



In re Estate of Bernard Kilonzo Katiku (Deceased) (Succession Cause 391 of 2015) [2023] KEHC 3992 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 391 OF 2015**

MW MUIGAI, J

APRIL 28, 2023

IN THE MATTER OF THE ESTATE OF BERNARD KILONZO KATIKU - DECEASED

BETWEEN

MUENI KILONZO PETITIONER

AND

JOYCE MUKULU KILONZO OBJECTOR

AND

RUEBEN KIMANI NJOROGE PROTESTOR

AND

VICTOR NZIOKI KILONZO BENEFICIARY

VICTORIA MUTETE KILONZO BENEFICIARY

CAROL KATHIO KARIUKI BENEFICIARY

ALEXANDER KATIKU KILONZO BENEFICIARY

JUDGMENT

Background

1. Bernard Kilonzo Katiku died intestate on 15th January 2015.
2. A Petition was filed on 24 /6/2015 by Mueni Kilonzo after gazettelement on 26/6/2015, the grant of letters of administration intestate was issued to Mueni Kilonzo.
3. On 6/7/2015, Objection to Making of Grant was filed by children of Joyce Mukulu Kilonzo. A Certificate of Urgency was filed on 7/7/2015, by Joyce Mukulu Kilonzo in support of Objection to



Making Grant Application by her children and she sought restraining orders against Mueni Kilonzo's administration over the estate of the deceased.

4. On 17/ 8 /2015 Joyce Mukulu Kilonzo filed another Certificate of Urgency and she sought restraining orders against 5 Intermeddlers/Respondents/Purchasers on/to the estate of the deceased.
5. On 24/8/2015, another Notice of Objection to Making of a Grant was filed by Joyce Mukulu Kilonzo on the basis that all assets comprising of the deceased's estate are matrimonial properties whose division is /was subject to Civil Suit 276 of 2009- O.S No 276 of 2009 after Divorce Cause No 1 of 2002 granted the deceased and Applicant dissolution of their marriage.
6. On 17/3/2016, the Applicant Mueni Kilonzo filed Amended Petition//Affidavit for letters of Administration, listed other beneficiaries left behind by the deceased as follows;
 1. Mueni Kilonzo
 2. Victor Nzioki Kilonzo– Son
 3. Victoria Mutete Kilonzo– Daughter
 4. Carol Kathio Kilonzo- Daughter
 5. Alexander Katiku Kilonzo – son
 6. Ben Mwendwa Kilonzo
 7. Grace Kathio Kilonzo
 8. Moses Kyalo Kilonzo
 - a. Assets as follows;
 1. Machakos/Kiandani/2312
 2. Machakos/Kiandani/2128
 3. Masii/Muthini/219
 - b. Liabilities as follows;

John Wambua Mutete -3 acres of Masii/Muthiini/219 & Masii/Mithini/531,4 portions of land 50 ft by 100ft in Kiandani/2128 & 50ft by 100ft Machakos Kiandani/2312 50ft by 100ft.
7. The Applications of 6/7/2015 and 17/8/2015 were heard before Hon. Nyamweya J (as she then was) and vide Ruling delivered on 11/1/2017 granted orders that rent, income and revenue due from the deceased's estate as shall be agreed by the Petitioner and Objectors shall be deposited in an interest earning account to be opened in the names of Petitioner and Objectors Advocates on record w.e.f January 2017. Secondly, that status quo shall be maintained with regard to all properties and assets belonging to the deceased pending appointment of Administrators and issuance of grant of administration and the Petitioner/Respondents & Objectors shall continue to be in possession and occupation of the deceased's properties and assets they currently occupied and not sell, transfer, lease or in any manner dispose or waste the said properties and assets.
8. On 18/12/2018, by Consent of the parties through their respective Counsel on record, it was agreed before Hon. D. K. Kemei J that Joyce Mukulu Kilonzo & Mueni Kilonzo be jointly issued with a grant



of letters of administration and Summons for Confirmation were to be filed within 30 days thereof. The grant was issued on 1/4/2019 to both administrators.

