



**In re Estate of Sichangi Chesoli (Deceased) (Succession Cause
103 of 2007) [2023] KEHC 26030 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 103 OF 2007
REA OUGO, J
NOVEMBER 29, 2023
IN THE MATTER OF THE ESTATE OF SICHANGI CHESOLI
(DECEASED)**

BETWEEN

PIUS MASINDE SICHANGI PETITIONER

AND

MOSES SIMIYU OBJECTOR

RULING

1. This cause relates to the Estate of the late Sichangi Chesoli who died intestate in 1962. A grant of representation in the said estate was issued to his son Zablon Masinde Sichangi who died on 22/8/1997. The deceased grandson, Pius Masinde Sichangi, was later appointed as the administrator of his estate on 8/11/2007.
2. The Applicant herein has moved this court vide chamber summons dated 4/9/2007 seeking that the grant of letters of administration issued to the petitioner be confirmed. According to his affidavit, the mode of distribution is as follows:

Kimilili /Kibengei /697 be shared equally among the following:

- a. Pius Masinde Sichangi
- b. Maurice Simiyu Masinde
- c. Remmy Wafula Masinde
- d. Phitalis Khisa Masinde
- e. Peter Colen Wanjala Masinde



- f. Bonface Barasa Mwelatuti
- g. Moses Wabwile Masinde
- h. Isaac Waswa Masinde
- i. Yona Nakhisa Masinde
- j. Protas Mulosi Masinde
- k. Simon Walekhwa Masinde
- l. Reuben Kundu Masinde

Kimilili /Kibengei /698

- a. Maurice Simiyu Masinde
- b. Simon Walekhwa Masinde

Kimilili /Kibengei /704

- a. Pius Masinde Sichangi

3. On 3/8/2015 the protestor filed an affidavit of protest to the confirmation of the grant. He avers that the deceased had 4 sons: Justo Wamalwa, Zablun Masinde, Crescent Wekesa and Ben Simiyu. It was argued that the petitioner's share is in parcel 697 which was his father's share, Zablun Masinde. He contends that the petitioner cannot distribute parcels 698 and 704 to strangers and leave him out of the estate.
4. The petitioner filed a supplementary affidavit and averred that parcel 697 did not form part of the deceased estate and attached a green card showing that the land was registered in the name of Zablun Masinde. He also referred the court to the judgment in P&A No 3 of 1983 where the court found that Ben Simiyu Sichangi was not entitled to a share of the deceased's estate.
5. The protestor in a rejoinder filed a further affidavit dated 17/5/2019 where it was averred that Ben Simiyu Sichangi lived with the deceased in parcel 704 as the last-born son. The deceased had allocated his sons Yusto Wamalwa with parcel 1104 measuring 4.0Ha, Zablun Masinde parcel 697 measuring 9.6Ha and Crescent Wekesa Parcel 695 measuring 2.8 Ha. The deceased therefore left Ben Simiyu Sichangi with parcel 704 measuring 2.0 Ha and 698 measuring 0.6Ha.
6. The applicant further filed two affidavits dated 8/11/2021 and the other dated 16/5/2022. The applicant contends that Ben Simiyu Sichangi had filed an appeal against the decision of the court in P&A No 3 of 1983 vide Civil Appeal No 53 of 1984 but the same was dismissed. The applicant also filed a fresh proposal on the mode of distribution:

Kimilili /Kibengei 698 – Pius Masinde Sichangi (Representative to Zablun Masinde (deceased))

Kimilili /Kibengei 704 – Zablun Masinde Sichangi

7. The parties in addition to the affidavit evidence also gave oral evidence. Pius Masinde Sichangi (Pw1) testified that he has filed affidavits on the mode of distribution, an affidavit in support dated 4.9.2007, a further affidavit on the mode of distribution dated 8.11.2021 and a further affidavit dated 16.5.2022. He adopted the affidavit evidence as his evidence in chief. He testified that parcel 697 belongs to Zablun Masinde and Ben Simiyu Masinde should be left out of parcel 704 because he had a case with Zablun



Masinde and Zablon won the case in 1983. Ben Masinde sold his portion of land to Peter Cheloti and he moved to Bungoma in 1969. On cross-examination, he testified that although the deceased had other sons none of his uncles came to make any objections. He testified that Zablon's children live or stay in parcel No. 697.

