REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

P&A CAUSE NO. 247 OF 2013

IN THE MATTER OF THE ESTATE OF KILUNDO MUINDE (DECEASED)

SAMMY MBITHI KILUNDO)

JUSTUS MUINDE KILUNDO)......................................PETITIONERS

JOSPHAT KITONYI KILUNDO)

VERSUS

JACKSON MUTUKU KILUNDO)

DANIEL NZIOKA KILUNDO) ....OBJECTORS

MUTHOKA KILUNDO)

RULING

1. The deceased herein **Kilundo Muinde** died on 22/04/1994. A grant of letters of administration intestate was issued on the 21/06/2013 to the Petitioners herein.

2. The Petitioners filed summons for confirmation of grant dated 29/01/2014 wherein eight(8) sons of the deceased were listed as beneficiaries as follows:-

(1) Muthoka Kilundo

(2) Sammy Mbithi Kilundo

(3) Josephat Kitonyi Kilundo

(4) Justus Muinde Kilundo

(5) Daniel Nzioka Kilundo

(6) Jackson Mutuku Kilundo

(7) Benjamin Kilundo - deceased

(8) Francis M. Kilundo – deceased

3. The petitioners listed four properties of the deceased and proposed the mode of distribution as follows:-

(i) Muthetheni/Wamunyu/33 – to be registered in the joint names of Justus Muinde Kilundo, Sammy Mbithi Kilundo, Daniel Nzioka Kilundo and Priscillah Mwende Ngeti.

(ii) Muthetheni /Wamunyu/84 –

- 1.8 Ha to be registered in the names of Josephat Kitonyi Kilundo.

- 1.8 Ha to be registered in the names of Dorcas Nguna Mutua.

(iii) Muthetheni /Wamunyu/597 – whole to be registered in the names of Justus Muinde Kilundo.

(iv) Muthetheni Wamunyu/481 – whole to be registered in the names of Raphael Mutua Nandi

4. The 1st Objector herein on his own behalf and on behalf of the other two objectors filed an affidavit of protest sworn on 7/07/2016 wherein he averred that the family members met on 12/06/2014 and resolved that the properties be shared among the eight sons of the deceased equally. A copy of the list of family members was annexed to the affidavit. He averred further that parcel number **Muthetheni /Wamunyu/481** that had been sold to Raphael Mutua Nandi be allocated to him.

5. The second Petitioner, **Justus Muinde Kilundo** filed a replying affidavit sworn on 23/06/2016 where he deponed *inter alia: that the purported family meeting of 12/06/2014 is not valid as not all family members were present; that the beneficiaries should be those named in the chief's introductory letter filed with the petition; that the properties should be distributed pursuant to the agreement of the majority of the beneficiaries reached on 22/05/2016 through the clan deliberations.* He annexed a copy of the resolution.

6. Parties agreed to canvass the summons for confirmation and protest by way of viva voce evidence.

7. The matter had partly been heard by Muriithi – J who received the evidence of the petitioners first witness **Anthony Muinde Kivindu** who testified that he is the secretary of Amuutu clan and that in 1981 the deceased herein invited the clan to assist him sub-divide his property. He averred that the deceased wished to sub-divide his land between his three (3) wives which request was accepted by the clan. On cross – examination, he denied being aware of a family meeting held on 12/06/2014 and further confirmed that the three wives of the deceased have also died. He finally averred that the deceased wished to have his property divided among his wives.

8. **Justus Muinde Kilundo** is the second petitioner. He sought to rely on his witness statement as well as family resolution held on 12/05/2016 and supervised by the clan elders. He added that the protestors failed to attend the said meeting while the 3rd protestor was forced to do so. It was his contention that the protest should be dismissed and the assets shared between the three houses. On cross – examination he maintained that the deceased had written a Will on 8/12/1981 but admitted that the same was not signed. He also admitted that the 3rd protestor was forced to attend the clan meeting of 12/05/2016; He also confirmed that all his sisters and step sisters are not interested in the share of the properties. Finally, he stated that the assets should be shared among the three households as had been directed by the deceased during his lifetime.

