



No. 467/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 206 OF 2010

IN THE MATTER OF THE ESTATE OF GABRIEL KYATU MUNYALA (DECEASED)

1. PAUL NGUMBAU KYATU

2. PETER MATHEKA KYATUPETITIONERS

VERSUS

PETER MATHEKA KYATU.....1ST RESPONDENT

MAWIA KYATU MANYALA.....2ND RESPONDENT

MUTIWA KYATU.....3RD RESPONDENT

URBANUS WAMBUA KYATU.....4TH RESPONDENT

LUCIA MAWIA KYATU.....5TH RESPONDENT

PRISCILLA MBEKE KYATU.....6TH RESPONDENT

NDUNGE KYATU.....7TH RESPONDENT

MWIKALI KYATU.....8TH RESPONDENT

MWENDE KYATU.....9TH RESPONDENT

JOHN MUENGE KYATU.....10TH RESPONDENT

MUENDO KYATU.....11TH RESPONDENT

JOSEPH MBINDYO.....12TH RESPONDENT

NDOLO KYATU.....13TH RESPONDENT

MANYALA KYATU.....14TH RESPONDENT

PETER KIALYUVO.....15TH RESPONDENT

ANNAH NDUKU KYATU.....16TH RESPONDENT

RULING

1. **Gabriel Kyatu Manyala** died on the 31st May, 2009 having been domiciled in Kenya. **Paul Ngumbao Kyatu and Peter Matheka Kyatu**, petitioners herein petitioned for grant of Letters Administration Intestate. It was issued on the 9th June, 2010. Beneficiaries of the estate disagreed on the mode of distribution of the same.
2. By way of *viva voce* evidence the 1st Petitioner **Paul Ngumbao Kyatu** stated that the deceased was survived by two (2) wives, **Lucia Mawia Kyatu Munyala** and **Priscilla Mbeke Kyatu**. The 1st household consists of five (5) people while the 2nd house consists of nine (9) people. He was of the view that the deceased's estate be divided equally amongst all the beneficiaries as the deceased wished.
3. The 2nd petitioner, **Peter Matheka Kyatu** on the other hand proposed that the land be shared according to the Akamba customary law. He prayed for distribution of the estate equally amongst the two (2) houses, each wife would then distribute the property among her children.
4. Submissions were filed by counsel representing the estate of the deceased that I have duly considered.
5. The full inventory of assets of the deceased at the time of his death was as follows:-

- Title No. Okia/Nzuuni/1427
- Title No. okia/Utaati/8689
- Title No. Okia/Nzuuni/4

6. The acreage was not given but the estimated value of the same was given as Kshs. 6,555,095/= . It has been proposed that customary law be applicable in respect of distribution of the estate. **Section 2** of the **Law Succession Act** provides:-

1. ***Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estate of those persons.***
2. ***The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.***

7. The deceased died on 31st May, 2009; therefore the applicable law is as provided in the Law of Succession Act, (Act). As correctly submitted by counsel for the estate, **Section 2** of the **Act** is applicable. The only exception would be as provided by the proviso of **Sections 32** and **33** of the **Act**, which provide thus:

“32). The provisions of this part shall not apply to-

- a. Agricultural land and crops thereon; or***
- b. Livestock,***

In various districts set out in the Schedule:

West Pokot, Wajir, Samburu, Lamu,

Turkana, Garissa, Isiolo, Kajiado,

Marsabit, Tana River,

Mandera, Narok,

33. The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be."

The estate of the deceased being situated in **Makueni County** does not fall under the excluded area.

8. While dealing with distribution of the estate of an intestate polygamous this court must revert to **Section 40(1)** of the Act which provides;-

"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 estate 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."

9. The provision alluded to provides for distribution of the estate of a polygamous intestate. It stipulates that the net intestate estate shall be divided among the houses according to the number of children in each house and also adding the deceased's wife as an additional unit to the number of the children.

10. A logical interpretation would be that such an estate ought to be divided equally amongst all the existing households taking into account the number of children of the deceased irrespective of their marital status, gender or age.

11. In the case of ***Saweria Wamuruona Muchanji versus Jinano Ngari [2008] eKLR*** the court held that:-

"This is plain unequivocal language means that the estate shall be sub-divided equally amongst the surviving children of the deceased adding the widow as a unit. It does not say that the estate (in most cases land) should first be shared equally among the houses and then later be distributed equally among the children within each house. I have noted this particular magistrate applied that interpretation and it is in my considered view wrong. He has misunderstood the proper meaning and purport of Section 40(1) of the Law of Succession Act. For emphasis, I repeat that according to Section 40 (1) of the Law of Succession Act, the estate of deceased who died intestate must be distributed equally among the surviving children regardless of house which they are born. The widow is then added as an extra unit to her house. This is the interpretation that has been applied in the High Court as well as in the Court of Appeal. The Court of Appeal in the celebrated case of Rono versus Rono and Another [2005] 1 E.A. 363, upheld this interpretation and held that the state of a polygamous deceased person should be distributed according to the number of the children and not the number of houses".

12. From the foregoing it is apparent that the estate of the deceased cannot be divided in accordance with the customary law. Justice demands that it be divided in accordance with

statutory law. The estate of the deceased will therefore be divided equally amongst the number of children in each household taking into account the widows as additional units.

13. Parties are therefore directed to agree on the distribution pursuant to the order of this court.

14. This being a family matter parties will bear their own costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 18TH day of DECEMBER, 2014.

L.N. MUTENDE

JUDGE



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