



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HC. F.A NO. 07 OF 2019**

**IN TH MATTER OF THE ESTATE OF NZOKA MBWELE KYAI (DECEASED)**

**NTHAMBI NZOKA MBWELE**

**(Substituted by BENJAMIN MUTISO NZOKA.....APPELLANT**

**-VERSUS-**

**PHOEBE NDULEVE JAMES.....PROTESTOR/RESPONDENT**

***(Being an Appeal from the Ruling of Hon. Mwaniki J. (C.M) in the Chief Magistrate's Court***

***Makueni Succession Cause No.112 of 2017, delivered on 20<sup>th</sup> November 2017).***

**JUDGMENT**

1. In a ruling delivered on 20/11/2019 in a contested application for confirmation of grant of letters of administration, the learned magistrate concluded as follows –

**“26. The deceased witness (wishes) had been expressed very clearly. Those wishes must be respected. In the end the court finds merits in the protestor’s case and makes the following orders:-**

**i. That land no. KIBAUNI/KALAWA/305 be wholly registered in the names of the petitioner Nthambi Nzoka Mbwele to hold in trust of the deceased’s beneficiaries.**

**ii. 20 acres from land no. KIBAUNI/KALAWA/403 be registered in protestor’s name Phoebe Nduleve James**

**and the remainder in the petitioner’s name Nthambi Nzoka Mbwele to hold in trust of the beneficiaries.**

**For the avoidance of doubt the protestor is not entitled to any share in land KIBAUNI/KALAWA/305**

**(iii) No orders as to costs.**

2. Aggrieved by the above distribution of the assets of the deceased, the appellant who was the administrator of the estate filed the present appeal through counsel M/s Mwangangi & Associates on the following grounds –

**1) The learned magistrate erred in fact and in law by failing to wholly evaluate the evidence laid before him while reaching his decision.**

**2) The learned magistrate erred in both law and fact by granting the protestor twenty (20) acres of land compared to the other beneficiaries without any justification and/or supporting evidence to justify the same.**

**3) The learned magistrate erred in law and fact by reaching a wrong conclusion that was not supported by evidence.**

**4) The learned magistrate in totality disregarded the appellant’s evidence that the deceased’s estate be divided among the beneficiaries equally as there was no evidence to support the protestor’s claim.**

**5) The learned magistrate failed to take cognizance of the fact that no eye witness was present when the**

**deceased allegedly gave the husband to the protestor the said twenty (20) acres as a gift against other beneficiaries.**

**6) The learned magistrate failed to give reasons for the decision which he arrived at.**

3. The appeal proceeded by way of written submissions and in this regard, I have perused and considered the submissions filed by Mwangangi & Associates for the appellants and O.N Makau & Associates for the respondent.

4. I note that at the hearing before the magistrate's court the respondent (who was protestor) called four (4) witnesses including herself. She testified as Pw1, while Pw2 was Jonathan Musango, Pw3 John Muema and Pw4 Dominic Mailu. On the side of the appellants who was the administrator (petitioner), three (3) witnesses including himself testified. He testified as Dw1, while Dw2 was Francisca Katula with Dw3 being Ngunu Nzoka.

5. I note that in his evaluation of evidence, the learned trial magistrate found as follows –

**“23. From the totality of the evidence on record, I have found that the deceased had expressed his wishes that the protestor's husband does establish his home on land no. 403. I also have no doubt the size of the portion he was to so occupy was pointed out and secured by the protestor's husband by fencing it off and it was 20 acres.”**

6. In my view, the above finding of the trial court was not based on the evidence on record for the following reasons. There is no evidence on record that anybody witnessed or heard the deceased specifically giving 20 acres to the husband of the protestor. The evidence is that he showed the adult sons the areas where they should occupy and work and not specifically give any of them a specific size of land.

7. With regard to the fence, the area of 20 acres might have been fenced yes, but the husband of the deceased died in 1994 before the deceased in the present estate, and there is no evidence that the land had been fenced then. Though there was no dispute raised immediately by the other brothers to the fencing, in my view, being fairly young brothers the others would find it rather difficult to raise such a challenge until they became mature with families. Of note is that none of the members of the clan who testified at the trial said they were present during subdivision. I also note that meetings were held much later after the deceased herein and the husband of the protestor had died.

8. Having said so, it does not appear to be in dispute however, that the husband of the protestor financially assisted his younger siblings in their education. It is also not in dispute that the deceased herein indicated his wish on who should use which piece of land among the children without specifying the sizes. I note that the two parcels of land are No. 403 (14 hectares) and 305 (6.0 hectares) and the petitioner herein proposes that all the two parcels be registered in trust in his name without indicating the sizes of portions for each beneficiary. The other beneficiaries consented to that proposal but the protestor does not agree.

9. Though this is a polygamous family, and the provisions of section 40 of the Law of Succession Act (cap. 160) would apply, in the circumstances of this case, and in order to do justice to all, I will divide the land between to be registered in the name of the administrator in trust and that to be registered in the name of the protestor. My view, the husband of the protestor having educated his younger siblings, he will get more. Since I am told that the administrator is also deceased and the court has substituted another administrator, the name to be used will be that of the substituted administrator.

10. In view of the fact that the husband of the protestor James Muthika Nzioka educated his siblings, he will get a slightly larger share of land than the rest. I thus set aside the distribution made by the trial court and order as follows:-

**1) That land no. KIBAUNI/KALAWA/305 be wholly registered in the names of the administrator Benjamin Mutiso Nzoka to hold in trust for the deceased's beneficiaries.**

**2) 10 acres from land no. KIBAUNI/KALAWA/403 be registered in the protestor's name Phoebe Nduleve James and the remainder in administrator's name Benjamin Mutiso Nzoka to hold in trust of the beneficiaries.**

**For the avoidance of doubt the protestor is not entitled to any share in land KIBAUNI/KALAWA/305.**

**3) Parties will bear their respective costs, this being a family matter.**

**DELIVERED, SIGNED & DATED THIS 4<sup>TH</sup> DAY OF APRIL, 2022, IN OPEN COURT AT MAKUENI.**

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**George Dulu**

**Judge**