



**In re Estate of Simon Muoki Kisya (Deceased) (Succession Cause
223 of 2005) [2024] KEHC 15174 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 223 OF 2005**

MW MUIGAI, J

NOVEMBER 28, 2024

IN THE MATTER OF THE ESTATE OF SIMON MUOKI KISYA (DECEASED)

BETWEEN

MARY MBINYA MUOKI 1ST PETITIONER

KISYA MUOKI 2ND PETITIONER

AND

ONESMUS MUSYOKI MUOKI 1ST OBJECTOR

ROSE PETER MUOKI 2ND OBJECTOR

JUDGMENT

1. The deceased herein died on 5.06.2004.
2. Petition for grant of letters of administration intestate were filed on 26.05.2005 by Peter Muoki Kisya in his capacity as the son of the deceased wherein he stated that the estate properties were plot no 1459 Kangundo and Kawethei/Kathana and that the beneficiaries were/are;
 - a. Anna Mutheke Muoki deceased
 - b. Peter Muoki Kisya Adult
 - c. Onesmus Musyoki Muoki adult
 - d. Martha Muoki deceased
 - e. Mutuku Muoki deceased
 - f. Tabitha Muoki deceased
 - g. Dorothy Muoki adult (married)



- h. Kitonga Muoki deceased
 - i. Mary Muoki adult (not married)
 - j. Kisya Muoki adult
3. The Grant of letters of administration intestate was issued on 05.05.2006 by Hon Justice D.A.Onyancha to Peter Muoki Kisya.
 4. A summons for revocation of grant was filed on 4.08.2006 seeking to have Onesmus Musyoki, Kisya Muoki and Mary Muoki as the intended administrators as Peter Muoki Kisya was alleged not to have sought the consent of the family members and as sole Administrator sold land.
 5. The grant was revoked and new grant issued on 9/7/2008 to Mary Mbinya Muoki & Kisya Muoki by Hon. Justice Lenaola (as he then was).
 6. The Summons for confirmation of grant filed on 28.04.2010.
 7. A protest was filed on 9.11.2011 by Richard Ndonge Mbatha who stated that he purchased land from the deceased sometime in 2004.
 8. A notice of objection was filed on 27.02.2012 against the protest. Mary Mbinya Muoki also filed a reply to the notice of objection on 14.03.2012.
 9. The grant of letters of administration was revoked under Section 76 of the *Law of Succession Act* and the file marked as closed for failure to apply for the confirmation of grant within one year on 1.09.2016 by Hon. Lady Justice P. Nyamweya (as she then was) .
 10. On 16.11.2017, upon application dated 25.08.2017 was considered by Hon. Justice D. Kemei, the orders dated 01.09.2016 were set aside and a fresh grant was issued. Further, the Petitioners were to proceed and file for confirmation of grant.

Summons For Confirmation Of Grant Filed On 13.03.2018

11. The Summons is supported by an affidavit of Mary Mbinya Muoki & Kisya Muoki who contended that the grant of letters of administration were issued on 16.11.2017 and the deceased was survived by;
 - a. Peter Muoki son (deceased)
 - b. Onesmus Musyoka Muoki son
 - c. Dorothy Nthenya Muoki daughter
 - d. Mary Mbinya Muoki daughter
 - e. Kisya Muoki son
12. The Administrators contended that Kangundo/Isinga/1459 measuring 0.48 HA had been divided as follows;
 - a. Rose Peter Muoki 68ft by 75ft
 - b. Onesmus Musyoki 70ft by 75ft
 - c. Mary Mbinya Muoki 90ft by 100ft
 - d. Kisya Muoki 55ft by 100ft



- e. Pascal B.M. Njeru 60ft by 110ft
13. That Matungulu/Kawethei/2389 measuring 1.77HA and Matungulu/ Kawethei/2397 measuring 0.21HA had been divided equally between Rose Peter Muoki , Onesmus Musyoki, Mary Mbinya Muoki and Kisya Muoki equally.