9. **Jackson Mutuku kilundo** is the 1st Protestor herein. He testified that he is opposed to the mode of distribution proposed by the Petitioners herein as the sub-division has not been properly done. According to him the same should be shared equally among the sons of the deceased. On cross – examination he confirmed that some family members did not sign the minutes of the meeting held on 12/06/2014 and that daughters of the deceased were not present. He denied the existence of a family meeting held on 12/05/2016 that had been called by the "Amuuti" clan but went ahead to confirm having been invited but opted not to attend. On re-examination, he stated that the petitioners left him out in the schedule of distribution yet he is a son of the deceased.

10. Parties were directed to file and exchange written submissions. The protestors' submissions are dated 13/05/2020 while those of the petitioners are dated 9.2.2021. Paul Kisongoa and Company Advocates for the protestors raised two issues for determination namely whether the purported Will made by deceased on 8/12/1981 is valid and secondly, whether the deceased's estate should be distributed under testacy or intestacy laws. On the first issue, it was submitted that the same did not meet the conditions of a valid Will in that the same was neither signed by the testator nor witnessed by the competent witnesses as provided for under section 11 of the Law of Succession Act. It was submitted that it is only the petitioner's witness Anthony Muinde Kivindu who signed the clan proceedings as its secretary. Reliance was placed in the cases of **Re Estate of G.K.K. (deceased) [2013] eKLR** and in the matter of the Estate of **James Ngugi Mungai HC SC No. 523 of 1990** and that it was the view of counsel that the estate should be distributed under intestacy laws. It was further submitted that the petitioners did not file the petition with Will annexed and hence the intestacy laws will be applicable. Counsel urged this court to declare the alleged Will as invalid, null and void. On the second issue, it was submitted that the purported Will made on 8/12/1981 being invalid, then the estate should be distributed under intestacy laws and in this regard proceeded to suggest that the assets of the deceased should be shared between the eight (8) sons of the deceased pursuant to the family meeting held on 12/06/2014 so as to ensure that none of the beneficiaries gets double allocation such as the 2nd petitioner Justus Muinde Kilundo from the third house and who is proposed to get portions on **L.R Muthetheni/Nyaani/33 and 597**. According to counsel, upon the death of the three widows, the estate should be shared equally among all the children as provided for in sections 35 and 38 of the Law of Succession Act. Reliance was placed in the case of **Re Estate of John Musambayi Katumanga (deceased) [2014] eKLR.**

11. F. M. Mulwa and Co. advocates vide their submissions submitted that the distribution of the assets of the deceased should be done pursuant to section 40 of the Law of Succession Act as the deceased was polygamous having married three wives. It was the view of counsel that Parliament in enacting section 40 of the said Act did not intend that there be equality between houses. According to counsel, the proposed schedule by the petitioners is in tandem with the spirit of section 40 of the Act. Counsel therefore urged the court to dismiss the protest dated 7.7.2014 with costs. Reliance was placed in the case of **In the matter of the Estate of Kahindi Gona Konde (Deceased) (2018) eKLR** where the court held that the property of the deceased be distributed among the houses according to the number of children in each house.

12. I have given due consideration to the rival evidence of the protestors and petitioners. I have also considered the submissions presented. It is not in dispute that the deceased herein had three (3) wives all of whom have since passed on. It is also not in dispute that several

meetings were held regarding the distribution of the properties of the deceased and that there was no unanimity arrived at by all the family members which eventually led to these proceedings. I find the issues for deamination are as follows:-

(i) Whether the meeting held on 8/12/1981 by the deceased and "Amuuti" clan amounted to a Will by the said deceased;

(ii) Whether the estate should be distributed under Testacy or Intestacy laws;

(iii) What orders may the court make?

