



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION CAUSE NO. 799 OF 2009.

IN THE MATTER OF THE ESTATE OF HENRY MWISUKHA.....DECEASED.

A N D

JOB LUVUNGA

KEPHA MWISUKHA

MOSES MWISUKHA.....APPLICANTS.

VERSUS

JOHN MUKHWANA MWISUKHA

TOM MWISUKHA.....RESPONDENTS.

RULING.

INTRODUCTION.

1. HENRY MWISUKHA BUSHURU (deceased) died on 8th August, 2007 and one of his sons JOB LUVUGA MWISUKHA applied for letters of administration on the 21st December, 2009. His brother JOHN MUKHWANA MWISUKHA objected to the making of the grant on grounds that he was an elder son of the deceased and their mother RAEL NANJALA was still alive.

2. By consent the objection was determined and a grant of letters of administration issued jointly to:-

(i) John Luvoga Mwisukha;

(ii) Kepha Mwisukha; and

(iii) Moses Mwisukha.

on the 12th august, 2015.

3. The petitioner applied for confirmation of grant on the 16th of August, 2010 and gave a proposal on the distribution of the deceased's estate. Her mother RAHELI N. MWISUKHA then objected to the confirmation on 11th October, 2010 on the grounds that she was the only surviving widow to the deceased and that the petitioner had proved dishonest and further that she is by priority entitled to file the succession cause.

4. The objector also protested to the confirmation by filing an affidavit of protest dated 10th November, 2010. He contended that he was never consulted and a survey had never been done to establish the individual acreage to be able to prepare the schedule of distribution. He deponed further that no consent had been obtained by the petitioner from other family members to the confirmation of the grant.

5. On the 16th February, 2011 this court ordered for the maintenance of status quo by each party and any permanent construction that had been commenced on suit land KAKAMEGA/SURUNGAI/313 by the dependants in respect of the deceased estate be stopped.

6. By the application dated 23rd May, 2011, the petitioner sought for leave to cite the objector/protestors for contempt of court for disobeying its orders. Leave was granted and the protesters raised a preliminary objection on the 21st June, 2011 claiming that leave was not obtained by the applicants to institute contempt proceedings. The preliminary objection was dismissed on the 18th December, 2014 by this court and the application dated 23rd May, 2011 heard and dismissed on the 14th May, 2015.

7. On the 6th June, 2016 this court ordered that:-

(i) That the Kakamega County surveyor do visit and survey land parcel No. Kakamega/Sulungai/313 to ascertain the acreage before distribution of the said estate.

(ii) That the respondent to file the survey report in court within 30 days;

(iii) That the respondents to take a mention at the registry and serve the petitioner;

(iv) That the respondent to file a further affidavit proposing the mode of distribution.

8. On 10th March, 2016, the Regional Surveyor Western region filed his report as ordered by this court. They visited land parcel No. Kakamega/Surungai/313 on 8th March, 2016 in the presence of the petitioner and the objector.

9. He found that the total area of the parcel of land including the path is 4.2 hectares excluding the area occupied by the road of access which has been used as part of the land. The respondent thereafter filed a supplementary affidavit on the 18th April, 2016 with proposals on distribution of the deceased's estate.

10. The issue this court is to determine is only the distribution of the estate of the deceased. Parties have filed their respective submissions which this court has duly considered. The deceased was survived by the following beneficiaries:-

(i) RAHELI N. MWISUKHA.

(ii) JOHN MUKHWANA MWISUKHA.

(iii) KEPHA MWISUKHA.

(iv) CHARLES KORJA MWISUKHA.

(v) JOB LUVONGA MWISUKHA.

(vi) MOSES WYCLIFFE MWISUKHA.

(vii) TOM MWISUKHA.

(viii) PATRICK JUMA MWISUKHA.

- (ix) ANDANJE MWISUKHA.
- (x) FRED LUVONGA MWISUKHA.
- (xi) PETER MWOMBE MWISUKHA.
- (xii) FRANCIS NETO MWISUKHA.
- (xiii) JOAB MWISUKHA.

11. In determining the distribution of deceased estate this court is guided by the provisions of the Law of Succession Act and especially Part V thereof. Section 35 (1) is the appropriate provision to apply in this case since the deceased left one surviving spouse. Much has been said about the said RAELI N. MWISUKHA.

12. She happens to have left the deceased home and as claimed by the petitioner, she has been settled elsewhere where she has built a brick house and where she lives. No one has mentioned that she was divorced by the deceased.

13. It is known that she was the wife to the deceased. The petitioner claims that RAHELI MWISUKHA is not entitled to inherit the estate of the deceased arguing that she left her matrimonial home fifteen years ago and went back to her father's home. Petitioner also claims that the deceased could not have wished to have the said Rael Mwisukha to inherit part of his estate.

14. A look at section 35 (1) of the Law of Succession Act it provides

“(1) subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:-

- (a) The personal and household effects of the deceased absolutely; and***
- (b) A life interest in the whole residue of the net estate;***

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person”

15. Rael is not married or divorced. She remains the spouse of the deceased unless otherwise shown. She has a life interest to the deceased estate and holds the same in trust for the beneficiaries. She has a right to inherit the estate of the deceased herein.

16. This court will therefore adopt the list of distribution as proposed by the respondent in which they have included the wife of the deceased therein. For ease of reference we reproduce the same as hereunder:-

- | | |
|-------------------------------|-------------|
| (i) RAHELI NANJALA MWISUKHA. | 0.25 ACRES. |
| (ii) JOHN MUKHWANA MWISUKHA. | 1.0 ACRES. |
| (iii) JOB LUVONGA MWISUKHA. | 1.0 ACRES. |
| (iv) MOSES WYCLIFFE MWISUKHA. | 1.0 ACRES. |
| (v) TOM MWISUKHA. | 1.0 ACRES |
| (vi) PATRICK JUMA MWISUKHA. | 1.0 ACRES. |

(vii) ANDANJE MWISUKHA.	1.0 ACRES
(viii) FRED LUVONGA MWISUKHA.	1.0 ACRES.
(ix) PETER MWOMBE MWISUKHA.	1.0 ACRES.
(x) FRANCIS NETO MWISUKHA.	1.0 ACRES
(xi) JOAB MWISUKHA.	1.0 ACRES.
(xii) ACCESS ROAD	0.25 ACRES.

There will be no orders as to costs.

SIGNED DATED and DELIVERED at KAKAMEGA this 1ST day of SEPTEMBER, 2016.

C. KARIUKI.

JUDGE.

In the Presence of:-

N/A..... for the Applicants.

SHIFWOKA.....for the Respondents.

ANUNDA..... Court Assistant