



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Succession Cause 47 of 2003**

**IN THE MATTER OF THE ESTATE OF ILONDANGA MATONYE KHALUSI... DECEASED**

**JULIUS MASINDE ILONDANGA ..... PETITIONER**

**V E R S U S**

**BENSON MUHANJI ..... OBJECTOR**

**R U L I N G**

The late **ILONDANGA MATONYE KHALUSI**, died on the 14<sup>th</sup> of February 1990. **BENSON MUHANJI**, his son, filed this petition and was issued with letters of administration intestate. The grant was nullified by the court on the 22<sup>nd</sup> of September 2005. The objectors were made to be administrators of the deceased's estate. The objectors **JULIUS MASINDE ILONDANGA** and **JULLIET MUTAMBI** filed an application dated 1<sup>st</sup> December 2009 seeking to have the grant confirmed. The initial petitioner filed an affidavit of protest sworn on the 12<sup>th</sup> of February 2010. Parties agreed to proceed by way of oral evidence.

The new objector **BENSON MUHANJI ILONDANGA** testified that the deceased herein was his biological father who died in 1990. He had five wives who are all deceased. The first wife had one son by the name **LUKUYANI**. The second wife had three daughters namely – **JULLIETA**, **HELEMINA** and **KHANYERA**. The third house had two sons **CHARLES SHIVERENJE** and **JULIUS MASINDE** plus three daughters. The 4<sup>th</sup> house had the objector **BENSON MUHANJI ILONDANGA** and the 5<sup>th</sup> house had **PATRICK MATONGO**. The deceased left plot number **ISUKHA/LUBAO/447** measuring 9.5 acres. The deceased divided his land and he was given 4 acres. Julius was given 4 ½ acres while Patrick was given 1 acre. No land was given to the daughters. Lukuyani from the 1<sup>st</sup> house was given his own land elsewhere and he lives in Lubao. He has his own title deed. Julius Masinde lives on the land with him as well as Patrick. Boundaries were placed by the deceased. He would like to take 4 acres out of the land. One acre to be given to Patrick and the remaining portion to be given to Julius. According to him the daughters can occupy ½ an acre out of Julius's share. He has children and his wife and they all live on the suit land. The deceased sub-divided the land in 1990 before he died. He categorically testified that he was the deceased's son and he showed his identity card to the court which has the deceased's name on it.

Patrick Ilondanga Matonye testified as the 2<sup>nd</sup> witness for the objector. He stated that the deceased was his father and he died in 1990. The deceased had five wives and left plot number **ISUKHA/LUBAO/447**. The deceased divided his land on the 21<sup>st</sup> of January 1990 and he was present. He was given one acre (1) and his other two brothers were given the remaining portion in equal shares. According to him **BENSON** is his brother and the deceased's son. Benson lives on the land and has planted sugarcane. He does not live on the land and Julius has planted sugarcane on his one acre. He is agreeable to give his sisters a share of the estate.

The defence called 4 witnesses. DW1, JULIUS MASINDE ILONDANGA, is the deceased's son. His evidence is that his late father had two wives. The first wife ELENA VIHENDA had three daughters namely – JULIETA MUTAMBI, GEDINA KHANYEREHA and ELEMINA NYANGAI. The second wife MARIA SAVAYI is DW1's mother. She had three daughters and two sons. The three daughters are not claiming inheritance and his brother CHARLES SHIVERENGE is deceased but left a wife and children. Charles had already been given his land. According to DW1 the objector is not the deceased's child. His late father told him to leave the objector and PW2 on the land for some time before they could get their own land. He was in Nairobi and the objector did the succession without informing him. PW1 is not the deceased's son and he is the son of the deceased's brother. He has his own land and should not inherit from the estate. The deceased divided his land into two. One portion was given to the first wife and the other portion to DW1. He saw the objector in 1976 and since then the objector has been living on the land. DW1 is using five acres and the objector is utilizing the other portion.