Affidavit Of Protest Dated 27.03.2018

14. Onesmus Musyoki contended that the summons for confirmation of grant was prepared by the 1st Petitioner alone and brought the same for their signature but they declined as they never consented to the mode of distribution. It was deposed that the summons had been made in bad faith, were meant to mislead the Honourable court and amounted to non-disclosure of pertinent material facts.

Replying Affidavit Dated 7.12.2018

15. The 1st Petitioner stated that the affidavit of protest does not reveal any cause for protesting the summons rather than rumbling over the issue of lack of consultation. No clause of the model of distribution is contested and the objector should clearly show what they object to in the schedule of distribution. It was contended that this was a delaying tactic as the protestors are using a large portion of the land forming part of the estate and would wish the matter stalls so they can continue benefitting solely.

Hearing

16. OW1 was Onesmus Musyoki Muoki who stated that the 1st Petitioner is her younger sister and the deceased was their father and had one wife who is deceased. He stated that they are nine children but five have died leaving four being, Mary Mbinya Muoki, Kisya Muoki and Dorothy Nthenya Muoki. He stated that the family met and agreed on the mode of distribution. He also indicated that he had no objection to Kangundo/Isinga/1457 but the proposed mode for Matungulu/Kathethei/2397 and 2389 were yet to be agreed upon.
17. Upon cross examination, he stated that the Kangundo plot was sold by their late father to one Njeru. He denied selling any family land. He told the court that the deceased died in June 2004. He denied being put in the cells by the Petitioners as well as colluding with his young brother to harass the 1st Petitioner.
18. OW2 Alex Kioko stated that the objector and the protestor were his first cousins while the deceased was his uncle. He stated that the protestor did not interfere with subdivision, that on 27.7.2014 they were called as clan members to go and participate in subdivision of the deceased's land where the chief was. They did the sub division of the land. He stated that the protestor was present as well as his sister in law Rose and some of their children, Kisya Muoki was present and the Petitioner was not present as it was said she was satisfied with Kangundo Plot.
19. He told the court that the it was decided that the Petitioner was to take over the Kangundo plot and later learnt the petitioner had sued the Protestor for refusing to share the land.
20. Upon cross examination, he stated that he was not present during the family deliberations. He did not learn from the Petitioner that she had forfeited her interest in the Kawethei land, he learnt the protestor has sold some parcels and he admitted being involved in the past over family disputes. He denied being the one instigating the protestor to harass the petitioner. He indicated that the squabbles were with regard to the Isinga plot. He admitted intervening on the boundary dispute between the petitioner and



Kisya Muoki. He admitted not establishing from the Petitioner whether she was in agreement with the distribution of the properties.

21. OB3 Yuda Kilele stated that he knew the Protestor and the Petitioners as their father was younger than his grandfather. That the deceased was his uncle. He stated that the dispute relates to a parcel of land which was subdivided on 27/7/2014. The 1st Petitioner had requested to be given land within Kangundo township while his brothers were to share the land situated in Shanthi. That they split the land into three portions among the three brothers but they disagreed. They sought help from the chief to intervene and since then there had been no dispute until the present one.
22. He contended that the 1st Petitioner is now claiming to be given a piece of land in Shanthi yet she has been satisfied with the Kangundo Plot. He stated that she had been given a portion of the Kangundo plot. He did not agree with her claim for land in Shanthi as most of her brothers had already sold and the portion remaining is held by the 1st Objector.
23. Upon cross examination, he stated that she has claimed she would be satisfied with the Kangundo parcel. He said she was a troublesome woman in the area and was not aware she was being harassed by the Objectors. He denied participating in the sale of the family land and stated that the Petitioner should have brought the case to them in the village level to resolve it.

This matter was partly heard before Hon D.K.Kemei J and this Court took over from here; proceedings were to be typed and availed to Parties.

