



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 435 OF 2004**

**IN THE MATTER OF THE ESTATE OF ELIJAH KASEKE MAKAU (DECEASED)**

**1. PHILIP MUTISO.....ADMINISTRATOR**

**2. PRIGNNIAS MBINYA MAKAU.....ADMINISTRATOR**

**VERSUS**

**DAVID MWANIA MUNYAO.....PROTESTER**

**RULING**

1. By a ruling delivered on 28<sup>th</sup> March, 2018, **Nyamweya, J** made the following orders:

**1. The 2<sup>nd</sup> Administrator shall file in Court and serve the 1<sup>st</sup> Administrator with certified copies of the title documents to all of the Deceased's properties that are in her possession within 30 days of today's date.**

**2. The properties known as Mitaboni/Mutituni/391 and Mavoko Town Block 3/1991 are hereby excluded from distribution and shall continue to vest in the 1<sup>st</sup> and 2<sup>nd</sup> Administrators, pending resolution of the dispute as to ownership of the said properties as between the Deceased and alleged purchasers by the Environment and Land Court.**

**3. All the remaining properties of the Deceased Elijah Kaseke Makau shall be distributed equally between the houses of the Deceased's 1<sup>st</sup> Wife, the late Beatrice Loko and the Deceased's 2<sup>nd</sup> Wife, the late Susan Mwelu. Each house shall in turn agree on the allocation of their respective share of the said properties to each of the Deceased's beneficiaries in that house.**

**4. The 1<sup>st</sup> and 2<sup>nd</sup> Administrators shall within 90 days of the date of this ruling file in Court and serve further affidavits indicating the names of all the beneficiaries in their respective houses, and the allocation to each beneficiary of their house's share of the Deceased's properties for final orders of confirmation.**

**5. There shall be no order as to costs.**

2. Pursuant to the said ruling on 29<sup>th</sup> June, 2018, the 2<sup>nd</sup> administrator filed an affidavit of distribution as regards the 2<sup>nd</sup> house. It was deposed that the identification and shares of all persons beneficially entitled to the said half share of the deceased's estate had been ascertained and that all the dependants of the estate consented to the confirmation of the estate as proposed.

3. As regards the 1<sup>st</sup> house, an affidavit of protest was filed sworn by **David Mwanja Munyao** who alleged that he was the son of **Regina Ndinda Makau** (deceased) who was a daughter to the deceased herein and sister to the 1<sup>st</sup> administrator. In opposing the mode of distribution proposed by the 1<sup>st</sup> administrator, he averred that the name of his said mother and himself as heir to the estate were omitted from the list of beneficiaries and proposed that the half share given to the first house be shared equally amongst all the beneficiaries.

4. However, by a further affidavit filed on 25<sup>th</sup> October, 2018, to which a schedule of the proposed distribution of the deceased's estate was annexed, the said **Philip Mutiso Makau** deposed that all the beneficiaries from the 1<sup>st</sup> house consented to the mode of distribution proposed in the said schedule. In the said affidavit, an issue was taken with the fact that the 2<sup>nd</sup> administrator, contrary to the ruling of the court,

purported to distribute certain assets in full to the 2<sup>nd</sup> house when the ruling stated that only half was available for distribution to each house. It was also contended that the said affidavit deliberately left out a number of the assets of the estate. The 1<sup>st</sup> administrator averred that if any estate asset has been sold by members of the 2<sup>nd</sup> house, then the 2<sup>nd</sup> administrator ought to make full disclosure thereof to the court.

5. There was also a replying affidavit sworn by the 1<sup>st</sup> administrator on 8<sup>th</sup> November, 2018 in which he stated that the affidavit of protest misrepresented the facts and was calculated to mislead. He reiterated that the said protestor was not a child of the deceased nor was he a dependant of the deceased and not a party to these proceedings hence lacks the *locus standi* to file the protest. It was averred that though the protestor claims to be a legal representative of his deceased mother, **Regina Ndinda Makau**, he has not exhibited any grant of letters of administration in that respect. According to the 1<sup>st</sup> administrator, one of the daughters mentioned by the protestor does not wish to share in the estate and that the protestor is being used by the 2<sup>nd</sup> administrator to disrupt these proceedings.

