



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**PROBATE & ADMINISTRATION CAUSE NO. 5 OF 2013**  
**RE: ESTATE OF MOSES MUSI AKOLA (DECEASED)**

**RAEL VULEKANI MUSI.....PLAINTIFF**

**VERSUS**

**RACHAEL EDAGAYE AKOLA.....DEFENDANT**

**MADRID ANDIA AKOLA.....CO-DEFENDANT**

**JUDGMENT**

1. Moses Musi Akola (hereafter *the deceased*) died intestate on 1<sup>st</sup> August 2012 at the age of seventy nine. He was polygamous. A dispute has arisen over the distribution of his free estate. Rachael Edagaye Akola (hereafter *the defendant*) and Rael Vulekani Musi (hereafter *the plaintiff*) are widows of the deceased. The *co-defendant*, Madrid Andia Akola, is a daughter of the deceased.

2. A petition for letters of administration was jointly presented by the two widows. But they failed to agree on the mode of distribution of the net intestate estate. The initial directions were that the cause be heard by *viva voce* evidence. On 16<sup>th</sup> June 2014, the court directed that the affidavit of protest by the plaintiff sworn on 8<sup>th</sup> February 2014 be deemed to be the plaint. The summons dated 20<sup>th</sup> December 2013; and, the two replying affidavits sworn by the defendant and the co-defendant on 3<sup>rd</sup> June 2014 respectively were deemed to be the statement of defence.

3. On 22<sup>nd</sup> June 2015, the parties changed their minds. They now agreed that the dispute on distribution of the assets be resolved by *affidavit evidence*; and, the *submissions* by counsel. They recorded a lengthy *consent* in the following terms-

“(1) *The cause shall be determined on the affidavits on record and the written submissions of parties.*

(2) *The key question for determination shall be distribution. The two widows [shall] be co-administrators.*

(3) *The following are the affidavits referred to;*

a) *Affidavit of protest sworn by Rael Musi sworn on 8<sup>th</sup> February 2014 in opposition to summons for confirmation dated 20<sup>th</sup> December 2013;*

- b) *Replying affidavit of Madrid Andia Akola sworn on 3<sup>rd</sup> June 2014 and filed on even date;*
- c) *Gideon Luvembe's affidavit dated 3<sup>rd</sup> June 2014. d) Affidavit by Rachael Edagaye Akola in support of summons of confirmation sworn on 20<sup>th</sup> December 2013.*
- e) *Replying Affidavit of the same deponent sworn on 3<sup>rd</sup> June 2014 and filed on even date.*
- (4) *The plaintiff, shall rely on the list of documents dated 26<sup>th</sup> January 2015 and filed on 10<sup>th</sup> March 2015*
- (5) *The defendant shall rely on the documents annexed to the affidavits above”.*

4. It is thus obvious that there is *no* dispute on the appointment of the administrators. The plaintiff and the defendant shall remain the joint administrators. The issue for determination is how the estate should be distributed between the two houses. The plaintiff's case is that the estate should be distributed *equally* between the widows and the children from the two houses. The defendant's learned counsel submitted that *equality* is not *equity*. The defendant's case is that the deceased had settled each widow and their children on separate parcels of land. The plaintiff and her children should thus get two pieces of land in Serem known as Tiriki/Serem/846 and Tiriki/Serem/328. The defendant and her children should be left with the land known as Tiriki/Serem/247 and Kakamega/Mabusu/11.

5. The plaintiff's position is diametrically opposite. Her view is that the net intestate estate should be equally divided between the two houses according to the number of children of the deceased; and, adding the two widows as additional units. She has filed a proposal indicating the various sizes of landed property that should go to the widows and children. The sizes are not entirely equal but do not vary too much. She proposes that Plot No. A4/670 Kayole be sold and the proceeds shared equally.

6. The plaintiff thus insists that Plot No. A4/670 Kayole forms part of the estate. The co-defendant claims that she acquired the plot through a *lottery*; that she is the registered owner; and, it should accordingly be distributed to her. She avers that the property has never been registered in the name of the deceased; and, that she was not holding it in trust for the family.

7. There seems to be an agreement that the defendant should get all the shares in Munyonzo Farmers Society. I will give the reasons shortly. The parties also agree that the pension funds held in the Post Office Savings account should be divided equally.

8. The plaintiff has filed submissions dated 20<sup>th</sup> July 2015. The defendant's and co-defendant's submissions were filed on 20<sup>th</sup> July 2015. I have considered the affidavits and documents referred to in the consent of the parties above, the evidence and the rival submissions.

9. I will start with three *non-contested* assets. The first relates to a claim by a *purchaser*, Gideon Luvembe. He averred in an affidavit sworn on 3<sup>rd</sup> June 2014 that he purchased the property known as Kakamega/Shirere/1582 from the deceased. The consideration was Kshs 300,000. He has been in possession. The purchaser filed a chamber summons dated 3<sup>rd</sup> June 2014 praying that the property be included in the schedule of assets; and, that it be distributed to him. This was clearly a sale *inter vivos*. By *consent* of the parties, the chamber summons was allowed on 16<sup>th</sup> June 2014. The property known as Kakamega/Shirere/1582 shall accordingly be distributed to Gideon Luvembe.

