



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 270 OF 2001

IN THE MATTER OF THE ESTATE OF WANZA MULI (DECEASED)

BETWEEN

NICHOLAS MUTUA MULI.....2ND ADMINISTRATOR

KISESI MULI MUTUA.....3RD ADMINISTRATOR

AND

PETER KITHUKA MULI.....1ST ADMINISTRATOR/ PROTESTOR

RULING

1. By Summons for Confirmation of Grant dated 15th October, 2020, the 2nd Administrator/Applicants herein sought an order that **the grant of Probate made to the said Nichollas Mutua Muli, Peter Kithuka Muli & Kisesi Muli Mutua** in this matter on 4th July, 2014 be confirmed and that the costs of this application be in the Cause.

2. The summons was supported by an affidavit sworn by **Nicholas Mutua Muli** on 15th October, 2021. According to the deponent, following the grant of letters of administration herein on 4th July, 2014, the court proposed that the parties undertake mediation but the same did not bear any fruit as the process was made impossible by **Peter Kithuka Muli's** claim that he had sold all the commercial portions when in reality he knew the remaining part would have gone to the deponent for equitable and just distribution. It was deposed that all the alleged sales were supposedly undertaken notwithstanding the existence of restraining orders.

3. It was disclosed that it was the said **Peter Kithuka Muli** who made the distribution of the estate on the part of their house and that he had no problem with the house of **Ndungulu Muli** as represented by **Kisesi Muli Mutua**, a co-administrator. According to the deponent, his said brother has no basis for claiming that the remaining portion is required by his wife when they have already appropriated to their own benefit the commercial portions of the state. In the deponent's view, **Peter Kithuka Muli** ought to get $\frac{1}{4}$ share of Masii/Mbaani/3 and $\frac{1}{4}$ share in Masii/Mithini/305; **Nicholas Mutua Muli** ought to get $\frac{1}{4}$ share of Masii/Mbaani/3 and $\frac{1}{4}$ share in Masii/Mithini/305; and **Kisesi Muli Mutua** ought to get $\frac{1}{2}$ share of Masii/Mbaani/3 and $\frac{1}{2}$ share in Masii/Mithini/305.

The 1st Administrator/Protestor's Case

4. The 1st Administrator/Protestor however swore an affidavit of protest in which he averred that the abovementioned Application is based on greed, dishonesty and bare allegations. It was disclosed that the Deceased herein owned Two (2) Agricultural Parcels of Land namely Land Parcel No. Masii/Mbaani/3 and Land Parcel No. Masii/Mithini/305.

5. It was deposed that contrary to the 2nd Administrator's allegation, the Deceased did not own any Commercial Plot whatsoever. According to the Protestor, during the Deceased's lifetime, she advised him to settle in Land Parcel No. Masii/Mbaani /3 whilst the 2nd Administrator was advised to remain settled in Land Parcel No. Masii/Mithini/305. In adherence to the said advice, the Protestor built a permanent house in Land Parcel No. Masii/Mbaani /3 while the 2nd Administrator built a permanent house in Land Parcel No. Masii/Mithini/305 respectively and during the lifetime of the deceased, the 2nd Administrator herein never challenged the Deceased's decision but started claiming that they should share Land Parcel No. Masii/Mbaani /3 equally in the year 2017, 20 years after the Deceased's death.

6. It was averred that on 24th April, 2017, they sat as a family, a meeting in which the 2nd Administrator was present, and agreed that the 2nd Administrator should get the whole share of our portion in Land Parcel No. Masii/Mithini/305 and that the Protestor should get the whole share of our portion in Land Parcel No. Masii/Mbaani /3. However, since Land Parcel No. Masii/Mithini/305 was smaller than Land Parcel

No. Masii/Mbaani /3 it was agreed that the Protestor should excise a portion of Land measuring ½ Acre from Land Parcel No. Masii/Mbaani/3 in favour of the 2nd Administrator and that a Surveyor do proceed and produce Sketch Maps of the agreed distribution so that the matter could be finalized. Consequently, a Surveyor was hired and produced the aforesaid Sketch Maps. Additionally, on 23rd May, 2017 they had a Clan meeting and it was similarly agreed that since Land Parcel No. Masii/Mbaani/3 was bigger than Land Parcel No. Masii/Mithini/305, the Protestor should hive off a portion from the former in favour of the 2nd Administrator. However, the 2nd Administrator did not feel contented and approached this Court vide an Application by way of Summons for Revocation of Grant dated 16th April, 2018 though date stamped on 16th February, 2018 which application was disallowed vide a Ruling delivered on 4th June, 2019 by which the court directed that the matter be referred to Mediation in order to enable the Parties arrive at an amicable solution.

7. According to the Protestor, the 2nd Administrator went to the Mediation table in bad faith because he never filed any Case Summary nor Issues as is by law provided and that the Case Summary and Legal Issues annexed to the 2nd Administrator's Supporting Affidavit is the one the Protestor's Advocates on record and prepared and filed. The Protestor averred that the reason mediation failed is because, the 2nd Administrator insisted that he should get a portion of Land where the Protestor built his permanent house on Land Parcel No. Masii/Mbaani/3 in the pretext that there are Commercial Plots therein. The Protestor however deposed that contrary to the 2nd Administrator's allegations, he never sold any piece of the Deceased's property after this Court issued Prohibitory Orders and that it is crystal clear that the 2nd Administrator is simply settling scores with him.

