



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**SUCCESSION CAUSE NO. 89 OF 2006**

**IN THE MATTER OF THE ESTATE OF NICHOLAU INO----DECEASED**

**AND**

**WASHINGTONE IJAKAA INO----- PETITIONER**

**VERSUS**

**PETER KITUI INO----- OBJECTOR**

**RULING**

1. **Nicholas Ino** (The Deceased) died on 22<sup>nd</sup> February 1971 having created a polygamous family. There now has arisen a contest on the Distribution of his estate pitting some members of his family.
2. The Petition to the grant of Letters of Administration to the estate of the Deceased was presented by Washingtone Ijaka Ino (Washington), He is a son to the Deceased. In Summons for confirmation dated 22<sup>nd</sup> February 2008, Washington proposed that North Teso/Kolanya/27 be distributed as follows:-
  - i. Washington Ijaka Ino - 5 acres
  - ii. Wilberforce James - 5 acres
  - iii. Jonathan Ino - 2.5 acres
  - iv. Silas Olaibon Okwakau - 2.5 acres
  - v. Peter Ino - 5 acres
  - vi. Washington Ijaka Ino to hold in trust for the Minors until they attain 18 years.
3. That Distribution was not agreed to by Peter Kitui Ino (Peter) who infact sought the revocation and/or annulment of the Grant made to Washington. That application was made through a Summons dated 12<sup>th</sup> March 2013. Directions were given by this court on 1<sup>st</sup> October 2013 asking both sides of the divide to suggest their mode of Distribution within 14 days thereof. Thereafter the Court was to decide on Distribution. Evidence on Distribution was taken parole and this decision is the Court's determination on Distribution.
4. Peter Kitui Ino is a son to the Deceased. It was is evidence that the Deceased had four (4) wives namely:-
  - i. Joyce Karikonyi
  - ii. Jane Achudi
  - iii. Janta Atyang
  - iv. Elizabeth Akwede

That prior to his death the Deceased assembled members of his entire family and demarcated out North Teso/Kolanya/27 to each of his wives. In his affidavit evidence of 23<sup>rd</sup> October 2013 in which he partly relied in his oral evidence, Jane Achudi was given plot North Teso/Kolanya/68 (Parcel 68).

5. Peter told court that Joyce, Elizabeth and Jantar are dead and it is his wish that while parcel North Teso/Kolanya/68 should remain with the family of Jane, North Teso/Kolanya/27 should be distributed as follows:-
  - a. Family of Joyce - 8 acres
  - b. Family of Elizabeth - 6 acres
  - c. Family of Janta - 6 acres
6. Jane Achudi Inyo (Jane) is the only surviving wife to the Deceased. She gave evidence in support of Peter. According to her, her husband divided his land amongst the family prior to his death. And that although he divided the land according to houses he gave at least 2 of his sons (namely Peter and Titus) some land directly. She supported the evidence of Titus that although he is not her son, he resides on the same parcel of land as her, namely parcel 68.
7. Peter's two other witnesses were Bonface Karani Omachar (Bonface) and Duncan Ochilangor Okumu (Duncan). Bonface is the cousin of the Deceased. His evidence was that he was present in 1969 when the Deceased divided his property to his wives. On his part Duncan was the Secretary to a meeting of the family of the Deceased that was held on 2<sup>nd</sup> August 2002. He produced the minutes to that meeting (Exhibit 1). It was his evidence that the meeting resolved that the manner in which the Deceased had settled his family be respected.
8. Washington does not agree with Peter's view on Distribution. It was his evidence that at the time the Deceased died he had not distributed his land to members of his family. His suggestion was that parcel No. 27 be divided equally between :-
  - a. Peter Kitui Ino
  - b. Peter Okwakau Ino
  - c. Wilberforce Ino

He denied being present in the meeting of 2<sup>nd</sup> April 2002.