10. The second matter relates to the pension. All the parties were in agreement that that the pension funds held in the Post Office Savings account be divided *equally* between the widows and all the children from both houses.

11. The third property that is not contested relates to the shares in Munyonzo Farmers Society. In the affidavit in support of summons for confirmation of grant, the defendant had proposed that the shares be

transferred to her. The affidavit of protest to mode of distribution by the plaintiff sworn on 8<sup>th</sup> February 2014 does not challenge the distribution of those shares. Parties are bound by their pleadings. I thus find that all the shares in Munyonzo Farmers Society shall be distributed to the defendant.

12. I will now turn to the five disputed properties. There were four properties in the name of the deceased: Tiriki/Serem/846, Tiriki/Serem/328, Tiriki/Serem/247; and, Kakamega/Mabusi/11. The fifth property, Plot No. A4/670 Kayole, is in the name of the co-defendant. The plaintiff however claims that the co-defendant was holding it in trust for the whole family.

13. It is common ground that the deceased was married to the plaintiff and defendant. He married the defendant in 1953 or thereabout; and, the plaintiff in 1961 or thereabouts. The deceased died intestate on 1<sup>st</sup> August 2012. He was aged 79. That is clear from the death certificate dated 8<sup>th</sup> November 2012. He was survived by *two* widows and *nineteen* children. The beneficiaries from the two houses are as follows-

1<sup>st</sup> House

- i. Rachel Edagaye Akola - 1<sup>st</sup> Widow
- ii. Margaret Mwenesi Akola - Daughter
- iii. Jerida Gladys Ayesa - Daughter
- iv. Bedina Inyuma Njoroge - Daughter
- v. Iris Akhalakwa Ogoli - Daughter
- vi. Madrid Andia Akola - Daughter
- vii. Aileen Khavere Mandi - Daughter
- viii. Ian Nelson Akola - Son
- ix. James Doral Akola - Son
- x. Violet Ambati Akola - Daughter

2<sup>nd</sup> House

- i. Rael Vulekani Musi - 2<sup>nd</sup> Widow
- ii. Paul Khavere Akola - Daughter
- iii. Jane Ayuma Akola - Daughter
- iv. Kennedy Indimuli Akola - Son
- v. George Shivachi Akola - Son
- vi. Maclelan Likhakasi Akola - Daughter
- vii. Avelling Maluti Akola - Son
- viii. Isabella Avisia Akola - Daughter
- ix. Wycliffe Murunga Akola - Son

x. Nancy Andia Akola - Daughter

xi. Lucy Mwenesi Akola - Daughter

14. Learned counsel for the plaintiff submitted that the proposal made by the defendant is unjust. It would mean that the 1<sup>st</sup> house would get more than 37.5 acres equivalent to 70% of the estate. Counsel submitted that that would leave the 2<sup>nd</sup> house with a paltry 13 acres or 30% of the estate. No valuations were presented to court.

15. It is common ground that the deceased was a polygamist; and, he died intestate. The 1<sup>st</sup> house has ten beneficiaries while the 2<sup>nd</sup> house has 11 beneficiaries. Learned counsel for the plaintiff submitted that the estate should be consolidated and distributed equally among all the beneficiaries.

16. That submission finds support in section 40 of the Law of Succession Act which provides-

*“40 (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 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 within each house shall be in accordance with the rules set out in section 35 to 38”.*

17. Section 40 does *not* however take away the discretion of the court to distribute the estate *fairly*. By dint of sections 27 and 28 of the Act, the court has been clothed with wide *discretion* to provide for dependants or beneficiaries. This point was succinctly captured by Omollo J A in *Rono v Rono & another* [2005] 1 KLR 538 at 553-

*“I had the advantage of reading in draft form the judgment prepared by Waki, JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act”.*

18. The parties have for example not provided the valuations for the properties. Looking at the properties through the narrow lenses of *acreage* could be misleading. There is also the question of the *wishes* of the deceased and Tiriki customs. Throughout the life of the deceased, he had settled the two families on *separate* properties that were many miles apart. The 1<sup>st</sup> widow lived on the Mabusi land which is 14.2 hectares. The deceased was buried there. The other family was settled in Tiriki. Learned counsel for the defendant thus submitted that the plaintiff’s proposed mode of distribution runs counter to the wishes of the deceased. The plaintiff’s proposal would mean that she and her family take three parcels of land Tiriki/Serem/846, Tiriki/Serem/328 and Tiriki/Serem/247; and, extend to another 5.8 hectares of Kakamega/Mabusi/11 now occupied by the defendant.