24. PW4, Dorothy Muthenya Muoki stated that she is the daughter of the deceased and the property is his. She stated that Onesmus is her brother. She stated that she went the 2nd time to Kangundo and Onesmus refused to talk to her. The 3rd time he also refused to talk about the matter. She stated that Onesmus does not call nor talk to them and they decided to file the matter in court so that the truth comes out. That when Onesmus was called to court, he refused to come and despite summons, he again did not show up.
25. She stated that Onesmus stated that he would object to the matter and they were children of the deceased.
26. Upon cross examination by Onesmus, she stated that the shamba is in her father's name. She denied that Rose Muoki and Kisya Muoki has sold the land and emphasized need to come to court
27. PW5, Rose Nduku Peter stated that she is the daughter in law of the deceased and she was married to Peter Muoki son of Simon Muoki. She asked the Court to halt proceedings and allow the family to hold a meeting discuss and agree on the Way forward. The Court obliged as provided by Art 159 of *the Constitution* 2010 and allowed family to meet and return after 1 month.
28. PW6, Mary Mbinya Muoki stated that she is one of the daughters of the deceased herein. That the other children are;
 - a. Onesmus Musyoki Muoki
 - b. Kisya Muoki
 - c. Peter Muoki Kisya deceased
 - d. Dorothy Muoki
 - e. Martha Jacinta deceased
 - f. Tabitha Muoki deceased



- g. Kitonga Muoki deceased
 - h. Mutuku Muoki deceased
29. She stated that they are of one mother. She stated that her and Kisya were on Plot 1459 Kangundo but all other beneficiaries came to the land and it was divided and they sold their portions.
30. Matungulu/Kawathei/2389 is the one they do not want her to get any portion and/or stay on the land. The rest of the family of deceased are against her Onesmus, his wife Rose and Kisya and they wanted to demolish her house in Kangundo but she reported to the Police.
31. That the estate properties were plot no 1459 Kangundo measuring 0.48 Ha and plot no 2389 Matungulu/Kawethe measuring 1.77Ha.
32. Kisya and herself were on plot 1459 Kangundo but all other beneficiaries go to the land and it was divided equally. She stated that Matungulu/Kawethe/2389 is where they do not want her to get any portion and be on the land. That they are all against her, Onesmus and his wife. Rose and Kisya are all against her share. She averred that they even wanted to demolish her home in Kangundo and she reported the matter to the police as per letter of 2/12/2015.

1st Petitioner's Submissions Filed On 29.12.2023

33. It was submitted that the estate property consisted of plot no 1459 Kangundo/Isinga measuring 0.48 Ha and plot no 2389 Matungulu/Kawethe measuring 1.77Ha and the legitimate beneficiaries are, Onesmus Musyoki, Mary Mbinya Muoki , Kisya Muoki and Rose Peter Muoki .
34. It was contended that in plot no 1459 Kangundo/ Isinga, Onesmus M. Muoi, Peter Muoki and Kisya Muoki jointly sold a portion of land measuring 60ft by 100 ft to one Pascal Njeru without her consent.
35. That in the same plot, some temporary sub divisions were made under the area chief.
36. As regards plot no 2389 Matungulu/Kawethe, it was contended that Onesmus M. Muoi, Kisya Muoki and Rose Peter sub divided the land in the absence of the 1st Petitioner and left her without a share. She prayed that the available property be divided equally among them.

Determination

37. I have considered the Application, the Replying affidavit and the submissions thereto and find the issues for determination are;
- a. Whether the grant of letters of administration dated 16.06.2017 should be confirmed
 - b. How the estate property should be shared
38. A number of statements, affidavits and handwritten letters were filed with the Court by various parties indicating views on the events leading to proposed distribution of the estate. These documents disclose competing compelling and at the same time contradicting versions regarding assets that comprise of deceased's estate.
- a. Statement by Dorothy Nthenya Muoki of 6/1/2022 discloses that brothers to author of the statement sold portion of Kangundo/Isinga/1459 to Pascal Njeru and distributed the said property as portions to Rose Peter Muoki w/o son of deceased Onesmus Musyoki Mary Mbinya Muoki Kisya Muoki and Pascal Njeru.



