



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KAKAMEGA**

**Succession Cause 140 of 2004**

**IN THE MATTER OF THE ESTATE OF JEREMIAH MUKOLE  
AFUBWA - DECEASED**

**BETWEEN**

**LABAN AFUBWA MUKOLE ----- PETITIONER**

**VERSUS**

**AGNESS SAKWA MUKOLE ----- OBJECTOR**

**JUDGEMENT**

The late **JEREMIAH MUKOLE AFUBWA** died on 15<sup>th</sup> May, 1978 at Namirama Sub-location within Kakamega District. He was survived by four wives and thirteen children (Four sons and nine daughters). The Petitioner, **LABAN WAFUBWA MUKOLE** is the eldest son. He was issued with a Grant on 11<sup>th</sup> June, 2004. The records it is evident the grant has not been confirmed.

The Objector, **AGNES SAKWA MUKOLE** is one of the deceased's wives. She contends that she was given only two acres yet she had five daughters with the deceased. In her testimony she testified that the deceased left two plots namely **BUNYALA/NAMIRAMA/889** measuring 7.0 Hectares and **BUNYALA/NAMIRAMA/879** measuring 7.2 Hectares respectively.

She called two of her daughters who testified as PW2 and PW3. **PW2, LENA KHAOMO MUKOLE** corroborated her mother's testimony and urged the court to divide the estate equally among the deceased's children. **PW3, RAEL CHIRANDE MUKOLE's** testimony is that she was not given any plot. Her mother, Agnes, the Objector was given two acres.

On his part, the Petitioner confirmed that the deceased had four wives namely **RESPER, DIANA, JERIDA** and **AGNES**.

He testified that after the deceased's death Agnes remarried and had three children with the other husband known as **JONATHAN CHEMASE**. He did confirm that Agnes had five children with his late father. The Petitioner further testified that he allocated **AGNES** two Acres which she sold to **SIFUNA WAFULA**.

**DW2, NASHON OKWIRI TANAI** is the deceased's uncle. He testified that the deceased had four wives. The Objector remarried after the death of her husband. She was later given two acres in 2004 and she sold the plot. The two acres was for herself and her children.

DW2's testimony is that the property had been distributed as follows:-

- 1) Respar whose son is Elisha Mukole - 8 Acres.
- 2) Jerida who has two sons, Julius and Jafred - 13 Acres.
- 3) Agnes Sakwa who has five daughters - 2 Acres.
- 4) Diana whose only child is the Petitioner - 8 Acres.

Parties filed written submissions and the Petitioner urged the court to dismiss the Objection while the Objector would like to have

the property distributed equally.

From the evidence on record, the deceased had four wives. Each of the wives had children as follows:-

1. Resper - 4 daughters, one son.
2. Jerita - 2 sons only
3. Agnes - 5 daughters
4. Diana - one son only – the Petitioner.

The Petitioner raised the issue that the objector remarried and had children with another husband. Under the Succession Law, the Objector's interest is a life interest and this can be absolved in her daughters share.

**Section 40** of the **Succession Act** states that where the deceased was polygamous, the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house and any surviving wife shall be added as an additional unit to the number of children.

**Section 29 (a)** of the **Succession Act** defines a dependant as the wife or wives or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death. The objector had been allocated two acres with her five daughters. This distribution was not fair to the objector's children. The total acreage according to the Official Search for the two properties is as follows:-

BUNYALA/NAMIRAMA/87 - 7.2 HA.  
BUNYALA/NAMIRAMA/887 - 7.0 HA.  
**TOTAL** \_\_\_\_\_ - 14.2 Hectares

The 14.2 Hectares translate to almost 35 Acres. However, the Petitioner and his witness testified that one plot is 15 acres while the other plot measures 16 Acres making a total of 31 Acres.

There is no mathematical formula to subdivide a deceased's Estate. Equal distribution at times leads to injustice. The Petitioner in this matter must have used his own money to pursue this Succession Cause. In some instances, the older children take care of their parents before death and the parents allocate them bigger shares than their younger children. The entire process of distribution should be governed by what would be seen to be fair by the beneficiaries. Parties herein did not indicate in which plot amongst the two properties they do reside or they wish to have their shares. If the estate was to be distributed equally, this would mean out of the 31 acres, each of the thirteen children would get 2.38 Acres. I do not think that this is a fair distribution. I will use the proposal by the Petitioner's side with the following adjustments.

1. Family of Respar whose son is Elisha Mukolwe – 7 Acres
  2. Jerida who has two sons Julius and Jafred - 10 Acres
  3. Agnes who has five daughters - 7 Acres
  4. Diana whose only child is the Petitioner - 7 Acres
- Total \_\_\_\_\_ -31 Acres

Given the acreage shown on the Official Search, I am satisfied that the Plot on the ground should be 35 acres. Should there be 4 extra acres remaining after the distribution, the family of Jerida should get two more acres, one Acre should go to the family of Agnes and half an acre each to the family of Respa and Diana.

The two acres already given to Agnes shall form part of the seven Acres given to her and her daughters. Parties shall ensure that they get their respective portions from the plots where they reside unless that is not possible. Each party shall meet his own costs.

***Delivered, dated and signed at Kakamega this 12<sup>th</sup> day of November, 2009.***

**SAID J. CHITEMBWE**

**JUDGE**