



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Civil Appeal 46 of 2002**

**ESTHER KARUANA MUNUNO.....APPELLANT**

**VERSUS**

**JEREMIAH KINYA MUNUNO.....RESPONDENT**

**JUDGMENT ON APPEAL**

This appeal arises from Succession proceedings under provision of Succession Act Cap. 160 Laws of Kenya. The grounds of appeal are set out in the Memorandum of Appeal numbering 5. The major complaint is that the learned Trial Magistrate erred in law and fact in sharing out land parcel Mutira/Kathere/22 unfairly and inequitably, the court erred in finding the deceased a polygamous man at his death and there was contradictory evidence of witnesses and that the distribution was against the wishes of deceased. The record shows that initially the parties opted for arbitration by Baricho District Officer, and elders. Arbitration was filed and read to the parties and right of filing objections given for 30 days. An application was filed dated 18/4/2000 for setting aside arbitration award by the petitioner which was allowed on 11/7/2000 and matter heard in open court.

The Judgment of Trial court was that the land be divided into two equal portions and each party to take one half portions. The petitioner (widow) thereafter filed this appeal.

I have perused the record and evaluated the evidence as I am entitled to do. It is my finding that as the deceased died in 1978 before coming into force of the Succession Act Cap.160 under Section 2 (2) therefore the distribution of his estate “shall commence or proceed so far as possible in accordance with this Act. It is to be noted that these proceedings commenced in 1995 under these rules and therefore the administration of this estate commenced and proceeded under the Act”.

Also it is my finding that there is no sufficient evidence of the alleged wishes of the deceased. There was nothing in writing, he had not taken any steps to subdivide his land, before his death. The oral statements made are not corroborated these are not adequate to warrant a finding that he left behind instructions or wishes as to how his assets are to be distributed. However his personal custody laws to be considered.

Regarding the evidence of polygamous status of deceased the Trial Magistrate was correct in his interpretation. It is clear he married second wife after death of his first wife. And then after taking the petitioner to wife he did not contract any other marriage. He was a polygamous man in terms of Section 40 thereof. The substantial evidence which is not contradicted is that the deceased was survived by 8 sons and one wife he did not contract any other marriage. He was a polygamous man in terms of Section 40 thereof. The substantial evidence which is not contradicted is that the deceased was survived by 8 sons and one wife. His land is said to be 4 acres and the dispute was as to the division of the land among the 8 sons and widow. There is not contradictory evidence in the matter and whatever may be there it was correct to disregard the same. Now the Trial Magistrate ordered distribution into half portion as if the deceased had 2 homes. However that is the correct position. The objection is that the house with 7 sons shall take same portion as house with one child

This appears the provisions of Section 40 provides that the estate shall be divided among the houses

according to the number of children in each house but also adding any wife surviving him as additional in it. The law does not state that the estate be divided into equal shares.

After evaluating the evidence, I find the Trial Magistrate erred and I allow this appeal and order that the distribution be in accordance with provisions of Section 40 so that each house shall inherit according to the number of children surviving widow with her 7 sons shall take 8 portions of the land and the deceased widows house shall take one portion. The Judgment of Trial Magistrate is set aside.

No order is made as to costs.

Dated this 30<sup>th</sup> January, 2008.

**J. N. KHAMINWA**

**JUDGE**

**30/1/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Chomba for Respondent**

Read in open court.

**J. N. KHAMINWA**

**JUDGE**