Summons For Confirmation Of Grant

9. The 1st Administrator, Joyce Mukulu Kilonzo filed Summons for Confirmation on 3/7/2019 and deposed that she was wife to the deceased from 31/1/1970 until 5/7/2005 after 35 years they divorced. The deceased and 1st administrator had 4 children namely;
 1. Victor Nzioki Kilonzo– Son
 2. Victoria Mutete Kilonzo– Daughter
 3. Carol Kathio Kilonzo- Daughter
 4. Alexander Katiku Kilonzo – son
10. During the marriage the deceased and 1st Administrator acquired the following properties as shown by the Certificates of Search attached to the Summons for Confirmation of Grant.
 1. Machakos/Kiandani/2312
 2. Machakos/Kiandani/2128
 3. Masii/Muthini/219
11. The 1st administrator deposed that developed Plots they acquired with the deceased during their marriage, the deceased unilaterally sold despite the Court Order that restrained the sale pending division of matrimonial property. These are;
 - a) Machakos Town Block/11/429
 - b) Machakos /Kiandani/344
12. On 21/4/1983, the deceased unlawfully sold Machakos/ Kiandani/2128 to Eliud Munywoki Kioko for Ksh 40,000/= and the 1st Administrator realized the unlawful sale. The 1st Administrator entered into an Agreement with the Purchaser and revoked the sale and refunded the Ksh 40,000/-The Agreements were annexed as JMK –(d) & JMK- (e) respectively.
13. The 1st administrator proposed distribution of the estate as follows;
 - a) Machakos/Kiandani/2128- not available for distribution to be left solely to 1st administrator.
 - b) Machakos/Kiandani/2312
 - c) Masii/ Muthini/219

Both Land Parcels to be divided in ½ one ½ to the 1st Administrator and the other ½ to beneficiaries of the deceased’s estate that is herself and their 4 children to the exclusion of the 2nd Administrator.
14. The 1st Administrator deposed that the 2nd Administrator should tell the Court when she was married and under what system of law. The 1st administrator asserted that the 2nd Administrator should disclose the properties she and the deceased acquired during their marriage and reiterated that the 2nd Administrator did not have children with the deceased but the 3 children are the Petitioner’s children.



Affidavit Of Protest By Mueni Kilonzo

15. An Affidavit of Protest was filed on 21/10/2020 by Mueni Klonzowho deposed that she was legally the wife of the deceased before the deceased's demise as the deceased already divorced the Applicant and she annexed the copy of marriage certificate marked MK-I.
16. The Protestor deposed that she took care of the deceased and paid his medical bills as well as she purchased drugs and the 1st administrator and her children did not bother with the deceased. The 2nd Administrator/Protestor sought reimbursement of her monies before distribution of the estate.
17. The 2nd Administrator deposed that she and deceased had 3 children and copies of ID cards are attached, for Ben Kilonzo, Grace Kathio & Kyalo Kilonzo.
18. The 2nd Administrator deposed that during her marriage to the deceased, the deceased purchased and registered in the 1st Administrator's names properties as follows;
 - a) Machakos Town block 1/187
 - b) Machakos Town block 1/188
 - c) Machakos/Town Block 1/189
 - d) Nairobi Block 32/366
19. These properties are held used by the 1st Administrator and not disclosed for distribution of the deceased's estate.
20. The 2nd Administrator deposed that the following properties are not available for distribution as the deceased sold to the intermeddlers/purchasers/protestor (s);
 - a) Masii/ Mithini/219- donated to Kathima Primary School and the remainder was sold to John Wambua Mutete-MK-4
 - b) Machakos/Kiandani/2128 was purchased by;
 - i. Lucas Mwove
 - ii. Julius Ndegwa
 - iii. John Wambua Mutete

And the remainder should be registered in her names to hold in trust for the 3 children.
21. Machakos /Kiandani/2312 – was sold to John Wambua Mutete and the remainder should be registered in her names to hold in trust for the 3 children.
22. The 2nd Administrator asserted that the deceased wished her and the children to inherit the properties as shown by the Minutes of the meeting of 29/12/2014.
23. The 2nd Administrator submitted that this Court sitting a Succession Court cannot deal with matrimonial property and the court cannot issue orders subdividing the properties as matrimonial property before distributing the estate of the deceased.

Affidavit Of Protest By Purchaser

24. The Protestor, Rueben Kimani Njoroge also filed an Affidavit of Protest dated 18th March, 2021 and deposed that during his lifetime the deceased sold to him land measuring 50 by 100 from Land title



No. Machakos/Kiandani/2128 and he immediately took possession of the same but has been excluded in the confirmation of grant proceedings and the said land ought to be hived off and left out in the distribution of the deceased's as the deceased sold the same land to him.

Hearing

25. The Court heard oral evidence of the Petitioner, 1st Protestor, Ms Mueni Kilonzo who reiterated the substance of her Protest and various Petitions filed in this matter and annexed documents. She was cross-examined by adverse parties.
26. The 2nd Protestor, Purchaser, Reuben Kimani Njoroge also testified and reiterated contents of his Protest and the Agreements attached. He indicated he was/is a bona fide purchaser and creditor to the estate of the deceased as he purchased the land from the deceased and produced 2 Agreements. He conducted due diligence before the sale and was not served Court orders. He was subjected to cross examination by adverse parties.
27. The petitioner Joyce Mukulu Kilonzo testified and relied on the pleadings filed and documents annexed and the Summons for confirmation of Grant. She was subjected to cross examination by the adverse parties.