8. Just like the 2nd Administrator, the Protestor averred that he has no problem with the 2nd House of the Deceased where the 3rd Administrator herein **Kisesi Muli Mutua** comes from. He disclosed that his step brother **James Ngonzi Muli** passed away on 14th May, 2016 and is survived by his wife **Esther Mutheu Kisilu** and Children and that all the beneficiaries herein are male and female adults.

9. The Protestor therefore implored the Court to confirm the Grant made to them on 15th March, 2016 as per his Schedule of Distribution attached since, according to him, it reflects the Deceased's wishes. He therefore urged the Court to dismiss the 2nd Administrator's Summons for Confirmation of Grant with Costs.

Reply to the Protest

10. **Kisesi Muli Mutua** and **Esther Mutheu Kisilu** the 3rd administrator and a beneficiary respectively and the representatives of the 2nd house swore an affidavit dated 12th July, 2021 in opposition to the Summons for Confirmation of Grant dated 15th October, and in support of the Affidavit of protest filed by the 1st Administrator sworn on 5th May, 2021. According to the deponent, the deceased was survived by her sons **Peter Kithuka Muli**, **Nicholas Mutua Muli** and Co-wife **Ndungulu Muli** who died on 17th March, 2007 and was survived by her sons **Kisesi Muli**, **Samson Muli** and **James Ngonzi Muli** who himself subsequently died and was survived by the beneficiary herein, **Esther Mutheu Kisilu**.

11. According to the deponents, based on legal advice, the summons for confirmation of grant as filed is based on falsehoods and mere allegations. They averred that the deceased owned 2 Agricultural Parcels of land namely Masii/Mbaani/3 and Masii/Mithini/305 and that while the 1st administrator is settled on the parcel of land known as Masii/Mbaani/3, the 2nd administrator is settled on land parcel number Masii/Mithini/305. They deposed that both the 1st and 2nd administrators have got no issues with the 2nd house which they represent on behalf of the 2nd house, they proposed that as regards land parcel number Masii/Mithini/305, ½ of the parcel to be shared equally between **Kisesi Muli Mutua** and **Moses Kisesi Muli** while regarding parcel of land known as Masii/Mbaani/3, ½ of the parcel to be shared equally between **Kisesi Muli Mutua** and **Esther Mutheu Kisilu**. Based on the same advice, they deposed that it is practically impossible for the beneficiary herein to hold a parcel of land in trust and on behalf of the estate of James Ngonzi Muli (deceased beneficiary) as proposed in the schedule of distribution by the 1st administrator since the share of a deceased beneficiary should go to their estate but not to be held in trust by a beneficiary on behalf of the estate.

12. They deposed that the beneficiary was misled into consenting to the mode of distribution proposed by the 1st administrator via a consent executed on 5th May, 2021 and that the beneficiary consents to the mode of distribution proposed herein above.

Determination

13. I have considered the issues raised hereinabove.

14. In this case, it is not in dispute that, the deceased was survived by her sons **Peter Kithuka Muli**, **Nicholas Mutua Muli** and Co-wife **Ndungulu Muli** who died on 17th March, 2007 and was survived by her sons **Kisesi Muli**, **Samson Muli** and **James Ngonzi Muli** who himself subsequently died and was survived by the beneficiary herein, **Esther Mutheu Kisilu**.

15. It is also not disputed that the deceased herein was the 1st wife of the deceased father of the three administrators. However, their said father's parcels of land were registered in the name of the 1st wife in trust for both houses. This dispute however only affects the 1st house to which the 1st and 2nd Administrators belong. This dispute only relates to the parcel of land known as Masii/Mbaani/3 and land parcel number Masii/Mithini/305.

16. According to the 2nd Administrator, **Peter Kithuka Muli**, the Protestor, ought to get ¼ share of Masii/Mbaani/3 and ¼ share in Masii/Mithini/305; **Nicholas Mutua Muli**, the 2nd Administrator, ought to get ¼ share of Masii/Mbaani/3 and ¼ share in Masii/Mithini/305; and **Kisesi Muli Mutua**, the 3rd administrator, ought to get ½ share of Masii/Mbaani/3 and ½ share in Masii/Mithini/305.

17. The 3rd Administrator and the beneficiary who have no dispute amongst themselves propose that as regards land parcel number Masii/Mithini/305, ½ of the parcel to be shared equally between **Kisesi Muli Mutua** and **Moses Kisesi Muli** while regarding parcel of land known as Masii/Mbaani/3, ½ of the parcel to be shared equally between **Kisesi Muli Mutua** and **Esther Mutheu Kisilu**.

18. Since there is no dispute as regards the shares of the 2nd house, I hereby direct that ½ of land parcel number Masii/Mithini/305 that should go to the 2nd house be shared equally between **Kisesi Muli Mutua** and **Moses Kisesi Muli** while ½ of parcel of land known as Masii/Mbaani/3, which ought to go to the 2nd house be shared equally between **Kisesi Muli Mutua** and **Esther Mutheu Kisilu**.

19. As regards the other half of the two parcels, both the 1st and 3rd Administrators agree that there was a clan meeting at which both parties agreed on how to distribute their shares. While the Applicant has not addressed the court on what the clan decided, the Protestor has annexed two agreements and the sketch survey maps both of which are not expressly disputed.

20. In the premises I direct that the portions that belong to the 1st house be subdivided in accordance with the said agreements as read with the sketch maps as drawn.

21. There will be no order as to the costs of these proceedings. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF JANUARY, 2022.

G V ODUNGA

JUDGE

DELIVERED IN THE PRESENCE OF:

MR MUKULA FOR THE 1ST ADMINISTRATOR/PROTESTOR

CA SUSAN