



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA.

SUCCESSION CAUSE NO. 198 OF 2011.

IN THE MATTER OF THE ESTATE OF TRUPHOSA INZIANI OJAGO.....DECEASED

BETWEEN

RASTO G. OJAGO.....1ST PETITIONER

MARGARET I. OJAGO.....2ND PETITIONER

JOSEPH M. OJAGO.....3RD PETITIONER

JUDGMENT

TRUPHOSA INZIANI OJAGO the deceased was married to LIVINGSTONE LIBILISI OJAGO who died on 4th February 1992 and Succession was done and property transferred to her. Truphosa died on 4th November 2003 in Texas U.S.A at the time of death she left the following children surviving her

Name	Age	Relationship
1. Anne Lumire Ojago	Deceased	Daughter
2. James M'mbuka Ojago	57 years	Son
3. Zippy Ingado Ojado	55 years	Daughter
4. Ernest Livoi Ojago	54 years	Son
5. Margaret Iminza Ojago	52 years	Daughter
6. Charity Imbulani Ojago	46 years	Daughter
7. Rasto Gidali Ojago	45 years	Son
8. Joseph Musalia Ojago	43 years	Son
9. Grace Vutia Ojago	31 years	Daughter

The deceased left behind the following assets;

1. Bungoma/Kamukoiwa 167	16 HA or 40 Acres
2. Bungoma/Kamukoiwa/1645	0.02 HA
3. Bungoma/Kamukoiwa/772	0.02 HA
4. Bungoma/Kamukoiwa/767	0.03 HA

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|---------------------------|----------------|
| 5. Kakamega/Kegoye/563 | 2.5 HA |
| 6. Bungoma/Kamukoiwa/341 | 2 Acres |
| 7. Bungoma/Kamukoiwa/1098 | 8 Acres |
| 8. Kenya Airways Shares | A/c. No.046092 |

The deceased died intestate and Rasto Ojago, Joseph M. Ojago and Margaret I. Ojago filed this cause and were on 30th September, 2011 issued with grant of Letters of Administration.

Disagreement among the Petitioners emerged and on 8.4.2016, Margaret Ojago (2nd Petitioner) and Joseph M. Ojago (3rd Petitioner) applied for confirmation of the grant annexing a Distribution schedule for confirmation. Rasto G. Ojago the 1st Petitioner filed an affidavit of protest opposing the application for confirmation on the grounds that property not belonging to the deceased had been included the share allocated to him is not adequate and that his contribution to the estate for 25 years has not been acknowledged or rewarded in the distribution.

As the Petitioners were unable to agree on the distribution mode, this court directed the 1st Petitioner to also file his proposed mode of distribution.

The petitioners gave evidence in support of their respective mode of distribution. Counsel for the parties filed their respective submissions. Mr. Mulele for 2nd & 3rd Petitioners submitted that the 2nd and 3rd Petitioners mode of distribution is fair as even the 1st Petitioner is given equal shares as other sons, and the daughters also given equal shares. He urged the court to adopt the 2nd and 3rd Petitioners mode of distribution.

Mr. Were for the 1st Respondent submitted that the 2nd and 3rd Petitioner have included Land Parcel No. Bungoma/Kamukoiwa/1098 which is registered in the name of Japheth Nyongesa Kimungui and therefore the land cannot be subject to these proceedings. He urged that the 1st Petitioner mode of distribution be adopted and in addition he should be paid by the other beneficiaries Kshs.120,000/= for 10 years 1992 – 2002 and Kshs.25,000/= per Month from January 2003 to date for taking care of the property and finally that he should not be moved from where he has developed his home.

From the evidence and submission there is agreement that the deceased died intestate having 9 beneficiaries. These are;

Name	Age	Relationship
1. Anne Lumire Ojago	Deceased	Daughter
2. James M'mbuka Ojago	57 years	Son
3. Zippy Ingado Ojado	55 years	Daughter
4. Ernest Livoi Ojago	54 years	Son
5. Margaret Iminza Ojago	52 years	Daughter
6. Charity Imbulani Ojago	46 years	Daughter
7. Rasto Gidali Ojago	45 years	Son
8. Joseph Musalia Ojago	43 years	Son
9. Grace Vutia Ojago	31 years	Daughter

It is also not contested that the deceased left the following properties registered in her name.

