



REPUBLIC OF KENYA

High Court at Kakamega

Succession Cause 73 of 1997

**IN THE MATTER OF THE ESTATE OF JOHN WAMOCHO NYUKURI DECEASED
ANNAH WAMOCHO PETITIONER**

V E R S U S

PATRICIA KHANJILA MASIBO OBJECTOR

R U L I N G

The late **JOHN WAMOCHO NYUKURI** died on the 3rd September 1978. He was survived by two widows and children. His first wife, **ANNA WEKESA WAMOCHO** filed this succession cause and was issued with a grant of letters of administration on 18th January 2005. The second wife, **PATRICIA KHANJILA MASIBO** filed an application dated 26th November 2009 seeking to have the grant revoked. The matter proceeded by way of oral evidence.

Patricia Khanjila’s evidence is that she is the deceased’s widow. She had one child (son) with the deceased while the first widow had three children, one son and two daughters. The deceased left plot number **KAKAMEGA/NZOIA/129** measuring 48 acres. She would like to be given 16 acres and her co-wife get the remainder. Her co-wife sold part of the land.

ANNAH WEKESA WAMOCHO, the first widow testified that she got married to the deceased in 1961. While her co-wife was married in 1975. She has one son and two daughters with the deceased. The plot had a loan with the Kenya Finance Association (KFA) and Agricultural Finance Corporation. She sold part of the land to offset the loan as well as pay school fees for the children including her co-wife’s son – Martin. According to her she sold portions of the land to five different persons, namely:-

- | | | | |
|----|----------------------|---|-----------|
| 1. | Fred | - | 6.5 acres |
| 2. | Boaz | - | 2 acres |
| 3. | Patrick Wafula | - | 2 acres |
| 4. | Luke Kalamu Musamali | - | 1 acre |
| 5. | Daniel Nkema Wasike | - | 1 acre |

Annah is not willing to give her co-wife 16 acres as she got married in 1975 and only lived with the deceased for two years. She then went back to her parents. Her late husband had told her that the co-wife could return to her parents in the event of his death. The deceased left them with nothing and she had to

educate and feed the children. The co-wife lived out of the land for thirty (30) years only to come back and start demanding it.

DW2, VINCENT WEKULO MAKOKHA is the area village elder. His evidence is that he witnessed five sale agreements whereby the 1st widow sold land to different people. According to him, whenever the first wife sold land, the 2nd wife's son, Martin was also involved and he signed the agreements.

DW3, FRANCIS SITATI NYUKURI is a brother to the deceased. He testified that the deceased had two wives. The first wife has one son and two daughters whereas the 2nd wife has one son. The deceased had one plot and by the time he died he had not sold any portion of his land.

From the evidence on record, it is clear that there is no dispute as to the list of the deceased's beneficiaries. The first wife contends that her co-wife has included her grandchildren to be part of the beneficiaries. Since the first wife confirms that the deceased died when her own children were minors, it follows that the grandchildren are not the deceased's dependants. The beneficiaries of the deceased are therefore the two widows Antony Sistati, Annette, Sisilia and Martin. It does not matter whether the daughters are married or not.

The deceased left plot number **KAKAMEGA/NZOIA/129**. The petitioner filed an application dated 13.11.2008 seeking to have the grant confirmed. She made her proposal on the mode of distribution. On 12th November 2010 she filed an affidavit that gives a different mode of distribution not similar to the earlier one.

There is a slight discrepancy as to the acreage of the land. Whereas the 1st wife states that it is 47.5 acres, the 2nd wife indicates that it is 48.5 acres. A letter dated 14th March 1997 from the Kakamega District Land Adjudication and Settlement officer indicates that it is 47.5 acres. No official search was produced. I do hold that the deceased's estate is 47.5 acres.

From the evidence on record, it is clear that the first wife sold part of the land. Part of the money was used to maintain the family. The deceased died aged 43 years old and left young children. I do find that the portions of land sold by the first wife should be deducted before the deceased's net intestate estate is distributed. The total acreage sold as per the evidence of the 1st widow is 12.5 acres. It appears that a further 1.7 acres was sold as per the evidence of the village elder DW2 since the names of the purchasers and their respective acreage is different from that given by the 1st widow. However, I will go by the evidence of the 1st widow and hold that 12.5 acres of the land was sold. The 2nd widow's son benefited from the sale proceeds and all that time his mother was living outside the homestead.

The first widow and her children make a total of four units while the 2nd widow and her son totals two units. The estate shall be divided into six portions. After taking into account the 12.5 acres sold to purchasers, the net intestate estate is 35 acres. This gives each unit about 5.8 acres. The deceased's estate shall therefore be distributed as follows:-

PLOT KAKAMEGA/NZOIA/129

- | | |
|--|-------------------|
| 1. (a) Patricia Khanjila Masibo | Jointly |
| (b) Martin Tumbago Wamocho | 11.5 acres |
| 2. (a) Anna Nekesa Wamocho | |
| (b) Antony Sitati Wamocho | Jointly |
| (c) Anet Namukunda Wamocho | 23.5 acres |
| (d) Sicilia Nafula Wamocho | |

- 3. Anna Nekesa Wamocho - 12.5 acres to distribute to the purchasers.**

In the end, the deceased's estate shall be distributed as herein above. Each party shall meet her own costs.

Delivered, dated and signed this 27th day of February, 2013

SAID J. CHITEMBWE

J U D G E