8. Moses Simiyu (Dw1) testified that his father Ben Simiyu filed affidavits dated 10.8.2015 and another dated 17.5.2019. He testified that the petitioner can have parcel No. 698 which is about 2 acres but parcel no. 704 belongs to his father Ben Simiyu Sichangi who was to inherit it. On cross-examination, he testified that after the deceased died a succession cause No. 3 of 1983 was filed over shamba 698 & 704. Succession 3 of 1983 was filed but it wasn't finalized. He testified that the finding of the court in succession 3 of 1983 wasn't true and that Ben Simiyu appealed but the same was dismissed. Parcel No. 1104. belongs to Yusuf Wamalwa. and parcel 697 is for Masinde Sichangi. On re-examination, he testified that the sons of the deceased did not buy the said parcels. The parcels of land belonged to the deceased but Ben Simiyu Sichangi wasn't given his share.
9. The applicant submits that section 42 of the Law of Succession Act provides that:
 42. Previous benefits to be brought into account
Where-
 - (a) 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
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
10. He urged the court to consider the decision of the court in P&A No. 3 of 1983, dismiss the protest, and allow the proposed distribution by the applicant.
11. The protestor submits that the two parcels of land belong to Ben Simiyu Sichangi as the same was bequeathed to him by the deceased. All the other 3 sons were similarly given their own portions. The said Ben Simiyu Sichangi before his death agreed to relinquish his claim to parcel 698 measuring 2 acres but proposed to remain with parcel 704.

Analysis And Determination

12. I have considered the pleadings by the parties, the evidence on record and rival submissions. It is not in dispute that the issue before the court is whether the protestor entitled to the deceased's estate. It is also not in dispute that the properties consisting of the estate are parcels nos. 698 and 704. However, this issue was sufficiently dealt with by the court in P&A No. 3 of 1983. The court in P&A No. 3 of 1983 in regards to Kimilili /Kibingei 698 and 704 held as follows:

“I find it as a fact that the objector had received his share because:

1. He was rather hesitant in court to admit that he had sold some land in Cheloti.
2. He was already married when the father died.
3. It's other two brothers (now deceased) who were of his age had received their share.



4. He had attempted to sell of this land in dispute to a Mr. Samuel Wekesa (as per the proceedings in D.M.C.C 16/79 Kimilili and his confession in court). He is not apparently fighting for this property for his own use: he has some commercial intention. Besides the fact that he was in a hurry to dispose-off the property even before he had acquired it, it may be evidence that he is only out to grab what may not be his. In my considered opinion therefore, the objector is not entitled to any interest on the two properties in question. He received his share during his father's lifetime. His objection is therefore dismissed with costs....”
13. Following the court's decision, an appeal was lodged by the protestor vide Civil Appeal No. 53 of 1984, the same was however dismissed for want of prosecution. I therefore find no reason to depart from the finding of the court in P&A No. 3 of 1983. According to the evidence of the protestor in that case, which evidence was considered by the court in arriving at its decision, the protestor had sold part of the land and was paid in full. He then used the proceeds of the sale to buy land and relocate to the area around Kibabi.
14. Dw1 in his testimony testified that the finding of the court was not correct and that the court ought to have found otherwise. In my view, the issue raised by the protestor herein are matters that could only be handled by an appellate court dealing with the court's decision in P&A No. 3 of 1983. As stated above, the protestor's appeal on the issue was abandoned and, in my view, it should not be entertained by this court as doing so would create an avenue for the revival of the protestor's abandoned appeal. The decision in P&A No. 3 of 1983 therefore stands.
15. In the end, I find that the protestor having sold part of the deceased estate and utilized the funds to buy his current home is not entitled to any part of Kimilili /Kibingei 698 and 704. I hereby allow the summons for confirmation of grant and order that the deceased's estate be distributed as follows:
- Kimilili /Kibingei 698 – Pius Masinde Sichangi (Representative to Zablon Masinde (deceased))
- Kimilili /Kibingei 704 – Zablon Masinde Sichangi
16. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF NOVEMBER 2023

R.E. OUGO

JUDGE