6. The protest was heard by way of viva voce evidence. Apart from the affidavit of protest, the protestor averred that it was the 1<sup>st</sup> administrator who was from the house he was connected with and that he was only interested in the first house's entitlement where his mother came from. According to him, the Chief's letter which was relied upon by the 1<sup>st</sup> administrator disclosed his mother as a daughter to the deceased herein. However, in the affidavit of distribution the said Regina was not mentioned hence his claim to Regina's entitlement.

7. In cross-examination, he stated that he was not aware of these proceedings as he was never informed by the 1<sup>st</sup> administrator and therefore was not in the case during the time the decision for distribution was made. He reiterated that his mother was the 1<sup>st</sup> administrator's sister but was never joined. According to him, it was his mother's brothers from both houses who told him to protest. He however confirmed that the advocate appearing for him was the same advocate appearing for the 2<sup>nd</sup> administrator and that one of the people who talked to him was the 2<sup>nd</sup> administrator.

8. He however admitted that he did not know all the assets of the deceased and was only aware of those that he could see. According to him, his father was **Munyao Nthenge** who was deceased and not **Mwania Ivuti** and that he was brought up by **Munyao Nthenge**. He insisted that he was entitled to inherit the assets of his mother, **Regina Ndinda Makau**. He however had no burial permit or death certificate in court but stated that his birth certificate got burnt in his house. According to him, his mother was buried in the home of the deceased herein, his grandfather from whom he is entitled to inherit on behalf of his mother. He however admitted that he had no document authorising him to claim on behalf of her mother.

**9. Philip Mutiso Makau**, the 1<sup>st</sup> administrator relied on his affidavits sworn in opposition to the protest in their entirety.

10. In cross-examination, he stated that he was aware that the court directed that the estate of the deceased be divided equally amongst the two families and they were instructed on how to do so. According to him he was representing the first house and was not administering the 2<sup>nd</sup> house and had no claim over that house and had no problem with the manner in which that house divided its property.

11. Referred to the Chief's letter he confirmed that it indicated the names of 8 people including **Regina Ndinda Makau** who was his later sister. However, in the affidavit of distribution her name was omitted. He admitted that the protestor was Regina's biological son and that he never notified the protestor when they went to the Chief. According to him, Regina died before the deceased herein and had one child. It was his evidence that **Munyao** was not married to Regina and that Regina was buried in his father's home. He stated that he never allocated Regina's share to anyone. According to him, he would object to the Protestor being allocated Regina's entitlement based on what he was told by his father though he was aware that daughters have a right to inherit. According to him the protestor was born by **Mwanzia** son of **Ivuti** who has a settlement farm in excess of 200 acres but conceded that he was not there when the protestor was conceived. Though the ID Card indicated that the Protestor's father was **Munyao** he still insisted that the Protestor was not the son of **Munyao**.

12. In re-examination, he stated that there were some other deceased children of the deceased who were not disclosed and that his father informed the daughters that upon marriage they would not be entitled to inherit his property and the other daughters accepted it.

**13. Pauline Ndunge Makau**, who was called by the 1<sup>st</sup> administrator as his witness was such daughter who testified that she was satisfied where she was married and was not laying any claim to the estate of the deceased.

14. In cross-examination she admitted that Regina was the deceased's daughter and that the Protestor was Regina's only child. She admitted that Regina pre-deceased the father and was buried in her father's home as those were her wishes which the father acceded to. According to her, at that time daughters were not inheriting their fathers' properties and Regina told her that she was not interested in the father's estate.

#### **Protestor's Submissions**

15. On behalf of the Protestor, reliance it was placed on the case of **In re Estate of Muthoni Kanyua (Deceased) [2018] eKLR**.

16. From the foregoing, it was submitted that the claim by the 1<sup>st</sup> Administrator that **Regina Ndinda** is not entitled to a share because she was married has no basis in law and ought to be rejected by Court.

