



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION NO. 53 OF 2003

IN THE ESTATE OF: CRESENT WERE HEZRON WERE (DECEASED)

BETWEEN

MARY MUSIKU WERE.....PETITIONER

AND

MARY KUBENDE WERE.....OBJECTOR

RULING

1. Mary Kubende Were the objector herein and Mary Musiku Were the petitioner herein are widows of the late Crescent Were Hezron Were. They have disagreed on the mode of distribution of the estate.
2. In my ruling dated 27th day of November, 2018, I made the following orders:
 4. **I am making the following orders:**
 - a) **That all properties available for distribution be valued and a valuation report be filed in court.**
 - b) **That both parties avail documentary evidence of the disposed properties and same to include the dates when the sale agreements were entered.**
 - c) **Both parties have 60 days within which to comply.**
 - d) **The costs to meet both requirements shall be borne by the estate of the deceased or in the alternative, both parties to share the same equally.**
3. The deceased herein died on 18th September 2000. Any land transaction effected after this date is in contravention of section 45 of the Law of Succession Act which states:
 - (1) **Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**
 - (2) **Any person who contravenes the provisions of this section shall—**
 - (a) **be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**
 - (b) **be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**
4. Any dealings, therefore, with the property of the deceased after his death was illegal. Any such property must revert to the original ownership and be available for distribution.
5. The deceased was polygamous and survived by two widows and fifteen children. Seven children with the petitioner (according to her form

P. & A. 5) and eight children with the objector (according to her averment in evidence affidavit dated 5th September 2016).

6. Section 40 of the Law of Succession Act will be applicable in this succession cause for the deceased was polygamous. It provides:

(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. In this case, there shall be seventeen units. The distribution shall factor the valuation reports filed herein to ensure equality. The distribution shall also factor any benefit the deceased had given to any beneficiary during his lifetime as envisaged under section 42 of the Law of Succession Act which provides as follows:

Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

8. The petitioner is given 60 days within which to file proposed distribution in line with the above orders. Failure to do so, then the grant to her shall automatically be revoked.

9. Each party shall bear own costs.

DELIVERED and SIGNED at BUSIA this 11th day of November, 2020

KIARIE WAWERU KIARIE

JUDGE