Written Submissions

Applicant's (1st Administrator) Submissions

28. Counsel pointed us to Section 26, 27 & 29 of the [Law of Succession Act](#) which includes former wives in succession matters and the four issues as beneficiaries whom the respondent did not object to. The law points to the Court's discretion in distribution of the deceased's estate to dependents as defined by Section 29 of [Law of Succession Act](#).
29. On the proposed mode of distribution to include Purchasers who bought land from the assets of the deceased's estate; Machakos/Kiandani/2128, Masii/ Mithini/219 & Machakos /Kiandani/2312. The Purchasers are 3rd parties and except for 2nd Protestor, the other Purchasers did not file pleadings nor appear in Court to establish their claim. The annexed Agreements are not proof of purchase and/or payment of purchase price.
30. The 1st Administrator presented evidence to prove that the 3 properties were acquired and developed during their marriage with the deceased. The 1st Administrator, made payments from her business as supplier of Prisons in Machakos and loans she obtained in her name but registered in the deceased's name as trustee of the family then. The 1st Administrator retained the titles to the 3 properties and exclusive control, possession and use.
31. The 2nd protestor, Purchaser presented 2 Agreements but did not fulfil the condition precedent, did not pay final 2 instalments as the deceased was to avail the requisite Consent(s).

2nd Protestor's/(2nd Obejector) Submissions

32. It is submitted the Protestor is a bona fide purchaser of a portion measuring 50" by 100" from title number Machakos/Kiandani/2128 as evidenced by annexed Sale Agreements between him and the deceased marked as RKN-1 of the sale of land by the deceased to him on 16/6/2000. He asserted that the 50ft by 100ft portion from Machakos/Kiandani/2128 should be excised and he obtains title in his name.



33. He relied on the cases of *Zebak Limited v Nadem Enterprises* (2016) eKLR on the definition of bonafide Purchaser from the Ugandan case of *Katende vs Haridas & Company Limited* (2008) 2 EA 174 hereby noted. Counsel submitted that the protest has merit and he met the criteria of bonafide Purchaser and conducted search and was not aware or informed of Court order. Therefore, his claim should be allowed.

Beneficiaries' Submissions

34. Counsel submitted that they fully support and embrace the application for confirmation of grant dated 2nd July, 2019 and the proposed distribution set out in the supporting affidavit; Counsel submitted that the applicant is a beneficiary of the estate as a former wife with the meaning of Section 29 of the *Law of Succession Act*.
35. The Children of the 1st Administrator submitted that their mother and father were married in 1970 and lived together with the beneficiaries for 35 years. The properties that comprise of the deceased's estate are; Machakos/Kiandani/2128 (bought in 1989) Masii/ Mithini/219 (bought in 1973) & Machakos / Kiandani/2312 (bought in 1990) and were acquired and developed during their marriage before divorce in 2005.
36. During their parents' marriage, and later ongoing divorce proceedings, the 1st Administrator filed suit and obtained orders in 1998, restraining the deceased from disposing any of the properties.
37. In 2009, the 1st Administrator filed suit against the deceased and sought division of matrimonial property in Machakos High Court No 276 of 2009(O.S). the deceased died in 2015 before the matter was concluded. The deceased married the 2nd administrator in 2014. The beneficiaries submitted that the 2nd Administrator's 3 children are not beneficiaries within the meaning of the *Law of Succession Act* as they are step children and their mother married the deceased when they were all adults.
38. With regard to the 2nd Protestor, the beneficiaries asserted that their mother was not consulted at the time of sale. They stated that the 1st Administrator was neither consulted nor was the Consent of the Land Control Board sought before sale of the land; they stated that the summons for confirmation of grant be allowed.

Petitioner's/ Respondent's Submissions

39. Counsel submitted that the Petitioner was married under Kamba Customary Law in 1993, specifically, on 31/7/1993 and they were blessed with 3 children and annexed their ID cards. The Petitioner annexed affidavit of marriage as marriage certificates were not issued in customary marriage at the time. Their marriage was solemnized in 2014. Therefore, they acquired and developed properties from 1993 until the deceased's demise.
40. The Petitioner confirmed payment of the deceased's medical bills upto his death and annexed the NHIF card in distribution of the estate of the deceased. The Petitioner asserted that this court should consider and/or consider all the expenses that the petitioner incurred and the same should be reimbursed to her before the distribution of the estate.
41. On whether the Petitioner was legally married to the deceased, the Respondent relied on the case of *Hortensia Wanjiku Yawe vs The Public Trustee* Court of Appeal Civil Appeal Number 13 of 1976 on presumption of marriage and *In the Matter of the Estate of John G. Kinyanjui* Nairobi HCP&A No 317 of 1984 where it was held that cohabitation can be evidence from where the presumption of marriage maybe inferred. *Mary Wanjiku Githatu vs Esther Wanjiru Kiarie*, Civil Appeal No. 20 of 2009, Court of Appeal at Eldoret and recently, in *John Gitau Githongo vs Victoria Mwibaki* (2014) eKLR all point



to ‘... .. the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises.’ The Petitioner submitted she was a legal wife to the deceased and is therefore entitled to a share of the deceased estate together with her children.