- | | |
|---------------------------|-------------------|
| 1. Bungoma/Kamukoiwa 167 | 16 HA or 40 Acres |
| 2. Bungoma/Kamukoiwa/1645 | 0.02 HA |
| 3. Bungoma/Kamukoiwa/772 | 0.02 HA |
| 4. Bungoma/Kamukoiwa/767 | 0.03 HA |
| 5. Kakamega/Kegoye/563 | 2.5 HA |

- | | |
|---------------------------|----------------|
| 6. Bungoma/Kamukoiwa/341 | 2 Acres |
| 7. Bungoma/Kamukoiwa/1098 | 8 Acres |
| 8. Kenya Airways Shares | A/c. No.046092 |

It is also not in dispute that part of Parcel No. Bungoma/Kamakoiwa/341 measuring 2 acres and Bungoma Kamakoiwa/1098 measuring 8 acres were in the process of being purchased from the owners, where agreement was made, purchase price paid but same had not been transferred to the deceased.

The main issue for determination is beneficiaries having been agreed and assets identified is how should the estate be distributed. The 1st Petitioner proposed the following distribution;

1ST PETITIONERS SCHEDULE OF DISTRIBUTION OF THE DECEASED'S ESTATE:

1st Petitioner's proposal for distribution of parcel of land No. BUNGOMA/KAMAKOIWA/167 - 16 Hectares is;

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|---------------------|----------|
| 1. JAMES M'MBUKA | 8 Acres |
| 2. ERNEST LIVOI | 8 Acres |
| 3. JOSEPH MUSALIA | 8 Acres |
| 4. ERASTO GIDALI | 10 Acres |
| 5. ANN KAZIGA | 2 Acres |
| 6. ZIPPORAH INGADO | 1 Acre |
| 7. MARGARET IMINZA | 1 Acre |
| 8. CHARITY IMBULENI | 1 Acre |
| 9. GRACE VUTIA | 1 Acre |

Parcel of land No. BUNGOMA/KAMAKOIWA/1645 0.02 hectares, Parcel of land No. BUNGOMA/KAMAKOIWA/772 0.02 Acres and Parcel of land No. BUNGOMA/KAMAKOIWA/767 0.03 Acres be allocated to ERASTO GIDALI.

Parcel of land No. KAKAMEGA/KEGOYE/563 - 2.5 Ha be divided equally between JAMES M'MBUKA, ERNEST LIVOI, JOSEPH MUSALIA and ERASTO GIDALI.

The 2nd and 3rd Petition proposed the following;

1. Bungoma/Kamakoiwa/167, 16 Hectares or 40 Acres

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|-------------------------------------------|---------|
| a. James M'mbuka Ojago | 8 Acres |
| b. Ernest Livoi Ojago | 8 Acres |
| c. Joseph Musalia Ojago | 8 Acres |
| d. Erasto Gidali Ojago | 8 Acres |
| e. Ernest Livoi Ojago (<i>to hold in</i> | |
| Trust for the Ojago Foundation) | 2 Acres |
| f. Ziporah Ongado Ojago | 2 Acres |
| g. Margaret Iminza Ojago | 2 Acres |
| h. Charity Imbulani Ojago | 1 Acre |
| i. Grace Vutia Ojago | 1 Acre |

TOTAL

40 Acres.

2. Parcel No. Bungoma/Kamukoiwa/1645 0.02 hectares allocated to Dr. JAMES M'MBUKA OJAGO.
3. Parcel No. Bungoma/Kamukoiwa/722 0.02 hectares to be allocated to RASTO G. OJAGO.
4. Parcel No. Bungoma/Kamukoiwa/767 0.03 hectares to be Allocated to ERNEST LIVOI OJAGO.
5. Parcel No. Kakamega/Kegoye/563 2.5 Ha divided equally between JAMES M'MBUKA OJAGO, ERNEST LIVOI OJAGO, JOSEPH MUSALIA OJAGO and RASTO GIDALI OJAGO.
6. Parts of Parcel No. Bungoma/Kamukoiwa/341, being 2 Acres and 1098 being 8 Acres bought by our mother were sold by 1st Petitioner to his exclusive benefit.

