



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.676 OF 2014**

**IN THE MATTER OF THE ESTATE OF JUMA SHIRO alias SOLOMON JUMA - DECEASED**

**JOHN KUTONDO JUMA.....PETITIONER**

**VERSUS**

**JULIA MASITSA LUCHUMA.....OBJECTOR**

**JUDGMENT**

1. **Julia Masitsa Lichuma** and **John Kutondo Juma** are personal representatives of the estate of **Juma Shiro alias Solomom Juma** who died intestate on 12<sup>th</sup> May, 2002. A Grant of representation intestate was made to the petitioners on 24<sup>th</sup> September, 2015 and issued on 15<sup>th</sup> October, 2015.
2. On 20<sup>th</sup> April, 2016, **John Kutondo Juma** took out summons dated 22<sup>nd</sup> March, 2016 seeking confirmation of the grant made to them. In the affidavit in support of the summons sworn by **John Kutondo** on the same day, 22<sup>nd</sup> March, 2016, it was proposed that the deceased's only property forming his estate, namely, **Parcel Number North Kabras/Malava/1282** be shared so that **John Kutondo Juma** receives 8 acres while **Andrew Shiro Juma, Luka Shiro Juma, Joshua Funchingo Juma, Philip Shamala Juma** and **Abraham Mulipi Juma** get 2.0 acres each. The widow **Julia Masitsa Luchuma** was not given any share.
3. **Julia Masitsa Lichuma**, the co-administrator, filed an affidavit of protest sworn on 18<sup>th</sup> September, 2016, protesting to the mode of distribution proposed for reason that as a co-administrator she was not consulted and that the mode of distribution is not acceptable.
4. According to **Julia**, the deceased was a polygamist who left behind a widow and fifteen children both sons and daughters; that the only asset left is **Parcel Number North Kabras/Malava/1282** and hence it should be shared equally.
5. When the summons for confirmation came up for hearing, **Mr Onyango** appeared for the 1<sup>st</sup> administrator, while **Mr Manyoni** appeared for the 2<sup>nd</sup> administrator. **Mr Onyango** submitted that the deceased was a polygamist who had two wives, **Rispah and Julia**. **Rispah** though deceased, left behind two children namely **John Kutondo** and **Haron Moto Luchuma**. **Julia Masitsa Lichuma**, on the other hand, has 12 children and one grandchild a son to the deceased's daughter. Learned counsel submitted that in determining the distribution of the estate, the court should apply **section 40** as read with **section 35** of the law of Succession Act. Counsel submitted that the church is entitled to 0.5 acres and the remaining be shared so that **John Kutondo** and **Haron Moto** being sons of the first house take 2/15 and the remainder 13/15 be given to Julia's house.

6. **Mr Manyoni**, counsel for the 2<sup>nd</sup> administrator, urged the court to go by the mode of distribution proposed by the 2<sup>nd</sup> administrator. According to learned counsel, the 1<sup>st</sup> administrator's house should get 11 acres while the 2<sup>nd</sup> administrator's house gets 8 acres. Counsel submitted that a grandson, **Christopher Samala** is not entitled to a share of the deceased's estate while **Margaret Juma** and **Ruth Juma** are married daughters of the deceased, and therefore not entitled to a share in the estate.

7. I have considered summons for confirmation, the proposed mode of distribution and the protest thereto. The deceased was in a polygamous marriage having married two wives. One is deceased while the other is alive. One got twelve children while the other had two. The applicant and the protestor are joint administrators of the estate. They are son and widow to the deceased respectively. Whereas the widow proposes that the estate be shared equally, deposing that some section of the land is arable while the other is not, the son proposes that his mother's house takes 8 acres while the co-administrator's house takes 11 acres.

8. Two issues arise for determination. First, whether married daughters should get a share from their father's estate, and secondly which mode of distribution is applicable.

9. The applicant, 1<sup>st</sup> administrator married daughters should not get a share of the estate so is the grandson whose mother, a daughter of the deceased, is herself deceased. On the other hand, **Mr Onyango's** submission takes a different position from that of his client. According to counsel, the estate should be shared according to houses where the house with two children takes 2 out of 15 while the house with 12 children takes 13 out of 15 including the grandson in accordance with **section 40** of the law of Succession Act.

10. **Section 71** of the law of Succession Act is clear that a grant of representation shall not be confirmed unless beneficiaries and respective shares have been ascertained. Beneficiaries include daughters whether married or not. **Section 51** of the Act is also clear on the people who have to be included in the petition are children of any deceased child of the deceased, that is grand children. However legally, the daughter's child cannot benefit from the grand father's estate where his/her mother is dead. Only the daughter of the deceased is entitled a stake where alive. When dead, her share is no more and her children cannot take her position and inherit their grandfather's estate. I therefore agree with **Mr Manyoni** that the grand child is not entitled to a share.

11. It cannot be argued any more, as **Mr Manyoni** purports, that married daughters of a deceased, are not entitled to a share of their deceased father's estate. **Article 27** of the **Constitution** prohibits any form of discrimination on the basis of race, sex, marital status or culture. Under **Article 27**, the people of Kenya did away with discriminatory practices such as those advanced by learned counsel that married daughters should not be considered because they are married. **Section 29(a)** of the law of Succession Act is also clear and provides –

**Section 29 “For purposes of this part, “Dependant” means**

**a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”**

12. **Section 29(a)** does not say that children are either sons or daughters, married or unmarried. The section does not discriminate between children of the deceased on sex or marital status either. They also do not have to prove that they were being maintained by the deceased prior to his death.

