



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

**Probate & Administration 12 of 2007**

**IN THE MATTER OF THE ESTATE OF KYENZE LUNGA**

**(DECEASED)**

**1. CHARLES MUTISYA**

**2. PETER KILAKA ..... PETITIONERS**

**RULING ON DISTRIBUTION**

1. The deceased in this Cause, Kyenze Lunga died on 23/6/2006 aged 85 years. He left behind one spouse and 15 children born of two wives. In Form P & A 5, their names are given as:

- i. "Charles Mutisya
- ii. Agnes Kasili
- iii. Josephine Nduku
- iv. Mary Nduku
- v. Philes Koki (Daughter)
- vi. Eunice Mwende (Daughter)
- vii. Elizabeth Ndeleve – widow
- viii. Peter Mutuku
- ix. Paul Kimilu
- x. Stanley Mutungi
- xi. Musau Kyenze
- xii. Margaret Munece
- xiii. Judith Mwikali

xiv. **Dina Mbithe**

xv. **Ndunge Kyenze**

xvi. **Catherine Mumbua.”**

2. The only asset that I can see that the deceased had is land parcel number Machakos/Ulu/143. As is common in polygamous families, the deceased’s survivors could not agree on how that parcel of land would be distributed and agreed to file Affidavits on how each party intended to distribute the same. Before me now are two proposals;

The first is by Elizabeth Nduleve Kyenze the surviving widow and her son Peter Mutuku Kyenze who in an Affidavit sworn by Peter on 28/5/2008 state at paragraphs 4 – 8 as follows:-

**“4. THAT the subject parcel Machakos/Ulu/143 is only available for distribution amongst the following persons:-**

- a. **Elizabeth Nduleve Kyenze – mother**
- b. **Peter Mutuku Kyenze – son**
- c. **Charles Mutisya Kyenze – son**
- d. **Paul Kimilu Kyenze – son**
- e. **Stanley Mutungi Kyenze – son**
- f. **Musau Kyenze – son**
- g. **Mumbua Kyenze – unmarried daughter**
- h. **Ndunge Kyenze – unmarried daughter**
- i. **Mutio Mulandi – Buyer of part of the subject parcel**
- j. **Wambua Mulandi – buyer of part of the subject parcel**

**5. THAT the Deceased herein had already sold part of the said parcel to Mr Mutio Mulandi and Wambua Mulandi and their interests should be considered before distribution to avoid problems in future.**

**6. THAT I am advised by my Advocates on record, which advice I verily believe to be true, that under the Kamba Customary Law a married daughter is not entitled to ask for a share of her late father’s estate. This position was taken by the Court of Appeal in Civil Appeal No. 56 of 2001 PHILLICERY NDUKU MUMO –VS-NZUKI MAKAU.**

**7. THAT what remains of the said parcel, after factoring in the two buyers named herein above, should be divided equally amongst the other eight beneficiaries.**

**8. THAT the mode of distribution proposed in paragraph 5 of the Affidavit sworn by Charles Mutisya Kyenze is unacceptable to me since it is not a unanimous position taken by the beneficiaries bonafide.”**

3. The clear position taken by that part of the family is therefore that only the surviving widow, sons and unmarried daughters of the deceased should benefit from the estate. The second proposal is by Charles Mutisya Kyenze who in paragraphs 2 – 5 of the Affidavit sworn on 18/1/2008 states as follows:-

**“2. THAT the deceased was survived by the following surviving beneficiaries;**

- i. Esther Kanuu Kyenze - (1<sup>st</sup> wife) – Deceased**
- ii. Charles Mutisya - Son**
- iii. Josephine Ndulu - Daughter**
- iv. Mary Nduku - Daughter**
- v. Philes Koki - Daughter**
- vi. Eunice Mwende - Daughter**
- vii. Elizabeth Ndeleve - (2<sup>nd</sup> wife)**
- viii. Peter Mutuku - Son**
- ix. Paul Kimilu - Son**
- x. Stanly Mutungi - Son**
- xi. Musau Kyenze - Son**
- xii. Margaret Munee - Daughter**
- xiii. Judith Mwikali - Daughter**
- xiv. Diana Mbithe - Daughter**
- xv. Ndunge Kyenze - Daughter**
- xvi. Catherine Mumbua - Daughter**

