



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
SUCCESSION CAUSE NO. 12 OF 2000

IN THE MATTER OF THE ESTATE OF RAPHAEL ESAIRI PAPAOK—DECEASED

AND

PERESI ALUNGA ESAIRE.....PETITIONERS

LIDIA AKWARA ESAIRE

MANEYA ECHAKARA ESAIRE

MOSES GAUNYA ESAIRE

RULING

1. When Raphael Esairi Papaok (Deceased)died on 10th May 1998 he left behind an Estate comprising of the following property:

- i. South Teso/Amukura/589
- ii. South Teso/Amukura/1381
- iii. South Teso/Amukura/2128
- iv. Bukhayo/Lupida/891

The Deceased was a polygamous man married to two wives who survived him. The houses of his two wives have not agreed on the distribution of the Estate and have asked this court to interpose.

2. The Parties herein filed Affidavit Evidence and submissions in respect to their positions on how distribution should proceed. From the Affidavit Evidence, there seems to be agreement on the following :-

- i. The acreage of the Deceased various land parcels is as follows:-
 - South Teso/Amukura/589 -11.8 ha (29.5 acres)
 - South Teso/Amukura/1381 -4.0 ha (10 acres)
 - South Teso/Amukura/2128 – 2.0 ha (5 acres)
 - Bukhayo/Lupida/891 – 2.0 ha (5 acres)

Indeed Certificate of Official Search in respect to these parcels of land filed in these proceedings confirms the areas of the land.

2. The Beneficiaries to the Estate are:-

1st house:

Maneya Echakara Esaire – Wife

Moses Aunya Esaire – Son

Edward Okwara Esaire – Son

Joseph Omoit Esaire – Son

Mary Itamong Esaire – Daughter

Robert Ikilesit Esaire – Son

Stephen Omaria Esaire – Son

Emmanuel Osikuku Esaire – Son

Peter Erinyi Esaire – Son

Celestine Emojot Esaire – Daughter

2nd House:-

Peres Arunga Esaire – Wife

Lydia Akwara Esaire – Daughter

Patrick Amai Esaire – Son

Fredrick Orute – Son

Nancy Epidong – Daughter

Janerose Amoit – Daughter

Others:-

Fabiano Ekwenyi Papako - Brother

Hellen Okoit – Sister in Law

iii. Fabiano Ekwenyi Papako, the brother to the Deceased is entitled to 6 acres in South Teso/Amukura/589 while Hellen Okoit to 7 acres therein.

3. Although the parties seemed to disagree on distribution, the written submissions filed by their respect Counsels suggested a convergence on the principle to be applied. Counsel for the 1st and 2nd Petitioners submitted,

“Your Honour, it is our humble submission that the 49.5 acres of land belonging to the Deceased are divided equally among all the beneficiaries. The daughters to the Deceased who are also beneficiaries to the estate have shown interest in the Estate. They are therefore entitled to get an equal share to the property as to the sons”

While it was urged by Counsel for the 3rd and 4th Petitioners that;

“The Estate should be distributed equally amongst all the Deceased’s Children”

This Court readily accepts that the formula suggested by both sides should be applied because it finds support in the law. In respect of Intestacy, such as here, Section 40 of the Law of Succession provides:-

Where intestate was polygamous

- 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 household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in section 35 to 38.**

Where it does to work hardship or injustice, equal distribution would normally apply. This is what my brother W. Musyoka, J. had to say in respect to the spirit of Equal Distribution in **Nairobi Succession Case no. 399 of 2007, Re Estate of John Musambayi Katumanga (Deceased)**.

The spirit of Part V, especially Section 35, 38 and 40 is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in section 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children

4. The area of land registered in the name of the Deceased is 49.5 acres. Removing the conceded entitlement to Fabian Ekwenyi Papako and Hellen Okoit, the net land available for distribution to his wives and children is 36.5 acres. The surviving children of the Deceased are 14. When you add the two widows you have 16 units. Applying the formula for equal distribution found in Section 40(1) of the Act, each unit would be entitled to approximately 2.28 acres.

5. This Court is told that the house of the 3rd Petitioner Resides on South Teso/Amukura/589 while that of 1st Petitioner on South Teso Amukura/1381. The total acreage that the house of the 3rd Petitioner is entitled is $2.28 \times 10 = 22.8$ acres. Since their house currently occupies 16.5 acres in South Teso/Amukura/589 it would only make sense to allow them to continue occupying that piece. As for the house of the 1st Petitioner, it is entitled to a total of 13.6 acres (2.28×6). South Teso/Amukura/1381 which that house currently occupies is 10 acres. That house should retain the entire South Teso/Amukura/1381.

6. What now remains is the distribution of Bukhayo/Lupida/891 (5 acres) and South Teso Amukura/2128 (5 acres) These make a total of 10 acres . From these area the house of the 3rd Petitioner is entitled to 6.3 acres while that of the 1st Petitioner to 3.7. But The Court is unable to complete the exercise because it is desirous that whatever order it makes causes as little disruption as possible to the status obtaining on the ground in respect to the current occupation of two land parcels. The evidence placed before this court has not been helpful in this regard. For that reason the court invites the parties to mutually agree on how the two parcels of land shall be divided on the ratio of 6.3: 3.7 to the 1st and 2nd Houses respectively.

7. As I close I wish to reiterate that each unit including the Widows and Daughters of the Deceased shall get equal shares, with the widow holding life interest to their shares. Secondly, a compliant had been raised by the 2nd house in respect to some compensation paid by Kenya Electricity Transmission Company (KETRACO) to the 1st house. From the evidence, that payment was made for a way leave passing over South Teso/Amukura/589. The compensation is for loss of use of 4.08 acres of land which is within the corridor of Electricity Transmission lines. This court has reached a decision that the first

house is entitled to South Teso/Amukura/589. It is members of that house who will have to bear the loss of the land and it is only just that they be compensated for it by KETRACO. It is therefore a complaint without merit.

8. Parties are members of the one family and there have been no losers or winners. I see no reason to make an order on costs.

9. As explained to the Parties, this Decision could only be delivered on Notice to them as I was proceeding for my Annual Leave and thereafter for August vacation. That explains the apparent delay.

DATED, SIGNED AND DELIVERED at Busia this 1st Day of October 2015

F. TUIYOTT

J U D G E

In the Presence of:-

Oile.....Court Clerk

Onsongo.....for 3rd & 4th Petitioner

N/A.....for 1st & 2nd Petitioner