13. In **RE The estate of Lenonka ole Ntutu** – deceased [2008] eKLR, **Rawal, J**, (as she then was), held that daughters of a deceased were entitled to inherit a share from their father's estate just like the sons, and in **Re Estate of Solomon Ngatia Kariuki** – deceased [2008] eKLR, **Makhandia J**. (as he then was) stated:-

**“The law of Succession Act does not discriminate between the female and male children**

**married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of customary law. Like most other customary laws in this country they are always biased against women and they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family."**

14. The deceased herein died intestate on 12<sup>th</sup> May, 2002. The law of Succession Act, came into force on the 1<sup>st</sup> July, 1981. **Section 2(1)** of the Act is clear that provisions of the Act apply to all persons dying after the commencement date. Customary practices have no place in estates where the intestate died after the commencement date. The submission by learned counsel for the 2<sup>nd</sup> administrator that married daughters should not inherit their father's estate is unfounded and is based on no law.

15. The law frowns upon any suggestion which, **prima facie**, cuts the undertones of discrimination based on gender, sex, marital status or culture. It is discriminatory and unconstitutional to suggest that married daughters of a deceased have no right to take a share in their father's estate. Such submission has no place in modern society.

16. The next question for determination is how the deceased's estate should be distributed. The 1<sup>st</sup> administrator proposes that it be shared equally but her counsel argues that it should be according to houses pursuant to **section 40(i)** of the Act. The 2<sup>nd</sup> Administrator on the other hand proposes that distribution be in the ratio of 11 to 8 acres. This is a clear indication that there is no agreement on the mode of distribution.

17. Where beneficiaries have not agreed on the mode of distribution, the court will resort to the law of Succession Act to resolve the issue. It is not in dispute that the deceased was a polygamous man, married to two wives. One is deceased while the other is alive. The deceased wife had two children while the widow who is alive had twelve children. It is deposed that Martha **Khamete** is deceased, while **Christopher Shamala** is a grandson who is also deceased, thus leaving eleven children alive and the widow.

18. This being a polygamous marriage and in the absence of an agreement amongst beneficiaries, the applicable law is **section 40** of the Act. According to the section, and the only estate being parcel of land known as **North/Kabras/Malava/1282**, the estate should be shared among the houses according to the number of children in each house.

19. Under **Section 71** of the Act before a grant is confirmed, the court should be satisfied as to the beneficiaries and their respective shares. It is therefore important to establish the beneficiaries before attempting to distribute the estate.

20. According to the 1<sup>st</sup> Administrator, the deceased had fifteen children and herself. She gave the names as **Juma Masitsa, John Kutondo, Matha Kamete, Haron Muto, Margaret Juma, Philip Shamala, Ruth Maseno, Andrew Shiro, Luka Shiro, Joshua Fuchigo, Abraham Mulupi, Jacob Kofia, Loyce Lwasima, Christopher Shamala, dorcas Fatuma** and **Everlyne Juma**.

21. The deceased first wife was called **Rispah Nanjala** (now deceased) and had two children that is **John Kutondo** (the 2<sup>nd</sup> administrator) and **Harun Moto**. The rest of the children belong to the second wife **Julia Masitsa**. According to the further affidavit by the 2<sup>nd</sup> administrator, **Nartha Khamete**, is deceased and **Christopher Juma** was a grandson who has since passed on. Those averments have not been controverted by the 1<sup>st</sup> administrator. That therefore means, the number of children of the deceased is reduced by two to thirteen, and the widow. **Rispa's** house therefore has two units while that of Julia has eleven units plus one making a total of twelve units.

22. The estate of the deceased comprised in **Parcel Number North/ Kabras/Malava/1282** measures approximately 7.6 HA which is equivalent to approximately 18.8 acres. There is a church which is said to be occupying 0.5 acres. That leaves 18.3 acres for distribution.

23. Taking the provisions of **section 40** into account, the remainder of the estate is to be divided into two units of **Rispas's** house and twelve units of **Julia's house**. This works out to 3.05 acres. **Julias'** twelve units will take the remainder being 15.25 acres.

24. After this, the houses will retreat to **section 35** of the Act which requires that the children of each house shares what has been given to their house equally. **Rispa's** house, that is **John Kutondo Juma** and **Harun Moto Juma** will equally share the 3.05 acres given to their house, while **Julia's** house will share equally the 15.25 acres given to their house.

25. I must state here that **section 40** of the Act, is the applicable section in a polygamous marriage and however inequitable it may appear. There is little a court of law can do unless the section is amended or parties resort to agreement on distribution to side step the apparent injustice created by the section.

26. That being my view of the matter, my final orders are that I allow the protest partially and distribute the estate of the deceased as follows:-

**1. John Kutondo UJuma – 1.525 acres**

**2. Haron Moto Luchume – 1.525 acres**

**3. Philip Shamala – 1.27 acres**

**4. Andrew Shamala – 1.27 acres**

**5. Luka Shiro Juma – 1.27 acres**

**6. Abraham Mulupi Juma – 1.27 acres**

**7. Margaret Juma – 1.27 acres**

**8. Ruth Juma – 1.27 acres**

**9. Jacob Kotia Juma – 1.27 acres**

**10. Dorcas Fatuma Juma – 1.27 acres**

**11. Everlyne Juma – 1.27 acres**

**12. Julia Masitsa Lichume – 1.27 acres**

**13. Joshua Fuchingo Juma 1.27 acres**

**14. Loyce Kwasima Yamo 1.27 acres**

**15. PEFA Church**

A certificate of confirmation shall issue in the regard.

Each party to bear their own costs.

**Dated and delivered at Kakamega this 28<sup>th</sup> day of November, 2016.**

E.C. MWITA

JUDGE