In re Estate of Timona Llumunyasi Kahikhana (Deceased) (Succession Cause 20 of 2004) [2022] KEHC 12627 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12627 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE 20 OF 2004

WM MUSYOKA, J

JULY 22, 2022

IN THE MATTER OF THE ESTATE OF TIMONA LLUMUNYASI KAHIKHANA (DECEASED)

RULING

1. Frederick Mutachi Timona, Mary Salano Timona, Thomas Timona and Masinya Timona were appointed administrators of the estate herein on 22nd March 2021 and a grant of letters of administration intestate was issued to them, dated 23rd March 2021. The application that is up for hearing is for the confirmation of that grant. It is dated 9th July 2021.

2. The beneficiaries of the estate are the survivors of the deceased and persons who had allegedly bought property from the deceased. The survivors are listed as Fredrick Mutachi Timona, Mary Salano Timona, Thomas Timona and Masinya Timona. The purchaser/Liabilities are said to be Barasa Lusasi and Julius Barasa Elijah. The assets available for distribution is N.Kabras/Malava/1842, measuring 15.56 acres. It is proposed that the same be shared out as follows. Fredrick Mutachi Timona 0.75 Ha, Mary Salano Timona 0.50Ha, Thomas Timona 1.35Ha, Masinya Timona 1.57 Ha, Jonathan Barasa Lusasi 0.79Ha and Julius Barasa Elijah 0.25Ha. It is stated that Cheptuli SDA church had had its title deed transferred to it inter vivo. The application is not supported by a form 37, as required by rule 40(8) of the Probate and Administration Rules.

3. There is an affidavit of protest by Masinya Timona, sworn on 9th November 2021 no doubt filed pursuant to Rule 40(6) of the Probate and Administration Rules. He states that Reuben Soita Nambosio had bought 2.51 acres of N. Kabrasa/Malava/1842 from the applicant, Fredrick Mutachi Lumanyasi in 2007. He avers that the said Reuben Soita Nambosio entered the land, after he signed the sale agreement. He asserts that the said Reuben Soita Nambosio should be allocated the portion he bought. He proposes that the property be distributed as per the surveyor's report, which is undated but attached to the affidavit, so that Jotham Barasa gets 1.21 acres, Reuben Soita Nambosio 2.5 acres, Thomas Lumanyasi takes 4.45 acres, Masinya Manyasi Timona 4.47 acres, Mary Salano Timona 1.23 acres, Julius Barasa Elijah 0.5 acres and Road Reserve 0.5 acres.

4. The application was canvassed by way of viva voce evidence. The oral hearing happened on 15th February 2022. The protestor, Masinya Timona, was the first on the witness box. He accused the

administrator of selling land to several individuals, who he named as Mary Beatrice Soita and Jotham Barasa Lumasi. Jotham allegedly entered the land in 1982, while Mary entered in 1988. He said that the proceeds of sale were not shared with to the survivors. He said it was the son of Reuben Soita Nambosio who bought the land. The son was said to be Francis Soita, he died and his father Reuben took over. He said that Jotham Barasa did not buy land from the deceased out from Fredrick Mutachi.

5. The applicant testified next. He said it was him who sold land to Jotham Barasa Lusasi, 2 acres, after the family agreed, and the same was plied to settle Agricultural Finance Corporation debts left by the deceased. He said that the protestor signed the sale agreement, which was drafted by Thomas Timona. The applicant then sold ½ acre to Julius Barasa Elijah. He said that his son also bought ½ acre from the deceased, and the whole family was aware. He denied selling land to Reuben Soita Nambosio and Mary Beatrice Soita. He said that the documents being used to disinherit him were forged. He stated that Reuben Soita Nambosio and Mary Beatrice Soita were not children of the deceased, and he said that he did not even know them.