Applicant’s/1st Administrator’s Supplementary Submissions

42. Counsel submitted that the Petitioner introduced evidence from the Bar through submissions which is inadmissible as it was not submitted earlier in pleadings or oral hearing. This point was buttressed by the case of *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Anor* [2014] eKLR where the C.A. observed;

“Submissions cannot take the place of evidence. The 1st Respondent failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally marketing language, each side endeavoring to convince the Court that its case is the better one.....”

43. The 1st Administrator took issue with production of Affidavit of Marriage sworn by the deceased confirming marriage to the Petitioner in 1996 is not admissible as it was not produced during proceedings.

44. Secondly, it was submitted that relying on the case of *In Re Estate Of the late Nelson Ndara Koibita (Deceased)* [2018] eKLR, Hon .W.Musyoka observed as follows;

“.....Let me end the discussion on this by stating that my view of presumption of marriage in cases where there is a subsisting civil or statutory marriage is that the presumption ought not arise. A statutory or civil marriage is viewed strictly monogamous. A person who is party to it would have no capacity to contract any other valid marriage as long as the statutory or civil monogamous marriage subsists.....”

Determination

45. The Court outlined the pleadings, documents relied on oral testimony by the parties and written submissions of the hotly contested dispute between parties and issues that emerge for determination are as follows;

- a) Who are the beneficiaries of the deceased’s estate?
- b) What assets comprise of the deceased’s estate and if/when available for distribution:
- c) The appropriate mode of distribution of the estate of the deceased; is it as per Summons for Confirmation, or as per the Protestors proposals or any other legal, fair and just process/ position?

Beneficiaries of The Deceased’s Estate

46. Section 66 *LSA* lists beneficiaries as preference for appointment as Administrators of deceased’s estate; Preference to be given to certain persons to administer where deceased died intestate When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—



- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

And Rule 40(3) of Probate & Administration Rules prescribes Beneficiaries [included in the Summons for Confirmation of Grant] are;

- (3) Save in the case of whole or partial intestacy or where the application is brought by virtue of section 71(3) of the Act, there shall be filed with the summons an affidavit containing the following information and particulars so far as known to the applicant—
 - (a) the names, ages and addresses of the children of the deceased by whom he was survived (whether or not they were being maintained by him immediately prior to his death) and of such of his parents, step-parents, grand-parents, grand-children whom he had taken into his family as his own, brothers, sisters, half-brothers and half-sisters, as were living at his death and were being maintained by him immediately prior thereto with full details of the manner and extent and for what period they were being or had been so maintained.

47. Joyce Mukulu Kilonzo testified she was married to Bernard Mutuku Kilonzo in 1970 and they had 4 children of the marriage and thereafter divorced in 2005. There was no contest or controverting evidence to these facts. The 1st Administrator is a beneficiary of the deceased's estate within the meaning of wife by Section 3 of LSA and Section 29 LSA as dependent. The children of the marriage are not contested as children of the deceased.

48. Mueni Kilonzo testified that she was married to the Deceased in 1993 under Kamba Customary law. They cohabited and had 3 children and solemnized their marriage in 2014 as per the Marriage Certificate produced and annexed to the pleadings.

49. Her marriage to the deceased under Kamba Customary law is contested by 1st administrator and the production of an Affidavit of Marriage during filing of Written Submissions and not during the hearing so as to be subjected to cross-examination on the Affidavit.

50. Secondly, the paternity of the 3 children of the marriage is also challenged as she was married in 2014 as per the Marriage Certificate when already the children were in the picture and if they are dependents there was no evidence of dependency.

51. Thirdly, it is contested if the marriage exhibited by the Affidavit Marriage was a valid marriage as the Affidavit was//is dated 1996, when the deceased was married with 1st Administrator and they divorced in 2005, he therefore had no legal capacity to contract another marriage as the statutory monogamous marriage subsisted.

52. Fourthly, that properties subject of the deceased's estate were acquired and developed during subsistence of 1st Administrator and the deceased's marriage and are not available for distribution to the Petitioner and/or her children.