13. As regards the first issue, the 2nd petitioner and the secretary of the "Amuuti" clan have maintained that the deceased invited the clan and expressed his desire to have all his properties shared among his three wives and that it is on the above basis that the petitioners proceeded to prepare the proposed schedule of distribution now contested by the protestors. I have looked at the minutes of the said meeting and note that it is only the secretary of the "Amuuti" clan who signed the same. All those persons who attended the meeting including the deceased did not sign the deliberations of the said meeting. If the petitioners seek to use the said minutes to amount to a Will made by the deceased, then I find such an attempt to be defeatist in that it is the same petitioners who filed petition for grant of letters of administration intestate when they ought to have filed a petition for grant of probate with a written Will annexed. Having opted to come under intestacy laws, then they cannot now turn around at the tail end of the matter and spring up issues to do with a Will having been made by the deceased. It is common knowledge that writing or making Wills is an elaborate process and not just a "by the way" activity. Section 11 of the Laws of Succession Act provides as follows:-

"***No Will shall be valid unless:***

(a) The Testator has signed or affixed his mark to the will or it has been signed by some other person in the presence and by the direction of the Testator;

(b) The signature or mark of the Testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;

(c) The Will is attested by Two (2) or more competent witnesses each of whom must have seen the Testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the Testator, or have received from the Testator a signature of that other person and each of the witnesses must sign the Will in the presence of the Testator, but it shall not be necessary that more than one witness be present at the same time, and not particular form of attestation shall be necessary."

Looking at the minutes of the clan meeting now purported by the petitioners to amount to a Will by the deceased against the back drop of the above section 11 of the Law of Succession Act, it is clear that the minutes of 8/12/1981 did not amount to a Will for a number of reasons. Firstly, the deceased did not sign the document. Secondly, the clan members present did not sign against their names. Thirdly, the particulars of the properties so bequeathed by the deceased were not indicated or disclosed. Hence it is my view that the meeting aforesaid was just like any other "*baraza*" held in the village as it did not have any solemn attributes to amount to a Will. Again, the minutes revealed that one of the wives of the deceased had raised a dispute challenging the deceased's proposed sub-division and that the area chief was roped in to defuse tensions. All these kind of activities did not reflect a situation showing that the deceased was making a Will. I am satisfied that the deceased did not execute a Will in accordance with section 11 of the Law of Succession Act and hence the same is invalid for all intents and purposes. The deceased must therefore be declared to have died intestate and hence his estate must be distributed under intestacy laws as presently filed.

14. As regards the second issue, and in view of my finding in paragraph 13 above, the estate should be distributed under intestacy laws as presently filed by the petitioners. As disclosed in the petition forms, the deceased had three wives namely **Syoluka Kilundo, Kanyaa Kilundo** and **Nthambi Kilundo**. The deceased was also blessed with both male and female children. Both petitioners and protestors maintain that their sisters are married and have no interest in the estate as they do not wish to be catered for in the proposed distribution. This would then explain why the beneficiaries are only male children totalling eight (8) in number. However, their assertions are not convincing since none of the female children have sworn affidavits renouncing their rights to the estate. Merely claiming that they are married is not enough reason to exclude them in the schedule of distribution since they still remain biological children of the deceased and entitled to inherit from the estate. The dispute on the distribution appears to revolve around the issue of whether the assets should be shared between the three (3) households or the eight sons of the deceased. There are several family meetings held as evidenced in the minutes presented by the protagonists herein. The petitioners on the one hand maintain that the beneficiaries had agreed to have the assets shared between the households while on the other hand the Protestors want the same distributed equally among the sons of the deceased. Therein lies the stalemate. Apart from the female children who have not been listed, it is noted that the first house has three (3) sons while the second house has four (4) sons and the third house has only one son who is the 2nd petitioner herein. It is the view of the protestors that if the petitioners' proposal is accepted then some beneficiaries such as the 2nd Petitioner who is an only son from his household are likely to have an undue advantage as their shares will be more than those of the other beneficiaries. Both the petitioners and protestors have traded accusations against each other for snubbing the family and clan meetings. Indeed, several minutes of those meetings have been presented to back their respective standpoints and which points to an irresistible conclusion that there is no consensus on the issue as to whether the properties should be shared between the three houses or between the children of the deceased. Due to the above stalemate, there is need to consider the provisions of sections 35, 38 and 40 of the Law of Succession Act. Section 35 relates to situations where the life interest of a spouse of deceased comes to an end due to death of such a spouse then the net intestate estate should be shared equally amongst the children of the deceased. Section 38 thereof provides that where the deceased leaves no surviving spouse then the estate will be divided equally amongst the children. The evidence presented together with the exhibits left no doubt that the deceased left no surviving spouses. The petitioners and protestors confirmed that their respective mothers are all deceased. That being the position and the fact that the deceased was polygamous, it is my view that the estate should be shared equally among the children of the deceased. I am guided by the provisions of section 40 of the Law of Succession Act which provides as follows:-