DW2, JULLIETTA MUTAMBI is the deceased's daughter. According to her the petitioner was her father's worker and he started living on the plot after the death of their father. The objector used to take care of her father's cattle. The objector chased her away from the plot. She would like to get a share of the estate together with her sisters. **DW3, SAMSON AMUKONGO** knew the deceased. He testified that the deceased's first wife had three daughters. The deceased called him one day and distributed his land. One portion was given to the three daughters from the first wife. This was in 1988. The deceased's son by the name ANDREA was present but he was not given land as he had already been given his own land. One portion was given to the daughters and the other portion to the second wife who is Julius's mother (DW1). Benson (PW1) was present and he was not given land and he did not complain. He knew the deceased as he used to do butchery business with his father. According to DW3 Benson used to tend to the deceased's cattle. DW3 further testified that PW2 has his own father who lives at Khandiri. His mother is called Siria and she was buried at Khandiri on her husband's land.

**DW4, ERASTUS ELANG'ATWA LUGEDI**, was the area assistant chief. His evidence is that at one time the deceased sent somebody to call him from his office. He went to the deceased's home and the deceased divided his land. The three daughters from the first wife were given their portion and another portion to the second wife. DW4 assisted in planting the boundary. Benson (PW1) was present and he assisted in planting the boundary. He did not ask for any land. Later after the deceased's death the daughters went to inform him that Benson had chased them away. He was retired by then and referred them to the chief. According to DW4 the deceased had a lot of cattle and Benson used to take of the cattle. It is his further evidence that **PW2, PATRICK ILONDANGA MATONYE** is not the deceased's child. His mother was buried at Lubao and not on the suit land and he does not have land on the suit property. It is the evidence of DW4 that the deceased had four wives. The first wife was the mother to Lukuyani. The second wife was the mother to Shiverenge. The third wife is Julius's mother and then there is the mother to the three daughters.

The evidence on record shows that the deceased left plot number **KAKAMEGA/LUBAO/447** measuring 3.8 Ha. The only dispute is who should inherit the estate. Whereas the objector maintains that he was the deceased's son, the petitioner maintains that the objector simply used to work for his father. From the evidence on record, it is established that PW2 **PATRICK ILONDANGA MATONYE** is not the deceased's son. Patrick himself appears not to be eager to get any land from the deceased's estate. The proposed distribution by PW1 had given him only one acre and he was satisfied. The defence evidence does establish that PW2 has his own land from his own father. The deceased was his uncle. There is no evidence that he used to rely on the deceased. I do therefore find that he is not a beneficiary to the estate.

According to the defence evidence the objector, Benson, started living on the suit land since 1976. The deceased died in 1990. The objector's identity card shows that he bears the names of the deceased. Although Julius testified that his father told him not to chase away Benson for some-time in the event that his father died, I do find that that explanation is not convincing. It is the defence evidence that the deceased distributed his land amongst his two wives. The other children had already been given their respective portions of land. I do find that the objector Benson Muhanzi does qualify to be a dependant of the deceased as defined by Section 29 of the Law of Succession Act. The next issue will be how to

distribute the estate. Parties should be aware that under the law of Succession Act Section 38 thereof gives each child irrespective of gender an equal share of a deceased's estate. Julius's mother had three daughters. He is now occupying five acres. I will not disturb his share and let him continue occupying that portion. With regard to the other portion of the land I will distribute 2 acres to Benson Muhanji and the remaining portion measuring about 3 acres to Julieta Mutambi and her two other sisters.

In the end, the grant herein shall be confirmed. A confirmed grant shall be issued to Julius Masinde Ilondanga, Julieta Mutambi and Benson Muhanji jointly. The deceased's estate shall be distributed as follows:-

**Plot number KAKAMEGA/LUBAO/447**

- (a) Julius Masinde Ilondanga - 5 acres
- (b) Benson Muhanji Ilondanga - 2 acres
- (c) Julieta Mutambi and her two sisters - 3 acres

Since parties are from the same family there shall be no orders as to costs.

Delivered, dated and signed at Kakamega this 27<sup>th</sup> day of February 2013

**SAID J. CHITEMBWE**  
**J U D G E**