



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**Succession Cause 207 of 1989**

**IN THE MATTER OF THE ESTATE OF THE LATE JACKSON MAMBO**

**- BETWEEN -**

**MOSES MMBWANGA MAMBO..... PETITIONER/APPLICANT**

**- VERSUS -**

**TITO MMBWANGA MAMBO ..... OBJECTOR/RESPONDENT**

**JUDGEMENT**

The Succession cause herein relates to the estate of the late Jackson Mambo Mmbwanga who died on 6-9-84 in Lubao Sub location, Kakamega District of Western Province. He left a piece of land known as ISUKHA/LUBAO/476 measuring eight (8) acres or 3.2 hectares. A polygamist, the deceased was survived by two widows, Monika Nyambura and Penina Shanyisa. Monica had seven sons and four daughters. The daughters were all married and were living with their husbands and had no interest in the estate of their father. Penina, the second widow, had two sons and two girls. Both daughters were also married and were living with their husbands and had no interest in the estate of their father. It was Moses Mmbwanga Mambo (the Petitioner), the fourth son of Monica the 1<sup>st</sup> widow who applied and had made to him the Grant of Letters of Administration Intestate on 8-12-89. In his application for confirmation of the said Grant, the Petitioner proposed that distribution of the estate would be to the sons in equal shares. This sparked off controversy and the 1<sup>st</sup> son of the second wife, Tito Mmbwanga (the Objector) filed objection proceedings claiming that distribution should be in accordance with the number of wives that is to say HOUSES, each House taking half portion. The effect of this was that the house with more sons would have less than their step brothers in the house with few sons. This is the point that went to trial in the objection proceedings.

The Objector gave evidence and called a witness who was said to be an expert in Luhya customary law who testified that, like the deceased who was related to him, he came from Basaniaga clan of Maragoli sub-tribe. He told the court that he was well versed with Basaniaga customs and that intestate succession to land under the said custom was done in accordance with Houses. (i.e. wives) and that the children of each house would share what their House had. It was his evidence that the proposal by the Petitioner was inconsistent with the Basaniaga custom to which the deceased was subject.

The Petitioner in his evidence contented that the deceased had not distributed his land during his lifetime and that as all the sons of the first widow and second widow were the deceased's sons, it was equitable and fair that they should all take equally. It was the Petitioner's view that the distribution in accordance with the said custom would result in injustice as the sons of the 2<sup>nd</sup> widow would end up with two acres each while the sons of the 1<sup>st</sup> widow would have only ½ an acre each.

The deceased died Intestate (on 6.9.84) after the date on which the Law of Succession Act Cap 160 came into force 1.7.81 and therefore succession to and administration of his estate is subject to the provisions of the Law of Succession Act, Chapter 160 of the laws of Kenya. The Act does not govern Intestate Succession where the land is agricultural or livestock situated in such areas as the minister may by notice in the Gazette specify.

There was no evidence tendered by either party that the estate of the deceased was exempt from the application of section 32 of the Law of Succession Act Cap 160. The law applicable to the distribution of the estate of the deceased who died intestate is the law and custom applicable, to the deceased's community or tribe as the case may be. The Petitioner did not deny that the deceased was subject to the customs of the Basaniaga custom which, it was said, allows distribution in accordance with the number of houses all taking in equal shares.

Under Section 3 of the Judicature Act Cap 8, the jurisdiction of this court is exercised in conformity with the constitution and is guided by African customary law in civil cases in which one or more of the parties are subject to it or affected by it so far as it is not repugnant to justice and morality or inconsistent with any written law and is required to decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay. The issue for determination here is whether the Basaniaga custom is repugnant to justice.

There can be no sound or valid argument that distribution of an estate by disproportionate shares to the sons of the same person is unfair. The sons of the two houses stand on equal footing in relation to the deceased and none can claim to be more closely related to the deceased or to have a more superior right than the other to inherit the estate of their father. The requirement by the Basaniaga custom that regardless of the number of sons in each house the houses must take equally works out injustice. There was no evidence given by the Objector and his expert witness to show the reason for the practice by the Basaniaga clan and why it is necessary to inflict injustice where there are disproportionate number of sons in each house. I cannot countenance such injustice. The practice by the Basaniaga clan is clearly repugnant to justice and ought to be discontinued. I declare the practice by Basaniaga clan which requires intestate succession to be in accordance with houses regardless of the number of sons of heirs in each house to be repugnant to justice. Consequently, I reject the Objector's claim that the estate of the deceased should be in accordance with the two houses. I accept the proposal by the Petitioner and order that the sons of the

deceased from both houses should take equally. The Objection proceedings are dismissed. Each party shall bear its costs.

*Dated, signed and delivered at Kakamega this 2<sup>nd</sup> day of March, 2006.*

**G. B. M. KARIUKI**

**J U D G E**