



In re Estate of Andrea Komeri Shamala (Deceased) (Succession Cause 437 of 2014) [2022] KEHC 13883 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KEHC 13883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 437 OF 2014
SN RIECHI, J
OCTOBER 7, 2022**

IN THE MATTER OF THE ESTATE OF ANDREA KOMERI SHAMALA-DECEASED

IN THE MATTER OF
SIMON KOMERE 1ST PETITIONER
PIUS SAMBULI KOMERE 2ND PETITIONER

JUDGMENT

1. Andrea Komere Shamala died intestate on 21/5/2006, the 2nd petitioner applied for letters of administration intestate to his estate. The deceased was survived by 3 widows namely; Peris Aneyo Komere, Leonida Lihayi Komere and Ernoda Makomeri. Peris had 11 children while Leonida had 8 children and number of Ernoda's children was not disclosed. The deceased equally had the following parcels registered in his name. Bukusu/S. Kanduyi/4005-(0.06 Acres), Kakamega/Mukulusu/ 599-(5 Acres) and Kakakega/Mukulusu 598-(3 Acres) is still registered in the name of one Seyi Sambuli (Deceased) as it had not been transferred to the deceased.
2. During the pendency of the matter and before confirmation, the third widow Ernoda appeared before the court and renounced her claims over the estate as she had been settled by the deceased elsewhere thus leaving the 2 widows and their respective children to share out the estate.
3. Subsequently, the petitioners could not agree on the mode of distribution of the estate whereupon they were directed to file their respective proposals on the mode of distribution. The 1st petitioner proposed as follows;
 - a. E. Bukusu/S. Kanduyi/4005-Leonida Lihayi Makomere
 - b. Kakamega/Mukulusu/599 -Peris Aneyo Komere
 - c. Kakamega/Mukulusu/578 -Leonida Lihayi Komere and Peris Aneyo Komere.The 2nd petitioner's proposal was follows;



- a. E. Bukusu/S. Kanduyi/4005-to be shared equally between Peris Aneyo Komere and Leonida Lihayi Makomere
- b. Kakamega/Mukulusu/599 -to be shared equally among the sons of the deceased from the 1st and 2nd houses.
- c. Kakamega/Mukulusu/578 does not form part of the estate since it is registered in the name of Seyi Sambuli-Deceased

4. Even after these proposals had been filed, the parties could not agree on the proposals and the matter proceeded to hearing. The parties filed their respective witness statements which were adopted during hearing. The 1st petitioner testified as PW-1 and his testimony was follows;

That prior to his death, the deceased had allocated his mother Peris and her children land parcel Kakamega/Mukulusi/599 where he stays while the 2nd widow Leonida and her children had been allocated land parcel E. Bukusu/S. Kanduyi/4005 and the third widow and her children allocated land in Tuuti, Bungoma County. That at the time of his death, the respective families had already settled in their respective parcels of land.

- 5. In cross examination, he stated that the deceased had 21 children, 11 from the 1st widow and 10 from the 2nd widow. That the third widow had been allocated land but sold it and left. That the plot number Kakamega/Mukulusu/578 is still registered in the name of the deceased owner.
- 6. PW-2 Ernoda Wesonga Malaba stated that Peris and Leonida stay in the land in Kakamega while she stays in Chwele in half acre piece of land and is satisfied and has no claim over the estate.
- 7. PW-3 Leonida Makomere stated that she is the 1st petitioner's biological mother. Prior to his death, the deceased had allocated her and her children land parcel in Bungoma after its purchase in 1974 where they have settled to date while peris had been settled in Kakamega and the third widow Ernoda had been settled in Tuuti. She proposed each family to settle where they were before the deceased's death.
- 8. In cross examination, she stated that the land she stays in was bought in 1977 through her efforts and that of her husband after relocating to from Uganda. That the 1st house had been allocated land in Kakamega by the deceased where he was finally buried and the third wife in Chwele. She stated that she has sold part of her parcel measuring 25 by 50 feet and used the proceeds to build shops thereon way after the demise of her husband. She stated that she has no claim over the parcels of land in Kakamega.
- 9. PW-4 Witindi Shamala stated that he is a brother to the deceased. He knew the deceased had 3 wives who he had settled in their respective portions. That PW-3 was a business lady and combined their money with the deceased and bought the land in Bungoma in the year 1974 occupied by the second house.
- 10. In cross examination, he stated that the deceased had settled his wives before his death and were settling in those respective parcels.
- 11. PW-4 Bartholomew Wanjala stated that the deceased bought land parcel E. Bukusu/S. Kanduyi/4005 from his deceased father in the year 1974 and settled therein with PW-3. Later on, the deceased asked him to look for land in Tuuti area to settle his other wife Ernoda. He found a quarter of an acre where the deceased disposed a portion from Leonida's share to purchase the former where he settled with Ernoda. That Leonida's family still stay in the land since then.
- 12. In cross examination, he stated that he only knew the 2nd wife Leonida as she stayed in their home. That there are shops in the plot built by Leonida's son.



