



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 660 OF 2012**

**IN THE MATTER OF THE ESTATE OF ESAYA OTERA ASHIEMBA alias ISAYA WASHIEMBI (DECEASED)**

**JUDGMENT**

1. On the 22<sup>nd</sup> May 2020, I delivered a ruling herein where I declined to allow an application dated, 11<sup>th</sup> November 2018, which had sought substitution of a dead administrator, on grounds that I did not have sufficient material before me, to determine the persons that I could appoint administrators, for there appeared to be some suppression of some of the survivors. I directed that a further affidavit be filed to disclose the children and grandchildren of the deceased.
2. A further affidavit was subsequently lodged herein on 2<sup>nd</sup> February 2021, sworn by Charles Odera Ombuku, on 1<sup>st</sup> February 2021, in compliance. He addresses several issues, which include the persons entitled to the estate according to him, and a list of the survivors of the deceased. The matter was subsequently mentioned on 27<sup>th</sup> April 2021, when an order was made, appointing administrators. I directed that a summons for confirmation of grant be filed. None was filed since the application dated 11<sup>th</sup> November 2019 had a component on confirmation of grant. I was pointed to that and the further affidavit filed on 2<sup>nd</sup> February 2021.
3. What is for determination now is that second limb of the application of 11<sup>th</sup> November 2018, on confirmation of the grant, which is now that made on 8<sup>th</sup> March 2021, dated 7<sup>th</sup> May 2021, which appoints Michael Obati Ngwara, Fredrick Ashiemi Oluchula and Charles Odera Ombaku administrators. The application dated 11<sup>th</sup> November 2018 is supported by the affidavit Michael Obati Ngwara, sworn on even date. He proposes that the estate of the deceased, Marama/Shiatsala/523, be shared equally between Michael Obati Ngwara, Fredrick Ashiemi Oluchula and Charles Odera Ombaku.
4. There is a reply to the application, by Charles Odera Ombaku, vide an affidavit sworn on 23<sup>rd</sup> January 2020. He avers that the deceased herein had eight sons, out of which only one was surviving, that is to say Mutakho Isaya. The ones who are dead are said to be Jacktone Ngwara, Yusuf Okelo, James Oluchula Isaya, Thomas Amuoga, Wanywa Isaya, Odera Isaya and Samwel Stephen Ombuku. He avers that the deceased had distributed his estate during his lifetime to seven of his sons, and he had retained Marama/Shiatsala/523, which he argues was meant for his late father, Samwel Stephen Ombuku, the only son who had not benefitted from the lifetime distribution. I shall generally treat Charles Odera Ombuku as the protestor, and I shall refer to him as such hereafter.
5. The other affidavit on record is that which was filed on 2<sup>nd</sup> February 2021, following my directions of 22<sup>nd</sup> May 2020, by the protestor, Charles Odera Ombuku, sworn on 1<sup>st</sup> February 2021. He opposes the proposal that Marama/Shiatsala/523 be shared equally between Michael Obati Ngwara, Fredrick Ashiemi Oluchula and Charles Odera Ombaku. He avers that the said property was the reserve for the estate of Samwel Stephen Ombuku, the youngest son of the deceased. He explains that the eldest sons of the deceased had all benefitted from lifetime gifts from the deceased and he had retained Marama/Shiatsala/523 in his name, which he intended to go to his youngest son. He avers that the deceased had on 21<sup>st</sup> April 1967 gifted Mutakho Ashiemi with Marama/Shiatsala/495, Jacktone Ngwara Isaya with Marama/Shiatsala/499, Odera Ashiemi with Marama/Shiatsala/505, Anywa Isaya with Marama/Shiatsala/508, and Samuel Stephen Ombuku with Marama/Shiatsala/523.
6. On the individuals who make up the family of the deceased, the protestor has said that the deceased had two wives, being Norah Omuwanga Washiemi and Anne Endeche Isaya. The household of the deceased, therefore, comprised of two houses. Norah Omuwanga Washiemi had eight children, being six sons and two daughters. The sons are the late Jacktone Ngwara Isaya, the late Yusuf Okelo, the late Harrizone Anyua Isaya, the late Odera Ashiemi, Aggrey Mutakho Ashiemi and the late Samuel Ombuku Isaya. The daughters are Peres Manyasi Isaya and Agnetta Omurunga. Anne Endeche Isaya had two children, both sons, being the late Thomas Amuoga and the late Oluchula Isaya. He has set out the names of the grandchildren of the deceased from each of the children of the deceased. The late Jacktone Ngwara Isaya had seven children, being Tito Samuel Ngwara, Johanes Ngwara, Michael Obati Ngwara, Musa Ngwara, Norah Omuwanga, Agnes Makokha and Isaya Ashiemi Ngwara. The late Yusuf Okelo died without wife nor children. The late Harrizone Anyua Isaya was the father of Samuel Atola Anyua, the late Nerea Mukoma, Nora Omuwanga, Ashiemi, the late Stephen Ashiemi, Alfred Ondigo, Peter Ong'ale, Joseph Okusimba, Mukhwana Anywa, the late Ruth Anywa and the late Haggai Minabo. The children of the late Odera Ashiemi are said to be the late Maumo Odera, the late Omondi Odera, the late Odinya Odera, Eunice Odera, the late Sarah Odera and the late Ouma Odera. The children of Aggrey Mutakho Ashiemi are the late Obati Mutakho, the late Leah Aswani, Justus Isaya, Wilfred Amwayi,