17. As regards the claim by the Protestor, a grandson of the deceased, **Elijah Makau Kaseke**, is not claiming a share as a beneficiary of the Estate herein but the share her mother is entitled from the Estate based on a letter from the area assistant chief certifying that he is the only surviving child and heir to **Regina Ndinda Makau**. According to the Protestor, whatever share belongs to Regina should be registered in the name of the Protestor herein. In this regard, the Protestor relied on the case of **In re Estate of Joyce Kanjiru Njiru (Deceased) [2017] eKLR**, where the court stated as follows;

“The second consideration is whether the grand children are entitled to inherit the deceased’s estate. From the definition given under Section 29 (supra) the spouses and children of the deceased have priority to inherit the estate. The grandchildren and others can inherit if they were being maintained by the deceased prior to her death. In this present cause, the two grand children are not claiming interests as dependants but are coming in to claim the interests of their respective parents who are now deceased. My view is that the children are entitled to inherit the share which their deceased parents would have inherited. In persuasive decision by Musyoka J. in the case of Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR it was stated:

“.....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grand children inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grand children step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

18. It was submitted that from the case of **Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR**, it is clear that the protester did not require letters of Administration for Estate of her mother. He has a right to directly get the share of her mother from the Estate.

19. It was however submitted that the contention that the deceased left an oral will as to who should inherit his property did not meet the requirements of *Section 9(1)* of the **Law of Succession Act**.

20. The Court was therefore urged to allow the Protest, include the Protester as a beneficiary through her late mother **Regina Ndinda Makau** and proceed to order that the protester is entitled to a share of his mother and it should be equal with the shares of the other beneficiaries of the 1<sup>st</sup> House.

### **The 1<sup>st</sup> Administrator’s Submissions**

21. The 1<sup>st</sup> administrator relied on **Re Estate of Kiriungi Karani [2019] eKLR** and submitted that grandchildren may only inherit a grandparent indirectly through their late parents who are children of the deceased irrespective of their number and they can only get the share of their late parent. However, to do so, the grandchildren must first obtain grant and become legal representatives since in this case the Protestor was not a dependant of the deceased herein prior to his death and cannot claim as his dependant. He relied on the case of **Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR** and **Gabriel Simali & 7 Others vs. George Oduori Oloko [2020] eKLR**.

### **Determination**

22. I have considered the issues raised in this application.

23. It is clear both on documentation and on the evidence adduced that there is no valid objection to the proposed distribution by the 2<sup>nd</sup> house.

24. As regards the proposal by the 1<sup>st</sup> administrator, the only protest is by the Protestor herein, **David Mwanja Munyao**. That protest is based on the fact that neither his mother **Regina Ndinda Makau** nor himself was included in the proposal. It is not in dispute that the said **Regina Ndinda Makau** was a daughter of the deceased. It is however contended that at the time of her death, daughters had no right to inherit the properties of their fathers and that her father had expressly excluded her daughters from inheriting his property. In support of the latter contention it was contended that the deceased made this declaration orally. However as rightly submitted on behalf of the 1<sup>st</sup> Administrator that contention does not meet the requirements of section 29 of the **Law of Succession Act**.

25. As for the contention that daughters have no right to inherit their father’s property, in the case of **In re Estate of Muthoni Kanyua (Deceased) [2018] eKLR** it was as follows:

“In a case involving sisters only one would not have expected the ‘marriage card’ to be played. It’s dark shadow here reveals how discriminatory cultural practices turn women into their gate keepers, demonstrating just how deep the socialization about the effect of marriage on a woman is; - total alienation from her family as long as dowry has been paid- the woman ceases to belong to her parents but now belongs to the people who married her. This is the card the PW2 and PW3 tried to play against the petitioner and her other sister. The Law of Succession Act is blind to these lines of differentiation, and the Constitution of Kenya 2010 article 27 refuses them, as neither the state nor any person is permitted to discriminate a person on the basis of among other things sex, gender, marital or other status. Courts have spoken before the new Constitution see **In re Estate of Warui (Deceased) [2001] eKLR** where the deceased, died before the coming into force of the Law of Succession Act, had only daughters who were all married. Their male cousin came to court seeking to revoke the grant on the basis of applicable Kikuyu Customary Law. The court said no, on the basis of the provisions of the Act which gives every child an equal right to inherit her parents’ property. The court recognized that Customary law is not a dead letter law. Customary law is living law and has undergone a lot of changes. In **Mary Wangari Kihika v John Gichuhi Kinuthia & 2 others [2015] eKLR** the court cited and applied several authorities on the place of daughters when it comes to inheritance. The fact of the matter is unmarried or married, that is neither here nor there.”