53. For this Court,

Section 107 of Evidence Act is applicable

Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109 of *Evidence Act* on proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112 *Evidence Act* on proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

In a nutshell 'He who alleges must prove'.

54. *In Restatement of African Law: The Law of Marriage & Divorce* by Eugene Cotran prescribes a Kamba Customary Marriage entails;

'Capacity- The Parties must have capacity to marry and capacity to marry each other

Consent- The parties to the marriage and their respective families must consent to the Union

Slaughter of Ram- No marriage is valid unless the nthenge ya kwitia mbui nthamake nthi is slaughtered

Marriage Consideration- There can be no valid marriage unless a part of the marriage consideration has been paid.

Commencement of Cohabitation- The time at which a man and woman become husband and wife legally, is when they begin cohabitation, when the bride comes to the bridegroom's home.'

55. The Petitioner did not present evidence or witnesses who participated or witnessed the Kamba customary marriage as alluded to have occurred in 1993. Traditional marriage is a celebration and ceremony/ceremonies that involve various members of/from both families.

Surely, there must be [a] family member(s)/elders who would testify to any of the above steps of Kamba customary marriage to have taken place. In the absence of such evidence, this Court cannot confirm a traditional/customary marriage/wedding between the deceased and the Petitioner in 1993 or any other date in the absence of cogent and tangible evidence.

56. With regard to the Affidavit of Marriage sworn in 1996, it is true from the Court record that during the Petitioner's/1st Protestor's evidence in Chief, this document was not introduced or referred to or produced as evidence during the hearing. The Petitioner produced an Affidavit of customary Marriage by attaching a copy to the written submissions.

57. The 1st Administrator and her children opposed through their Counsel in Supplementary written Submissions as the Affidavit was not tendered as evidence during the hearing and/or subjected to cross examination by the adverse party. This Court considered the issue of the said Affidavit on merit and finds that it was/is inadmissible as it was produced during submissions. Written Submissions are to



inform and/or persuade the Trial Court on the evidence and the law applicable in decision-making but not to introduce new evidence at this stage. It cannot form part of evidence to be relied on by this Court as it was produced at the submissions stage.

58. This Court was persuaded to infer a marriage between the deceased and Petitioner from 1993 but solemnized on 6/5/2014 as per Marriage Certificate No 209004 attached; on 2 fronts at the same time; either under Kamba customary law where evidence was not adduced to prove such fact and at the same time to invoke presumption of marriage by virtue of long cohabitation.

The presumption of marriage is contested by the 1st family that the Petitioner's children are not the deceased's children.

59. From the above evidence on record, this Court finds, the Petitioner was with the deceased in some arrangement but she was married in 2014 as per the Marriage Certificate produced and she is one of the beneficiaries of the deceased's estate. Secondly, by Consent of parties a grant was issued to both Petitioner and Objector. Therefore, the Petitioner is a beneficiary of the deceased's estate. Whereas reference is made to Section 3(5) *LSA*, the marriages herein are not concurrent but consecutive one marriage between the 1st Administrator and the deceased and divorced in 2005. Thereafter, a marriage between the 2nd administrator and the deceased in 2014.

60. With regard to the 3 children, the Objector, 1st administrator and her children have contested the paternity of the Petitioner's children and if they are dependents of the deceased then proof of the dependency ought to have been produced. The 1st Administrator contends the 2nd Administrator was married when the children were adults.

61. The Petitioner produced Identity Cards of the 3 children ideally Birth Certificates would help determine biological parents of the children. See; *In Re Estate of Peter Simel Muse Lengakah (Deceased)* [2019] eKLR. If they were assimilated into the family, evidence of dependency would help resolve the dispute on whether they are beneficiaries of deceased's estate or not. At this stage, there is no sufficient evidence on record to determine this question one way or the other. The children may consider Sibling DNA testing to resolve the matter once and for all.

For now, the list of beneficiaries includes, the Objector and 4 children and the Petitioner awaiting DNA Sibling testing to include the children as the deceased's biological children or evidence of dependency of the children as having lived with and/or that they were maintained by the deceased and are dependents of the deceased's estate within the meaning of Section 29 of *LSA*.

List of Assets That Comprise of Deceased's Estate

62. The properties disclosed in the pleadings are;
- a. Machakos/Kiandani/2128,
 - b. Masii/ Mithini/219 &
 - c. Machakos /Kiandani/2312.
63. This is a convoluted situation/circumstances due to competing legal interests, because on the one hand the Objector/1st Administrator claims these properties as matrimonial properties; she reiterated she was married to the deceased from 31/01/1970- 2005 when divorce proceedings terminated. During the marriage they had 4 children.
64. During the marriage both and deceased acquired and developed properties that culminated to matrimonial properties listed above. The 1st Administrator testified that they had a long-standing



business to supply goods to Machakos, Kitui and Yatta Kenya Prisons and produced some Invoices to prove this fact. Between 1971-1973, they paid for the property, Land Parcel

Masii/ Mithini/219 and title was issued in 1976 upon completion of payment. The property was registered in the names of the deceased as Trustee for the family as she never anticipated divorce in future. The 1st Administrator retains the title and the property has been in her possession and use to date.