Fredrick Omollo, Fanuel Amakobe, Joseph Nyende, Esther Omunanga, Aoko Mutakho and the late Sarah Onduso. The children of the late Samuel Ombuku Isaya are Susan Auma Ombuku, Charles Odera Ombuku, Alfred Otieno Ombuku, Norah Omuwanga Ombuku and Isaya Ashiambi Ombuku. The children of Peres Manyasi Isaya are James Okelo Siwawo, the late Owino Siwawo, Otieno Siwao and Sigar Siwawo. The late Agnetta Omurunga is said to be the mother of Pius Otieno, Atieno Otieno and the late Enock Atola Otieno. The late Thomas Amuoga died without a wife nor children. The children of the late James Oluchula Isaya are Frederick Ashiambi Oluchula, Pamela Akinyi Oluchula, Jared Sakwa Oluchula, Ruth Waswa Oluchula, Ezekiel Obati Oluchula, Joseph Rapel Oluchula, Lilian Akoth Oluchula, Mourine Adhiambo, Felix Ochieng, Nelson Mandela, Gideon Odhiambo, Emmanuel Omondi and Violet Akoth.

7. He has attached a number of documents to his affidavit, an official search certificate for Marama/Shiatsala/495 shows that the same was registered on 21<sup>st</sup> April 1967 in favour of Mutakho Ashiambi, measuring 0.28 hectares. An official search certificate for Marama/Shiatsala/499 shows that the same was registered on 21<sup>st</sup> April 1967 in favour of Nguara Ashiambi, measuring 0.65 hectares. An official search certificate for Marama/Shiatsala/505 shows that the same was registered on 21<sup>st</sup> April 1967 in favour of Odera Ashiambi, measuring 0.36 hectares. An official search certificate for Marama/Shiatsala/508 shows that the same was registered on 21<sup>st</sup> April 1967 in favour of Anywa Isaya, measuring 0.32 hectares. An official search certificate for Marama/Shiatsala/523 shows that the same was registered on 21<sup>st</sup> April 1967 in favour of Isaya Ashiambi, measuring 2.14 hectares. There is also copy of land certificate, dated 22<sup>nd</sup> February 1968, for Marama/Shiatsala/523 issued in the name of the deceased.

8. For the sons with families it is not clear which property was allocated to the late James Oluchula Isaya; while the sons who died without wives or children were not allocated anything, that is to say the late Yusuf Okelo and the late Thomas Amuoga.

9. The applicant did not respond to either of the two affidavits by the protestor.

10. I conducted an oral hearing on 25<sup>th</sup> February 2020. The applicant testified that the deceased died in 1979, and that he died possessed of only one property, being Marama/Shiatsala/535, measuring 5.3 acres. He stated that the deceased had two wives, Norah Omurunga and Anna Endeche. Norah Omurunga had six sons being Jackton Ngw'ara Isaya, Yusuf Okello Isaya, Harrison Wanywa Isaya, Simion Odera Isaya, Aggrey Mudakho Isaya and Samwel Ombuku Isaya. He stated that of the six only Aggrey Mudakho Isaya was alive. He stated that they all had families. He said Anna Endeche had two sons, James Oluchula Isaya and Thomas Amuoga Isaya, adding that Thomas Amuoga died before he got children.

