



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE 20 OF 2001

**IN THE MATTER OF THE ESTATE OF SELEMANI HAMISI FAYA alias FERIMANI
FWAYIA**

BETWEEN

**MARRIANNE SHISIA HAMISI.....OBJECTOR/
APPLICANT**

AND

**KASSIMANI ATIBU HAMISI.....PETITIONER/
RESPONDENT**

JUDGMENT

The deceased, **SELEMANI HAMISI FAYA** passed away on 26.3.97. His survivors:

- The widow – MARRIANNE SHISIA HAMISI
- The daughter – FATUMA OKANDA
- The son – KOSSIMAN ATIBU HAMISI

The son is the administrator of the estate as per the grant of letters of Administration issued on 28.11.01.

The application dated 8.3.11 is for the confirmation of grant was filed by the Objector, MARRIANNE SHISIA HAMISI. The application is supported by the affidavit sworn on 8.3.11 by the Objector/Applicant. The properties, the subject of this Succession cause are as follows:-

- S/WANGA/EKERO/477 with an approximate area of 0.12 hectares.
- S/WANGA/EKERO/1496 with an approximate area of 0.05 hectares.

In the said affidavit, the Objector proposed that the two parcels of land be shared out equally between the three beneficiaries.

In his affidavit in protest sworn on 18.7.11, the Petitioner stated that his father had two wives and

therefore the two parcels of land should be divided equally between the two families. He further stated that his step-sister, FATUMA OKANGA got married a long time ago.

Although the Petitioner was in court when the case was called out on the hearing date, by the time the case was reached he had left the court room. The case proceeded in his absence.

During her testimony, the Objectors stand was that the Petitioner should get S/WANGA/EKERO/1496 and S/WANGA/EKERO/477 to go to herself and her daughter. According to the Objector, this was as per the wishes of the Deceased as stated in the book (Exh. 1) which was witnessed by the Objector, daughter and one SHEBAN NANDWA.

The daughter (PW2) in her evidence however wanted for an equal distribution of the two parcels of land between the three beneficiaries. The daughter (PW2) also stated that she walked out of her marriage in the year 1978 and was welcomed back home by her father and she now lives on S/WANGA/EKERO/477.

Although the Petitioner mentioned his mother in the affidavit of protest, the uncontroverted evidence from the Objector (PW1) and her daughter (PW2) is that the Petitioner was born out of wedlock and that the mother was never married to the deceased. I will therefore accept their evidence that the deceased had one wife and therefore one house.

Section 35 (1) of the Law of Succession Act Cap 160 Laws of Kenya makes provision for the surviving spouse or child or children of the deceased. The said provision does not differentiate between sons and daughters nor between married and unmarried daughters.

I have taken into account the provisions of Section 35 (4) in distributing the estate of the deceased.

The Petitioner is already occupying S/WANGA/EKERO/1496 while the Objector and her daughter occupy S/WANGA/EKERO/477. The evidence also shows that the Petitioner has settled one of his wives on S/WANGA/EKERO/477.

Although it is stated that the wishes of the deceased were that the widow and daughter remain on S/WANGA/EKERO/477, I note that the L.P. No. S/WANGA/EKERO/1496 which is occupied by the Petitioner is only 0.05 hectares while that one occupied by the widow and the daughter is 0.12 hectares. It is therefore reasonable to appoint a share of S/WANGA/EKERO/477 to the Petitioner.

The widow (PW1) is advanced in age. Her share can therefore remain in S/WANGA/EKERO/477 together with her daughter.

The Petitioner is therefore apportioned the entire of S/WANGA/EKERO/1496 and 1/3 of S/WANGA/EKERO/477. The rest of S/WANGA/EKERO/477 to remain with the Objector and her daughter.

Orders accordingly.

Delivered, dated and signed at Kakamega this 18th day of July, 2012

B. THURANIRA JADEN

J U D G E