



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 26 OF 2011

IN THE ESTATE OF JACOB NAPWOLI NAKITARE - DECEASED

WILLIAM JUMA NAKAITARE.....1ST PETITIONER

FRED WEKESA NAKITARE.....2ND PETITIONER

JUDGEMENT

Jacob Napwoli Nakitare, the deceased to whose estate these proceedings relate died on 5th December 2009. In his life time, he was married to three wives. One wife, the 1st wife, pre-deceased him. That left behind two widows. There is no dispute regarding who the beneficiaries of the estate of the deceased are. The 2nd wife, (2nd house) Joyce Nakhumicha and her children were settled away from the disputed parcel of land by the deceased prior to his death. She is therefore not a party to dispute in these proceedings.

The dispute relates to the distribution of the parcel of land that comprise the only asset of the estate of the deceased. The parcel of land is registered as LR No. Trans Nzoia/Sinyerere/266. According to the certificate of search which was produced as Exhibit No. 1, the parcel of land measures 13.2 Hectares (or approximately 32.7 acres) prior to the hearing of the case, this court (Hon. H. Chemitei J) had on 26th June 2019 made the following order;

“1. That the County Surveyor to undertake the above survey exercise so as to indicate the portions due to the purchasers as per the partial grant confirmed and the portion of 7.5 acres each or thereabout due to the 1st and 2nd houses respectively.

2. That further to indicate the portion occupied by the tea.”

In compliance to this order, the County Surveyor visited the suit parcel of land on 29th August 2019 and carried out the survey. He found the following position on the ground as relate to the Land occupied by the 1st and 3rd houses (he referred to the 3rd house as the 2nd house):

“1. The 1st house has a total of 19.44 Acres i.e William Juma Nakitare at the extreme end on the left of the farm occupies 4.78 acres while 14.66 acres is at the middle of the farm thus totaling 19.44 acres.

2. 2nd house is in occupation of 6.42 acres of which 2nd to that of William Juma Nakitare.

3. The area covered by the tea plantation is 2.09 acres”.

During the hearing of the case on distribution, this court heard the testimony of William Juma Nakitare (William) representing the 1st house and Fred Wekesa Nakitare (Fred) representing the 3rd house. It was evident from the evidence of William, that he is insisting that the deceased had distributed the properties that comprise the estate to the beneficiaries and therefore there was nothing left to distribute. On the other hand, it was Fred's testimony that although the deceased had partially distributed the suit parcel of land, he had not done so with finality hence his application to this court to complete the distribution. Both parties are in agreement that the deceased died testate – he did not leave a valid Will capable of being probated by this court. That being the case, this court has jurisdiction under **Section 26, 27 and 28 of the Law of Succession Act** to determine the respective shares of the beneficiaries and to determine if, whatever share was allegedly gifted to a beneficiary during the deceased's lifetime, offends the precept of fairness and equity.

In his testimony, Fred told the court that the 3rd house will be satisfied if the court awarded them 3.5 acres in addition to what they already have. William told the court that there was no land remaining or available to be distributed since most of it has been sold by the putative beneficiaries after they were shown their respective shares. Fred conceded to the fact that the children of the 1st house have sold nearly all

their shares and therefore there was likelihood that what William was saying was true.

This court's evaluation of the proposals made leads it to the irresistible conclusion that indeed the 3rd house made a case that they were unfairly treated when the parcel of land was proposed to be distributed. There is no dispute that the 1st house has eleven (11) beneficiaries while the 3rd house had nine (9) beneficiaries, when the widow is included as a beneficiary. **Section 40** of the **Law of Succession Act** provides how the estate of a deceased shall be distributed where the deceased was polygamous. It provides thus:

“ 1. Where 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 in accordance to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

In the present case, if **Section 40 (1)** of the **Law of Succession Act** were to be strictly applied, the 1st and 3rd houses would have benefited from the distribution more or less equally with the 1st house benefitting slightly more. In succession cases, however, what is important is equity. Where the beneficiaries are satisfied with a little less share, it is not for the court to impose upon them what it thinks is fair and equitable in circumstances.

In the premises therefore, this court holds that the 3rd house has made a case for this court to award them more land. This court therefore orders and directs that the tea plantation comprising of 2.09 acres and the 0.3 acres which would have been inherited by the deceased's brother Joshua Wafula Nakitare (who is also deceased and left no issues) shall be inherited by the 3rd house. The Plot at Mwangaza Trading Centre shall be shared equally between the two (2) houses as earlier agreed. There shall be no orders as to costs as this is a family dispute.

DATED AT KITALE THIS 5TH DAY OF MAY 2021

L. KIMARU

JUDGE