65. With regard to Machakos/Kiandani/2128, the 1st Administrator testified that she purchased the property in 1978 and she paid one Nziuko. After she completed payment and the land adjudication process took place obtained title deed in 1989 in the names of the deceased as trustee for the family.
66. In 1983, the deceased sold the land parcel Machakos/Kiandani/2128 to one Eliud Munyoki Kioko for Ksh 35,000/- without her knowledge or consent and she discovered the sale 2 years later. The 1st Administrator approached the said Buyer/Purchaser through her sister who worked in Mtito- Andei where the Buyer lived and they entered into a Sale Agreement for refund of the Purchase price Ksh 40,000/-. The 1st Administrator produced the Sale Agreement copy marked JMK-e as evidence, and she repaid the purchase price to the Buyer. By Agreement of 24/8/1988 produced and marked- JMK-d she received the title to the said property from the Purchaser after the refund.
67. The 1st Administrator asserted that even the property was/is in the deceased's names, the suit property belongs wholly to her as he sold it and she repurchased it back and obtained title. The property though registered in his names had an equitable beneficial interest /held also in trust for her share/ interest as prescribed by Section 14 *Matrimonial Property Act* (MPA) and C.A. observed in the case of *Mugo Muiru Investments Ltd vs EWB& 2Others* [2017] eKLR.... Any transfer[distribution] is subject to the spouse's overriding interest. According to 1st Administrator, this property is not available for distribution as the deceased's estate.
68. With regard to Machakos /Kiandani/2312, 1st Administrator reiterated she bought the single Plot from the said Mr Nziuko and paid *vide* a loan she obtained and the deceased witnessed the transaction. After payment, she obtained the documents and the property was registered in the names of the deceased for the family.
69. In summary, the 1st Administrator took the view that the properties were acquired and developed during her marriage to the deceased, until their divorce, the deceased lacked capacity to enter into another lawful and legal marriage to the 2nd Administrator before their divorce as there was a monogamous in existence, the properties were acquired before the 2nd Administrator's marriage to the deceased. The 2nd Administrator did not contribute, purchase and/or acquire any of these properties or any other properties during her marriage to the deceased. Therefore, all properties although registered in the names of the deceased should be awarded to her and her children only, left to her as it is matrimonial properties and there is no property available for distribution.
70. The 2nd Administrator objects to the 1st Administrator's proposals as follows;

The 2nd Administrator testified that before the deceased passed on, she took care of him and paid his hospital bills and purchased medicine for him with her own resources and attached copy of NHIF card and copies of paid bills as evidence, as the deceased was unemployed and sick and she sought to be refunded the funds before distribution of the deceased's estate.

The 2nd Administrator asserted that these properties are in the names of the deceased and are available for distribution, even if the 1st Administrator re- purchased Machakos/Kiandani/2128 as it was not registered in her names even after the re-purchase. The 2nd Administrator, also relied on the Minutes



of the Meeting held on 29/12/2014 where the deceased indicated he wanted the 2nd Administrator to inherit part of his estate. The 2nd Administrator and her children are also entitled to a share of the deceased's estate and the Purchasers be awarded their portions.

71. From the evidence on record, this Court finds that all 3 properties were /are registered in the names of the deceased and are therefore assets that comprise of the deceased's estate.

Distribution of The Estate of The Deceased

72. The 1st Administrator posited that the properties in question were acquired and developed during her marriage with the deceased and after High Court Divorce Case No 1 of 2002 and divorce was granted on 5/7/2005. The pending case was Civil Case 460 of 1998 on division of matrimonial property where interim orders were granted that the Defendant/deceased was restrained by orders granted on 7/12/1998 from selling or disposing properties that were acquired during their marriage. Civil Case 460 of 1998 on the division of matrimonial property was not concluded due to the demise of the deceased and the matter abated.

73. This Court was urged to proceed with division of matrimonial property first before undertaking distribution of the deceased's estate.

