



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 576 OF 2006

IN THE MATTER OF THE ESTATE OF *NDENJE MULAMA* – DECEASED

BETWEEN

ISAYA NDECHE WEVEKA.....PETITIONER

VERSUS

SAMUEL NDECHE WEVEKAOBJECTOR

RULING

1. Ndenje Mulama died on 9.7.1997 and in the Petition for a grant of letters of administration dated 14.9.2006, it is indicated that he was survived by the following persons;

(i) *Isaya Ndeche Weveka*

(ii) *Samuel Ndeche Weveka*

2. It was also indicated that he left behind land parcel No. North Kabras/Malava/918. The Petitioner was Isaya Ndeche Weveka and on 1.12.2006, Samuel Ndeche Weveka objected to the grant being issued to Isaya.

3. On 16.4.2008, a grant was made to Isaya and Samuel jointly and on 12.10.2009, it was ordered by *Chitembwe, J.* that the District Surveyor, Kakamega should visit title No. 918 aforesaid and determine the occupancy on the ground.

4. I have read two reports by the Surveyor; one dated 9.12.2009 and another dated 28.4.2010. The import of both is that although on paper the land is recorded as measuring 10.4 hectares, on the ground, it actually measures 9.2 hectares. Further, that Isaya occupies 3.88 hectares while Samuel occupies 5.40 hectares.

5. In the Application to confirm the grant filed on 7.11.2008, Isaya proposed that the land be shared equally but in an Affidavit sworn on 16.3.2009, Isaya's wife deponed that her husband had sold 3 acres of the land, moved out of it and married another wife and she proposed that the remainder thereof be registered in the names of her son, Levictus Ndeche.

6. Samuel in an Affidavit sworn on 16.3.2009, stated that elders as well as the deceased created boundaries between the portions occupied by the brothers and the grant should be confirmed in line with that decision.

7. One Kelly Sanya Muchende in an affidavit sworn on 14.9.2009 deponed that he had purchased one (1) acre from Isaya's portion and that he should be included in the distribution.

8. I have taken into account all the above matters and I note that only Isaya and Samuel are entitled to the estate as the only surviving children of the deceased. S. 38 of the Law of Succession Act 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 Sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

9. It is claimed that Samuel occupies more land than Isaya and a certain decision of the elders and deceased is referred to. Sadly, I have seen no evidence of such a decision and in any event, occupancy on the grounds cannot *per se* override the provisions of S.38 aforesaid. That being the case, and since the land is 9.2 hectares, each of the two brothers will inherit 4.1 hectares. Further, from Isaya's portion, 1 acre shall be distributed to Kelly Sanya Muchende. The remainder of the portion transmitted to Isaya shall be held in the usual manner and his wife and son may find other means of securing their interests as I am unable at this stage to make any orders with regard to them as they can only inherit the land through him. That is the law.

10. The grant in any event is confirmed in the above terms and costs shall be in the cause.

11. Orders accordingly.

Delivered, Dated and Signed at Kakamega this 14th day of April, 2011.

ISAAC LENAOLA

J U D G E