13. PW-5 the 2nd petitioner stated that the deceased had 2 known wives and a female friend Ernoda. That his mother Peris stays in Kakamega occupying land parcel Kakamega/Mukulusu/599 measuring 5 acres while the 2nd widow Leonida stays in Kanduyi in the plot measuring 75 by 130 feet.
14. In cross examination, he stated that his mother peris had never stayed in Kanduyi but his elder brother. That Leonida had moved to Eldoret but came back when the deceased fell ill. That the said Leonida left Kakamega farm in 1982 and has never come back.
15. PW-6 Peris Aneyo stated that her husband died intestate and such, he never distributed any part of his properties before his death. That after his death, they sat as a family and agreed to subdivide the properties as proposed by the 2nd petitioner. She stated that the plot in Kanduyi is commercial and has to benefit all the deceased's children and widows.
16. In cross examination she confirmed that she stays in Kakamega and has never stayed in Bungoma.
17. PW-7 Gerald Abung'a the 2nd petitioner's brother stated that he wished the Bungoma plot be divided amongst all the beneficiaries since it is a commercial plot.
18. In cross examination, he confirmed that Leonida stays in Kanduyi since the year 1978. That Peris only came to Kanduyi to visit their father. That their father had given verbal instructions on how his estate ought to be distributed.
19. The parties were directed to file written submissions but only the 2nd petitioner complied. He submits that since the deceased was a polygamist, the distribution of his estate is governed by Section 40 of Cap 160. That since the 3rd widow renounced her claim over the estate, the 2 widows ought to benefit and the mode of distribution is as proposed by him. He submits that the estate ought to be distributed equally among the 2 families. That since the 2nd widow in collusion with the 1st petitioner sold off part of the estate in E.Bukusu/S. Kanduyi/4005, this amounts to intermeddling.
20. In support of his contention, the cases of *Mary Rono Vs Jane Rono* (2005) eKLR and in the matter of the estate of Mwangi Gitire. Succession Cause No. 1033 of 1996- Nairobi High Court have been cited.
21. The uncontested facts in this cause are that;
 1. The deceased died intestate leaving 3 widows and their respective children.
 2. The 1st widow Peris had been settled in Kakamega in land parcel Kakamega/Mukulusu/599.
 3. The 2nd widow Leonida had been settled in Bungoma in land parcel E. Bukusu/S. Kanduyi/4005.
 4. The 3rd widow Ernoda was settled elsewhere and has no claim over the properties of the estate.
 5. At the time of his demise, the deceased had bought a portion of land measuring 1 acre from another person and had not been transferred to him at his death.
 6. The 2nd widow and her children including the 1st petitioner are contented with their share in plot number E. Bukusu/S. Kanduyi/4005
22. Having established the above, the only issue remaining herein are; whether the deceased's wishes of distribution can be established, and; which mode of proposal is fair.
23. The starting point is that in absence of any agreement on the mode of distribution, the distribution of a polygamous estate has to be in line with Section 40 of the Law of Succession Act which provides;



(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in Sections 35 to 38.

24. It is clear here that the parties here could not agree on how to distribute the estate and the above provisions could have to be applied. But then, there is evidence that the deceased had settled his widows in three different parcels of land where they settle to date. This in turn brings in to play the provisions of Section 27 of Cap 160 which accords the court a wide discretion when making an order on provision for dependants. Section 28 gives the circumstances the court ought to take into consideration while making such an order regarding provisions for dependants.

25. Similarly, under Section 42(a), it is provided;

an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

.....

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

26. These provisions were discussed by Mumbi Ngugi J. in *In re Late Morogo A Mugun (Deceased)* [2019] eKLR where the learned judge observed;

I believe that the sole issue for determination in this matter is whether the deceased had distributed his land between his three houses prior to his death. If he had, then the court should respect his wishes, and direct that the estate should be distributed in accordance with the mode of distribution that is set out in the affidavit of protest by the 1st and 2nd petitioners. If he had not, then the estate should be distributed in accordance with section 40 of the *Law of Succession Act*, in accordance with the number of children in each house, and including the surviving spouse as a unit.

27. With the above in mind, there is ample evidence that the deceased had and indeed wished every house to settle where they are as can be seen from the fact that at the time of his death, every house was settled in a different parcel.

28. The 2nd petitioner's assertion that the estate be distributed in accordance with section 40 of cap 160; I find is not practicable in the circumstances. Even if such was to be the case, I find that the 1st house is settled in a portion measuring 5 acres while the 2nd house is settled in a much smaller portion though developed with commercial buildings. It could be true to say that it has much value than the 1st house' parcel but then, no valuation was done.

29. If the court was to apply the provisions of Section 40, absurdities may result. It has been stated that the application of Section 40 is mandatory and has to be applied in every polygamous situation. To the contrary, it has to be applied where the same would advance equitability and fairness to the beneficiaries and avoided where absurdities and or fairness would not be achieved. This position was reiterated by



the Court of appeal in *Scolastica Ndululu Suva vs Agnes Nthenya Suva* (2019) eKLR where it was observed; -

It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.

30. Having set out the above, I do find and hold that from the evidence on record and taking into account all the relevant facts, the deceased had by his acts intended that his estate ought to be distributed as is occupied by the two houses. This position is buttressed by the 2nd petitioner by stating that the deceased had given verbal directions on the distribution of his estate.
31. The second issue as whose proposal is fair, I do find that the 1st petitioner's proposal is fair and accords with the finding in the first issue as discussed above. It takes into account the deceased's established wishes which this court is bound to give effect to.
32. The other issue arising here is the parcel measuring one acre stated to be registered in the name of Seyi Sambuli-Deceased. This parcel taking into account that each house has been provided for, I do order that the administrators will jointly engage the beneficiaries of the said Seyi Sambuli with a view having the parcel transmitted to the joint names of the administrators who shall then distribute equally among the 2 houses.
33. I therefore order that the estate of the deceased be distributed as follows;
 1. E. Bukusu/S. Kanduyi/4005-Leonida Lihayi Makomere.
 2. Kakamega/Mukulusu/599-Peris Aneyo Komere
 3. Kakamega/Mukulusu/578-Leonida Lihayi Makomere and Peris Aneyo Komere.

This being a family matter, each party shall bear its own costs.

DATED AT BUNGOMA THIS 7TH DAY OF OCTOBER, 2022

S.N. RIECHI

JUDGE

