



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 220 OF 2011

IN THE MATTER OF THE ESTATE OF M'MUTUNGI M'RAIBUNI-DECEASED

MARTIN GITONGA.....PETITIONER

VERSUS

MARION KAGUTA M'MUTUNGI.....1ST INTERESTED PARTY

PETER M'MUTUNGI.....2ND INTERESTED PARTY

RULING

1. The court is called upon to determine two applications both filed by Lydia Kainda (**hereinafter referred to as the applicant**). The first application is a chamber summons brought under certificate of urgency dated 21/10/2020 pursuant to Sections 40 & 43 of the Law of Succession Act and other enabling provisions of the law, by which the applicant seeks; an order of inhibition restraining and preventing all dealings over all subdivisions of NYAKI/KITHOKA/1306 and all resultant numbers until the hearing and determination of this application; cancellation of resultant titles out of subdivision on NYAKI/KITHOKA/1306 and the subdivision of the estate property be done afresh equally in terms of the value of the land and for valuation report over NYAKI/KITHOKA/1306 be filed so that it can guide the court on the equal sharing of the estate property. The grounds upon which the application is founded are set out in the body of the application and supporting affidavit of the applicant, sworn on 23/10/2020 whose gist is that of the entire estate property comprising land, only about 2^{1/2} acres of the land is economically viable as fronting a tarmac road while the rest is hilly, unproductive and barren. She contends that the distribution of the same by subdivision into equal pieces from the road upwards is unjust as the person who gets the road frontage gets a more valuable land compared to the rest and thus the sharing was not equal. She thus wants the land re-shared equally and to her equality be viewed in terms of value of the land and not acreage.

2. The second application is still by the applicant, brought under certificate of urgency dated 19/12/2019 also pursuant to Section 40 & 43 of the Law of Succession Act and all other enabling provisions of the law and seeks that the court orders the government surveyor to survey and subdivide NYAKI/KITHOKA/1306 in accordance with the grant herein and in such a way that each beneficiary gets a portion on the ground stretching from the tarmac road (Meru-Maua). The latter application is premised on the grounds that the stretch to the tarmac road is fertile, suitable for any sort of developments and economically high in value, whereas the stretch backwards is hilly, infertile, unsuitable for developments and economically low in value. She laments that each house, the deceased had two wives, should get a portion along the tarmac road as well as a portion on the hilly area.

3. The 1st interested party in opposition to the applications filed two replying affidavits sworn on 7/8/2020 and 15/12/2020, respectively and contends that **NYAKI/KITHOKA/1306 (hereinafter referred to as the estate property)** was subdivided equally in accordance with the court's decision of 17/12/2018. In his view, the applications are informed more by greed and improper design to delay the conclusion of the matter because in carrying out the subdivision regard was given to many factors including where each beneficiary lives and has developed. It is equally asserted that the court in the judgment on distribution had decreed that each of the eleven beneficiaries including the applicant gets equal share in the estate property which was done in accordance with the mutation forms exhibited. She terms the proposal by the applicant as untenable and difficult to implement when regard is given to the shape of the land and the fact that beneficiaries have assumed ownership and developed respective portions hence the same has been overtaken by events. She then annexed the mutation forms on how the land was subdivided which shows that the applicant was assigned the third parcel from the road. In praying for dismissal of both applications, she expressed her annoyance with the applicant's greed, malice, non-cooperation and dissatisfaction. She views the applications as baseless afterthoughts and abuses of the court process devised to delay the finalization of this old matter.

4. The court asked parties to file and exchange submissions and the applicant in her submissions filed on 15/1/2021 accuses 2nd interested party of awarding himself and those close to him the valuable portions whilst throwing her into the hill side at a time that an application was pending while taking advantage of the Covid19 pandemic. She insists on the principle of equal sharing to the level of mathematical accuracy based on cash value thereof.

