife inherit plot number 639 while those of the second wife inherit plot number **1029**. He was not aware that plot number **639** was transferred to **MAURICE**, his step brother from the first mother.

**PW2, SHEM SHABAYA** testified that he was the village elder between 1966 and 1978. As far as he is concerned the deceased had two wives and each wife and her children lived separately. It is his evidence that he is a neighbor and each family should live on its plot.

The petitioner testified as DW1. It is her evidence that her late father divided plot number 1029. Her father transferred plot number 639 to **MAURICE** during his lifetime and the only estate remaining was plot number 1029. It is her evidence that she is the eldest daughter and filed the succession cause with a view to distribute the estate as per her father’s wish. The objector and her sister **LEAH** were born out of wedlock but they are the deceased’s children. According to her plot number 1029 was divided into four portions. One portion was given to the objector. The second portion was given to **LEONIDA** who is a daughter in law to the deceased. Leonida’s husband is from the second house but he is deceased. The third portion was given to Leah who is also from the second house and the fourth portion was given to all the other daughters jointly. She would like to have the estate distributed in that manner. Plot number 639 was given to Maurice and her deceased brother.

**MAURICE SHIVANDA MUHATIA** was DW2. He testified that he was given plot number 639 by his father. According to him plot number 1029 was divided into four portions by his father on the

9.7.2003. The division was measured in feet and the objector was given an extra portion measuring 11 ft. Leonida and Leah were also given their plots and the remaining portion was given to the other daughters who were taking care of the deceased when he was sick. According to him plot number 1029 is about 6 acres but 2 acres were sold by the deceased to a purchaser who lives on the land. On plot 639 it is only himself and the two wives of his late brother (**AMOS**) who occupy that land. He denied that plot number 639 was meant for the children of the first house. **DW3**, is **LATAN MUSIKOYE**. He is the chief of Murhanda location. His evidence is that in the year 2002 he was the assistant chief of Shisembe sub-location where the deceased came from. On the 27.12.2002 the deceased called him and other village elders whereby the deceased divided his plot number 1029 into four portions. The objector was given the upper side. The second portion was given to the daughter in-law of the deceased while a third portion was given to Leah who is the deceased's daughter. The fourth portion remained with the deceased and he said it was for his five daughters namely – **HELLEN, PERIS, GLADYS, MARY** and **MARGARET**. It is **DW3**'s further evidence that the objector was given 11 more footsteps. When the deceased passed on he gave the letter to the petitioner to commence the succession cause as the objector was born out of wedlock.

**DW4, HERBERT MUSONYE** is a cousin to the parties herein. According to him he was present when the deceased divided plot number 1029 into four portions. The process was recorded and produced written document. He is the one who recorded the subdivision. The deceased remained with another portion which was meant for his daughters.

Parties agreed to file written submissions but only counsel for the petitioner managed to do so. I have gone through the submissions and they are only a summary of the evidence on record. The evidence on record shows that the deceased had four sons namely **MAURICE, AMOS, DANIEL** and **ANDREA**. Amos and Daniel are deceased but they are survived by their widows. The deceased also was survived by his daughters. The evidence also shows that the two plots were initially registered in his name. Plot number 639 is 1.1 Ha. while plot number 1029 is 1.9 Ha. The objector's contention is that the children of the first house comprising two sons and five daughters should live on plot number 639 while the other two sons and two daughters should live on plot number 1029. According to the Law of Succession Act each child is entitled to an equal share of his or her father's estate. A simple distribution would mean totaling the two plots and distributing them equally amongst all the children irrespective of their gender. The evidence shows that plot number 639 is occupied by two sons of the deceased. That would mean each son got 0.55 Ha. Plot number 1029 is a bit bigger and I am satisfied that the deceased distributed that plot to his other children. The petitioner's proposed mode of distribution as per her affidavit sworn on 19.7.2010 is as follows:-

- |   |      |                                 |
|---|------|---------------------------------|
| 1. Andrea (Objector)                      | ---- | 1 acre                          |
| 2. Leonida                                | ---- | 1 acre                          |
| 3. Leah                                   | ---- | $\frac{3}{4}$ acre              |
| 4. Peris, Gladys, Mary, Margaret & Hellen |      | – 1 $\frac{3}{4}$ acres jointly |

The evidence on record shows that the objector was given a bigger portion when the deceased distributed his plot number 1029. All the three witnesses for the defence namely **DW2** to **D4** confirms that the objector was given an extra 11 footsteps. I do find that the distribution of plot number 639 by the deceased is proper. Although the land is registered in the names of Maurice he should know that the wives of his late brother are also entitled to their share. It appears that the only person left out in the distribution is Lucy who a daughter from the second wife. Although she is married she is also entitled to a share of her father's estate.

I will adjust the mode of distribution proposed by the petitioner and distribute the estate as follows:-

**Plot number Isukha/Muranda/1029**

- |                             |   |           |
|-----------------------------|---|-----------|
| a. Andrea Shiliboha Muhatia | - | 1.2 acres |
| b. Leonida Atamba Anyula    | - | 1 acre    |

c. Leah Imbiti

-

$\frac{3}{4}$  acre

d. Hellen Inamani, Peris Khaluyi,

*Gladys Chemwani, Mary Masitsa,*

*Margaret Muhatia and Lucy Ilumula-the remainder jointly*

In the end, the estate shall be distributed as herein above. Since plot number 639 is already in the names of Maurice there is no need to include it in this mode of distribution. Lucy Ilumula is free to give her share to either the objector or any person of her wish should she decide not to retain her share. Those are the orders of the court and each party shall meet his/her own costs.

***Delivered, dated and signed at Kakamega this 30<sup>th</sup> day of October 2013***

**SAID J. CHITEMBWE**

**J U D G E**