11. During cross-examination, he stated that Jackton, the eldest son of the deceased was buried on a parcel of land that he had bought. He said that majority of the sons of the deceased had bought land, such as Aggrey Mudakho, Simon Odera and Harrison Wanywa. He said James Oluchula lived on Marama/Shiatsala/523. He conceded that it was the youngest son who was left on the land, and, in that case, it was the father of the protestor, while the older children had moved out. He stated that all the other sons of the deceased were buried on the lands they moved out into and settled on. James Oluchula was buried on Marama/Shiatsala/523. He stated that Yusuf Okello was buried on Marama/Shiatsala/523, but he could not tell where Thomas Amuoga was buried. He also stated that he was not aware where Anna Endeche was buried. He could not explain why the older children did not apply for succession after the deceased died in 1979, until the father of the protestor, the youngest son in the first house, moved the court in 2011 at the Butere law courts.

12. The protestor confirmed the family details given in the testimony of the applicant. He stated that the deceased had eight sons, out of which the two did not have families of their own. He stated that the deceased owned Marama/Shiatsala/523 and other lands where he settled some of his sons. He testified that he lived on Marama/Shiatsala/523 with his mother and siblings. He said that James Oluchula was not buried on Marama/Shiatsala/523 but on a parcel of land next to it. He said that there was a piece of land set apart for the second house of the deceased, whose details he did not have. He asserted that James Oluchula was not living on Marama/Shiatsala/523 and was not buried there, but on his own land, which was adjacent to Marama/Shiatsala/523. He asserted that the only other son of the deceased who lived on Marama/Shiatsala/523 was Yusuf Okello.

13. The deceased died on 17<sup>th</sup> November 1979, before the Law of Succession Act, Cap 160, Laws of Kenya, came into force on 1<sup>st</sup> July 1981. His estate is, therefore, for distribution in accordance with customary law, by dint of section 2(1)(2) of the Law of Succession. The deceased died intestate, and therefore distribution should be in accordance with the customary intestate succession law, and not Part V of the Law of Succession Act.

14. The parties did not disclose the customary law that ought to apply to the estate. The land is situate within Butere of Kakamega County. That area is predominantly occupied by the Marama sub-tribe of the Luhya tribe. It could be presumed that the parties hereto are Luhya by tribe, from the Marama sub-tribe. But some parts of Butere are also occupied by members of the Luo community. It would, therefore, not be right to make any presumptions on the applicable customary law. As there is no evidence of the applicable customary law, I shall be guided generally by the principles that govern distribution under the Law of Succession Act.

15. As section 2(2) of the Law of Succession Act applies, the daughters of the deceased will not be reckoned for succession purposes. If they had come forward and claimed for a share in the estate, I would have considered their case in line with the provisions of the Constitution of Kenya, 2010, and the Convention on the Elimination of Discrimination Against Women (CEDAW), and allocated them shares. Therefore, in considering distribution I shall not take them into account, and I shall be guided by *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* [1992] 2 KAR 292, and hold that according to the law then in force, married daughters were entitled to access property from their husbands' side of the family.

16. From the material on record, the deceased is shown to have died possessed of only one asset being Marama/Shiatsala/523, which was registered in his name on 21<sup>st</sup> April 1968. The protestor argues that the deceased had distributed some of the assets to some of his children during his lifetime. The other properties are listed as Marama/Shiatsala/495, 499, 505 and 508, which were given to Aggrey Mutakho Ashiambi, Jacktone Ngwara Isaya, Odera Ashiambi and Anywa Isaya respectively. The deceased had eight sons, two died before they got families of their own, leaving six. Out of the six, four had benefitted from these lifetime distributions, according to the protestor, yet he was only able to produce search certificates for only four of the titles. He asserted that his father was the one solely entitled to Marama

Shiatsala/523. He said the sixth son had his own land, but he could not give details relating to it.