- b. Kisya Muoki & Onesmus Musyoki wrote letter to Court and objected to Summons for Confirmation of Grant as Mary Mbinya was allocated land at Kangundo town and she agreed not to be given land at Syanthi which was subdivided between Onesmus Musyoki Kisya Muoki and Rose Peter and they developed their portions and sold parts of the property.
 - c. Kamene Musyoki objected to the Petition and stated that Mary Mbinya was allocated land on Parcel at Kangundo Town while Syanthi Plot was allocated to Onesmus Musyoki, Kisya Muoki & Rose Peter
 - d. Rose Nduku Peter letter of 5/10/2022, the properties Kangundo & Syanthi were subdivided by the Area Chief and rest of family members, Mary to stay with her children in Kangundo and not have a share in Syanthi which the rest of family have shared.
 - e. On 11/12/2015, Sub Division of Kangundo/Isinga Plot 1459 of late Simon Kisia(deceased) Kisia Muoki 53ft by 100ft; Mary Mbinya Muoki 90ftby 100ft; Onesmus Musyoki 70ft by 75 ft & rose Nduku Peter 68ft by 75 ft. and sold portion to Pascal Njeru 60 ft by 110ft
 - f. Letter from Chief Isinga Location is that the family of deceased herein invited his office to witness subdivision of ancestral land -Matungulu/Kiwathei/2389. The land was divided amongst 3 sons/family; Rose Peter w/o late Muoki Kisia, Musyoki Muoki & Kisya Muoki. The Chief indicate Mary Mbinya was stubborn she had stated she wanted no other portion and was in Kangundo Town where property is valuable. It was also intimated that Musyoki Muoki was not arrested for any offence.
39. In The Matter Of The Estate Of Prisca Ong'ayo Nande (deceased) (succession Cause 836 Of 2013) [2020] The Court considered the issue of sale of land before distribution;
- “I note that the administrator has vehemently contested the alleged sales of land to the applicant, arguing that they should look up to one of the sons of the deceased for recompense. To him the applicant was not a creditor of the estate, warranting being listed as persons beneficially entitled to a share in the estate. Was the applicant a bona fide purchaser of property from the deceased to warrant being treated as a creditor of the estate, who ought to be catered for from the estate? Documents were placed on record, to demonstrate that there were agreements of sale and that money changed hands.”
40. This Court associates with the concern in exercise of Personal Representative's powers & Duties bestowed under LSA where instead of distributing the estate to the beneficiaries the Administrator, Kisya Muoki (alleged to have worked with his brothers) then before grant was revoked; engaged in selling chunks of land and later on took a sizeable share in the remainder of the properties and excluded or reduced other beneficiaries share and of concern refused to attend Court or be represented to give their version of events. The sale of parts of suit properties is evidenced by Affidavit filed by Richard Ndonye Mbatha & Pascal Muriithi Njeru for sale of 1 acre of Kangundo/Isinga/1459 for Ksh 620,000/- in December 2004 the Agreements for sale annexed to their Affidavit.
41. From the title deeds on record , the following properties belong to this estate;
- a. Matungulu/Kawethei/2389
 - b. Matungulu/Kawethei/2397
 - c. Kangundo/Isinga /1459



