

valued Ksh. 254,000/= the property of deceased NYANDUKO MAOKA MOGAKA.”

The petitioner and his daughters were tried, they were however acquitted of the charge.

5. The objection proceedings also proceeded for hearing by way of oral evidence, and took a considerable amount of time to hear evidence from a total of 8 witnesses on the part of the objectors. The objectors witnesses can be groups as the two objectors, they relied on the evidence of two elders who are also brothers of the petitioner. They also relied on evidence of director, secretary and treasurer of Goseta farm Ltd, who where the original owners of the parcel of the parcel of land in dispute. According to the objectors, **George Nyakara Bundi** (OW2) and **Dickford Bundi** (OW3) they are sons of the late Charles **Francis Bundi** who was also a son of the deceased. He died in 1981 and left both objectors living with the deceased on the piece of land at Goseta farm where they lived for the last 30 years.

6. According to the objectors the deceased was their grandmother. She brought them up at Goseta Farm Ltd which they claim was purchased by their late father but the title was registered in the name of the deceased to hold it in trust for the objectors. The objectors contend that the petitioner used to live in Kisii where he has another parcel of land. He never used to visit the deceased at Goseta farm. They only saw the petitioner when the deceased died. **Robert Orina Mogaka** (OW4) the brother of the petitioner testified that he came to Kitale in 1968 and bought a share at Goseta Farm which entitled him to a parcel of land. He told the court that it was the late Charles **Francis Bundi** who purchased the share at Goseta farm because the petitioner had no money. The deceased came to live with her son at Goseta farm in 1970 with his son Charles.

7. **Patroba Ong'aro** (OW5) also a brother of the petitioner testified that they bought this land in Goseta in 1976. He confirmed that the late Francis Bundi is the one who paid for the share of the share of land at Goseta farm. The late Francis died in 1982, and he was buried in Kisii. His wife, the mother of the objectors is alive and she also lives in Kisii. **Goerge Musiori Nyanguka** (OW6) testified that he used to be the treasurer of Goseta Farm and Charles Francis Bundi was a member of the Community at Gosetta, and he regularly contributed and paid the charges demanded from the members.

8. DW5 produced three receipts which were issued to the late Charles Francis Bundi dated 30th July, 1986, 17th September, 1984 and 24th January, 1985 for Ksh. 50, Ksh. 100/= and Ksh. 200/= respectively being for the building fund for the Goseta Primary School. DW5 testified that when Bundi died in 1982, the company decided to transfer Bundi's share of land to the deceased because she was looking after the children of the late Francis Bundi. This evidence was also confirmed by William Kerobu Musiani (OW7) a director of Goseta Farm. He testified that the late Francis Bundi was a member No. 31 on the list of their members. When Bundi died, the company registered the deceased as the proprietor of the land because she was living with the deceased's son.

9. On the part of the petitioner, he gave evidence that he is aged 73 years. He is the husband of the late Nyanduko Maoga who passed away and he buried her at Goseta Farm on a plot known as **Kwanza/Namanjalala Block 1/Goseta 103**. He produced a copy of the green card which shows the title was registered in the name of the deceased on 22nd January, 1986. He contested that he has never separated from the deceased. They were living together as husband and wife and they contributed money to buy the land at Goseta Farm. He confirmed that the objectors are his grandsons, the children of his late son Francis Bundi.

10. According to the petitioner the mother of the objectors is alive and she lives in the petitioner's parcel of land in Kisii which is 7 acres. According to the petitioner, that is the parcel of land that he had given his son the late Francis Bundi and that is where he was buried. He denied that the land in Goseta Farm was purchased by the late **Francis Bundi** and there is no way he can fraudulently take away land belonging to his late son. The petitioner says he took the objectors under his care when their father died, he educated them and provided for them but the objectors have now been harassing him to surrender the parcel of land and that is why he was charged with criminal offences. He urged the court to grant him the letters of administration so that he could distribute the parcel of land belonging to the deceased to all the beneficiaries of the deceased.

11. Both counsel for the objectors and petitioner filed written submissions in support of their respective positions. The issue for determination in this succession cause is firstly whether the petitioner should be granted the letters of administration. Secondly, whether the deceased property known as **Kwanza/Namanjalala Block 1/Goseta/103** was held by the deceased in trust of the objectors who are beneficiaries of the estate of the late **Charles Francis Bundi**. Lastly, how should the deceased parcel of land be distributed among the beneficiaries of the deceased? Due to the length of time this matter has taken in court it will be in the interest of justice also to determine how the estate of the deceased should be shared among the beneficiaries.

12. It is common ground that the petitioner is the widower of the deceased. Therefore according to the provisions of section 66 of the Law of Succession Act, he has the priority of being granted with the letters of administration. However, the petitioner had a duty to include the house of survivors of the late Charles Francis Bundi who was a son of the deceased and who was survived by a wife and the objectors. For that reason, the objectors had a valid reason to object because they were left out as the beneficiaries of the deceased's estate. Unfortunately, the succession cause took many twists and turns and lost the focus which was the determination of who was to be granted the letters of administration. According to P& A Rules, the other issues of what consisted the estate of the deceased, who the beneficiaries of the deceased's estate were and how to distribute the parcel of land are supposed to be addressed at the stage of distribution.

12. The lengthy hearing I would say was for purposes of determining whether the plot at Goseta Farm was held in trust for the

objectors. On this issue it was supported by the evidence of the petitioners' brothers who said that the share was paid for by the late Bundi because the petitioner was unemployed and he had no money. It was also supported by the directors of Gossetta farm who said the late Bundi was the registered member; they however decided to register the title in the name of the deceased on their own volition. A glance at the receipts which were produced by OW6, two of the receipts were issued after Francis Bundi had passed away. Moreover, those receipts are for building a primary school.

13. Further OW7 and OW8 said that they made a unilateral decision to transfer the Goseta plot in the name of the deceased because she was looking after **Charles Francis Bundi's** sons. This does not add up considering that Francis Bundi had a wife and children who could have been registered. Moreover, there is no indication in the title that the deceased was holding the title in trust of the children of the late **Charles Francis Bundi**. It is more probable than not that the parcel of land belonged to the deceased and that is why the title is in her name, also there were no documents that were produced in court to disapprove that. The court is thus inclined to go by the title which is registered in the name of the deceased.

14. For the forgoing reasons I hold that the title should be shared among the beneficiaries of the deceased. The two objectors are entitled as children of the late Francis Bundi. The two objectors form one unit for purposes of the distribution of the deceased's estate. Further, according to the Law of Succession, and due to the acrimony that is already demonstrated in these proceedings, it will be in the interest of justice to invoke the power of appointment of the share due to the objectors. It will not serve the interest of justice for the petitioner to hold the objectors share in trust due to this acrimony. Thus the court can determine that the deceased's estate be shared equally among the beneficiaries who include the objectors as survivors of Bundi.

15. The letters of administration shall be issued to the petitioner who is at liberty to apply for the confirmation of grant forthwith. Due to the age of this matter, he is granted leave to apply for confirmation notwithstanding that 6 months have not elapsed since the grant was issued. For the avoidance of doubt, the deceased's property being **Kwanza/Namanjalala/Goseta/103** shall be shared equally between

(a)The estate of the late Francis Bundi.(to the three objectors)

(b)Philip Maoga Mogaka.

(c) Alice Bonareri Birimo.

(d)Elizabeth M. Birimo.

(e) Pamela Kemima Bundi.

This being a family matter, each party shall bear their own costs.

Ruling read and signed this 29th day of July, 2011.

**MARTHA KOOME.
JUDGE.**