"1. Where an intestate has married more than once under any system of law permitting his personal and household effects and the residue of the net intestate estate shall in the first instance, be divided among the houses according to the number of children in each house but also adding any wife him as an additional unit to the number of children.

2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the Rules set out in section 35 and 38".

Being guided by the above provision, I find that the assets of the deceased ought to be shared equally between all his children. Even though the resistance has been posed by the 2nd Petitioner who is an only son of the third house, allowing him to have more land to the exclusion of his other siblings would be unfair. He should not be allowed to have an undue advantage over his siblings just because his household did not have more children. As all wives of the deceased have died, the net intestate estate should now be shared equally among all the children. The Petitioners' proposal to have the properties shared between the houses is not tenable at the moment in view of the fact that the widows are no longer alive so as to sustain the existence of a "*household*" as contended by the petitioners. Upon the demise of the widows then the issue of "*households*" does not arise since the determination of the life interest must pave way for the distribution of the assets equally among the children of the deceased. I wish to associate myself with the finding of W. Musyoka – J in the case of – **In Re Estate of John Musambayi Katumanga (deceased) [2014] eKLR** where he held as follows:

"***The spirit of part V especially sections 35, 38 and 40 is equal distribution of the estate amongst the children of the deceased. There have been debates on whether the distribution shall be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in section 35(5) and 38 is "equally" as opposed to "equitably". This is the plain language of the provisions. The provisions are in mandatory terms – The property "shall... be equally divided among the surviving children."***

Equal distribution is envisaged regardless of the ages, gender and financial status of the children.

Section 40 of the Act is not independent of section 35 and 38 of the Act, division is to be in equal portions"

I have no doubt in my mind that the evidence presented herein requires that the estate of the deceased herein should be distributed under intestacy laws. As noted above the estate should now be distributed equally among all the children of the deceased. I note that the female children did not testify and the explanation offered by both petitioners and protestors is that they have no interest in the estate as they are married. However, I have not seen any document such as an affidavit or even a letter by any of them renouncing their claims to the estate on the ground that they are married and satisfied wherever they are. Unless that is done, the petitioners and protestors will not be allowed to proceed with the distribution of the estate. As the petitioners did not include the female children of the deceased and in view of my above finding, the petitioners will have to go to the drawing board by filing an amended summons for confirmation of grant which captures those changes.

15. As regards the last issue, it is my finding that the protestors protest dated 7/07/2014 has merit. The same is allowed in the following terms:

(a) The estate of the deceased shall be distributed equally between all the children of the deceased (both male and female).

(b) The petitioners are directed to file an amended summons for confirmation of grant capturing the interests of the female members of the family and to file affidavits by the said female members renouncing claims to the estate if they do not want a share of the estate. The same be filed and served upon all beneficiaries within Forty five (45) days from the date hereof.

(c) As parties are members of one family there will be no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 11th day of February, 2021.

D. K. Kemei

Judge