The 1st Petitioner in his evidence in Court stated;

“I wish to adopt this as evidence. In my schedule I have allocated myself 10 acres. They say I should get 8 Acres. I have no problem with being given 8 Acres. The 2 Acres are in the compound of our parents homestead and graveyard. I have built on that parcel a house when complete will be Kshs.20 million. I have invested Kshs.5 million. I have planted cane, eucalyptus and coffee. The total value of trees is Kshs.22 million.

There are 3 plots available for distribution. Each of the 3 brothers should get one plot.”

It is therefore clear that 1st Petitioner has no serious objections to being given 8 Acres as the rest in Parcel Bungoma/Kamukoiwa/167. He also proposes 2 acres for parents homestead and graveyard which is what is proposed by 2nd and 3rd Petitioner for a foundation. In view of the above I distribute the estate of the deceased as hereunder.

1. Bungoma/Kamukoiwa/167, 16 Hectares or 40 Acres

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| a. James M'mbuka Ojago | 8 Acres |
| b. Ernest Livoi Ojago | 8 Acres |
| c. Joseph Musalia Ojago | 8 Acres |
| d. Erasto Gidali Ojago | 8 Acres |
| e. [To comprise the homestead of
The deceased and graveyard to be
<i>Held by all the dependants jointly</i>
through a Ojago Foundation.] | 2 Acres |
| f. Ziporah Ongado Ojago | 2 Acres |
| g. Margaret Iminza Ojago | 2 Acres |
| h. Charity Imbulani Ojago | 1 Acre |
| i. Grace Vutia Ojago | 1 Acre |

TOTAL

40 Acres.

2. Parcel No. Bungoma/Kamukoiwa/1645 0.02 hectares allocated to Dr. JAMES M'MBUKA OJAGO.
3. Parcel No. Bungoma/Kamukoiwa/722 0.02 hectares to be allocated to RASTO G. OJAGO.
4. Parcel No. Bungoma/Kamukoiwa/767 0.03 hectares to be Allocated to ERNEST LIVOI OJAGO.
5. Parcel No. Kakamega/Kegoye/563 2.5 Ha divided equally between JAMES M'MBUKA OJAGO, ERNEST LIVOI OJAGO,

JOSEPH MUSALIA OJAGO and RASTO GIDALI OJAGO.

The Petitioners agree on the status of part of Bungoma/Kamakoiwa/341 measuring 2 acres and Bungoma/Kamakoiwa/1098 measuring 8 acres in where the deceased had purchased, signed agreement for sale of land but had not by the time she died been transferred to her. A property which is not registered in the name of the deceased cannot be distributed by the court. Where however, the deceased had acquired an interest in property but the transactions had not been completed, a court on property can give direction as to the interest when it finally matures, and the interest or property is transferred to the estate. In this case, both the Petitioners in Form P & A 5 noted the deceased's interest in the property as there existed an agreement between Truphosa I. Ojago (ID. No.[...]) and Japheth K. Kimangui (ID. No. [...]) in Bungoma/Kamakoiwa/1098 and Truphosa I. Ojago and Laban Ingadi ID. No. [...]. That Interest was not extinguished by the death of the deceased. I therefore direct once the purchased property is transferred to the estate the same be distributed equally among the beneficiaries, and if the interest is disposed off the proceeds be shared equally among all the beneficiaries.

Dated and Signed at Bungoma this 4th day of July, 2019.

S.N. RIECHI

JUDGE