6. The filings are not clear on how the deceased related to Fredrick, Mary Salano, Thomas and Masinya, but I suppose that these are the children of the deceased. The deceased does not appear to have been survived by a spouse, and, therefore, the five survivors are all children, and the estate is available for distribution under Section 38 of the *Law of Succession Act*, Cap 160, Laws of Kenya, which envisages equal distribution of the estate amongst the children regardless of their gender, marital status or age. Section 38 provides as follows: -

> " 38. Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

7. The distribution proposed amongst the children is not equal, and, therefore, it does not confirm or comply with Section 38 of the *Law of Succession Act*. The protestor relies on a surveyor's report to have an uneven distribution based on occupation on the ground. That is not what the law requires. The prescription is in section 38, which is equal distribution. A departure from the equal distribution prescribed in section 38 is permissible, meaning that the estate can be distributed unevenly or unequally. That, however, can only happen with the consent or consensus or agreement or concurrence of all the survivors or children of the deceased.

   See Justus *Thiora Kiugu & 4 others vs. Joyce Nkatha Kiugu & another* [2015] eKLR and *In re Estate of Elizabeth Wanjiru Waweru* (Deceased)[2017]eKLR. Where there is no consensus on distribution, then the court applies section 38 of the *Law of Succession Act*, by distributing the property equally. There is no consensus herein, and therefore, the estate has to be distributed equally.

8. Both sides have made proposals for devolution of parts of the estate to non-family members. They are said to have bought land from either the deceased or the sons of the deceased. Initially, the applicant claimed it was the deceased who had sold land to Jotham Barasa Lusasi and Julius Barasa Elijah. At the oral hearing, he changed stance and said he was the one who sold the land to the two, to Jotham Barasa Lusasi, with consent of the family, to settle estate debts. On the sale to Julius Barasa Elijah, he prevaricated. At the oral hearing he said he sold the portion to him. In his witness statement, filed on 15th February 2022, he had a different version, that he did not share with the court. He wrote that the deceased had sold to son of Fredrick Mutachi, called Martin Chemunye Mutachi, some 0.5 acres, which he then sold with the consent of the son to Julius Barasa Elijah in 2007. The protestor accused

the applicant of selling land to Reuben Soita Nambosia and Mary Beatrice Soita, claims which the applicant has denied.

9. Except for the agreement attached by the protestor, with respect to the sale by the applicant to Reuben Soita Nambosio, there is no evidence to support any of the other alleged sales. Section 3 of the *Law of Contract Act*, Cap 23, Laws of Kenya, requires that any transaction relating to sale of land must be supported by some memorandum in writing. For me to believe that there were such sales, I must see some document, duly executed by the persons privy to that sale. He who alleges must prove. In the absence of proof, I shall take it that no such sales took place; and if they did then the person who purported to buy land from any of the children of the deceased, after the deceased died, should look up to the children who sold the land to them, after distribution. The only sales of land that the probate court will uphold would be those carried out by the deceased himself before he died, and those undertaken by the administrators with the leave of court. Outside that, any transactions relating to sale of land belonging to a dead person would be illegal. See section 45, 79 and 83 of the *Law of Succession Act*.

10. Let me then proceed to distribute the estate. I reiterate paragraph 8 of this ruling. Section 38 applies. Consequently, North Kabras/Malava/1842 shall be shared equally, between Fredrick Mutachi Timona, Mary Salano Timona, Thomas Timona and Masinya Timona. A certificate of confirmation of grant shall issue in those terms. The estate should be distributed within the next 6 months. The matter shall be mentioned after 6 months to confirm completion of transmission and administration, so that the court file can be closed. There is leave of 28 days to challenge these orders at the Court of Appeal. Each party shall have their own costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF JULY 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Aligula, instructed by Akwala & Company, Advocates, for the administrators.

Mr. Matete, instructed by Matete Mwelebe & Company, Advocates, for the objectors.

Mr. Manyoni, instructed by Momanyi Manyoni & Company, Advocates for Mary Salano.