26. Accordingly, the contention that **Regina Ndinda Makau** has no entitlement to the estate of the deceased herein does not hold any water and is for dismissal.

27. As to whether the Protestor, a grandson of the deceased herein can inherit from his deceased grandfather’s estate, I associate myself with

the position adopted in **Kiarie Waweru Kiarie, J** in **Gabriel Simali & 7 Others vs. George Oduor Oloko [2020] eKLR** that:

“9. The appeal herein revolve around the issue as to whether the appellants are beneficiaries of the estate of Oloko Munika, the deceased. It is not disputed that the respondent is the son of the deceased. From the record, the respondent was the only surviving son of his father and Klemensia Muniala was his sister. The appellants are therefore great grandchildren of the deceased herein.

10. There are instances when a grandchild or a great grandchild for that matter can inherit directly from the estate of the deceased. One such instance is where it is proved that such a grandchild or a great grandchild was being maintained by the deceased. In re Estate of Joyce Kanjiru Njiru(Deceased) [2017] eKLR Judge Lucy Waruguru Gitari observed the following:

From the definition given under Section 29 (supra) the spouses and children of the deceased have priority to inherit the estate. **The grandchildren and others can inherit if they were being maintained by the deceased prior to her death.** In this present cause, the two grandchildren are not claiming interests as dependents but are coming in to claim the interests of their respective parents who are now deceased. My view is that the children are entitled to inherit the share which their deceased parents would have inherited. [Emphasis added]

I wholly agree with the learned judge. In the instance case, the appellants cannot lay their claim on this basis for they have not proved that the deceased herein maintained them.

11. The second instance is where the grandchild can stake his claim on his/her parents’ right to inherit. Musyoka J. in the case of Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR described such a right in the following terms:

...grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

Whereas I agree with the Learned Judge, such must be clothed with legal powers to do so; he/she must first out seek and obtain letters of administration of their parents’ estate. This is when he can claim his/her parents’ inheritance from the estate of the deceased. In the instant case the appellants have not demonstrated that they have obtained letters of administration to allow them to stake any claim in the estate of the deceased.”

28. Similarly, in my view, the Protestor can only claim entitlement to the estate of the deceased is he satisfies two conditions. First he ought to prove that he was being maintained by the deceased. He does not claim so and there is no evidence along those lines. He therefore stakes his claims on the fact that his deceased mother was entitled to inherit from the estate of the deceased. There is no dispute that his mother was a daughter of the deceased and was therefore entitled to inherit from the deceased estate. However as rightly held by my learned brother, **Kiarie, J** his claim can only succeed is he proves that he is the legal representative of her estate. In other words, the mere fact that he is a son to **Regina Ndinda Makau**, does not entitle him to automatically step into the shoes of her deceased mother.

29. Accordingly, while his claim to the estate of the deceased fails, I hereby direct the 1<sup>st</sup> administrator to include **Regina Ndinda Makau** as one of the beneficiaries of the estate of **Elijah Kaseke Makau** and allocate her, her rightful share as ordered by this Court. The said allocation will eventually vest in the person to whom grant of letters of administration will be made and to whom the same shall be confirmed.

30. Pending that distribution, let there be partial confirmation of the grant in terms of the proposal by the 2<sup>nd</sup> Administrator.

31. Though the protest has not succeeded, there shall be no order as to costs since the 1<sup>st</sup> Administrator failed to comply with the court’s directions to furnish the court with the soft copies in word format.

32. Those shall be the orders of this court.

**Read, signed and delivered in open Court at Machakos this 19<sup>th</sup> day of January, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Musya for Mr Muumbi for the 2<sup>nd</sup> Administrator**

**Mr Njogu for the 2<sup>nd</sup> Administrator**

**Miss Kavita for Mr Mulei for the Applicant**