**3. THAT no application for provision for dependants is pending.**

**4. THAT no estate duty is payable in respect of the estate of the deceased.**

**5. THAT Land Parcel No. Machakos/Ulu/143 be shared and registered in two equal parts the names of Elizabeth Nduleve Kyenze and Peter Mutuku Kyenze on one part and Charles Mutisya Kyenze on the other part to hold for themselves and the beneficiaries in respective houses.”**

4. Paragraph 5 above captures the essence of their case. In another Affidavit sworn on 13/6/2008 Charles Mutisya Kyenze deponed that the family had agreed on a mode of distribution but I have taken the view that whatever agreement the family may have reached is of no consequence because the rival affidavits referred to above, clearly show that the differences on distribution have never been resolved. The advocates for the two sides have also filed submissions that are at cross-purposes hence the consent to have this court determine the proper, lawful and fair mode of distribution of the deceased’s parcel of land.

5. The first issue to address is the applicable law to the estate. Since the deceased died in 2006, Section 2 (1) of the Law of Succession properly applies as it provides as follows:-

**“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the**

**commencement of this Act and to the administration of estates of those persons.”**

**6. It is clear therefore that it is the statute and not customary law that should be invoked in distribution of the estate. If that be so, since the deceased was a polygamous man, Section 40 of the Act also applies. It provides as follows:-**

**“40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and 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, but also adding any wife surviving him as an additional unit to the number of children.**

**(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”**

7. **“House”** is defined in Section 3 of the Act as a **“family unit comprising a wife, whether alive or dead at the date of the husband, and the children of that wife”**. In this case therefore, the house of the deceased mother of Charles Mutisya Kyenze qualifies as a house for purposes of distribution.

8. During submissions, the issue as to whether married daughters were entitled to inherit the deceased’s property was raised. Charles Kyenze’s lawyer’s view was as follows:-

**“...the deceased’s married daughters have no business inheriting part of the estate hereof.”** The advocate for Elizabeth Kyenze and Peter Kyenze took a different view as follows:-

**“the statute law does not...discriminate sexes (sic) as all children are equal, thus daughters whether married or unmarried irrespective of their ages are entitled to inheritance unless they expressly denounce their entitlement.”**

9. I am aware of course as was argued by both parties that Kamba customary law is patrilineal – see **Cotran’s Restatement of African Law 2: page 24**. However, I have said that section 40 is the applicable law and in section 40 there is no discrimination against married daughters and the law as was set out in **Rono vs Rono (2005) 1 KLR 538** put the issue beyond debate save that as Omolo J.A stated in that case, the court retains the discretion, subject to the usual rider of fairness, to distribute an estate reasonably. My firm holding is that married daughters are children within the meaning of section 40 aforesaid and are to be treated as units in distribution.

10. It follows therefore that the fairest way to distribute the estate herein is by following section 40 and since it is agreed that there are two purchasers namely Mutio Mulandi and Wambua Mulandi, let their identified portions be excised out of land parcel no. Machakos/Ulu/143 and the remainder thereof to be divided equally amongst the surviving spouse, Elizabeth Kyenze and all the children of the two houses, save those that will voluntarily renounce their share.

11. The grant herein to be confirmed upon the land being surveyed and clear acreages identified. All beneficiaries shall share the cost of survey.

12. Orders accordingly.

Dated and delivered at Machakos this **18<sup>th</sup>** day of **December** 2008.

**ISAAC LENAOLA**

**JUDGE**

In the Presence of: Mrs Mutua for Applicant

Mr Ngolya for Respondent

**ISAAC LENAOLA**

**JUDGE**