17. Were Marama/Shiatsala/495, 499, 505 and 508 lifetime gifts by the deceased to his four sons? The applicant argued that the sons bought these lands and settled on them. Of course, no evidence was presented by either side as proof that these four assets ever belonged to the deceased and that he had gifted them to his sons, and equally that the said sons had in fact buy those assets. I have seen copies of the certificates of official search placed on record. What is curious is that these assets, Marama/Shiatsala/495, 499, 505 and 508, were all registered on the same day with Marama/Shiatsala/523, the property that was registered in the name of the deceased. I would be persuaded, therefore, by the argument that these assets were gifts to the sons from the deceased, hence he registered all of them on the same date with his Marama/Shiatsala/523.

18. The protestor submitted that his father was not settled with the rest. The applicant agreed with that. They both based themselves on custom, even though none of them sought to establish the custom. No evidence was presented that James Oluchula was equally settled. He appears to have been the youngest son of the deceased, given that he had minor children as at February 2021. The protestor did not provide a search certificate for the land given to him, and even though he asserted that he lived and had a piece of land adjacent to Marama/Shiatsala/523, but he could not give registration details of such land. It is he who alleges who ought to prove. The burden was on the protestor to establish that the late James Oluchula had benefited from lifetime gifts like the other sons, yet he did not provide any such proof. I shall take it that the late James Oluchula, like the late Samuel Stephen Ombuku, did not benefit from the lifetime gifts, and, therefore, his estate or family is entitled to a share in Marama/Shiatsala/523, equally with the family of Samuel Stephen Ombuku.

19. Should the other sons or their families, those who benefited from the lifetime gifts, also partake of Marama/Shiatsala/523? The answer to that question may very well depend on the acreages that they got as compared with that of Marama/Shiatsala/523. Marama/Shiatsala/523 measures 2.14 hectares, while Marama/Shiatsala/495 measures 0.28 hectare, Marama/Shiatsala/499 0.65 hectare, Marama/Shiatsala/505 0.36 hectare and Marama/Shiatsala/508 0.32 hectare. Should Marama/Shiatsala/523 be shared equally between two sons, that is to say the estates of the late Samuel Stephen Ombuku and the late James Oluchula Isaya, each would take 1.07 hectares. That would amount to each of them taking more than half of what the other sons benefited from in their lifetime gifts. It would appear that the other sons ought to take a share from Marama/Shiatsala/523, for there to be equity. Succession is subject to the principles of equity, and, therefore, the court must strive to ensure that the property is shared out equally or equitably between the six sons of the deceased.

20. The aggregate acreage of Marama/Shiatsala/495, 499, 505, 508 and 523 combined is 3.75 hectares. When 3.75 hectares are shared equally between the six, each son or his estate should get 0.625 hectares. Marama/Shiatsala/499 is 0.65 hectare, which means that Ngwara Ashiemi got a share bigger than the rest of the sons. I was told he was the first born son, and I take judicial notice that in some cultures, under custom, the eldest sons would be entitled to a slightly larger share. The balance, after deducting the 0.65 hectare, would be 3.10 hectares, when shared equally between the remaining five sons, would mean each should take 0.62 hectares. Consequently, the families of the late Charles Stephen Ombuku and the late James Oluchula Isaya shall each take 0.62 hectare out of Marama/Shiatsala/523. The balance of 0.9 hectare out of Marama/Shiatsala/523 shall be devolve as follows: to Aggrey Mutakho Ashiemi 0.34 hectare, to the estate of the Odera Ashiemi 0.26 hectare and to the estate of the late Anywa Isaya 0.3 hectare.

21. The final orders that I shall make are as follows:

- (a) That the estate of the deceased, being Marama/Shiatsala/523, shall be distributed in the terms spelled out in paragraph 20 here above;**
- (b) That the shares devolving upon the estates of the dead sons of the deceased shall be handled in succession causes to be initiated in their respective estates, for distribution amongst the children and other persons beneficially entitled to shares in such estates;**
- (c) That the grant made herein on 8<sup>th</sup> March 2021 is hereby confirmed in those terms;**
- (d) That a certificate of confirmation of grant shall issue accordingly in those terms; and**
- (e) That each party shall bear their own costs; and**
- (f) That any party aggrieved by the orders that I have made herein, has leave of twenty eight days to move the counter appeal, appropriately.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10<sup>TH</sup> DAY OF DECEMBER 2021**

**W MUSYOKA**

**JUDGE**