74. This Court declines to do so due to the following reasons;

- a. The deceased herein, one of the partners in the marriage that was the subject of dissolution is now/since deceased and therefore the determination of each party's contribution to the purchase and/or development of the properties herein and whether they constitute matrimonial property would be a futile exercise in the absence of one party to the marriage.
- b. The process of determining matrimonial property, contribution by each party and ownership of matrimonial property as envisaged and required by Section 2 that defines contribution Section 6 that defines matrimonial property, Section 7 that defines ownership of matrimonial property and Section 14 that outlines the rebuttable presumption on registration of matrimonial property is under the Matrimonial Property Act 2014 which is not pleaded and / or referenced in the pleadings herein.
- c. The Supreme Court of Kenya in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

75. On the other hand, the 2nd Administrator claims ½ share of the deceased's estate by claiming refund of settlement of medical bills for the deceased during his ailing health before his death, and the fact that she annexed the Minutes of the Meeting held preceding his demise that the deceased stated he wanted the 2nd Administrator to get inheritance from his estate.



76. The 2nd Administrator posited that the deceased purchased and registered the following properties in 1st Administrator's names for her and her children.
- a) Machakos Town block 1/187
 - b) Machakos Town block 1/188
 - c) Machakos/Town Block 1/189
 - d) Nairobi Block 32/366

Apart from the allegation no evidence of a search or such document was presented to prove the properties exist and are for and/or with the 1st Administrator.

77. Section 27 of Law Of Succession Act (LSA) provides for the Discretion of court in making order In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.
78. Section 28 of Law of Succession Act (LSA) provides for the circumstances to be taken into account by court in making order In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—
- (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the defendant;
 - (c) the existing and future means and needs of the dependant; (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
 - (e) the conduct of the dependant in relation to the deceased;
 - (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
 - (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.
79. This Court considered the minutes of the Meeting of 29/12/2014 and he died on 16/1/2015 and this Court notes with concern, that the minutes confirm that the 1st Administrator and their children were not present or represented at the meeting, secondly, from the Minutes, there was no discussion nor negotiations but the deceased allegedly gave a written note of what he wanted with his estate and those around/consented and agreed, signed and dated the Minutes. More importantly, it is in the said Minutes that at the meeting, the deceased was in excruciating pain at the time and could hardly speak and was to be taken to hospital the next day and contributions were made by members of the family. Cumulatively, the Minutes of the Meeting are not in any way legally admissible as evidence of the deceased's will as provided by Sections 5- 11 of Law of Succession Act more so, the deceased was critically ill suffering from colon cancer and in 2 weeks after the meeting, he died. This cannot infer free will but coercion to the deceased's oral/written Will.
80. From the totality of the evidence on record adduced by parties, this is an intestate estate as the deceased left no valid Will and the Petition filed was/is for letters of administration intestate and not for Probate with Will annexed. It is also not contested that the properties were acquired and developed during the 35-year marriage between the deceased and 1st Administrator. It is also not contested that the 2nd Administrator was married to the deceased as per the Marriage Certificate produced and that she



took care of the deceased during his illness and settled his medical bills as shown by paid medical bills produced. The Court is guided by provisions of Section 28 LSA, the nature and amount of the deceased's property, whether the deceased made any advancement of gift to 1st Administrator, the conduct of 1st Administrator in acquisition of the property with the deceased and circumstances of this case.

81. With regard to Land Parcel Machakos/Kiandani/2128, This Court satisfied that the suit property was acquired and developed during the subsistence of the deceased and 1st Administrator's marriage. This Court is also satisfied despite the property being registered in deceased's name he sold the same to a purchaser and the 1st Administrator re-purchased the said property and refunded the Purchase price. Although the suit property was/is registered in the deceased's names only, the 1st Administrator proved on a balance of probabilities; a flourishing family business of supply of provisions to Prisons and paid for purchase of the property among others and thereafter voluntarily agreed to registration in only deceased's name for the benefit of the family.

82. The 1st Administrator also proved re-purchase of the property from the Purchaser and refund of Purchase price paid to the deceased. The 1st administrator has been in possession and cultivated the land since 1973 and holds the title documents.

All these factors cumulatively attest to repurchase of the property by the 1st administrator and it is fair and just in the circumstances the 1st Administrator solely retains the said suit property.

83. Of the interest by the 2nd Protestor, Reuben Kimani Njoroge presented 2 Agreements for Sale of 50' by 100' from Machakos/Kiandani/2128 by the deceased on 16/6/2000. He paid Ksh 190,000/- and awaited from the Land Control Board to the deceased the Consent to complete the sale. The Agreement was annexed as RKN-1 and annexures of part payments acknowledged by the deceased and advocate; Mule Kavila & Co Advocates.

84. This sale was not claimed to be illegal or fraudulent save for the fact the 1st Administrator, claiming there were interim orders of 1998 issued restraining the deceased from selling matrimonial property and as the spouse her consent was not sought.

