



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO.348 OF 2006

**IN THE MATTER OF THE ESTATE OF CHARLES CHEYWE KIKUYU ALIAS JOHN KEYA
KIKUYU(DECEASED)**

A N D

PHINIAS ILATSIA

**KEYAAPPLICA
NT**

V E R S U S

JOHANA KEYA

**KIKUYU.....1ST
RESPONDENT**

SAMUEL JAMHURI

**KEYA2ND
RESPONDENT**

R U L I N G

1. Charles Cheywe Kikuyu (deceased) died on 11.12.1981 and on 30.6.2006, Johana Keya Kikuyu filed a Petition for a grant of letters of administration intestate and named himself as the sole survivor of the deceased. The only asset listed as belonging to the deceased was land parcel no. **Kakamega/Mudete/559**.
2. Upon the grant being issued on 20.9.2006, Johana Keya Kikuyu sought confirmation thereof and in to it, one Fredrick Kikuyu Cheywe, a son of the deceased filed an Affidavit sworn on 23.3.2007 and in it, he

stated that he had no interest in parcel no. 559 which was apparently registered in the names of the deceased and Johana Keya Kikuyu aforesaid, jointly.

3. Before the grant could be confirmed however, one Phinias Ilatsia filed a Summons for Revocation of grant and in a Supporting Affidavit sworn on 6.6.2007, he deponed that although Fredrick Kikuyu Cheywe had claimed no interest in his father's land, it was he, Phinias, and one Hesbone Kikuyu, who had purchased land for him in Soy so that his father's share in title no.559 would be transmitted to them. That the dispute between him (Phinias) and Johana Keya was, in any event, the subject of litigation in Vihiga SRMCC no. 98 of 2006 which was still pending for determination by that court.

4. Further, that the said Johana Keya Kikuyu had already transmitted title no. 559 to himself and had obtained consent to transfer it to one Samwel Jamhuri Keya without regard to the interests of other parties.

5. On 26.5.2008 Ochieng J. cancelled the registration of Johana Kikuyu as proprietor of title no.559 aforesaid and ordered it to revert to the deceased's name. on 20.1.2009, the learned judge revoked the grant issued to Johana Kikuyu and appointed Edward Shabanga and Manoa Lusala as co-administrators.

6. The only issue to be determined at this stage from the above narrative is that of distribution of land parcel no.559.

7. In his Affidavit sworn on 3.12.2009, Manoa Lusala proposed as follows;

(a) "The estate of Cheywe Kikuyu is comprised in the half share of KAKAMEGA/MUDETE/559

(b) The half share is identified

(c) The half share is the one occupied on the upper part by the applicant Phinias Ilatsia and where his parents' compound is

(d) All children of the 1st respondent are provided for from his portion

(e) The dispute resulting in the litigation was who should remain on the parents' compound between the applicant and the 2nd respondent"

8. On the other hand, one Seth Luvai in a Report filed on 9.10.2009 proposed as follows;

"Your Lordship, I found no difficulty in arriving at the above conclusion that the land belonging to Charles Cheywe Kkikuyu be apportioned from LR.NO. KAKAMEGA/MUDETE/559 and it amounts to 0.5 HA and the only person entitled to Charles Cheywe Kikuyu's share is his only surviving son Kikuyu Fredrick Cheywe and that he should take one lower portion of the land that is crossed by the main road.

The Objector herein Phinias Ilatsia Keya is the son to Johana Keya Kikuyu and his share is due to be given to him by his father in the remaining 0.5 HA. He has no right at all to the share of Charles Cheywe Kikuyu, since deceased died without giving any will to the said Phinias Ilatsia Keya. The claim that he bought Kikuyu Fredrick Cheywe land in Soy is far fetched as that land does not exist and cannot form the basis for [the] claim to half the land.

I therefore hand over the above report on my part

Dated at Mbale this 1st day of October, 2009

SETH LUVAI”

9. It is important to note that Luvai was appointed co-administrator (in place of Edward Shabanga) by Chitembwe J. on 17.9.2009 and that explains his role in the proceedings.

10. What is the lawful and reasonable module of distribution in this case?

11. It is important to note that from the matters on record, the late Charles Cheywe Kikuyu died without a wife but had a son, Fredrick Cheywe. The land in dispute from a search certificate dated 12.6.2006 was registered in the names of John Keya Kikuyu and Cheywe Kikuyu and the registration was that they were to hold it in common each having half of an undivided share in the land.

12. **Section 103** of the Registered Land Act provides;

“S.103 –(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

13. The import of the above section is that as regards the share held by the deceased, it is to be distributed as part of his estate and so the idea that Johana Keya or any of his sons is automatically entitled to that share is misplaced.

14. Since Fredrick Cheywe is the only person directly surviving the deceased, **section 38** of the Law of Succession Act applies to his estate. It provides as follows;

“S.38 – Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section

41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

15. The said Fredrick Cheywe would have automatically inherited his father’s share but he has sworn an Affidavit stating that Johana Kikuyu Cheywe had bought him land elsewhere and so he has no objection if Johana is registered over his father’s portion. That fact is contested and Manoah Lusala has argued that land parcel no, **Kakamega/Mautuma/281** was purchased for Fredrick by Phinias Ilatsia Keya and his

brother Luvai has argued however that it has been agreed that land parcel no.2811 should revert to Johana Keya while Fredrick should inherit his father's share as is the law.

16. To my mind the matter is simple; Fredrick Cheywe has filed an Affidavit stating that has no interest in his father's land because Johana Keya bought for him land parcel no.2811. Luvai seems to authenticate that position as did Johana Keya when he filed the Petition and also the summons for confirmation of grant.

17. There is absolutely no evidence before this court that Phinias Ilatsia and his brother purchased the land for Fredrick. Instead it is their father, Johana, who has annexed an agreement dated 22.1.2002 showing that Fredrick had agreed to the arrangement as detailed out above. There is therefore no need to tamper with title no.2811 which is already registered in Fredrick's name.

18. In the event, the person who should inherit the deceased's undivided half of title no.559 is Johana Keya Kikuyu and upon his demise, the whole parcel no. **Kakamega/Mudete/559** should be distributed in accordance with the law with no claim whatsoever by Fredrick Cheywe Kikuyu.

19. The grant issued herein is confirmed in those terms.

20. Each party will bear its own costs.

21. Order accordingly.

Delivered, dated and signed at Kakamega this 22nd day of February, 2011

ISAAC LENAOLA

J U D G E