5. For the administrator/1st interested party, submissions were made to the effect that it is only the applicant who is dissatisfied with the way the estate property had been subdivided. She points out that a survey was undertaken in line with the court's order of 17/12/2018, where all the requisite factors were considered including the occupation and user by beneficiaries at the time and that the current application is the work of the applicant's son who had sought to secretly administer the estate and a design to hold the beneficiaries as hostages. The length of the duration the matter has been in court was stressed

Analysis and determination

6. From the papers filed, I discern the only issue for determination to be expressed in the question as to what does equality in sharing of the estate property entail? Is it in terms of value, quality or acreage?

7. In its decision delivered on 17/12/2018, the court ordered that the estate property be distributed equally among the 11 beneficiaries. A certificate of confirmation of grant was subsequently issued on 14/2/2019 to that effect. The survey was undertaken and the estate property divided into 11 equal portions. The court on 3/8/2021 orally heard all the beneficiaries. They all stated that they conducted a ballot in the presence of the applicant, and that they were all satisfied with the portions they chose, except the applicant. The applicant confirmed that she was present during the ballot and had even fenced her plot. Evidence was equally led that all the beneficiaries have since collected their respective title deeds from the surveyor, save for the applicant. In the cause of taking submissions, the court asked the parties the dimensions of the land at its frontage with the road and the answer was that it measures 14 meters. That information is important in answering the question whether it is reasonable to divide a fourteen-meter stretch among eleven people to achieve mathematical equality.

8. I read Part V, especially Sections 35, 38 and 40, of the Law of succession Act to command equal distribution, of the intestate estate amongst the children of the deceased. Of course, as expected, there have been debates on whether the distribution should be equal or equitable. Sections 35(5) and 38 in fact use 'equally' as opposed to 'equitably' as a formula for distribution among children. I however, do not read the demand to be strictly mathematical equality. Mathematical equality if strictly applied in a situation like the one at hand can only result in an absurdity where each child gets a strip incapable of any meaningful land use. For me therefore, distribution even when made equally must also be reasonable and the resultant parcels must be utilitative.

9. It is conceded that the land by the tarmac road is of enhanced value as opposed to that on the hilly side. The ideal situation would be that all beneficiaries get a share of the land by the tarmac road and also that on the hillside. Nevertheless, based on the shape and alignment of the land a subdivision that gives each beneficiary a frontage of the road and the hilly part would have resulted into very narrow strips with widths less than 1.3 meters wide hence parties chose balloting in the presence of all the beneficiaries as a way of assigning each his portion. In essence, the applicant is asking the court to disrupt everyone else's occupation because she is displeased with her portion.

10. In *John Maina Gakuo & Another v Veronica Wanjiku Gakuo (2020) eKLR* the court rendered itself as follows:

Thus, the notion of equality of shares amongst the houses or the children, is not the decisive factor in the distribution of a net intestate estate in a polygamous family set-up; rather, it is equity, fairness and, ultimately the discretion of the court that count; exercise of that discretion in any particular way will, of course, take into account those factors that have been expressly specified in section 40(1) as necessary and, no doubt, the peculiar circumstances of each particular case. It does not, therefore, always follow that the house with the largest number of children will, as a matter of course, be entitled to the lion's share of the estate."

11. I must add here that it may be impossible to distribute the estate property with a scientific or mathematical precision. What the court should strive to achieve is a fair and equitable distribution of the estate property. The court has to consider, for example, whether it is fair, just and equitable to have the beneficiaries uprooted from one part of the estate and settled elsewhere on the same estate under the guise of equal distribution of the estate.

12. Taking all the factors into consideration, I find no justification has been offered by the applicant to warrant grant of the orders sought by distorting the sub-divisions already effected, registered and titles issued. The applicant must be asked to be content that his portion is not the furthest from the tarmac and that in size his is not smaller compared to those at the extreme ends

13. The upshot from the foregoing is that both applications are bereft of merit and they are hereby dismissed with an order that each party bears own costs. That I do reluctantly with a hope that the family ties remain and are strengthened otherwise this was a case that the applicant ought to have been made to meet the full costs.

14. In order that this file be closed and litigation on the estate brought to an end, I direct that the applicant may collect his title from the land registry at his earliest opportunity and the court registry shall close this file forthwith.

DATED SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 27TH DAY OF OCTOBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Omari for the interested party/respondent

No appearance for Kaume for the applicant.

PATRICK J.O OTIENO

JUDGE