9. It is common ground that the Deceased having died on 28<sup>th</sup> February 1971, Distribution of his Estate is subject to Teso Customs (Sec. 2(2) The Law of Succession Act). Stephen Charles Emacar (PW6) was called to shed some light on the custom. At the time of testifying he was 79 years old and the Chairman of the Teso Community Council of Elders, Kenya. He is a literate man having gone to school upto the then "A" Level. The highlight of his evidence is that:
  - **A Father has the mandate of Distribution and demarcating his parcel to family members as he liked.**
  - **The father's distribution must be maintained and honoured even after his death.**
  - **Where the deceased had not distributed his land, the children can agree on mode of Distribution and in the event of a dispute, the clan resolves it.**
10. The single issue I see for my determination is whether the Deceased had prior to his death Divided His estate to his children. The Petitioner and the Objector have taken opposing positions on this. Yet the submissions filed by Counsels for the rivals seem to resolve this all important question. The evidence of PW5 who took the minutes of the Deceased's family meeting of 2<sup>nd</sup> August 2002 was that it was for purposes of simply formalizing the Deceased wishes on Distribution. Counsel for Peter then submits,

**“As regards distribution of the estate of the Deceased, it is our very humble submission that this is a case that requires the surveyor to proceed to the parcels of**

**land left behind by the Deceased and pick up the established boundaries for each house and for distribution to be done in accordance with the ground position at a later date.”**

11. Curiously the Petitioners Counsel in his written submission of 10<sup>th</sup> March 2015 submitted-

**“We.. urge the court... to grant in favour of the meeting of the January 2002. We urge the court to find as per the exhibit produced by the Objector and the Evidence of his witnesses.”**

Although I am unable to find any evidence of a meeting of January 2002, the only exhibit produced herein the minutes of the meeting dated 2<sup>nd</sup> August 2002. From the attendance Mr. Washington (Petitioners) is said to be present. Although he denied attending this meeting, he now asks the court to find in accordance with the minutes thereof.

12. Minutes 3/08/03 of the meeting in communication from the chair. This is what the Chairman, in part, stated-

**The Chairman Mr. Zakayo told members the following:-**

- **The sub division of the late fathers two parcels of land was overdue.**
- **He called them purposely to have the parcel of land sub-divided among them.**
- **Land Parcel North Teso/Kolanya/27 would be shared among the following:-**
  1. **Peter Ino**
  2. **Washington Ijaka**
  3. **Wildard Otwane**
  4. **Jonathan Okwakau on behalf of his late father Joash Okwakau Ino.**
- **Land Parcel North Teso/Kolanya/68 would be sub divided among the following persons.**
  1. **Zakayo Okumu**
  2. **Titus Ino**
  3. **Fred Ipapo**
  4. **Kirade Ino**
  5. **George Etyang**
- **Finally he told members that he was going to accomplish the work which had been done partially by the late father Niculus Ino.**
- **Mzee Niculus Ino died in 1971 he had subdivided the land among his four wives and also he had instructed the late Joash Okwakau to put a home in parcel North Teso/Kolanya/27. The four wives were-**
  - **Joyce Karikonyi Ino**
  - **Jane Achudi**
  - **Janet Atyang**
  - **Elizabeth Akwede**
- **He cautioned members against incitement from within and without the family circles.**
- **After Chairman’s address, he proceeded to draw boundaries as follows on parcel No. 27.**
- **Between Peter Okwakau and Peter Ino**
- **Between Peter Ino and Washington Ijaka and the brother Wildard Otwane Ino.**
- **On land parcel No. Kolanya N. Teso/68 boundaries were drawn as follows:-**
  - **Kirade Ino verses Fred Ipapo**
  - **Fred Ino verses Zakayo Okumu**
  - **Titus Ino verses George Etyang**

- **Each house was represented among the four wives of the late Nicolus Ino. Soon after the exercise the Chairman call all the members together and asked for their reactions. (my emphasis)**

There is nothing in the minutes that suggest that members present disagreed with what the Chairman stated. This court therefore finds that during his lifetime, The Deceased indeed divided his land amongst his wives.

13.Attached to those minutes are sketch plans of parcel 27 showing the position of each beneficiary on the ground. At the end of the meeting it was resolved that boundaries drawn be respected The court finds great assistance from these minutes and order that North Teso/Kolanya/27 and North Teso/Kolanya/68 be distributed according to the sketch plans produced together with the minutes of the meeting of 2<sup>nd</sup> August 2002. In the event of a dispute as to the exact acreage the parties are at liberty to apply.

14.No orders on costs.

15.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 1<sup>st</sup> day of October 2015**

**F.TUIYOTT**

**J U D G E**

**In the presence of:-**

**Oile.....C/Clerk**

**N/A..... for Petitioner**

**Bokongo..... for Objector**