This Court is satisfied that the 2nd Protestor was not served with any order and he conducted a search before the sale, he was not party to the then ongoing litigation between the deceased and 1st Administrator. He was/is in possession of the portion since the deceased gave him possession. These circumstances disclose a legal interest on the land as Creditor of the estate of the deceased under Section 66 LSA. The said legal interest shall be acknowledged in the Summons for Confirmation of Grant or heard and determined before the ELC Court. The Protestor shall remain in situ until acknowledgement of the sale of the land under LSA as Creditor to deceased's estate or Bona fide Purchaser in ELC Court. For now, his interest is protected under Section 93 LSA and status quo shall be maintained.

85. As for alleged Buyers/Purchasers Lucas Mwove, Julius Ndegwa & John Wambua Mutete, the said Purchasers failed to file their respective pleadings in these Succession proceedings directly or through representation of Counsel to lay out the legal interest and also did not present evidence to establish their claim(s) over the suit property Machakos/Kiandani/2128. Therefore, the 2nd Administrator's Protest to the extent of including Purchasers and/or Agreements is not borne out by evidence on record. Their claims are not recognized in the distribution of the estate of the deceased. The said property is available for distribution to the 1st Administrator and their children only save for 2nd Protestor's claim.

86. With regard to Machakos /Kiandani/2312, the 2nd Administrator claimed a portion of the land was again sold to one John Wambua Mutete and proposed that the remainder should be registered in her



name and the children. On the other hand, the property was purchased by the deceased and the 1st Administrator during the subsistence of their 35 year marriage. Secondly, there were subsisting orders restraining the deceased from selling the said property. The said Purchaser has not filed any pleadings or tendered any evidence of the Sale of the land by the deceased and proof of payment thereof or that he is in possession of the portion. From these circumstances, this Court does not recognize any legal claim/ interest to the deceased's estate. The property was acquired and developed before dissolution of the marriage. The property is available for distribution to the 1st Administrator and each of her children.

87. With regard to Masii/ Mithini/219, the 2nd Administrator asserted that the said land Parcel was not available for distribution as part of it was donated to Kathima Primary School and the remainder sold to John Wambua Mutete. The search certificate confirms that the said property is in the names of the deceased. The donation is not evidenced by any legal document or process/transfer. The donee has not put the Court on notice of the donation in the administration and distribution of the deceased's estate in these Succession proceedings.

88. This Court relies only on cogent and tangible evidence to establish a legal right in the absence of which the claim is not recognized as in the instant case. The said property is available for distribution.

The suit property shall be distributed to the 1st Administrator and their children. The portion is available for distribution into 6 portions between the 1st Administrator and each of her children and the 2nd Administrator only and the 2nd administrator taking the portion of the alleged sale and this is subject to Sibling DNA of 2nd administrator's children. The Court took into consideration that she took care of the deceased and paid his medical bills and was wife/widow of the deceased as per the Marriage Certificate.

Disposition

1. The Summons for Confirmation and Protests are compromised as follows;
2. The Deceased is survived by the following beneficiaries;
 - a. Joyce Mukulu Kilonzo
 - b. Mueni Kilonzo
 - c. Victor Nzioki Kilonzo– Son
 - d. Victoria Mutete Kilonzo– Daughter
 - e. Carol Kathio Kilonzo- Daughter
 - f. Alexander Katiku Kilonzo – son
3. The following shall be subjected to Sibling DNA testing and/or evidence of maintenance by the deceased prior to his death
 - g. Ben Mwendwa Kilonzo
 - h. Grace Kathio Kilonzo
 - i. Moses Kyalo Kilonzo
4. The assets that comprise of the deceased's estate are as follows;
 - a. Machakos/Kiandani/2312
 - b. Machakos/Kiandani/2128



- c. Masii/Muthini/219
5. The estate of the deceased is distributed as follows;
- a. Machakos/Kiandani/2128- wholly to Joyce Mukulu Kilonzo and 4 children
 - b. Subject to 50' by 100' to Reuben Kimani Njoroge as Creditor of deceased's estate or bonafide Purchaser in ELC Court and status quo shall be maintained
 - c. Machakos/Kiandani/2312 distributed to Joyce Mukulu Kilonzo and 4 children.
 - d. Masii/Muthini/219 distributed to Joyce Mukulu Kilonzo and 4 children and portion to Mueni Kilonzo subject to Sibling DNA of 3 children
6. No order as to Costs each party to bear own costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28th APRIL, 2023.
(VIRTUAL /PHYSICAL CONFERENCE).**

M.W. MUIGAI

JUDGE

In the Presence Of:

Mr. B. M. Nzei for the 1st Administrator

☞ H/B Mr. Ngwele appearing with ☞

H/B for Mr. Muthama for the Beneficiaries

Ms Nzilani H/B Mr. Makundi for the Petitioner

GEOFFREY - COURT ASSISTANT

