



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.405 OF 2006

**IN THE MATTER OF THE ESTATE OF MWAMBA KOBIA ALIAS MIRAU KOBIA
(DECEASED)**

**STANLEY MWEBIA ITONGA & M'ITONGA M'MWAMBA ...
PETITIONERS/RESPONDENT**

AND

JULIUS NKUNJA ITONGA APPLICANT

-VERSUS-

NICHOLAS GIKUNDA ITONGA 1ST RESPONDENT

GEOFFREY MUNG'ATIA ITONGA 2ND RESPONDENT

CYRUS GICHUNGE 3RD RESPONDENT

JUDGEMENT

1. STANLEY MWEBIA ITONGA petitioned for grant of letters of administration in respect of the deceased estate herein being his grandfather. He was issued with grant of letters of administration intestate on 16th July, 2008. He subsequently filed an application for confirmation of grant on 6th September, 2013 but before confirmation M'ItongaM'Mwamba, son to the deceased herein and father to Stanley Mwambia Itonga filed an application for revocation of that grant through an application dated 18th February, 2014.

2. That before the application for revocation of the grant could be heard the parties and their respective counsel recorded a consent on 5th November 2014 revoking the grant of letters of administration issued to the petitioner Stanley Mwambia Itonga on 16th July 2008 and agreed that Stanley Mwebia Itonga and M'Itonga M'wamba be joint administrators and temporary grant of letters of administration was issued to the two. The court upon adopting parties consent directed that the two do agree on the mode of distribution within 30 days from the date of the consent. The parties did not agree and on 11th December 2014 the parties counsel were given 30 days to put in proposals on distribution.

3. Mr. Nyamu Nyaga learned advocate represented Stanley Mwambia Itonga, the 1st petitioner

and Mr. Rimita learned advocate represented Mr. M'ItongaM'Mwamba, the 2nd petitioner herein. The 1st petitioner's proposal on distribution was filed on 18th December 2014. The 1st petitioner proposed to have the parcel Abothuguchi/Igare/347 shared amongst thirteen (13) dependants each to get 0.474 acres save for Taratisio Kirimi M'Anampiu who was to get 0.16 acres and as regards L.R. Abothuguchi/Upper Kaonga/605 he proposed to have it shared amongst nine (9) dependants each getting 0.264 acres. His mode of distribution was signed by seven (7) family members out of thirteen (13) family members.

4. Mr. Rimita learned advocate on behalf of the 2nd Petitioner through a proposal dated 7th January, 2015 submitted that the 2nd petitioner was the only son of the deceased and his spouse is also deceased. His proposal is to have the estate shared in terms of **Section 38 of the Laws of Succession Act**. In addition to the share the 2nd petitioner proposed if it is acceptable to his co-petitioner and other children to distribute his estate in terms of paragraph 5 of his proposal of distribution amongst his children. The 2nd petitioner's proposal to share his land to his children was not acceptable to all his children but he has shown each of his sons where to build but some want to share his land before he dies. In summing up the counsel for the 2nd petitioner urged that the deceased estate be shared strictly as per provisions of the Laws of Succession Act.

5. I have carefully considered the proposal by the parties and counsel submissions. The issue in this matter is how should the deceased estate be distributed in view of the parties proposed mode of distribution?

6. In this cause there is no dispute that the deceased was survived by only one son, the 2nd petitioner, who is father to the 1st petitioner and others listed in the petitioner's respective proposals of mode of distribution. There is also no dispute as to the deceased assets. The 1st petitioner's proposal is not consented to by all other 2nd petitioner's children nor is the 2nd petitioner's proposal consented to by all his children.

7. The court notes that there is no consent in this cause on the distribution of the deceased estate and the only logical step to take is to distribute the estate as provided by the Law of Succession Act. The law of Succession Act does not provide for any other option other than to distribute the deceased estate as provided in the provisions of law of Succession Act where parties have no consent to the contrary.

8. **Section 38 of the Law of Succession Act** provides:-

“38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

9. The 2nd petitioner being the only surviving child the net estate should go to the 2nd petitioner. That as the 2nd petitioner's proposal on how to distribute the property has been unacceptable to his children; the court shall not proceed to entertain his proposal to share the net intestate estate with his children as he proposed to distribute the land amongst the children. He can now consider doing so once the property is registered in his name but not through this cause.

10. The upshot is that the grant is confirmed in favour of the 2nd petitioner in terms of **Section 38 of the Law of Succession Act**. The whole parcels of land Abothuguchi/Igare/347 and Abothuguchi/Upper Kiongo/605 to be registered in the name of the 2nd petitioner as owner and trustee for his children.

11. That as the matter is between a father and a son for sake of peace in the family, I order that each party bear its own costs.

DATED at Meru this 8th day of October, 2015.

J.A.MAKAU

JUDGE

8.10.2015

Delivered in open court in the presence of:-

Mr. Nyamu Nyaga for 1st petitioner

M/s. Gituma for 2nd petitioner

Court clerk –Mwenda

F. GIKONYO

JUDGE

8.10.2015