42. The Administrator proposed that the first two be divided equally between the legitimate beneficiaries are, Onesmus Musyoki, Mary Mbinya Muoki, Kisya Muoki and Rose Peter Muoki. The Protestor has indicated that he was not consulted on the division of the two properties named above but has not given a proposal of how he would want the properties divided. The attempt to exclude Mary Mbinya in the other 2 properties that she renounced her right to inherit is not borne out by evidence on record. I therefore see no problem with the proposed distribution by the Administrator which is equal distribution of the estate property.
43. As regards the plot known as Kangundo/Isinga/1459, which appears to be the most contested property, the Petitioner/Administrator indicated that she has been side-lined and PW1 indicated that the Objector Onesmus Muoki has not been talking to them. The Petitioner/Administrator contended that the subdivision of this property was done without her consent and this was confirmed by OW2, Alex Kioko who told the court that the Petitioner/Administrator was not present when they were subdividing the land. The subdivision was also confirmed by OBW3 who stated that the dispute relates to a parcel of land which was subdivided on 27/7/2014. The deceased herein died on 5.06.2004 therefore no subdivision, sale, transfer or any act on the land could happen without a confirmed grant. Any such act amounts to intermeddling which is punishable by law.
44. Section 45 of the Succession Act provides as follows;
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
45. By dint of this section, any transaction that did not happen during the lifetime of the deceased is null and void.
46. Section 82(b)(ii) of the Act provides that;
- Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
- (b) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative; to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:
- Provided that—
- i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and



- ii. no immovable property shall be sold before confirmation of the grant;

47. In re Estate of Barasa Kanenje Many (Deceased) (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) the court held that;

“Any transaction, entered into with a person who was yet to be appointed administrator, over estate assets, would be null and void, since such assets would not have vested in such a person, and such person would have no standing in law to transact over such property. Section 45 of the Law of Succession Act outlawed such dealings and designated them as amounting to intermeddling with the estate of the deceased, which was a criminal offence, according to that provision.

Section 79 of the Law of Succession Act should be read together with sections 82 and 83 of the Act, which set out the powers and duties of administrators. Once the assets of the deceased were vested in the administrators, the administrators would then be entitled to exercise the powers conferred upon administrators by section 82, and they were subject to the duties that were imposed by section 83. The powers included powers to enter into contracts with respect to assets of the estate, to sue and be sued with regard to estate assets, among others. Entering into contracts over estate assets would include converting estate assets by way of sale. However, section 82(b)(ii) of the Act outlawed the sale of immovable assets of an estate before the grant had been confirmed. That would mean that any such sale would be unlawful and unenforceable unless it happened with the leave of the court.

48. It is clear that the alleged subdivision contravened Sections 45 and 82 of the Law of Succession Act and there was no possibility that the applicants could have acquired any valid title from the sales, for the people including the elders who purported to subdivide the property, in particular Kangundo Isinga/15459 to them had no title to it. Even the 2nd administrator, Kisya Muoki could not subdivide the land without a confirmed letters of administration.

49. Where the deceased did not have/leave a valid Oral or written Will then distribution of the estate is as provided by Law of Succession Act. The deceased died in 2004, LSA was/is applicable w.e.f 1981. In this case as both parents were/are deceased the distribution would be as per Section 39 of LSA.

50. Of course the peculiar circumstances of each case are taken into account and as far as is practically possible attempt equal/equitable distribution of the estate amongst the children of the deceased. In the instant case where members of the family built developed permanent structures, access roads livestock and farming permanent buildings those shall not be demolished but areas taken into account and compensated and as near as possible attain fair distribution. PEter Karumbi Keingati & 4 Others Vs. Dr. Ann Nyokabi Nguthi & 3 Others (2014) Eklr

In Re Estate Of In Re Estate Of Wilfred Kihara Kariuki (deceased) (succession Cause 1001 Of 1993) [2018] Kehc 4872 (klr)

In Re Estate Of Julius Ndubi Javan (deceased) (succession Cause 720 Of 2013) [2018]

Disposition

51. In the circumstances, I hereby issue the following ;

1. The grant of letters of administration dated 16.11.2017 is hereby confirmed.



2. The beneficiaries of the estate are;
 - a. Onesmus Musyoki,
 - b. Mary Mbinya Muoki ,
 - c. Kisya Muoki and
 - d. Rose Peter Muoki.
3. The estate property is;
 - a. Matungulu/Kawethei/2389
 - b. Matungulu/Kawethei/2397
 - c. Kangundo/Isinga /1459
4. The estate property shall be divided equally/equitably among the beneficiaries.

It is so ordered.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 28/11/2024 IN MACHAKOS HIGH COURT. (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