19. I have considered the averments of the defendant at paragraph 2 (d) of her affidavit sworn on 3<sup>rd</sup> June 2014. She states as follows-

*“For over fifty years from the early 1960's, the deceased had separately settled his two wives with I and my children being settled on land parcel Kakamega/Mabusi/11 while the protestor and her children were settled on the family land parcel No. Tiriki/Serem/846 which in fact was our ancestral land and where I was also settled and had my permanent house but had to painfully leave it and relocate to the remote bushy and snake ridden Mabusi land to avoid the constant harassment from the protestor and my sisters-in-law over what they claimed to be my inability to beget male*

*children for my deceased husband to inherit him upon death in line with the Tiiriki custom.”*

20. Those averments are not seriously contested by the plaintiff. The two widows had historical differences. Due to the harassment or embarrassment detailed above, the defendant left the Tiriki home. She said she had planted over 2000 tea bushes, some bananas and trees. They were left to the plaintiff. The Mabusi land that she settled in was many miles away from the Tiriki properties. I thus readily find that the deceased *intended* that the two houses and the children live on *separate* properties. If I were to apply section 40 of the Act blindly, the plaintiff and her children would not only take all the Tiriki properties but cross over to the property of the 1<sup>st</sup> house. I thus readily find that the property known as Kakamega/Mabusi/11 should be distributed to the 1<sup>st</sup> house. That is to say the defendant and her children.

21. Applying similar logic, the two properties known as Tiriki/Serem/846 and Tiriki/Serem/328 should be distributed to the plaintiff and her children. The defendant has no objection in any event. The defendant claims that she and the deceased bought Tiriki/Serem/247; and, that the plaintiff made no contribution. There is no cogent evidence to support that assertion. There were also allegations that the land was sold in the course of these proceedings to one Rodgers Shiraho. The evidence is scanty but there are photographs annexed to the defendant’s replying affidavit showing some developments on the land. Furthermore, the defendant cannot approbate and reprobate. She has herself stated that the deceased settled the two families in different properties across the country. I thus hold that Tiriki/Serem/247 should also go to the plaintiff and her children.

22. That leaves the commercial property known as Plot No. Nairobi Kayole A4/670. In paragraph 4 (a) to (c) of the co-defendant’s affidavit of 3<sup>rd</sup> June 2014, she states as follows-

*“That the plot at Kayole was part of a tenant purchase housing project developed by the then Nairobi City Council for the benefit of low income residents of Nairobi and the beneficiaries were determined through public balloting to which every person was invited through public announcement but none from my family other than myself applied.*

*“That there was no possibility for my late father to ballot for the property as he did not qualify nor corruptly influence the outcome of the balloting either directly or through proxy as intimated in the affidavit of the protestor when the exercise was done in open and publicly and the beneficiaries were determined by the lucky numbers and not the might or influence of any one”.*

23. The commercial plot is *registered* in the name of the co-defendant. Although the plaintiff contends that the co-defendant was holding it in *trust*, there was no cogent evidence. The burden to prove the trust or to show the property belonged to the deceased fell squarely upon the plaintiff. See sections 107 and 109 of the Evidence Act. See also *Evans Nyakwana v Cleophas Ongaro*, High Court, Homa Bay, Civil Appeal 7 of 2014 [2015] eKLR.

24. The property has never been in the names of the deceased. At paragraph 10 of the affidavit of the plaintiff sworn on 8<sup>th</sup> February 2014 she states that

*“It is within my knowledge that the plot is part of the estate of the deceased since it is the deceased who acquired it but registered it in the names of Madrid Andia Akola to hold in trust for him and the family”.*

25. I find that to be a bare statement; and, unadorned with any persuasive evidence. I think the plaintiff strongly believes the property belonged to the deceased. But in the absence of concrete evidence of a *trust*, I have no hesitation in finding that the property is *not* part of the estate of the deceased. The property remains that of the *registered* owner Madrid Andia Akola, the co-defendant.

26. For all the above reasons, I make the following orders-

a) The plaintiff and the defendant shall be the *joint* administrators of the estate of the deceased.

- b) That the property known as Kakamega/Mabusi/11 shall be distributed to the 1<sup>st</sup> house. That is to say to the defendant Rachael Adagaye Akola and *her* children.
- c) That the three properties known as Tiriki/Serem/846, Tiriki/Serem/328 and Tiriki/Serem/247 shall be distributed to the 2<sup>nd</sup> house. That is to say to the plaintiff Rael Vulekani Musi and *her* children.
- d) The commercial property known as Plot No. A4/670 Kayole does *not* form part of the estate of the deceased. It shall remain the property of the *registered* owner Madrid Andia Akola, the co-defendant.
- e) That the defendant shall get all the shares in Munyonzonzo Farmers Society.
- f) That the pension funds of the deceased held in the Post Office Savings account shall be divided *equally* between the *two* widows and *all* the children of the deceased named in paragraph 13 of this judgment.
- g) That the property known as Kakamega/Shirere/1582 shall be distributed to the purchaser Gideon Luvembe.
- h) That considering that this is a succession matter; or, family dispute, I shall make no order on costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 2<sup>nd</sup> day of February 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:-**

Mr. Kuria for Mr. Osago for the plaintiff.

Ms. Chepkurui for Mr. Omondi for the defendant and co-defendant.

Mr. J. Kemboi, Court clerk.