



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: D. K. Kemei, J)**

**SUCCESSION CAUSE NO. 125 OF 1994**

**IN THE MATTER OF THE ESTATE OF SAMUEL KINYOWE NZAU (DECEASED)**

**JOSEPHINE KINYOWE & 2 OTHERS..... PROTESTORS/APPLICANTS**

**VERSUS**

**LAWRENCE KINYOWE & OTHERS.....PETITIONERS/RESPONDENTS**

**RULING**

1. The summons for confirmation of grant filed on 6<sup>th</sup> February 2017 in respect of the Estate of *Samuel Kinyowe Nzau* has been challenged vide an Affidavit in Protest sworn on 15<sup>th</sup> March 2017 by Josephine Kinyowe, the Protestor herein. The summons is supported by the affidavit of *Lawrence Kinyowe*, the 1<sup>st</sup> Respondent herein. In paragraph 3, the 1<sup>st</sup> Respondent averred that the properties had been ascertained and determined as to who was entitled to the properties. In support of the confirmation is a consent to the mode of distribution signed by beneficiaries of the estate except the Protestor.

2. In her affidavit, the Protestor averred that she is one of the daughters of the deceased and beneficiary to the estate while her co-applicants are sons of her late sister Betty Mueni Waita. She averred that the distribution was unfair and discriminatory to the daughters of the deceased. According to her, the estate of the deceased ought to be equally distributed among all beneficiaries as the deceased died intestate and that the court should take into account the bequeathed gifts to the administrator and other beneficiaries by the deceased during his lifetime. She also averred that the administrator left out several properties belonging to the deceased which should be included in the schedule of distribution. She also listed the assets that had been bequeathed to the beneficiaries by the deceased during his lifetime. Finally, she castigated the conduct of the administrator who have breached his duties as administrator which amount to maladministration of the estate.

3. In response to paragraph 3 of the Summons, in paragraph 10 of her affidavit, she listed from (a) to (h) how the gifts had been distributed by the deceased before death. She averred that a family meeting was held on 3<sup>rd</sup> May 2014 and 24<sup>th</sup> May 2014 at Jimmy Kioko's house. The minutes of the meetings are annexed and marked as 'JKI'. She has listed the omitted properties by the administrator at paragraph 12 (i) to (xvii) and averred that the administrator has ulterior motive of enriching himself. She averred that the administrator has sold the *Yatta Matungulu Ranching Society Ltd* shares and dividends of the co-applicants to one *Paul Kivuva Nzyioka*. According to her, the deliberate omission of the deceased's assets shows that the administrator is not diligent and does not wish to preserve the estate and is trying to undervalue the deceased's estate to secretly profit himself. She averred that the administrator and the other respondents action amount to breach of his duties as an administrator and mal-administration of the deceased's estate by deliberately leaving out the deceased's assets.

4. The Protestor filed her witness statement dated 19<sup>th</sup> May 2017 reiterating the contents of the affidavit in protest plus list of documents and supplementary list of documents dated 15<sup>th</sup> May 2017 and 20<sup>th</sup> May 2017 respectively. The Respondents also filed witness statements and list of documents on 17<sup>th</sup> May 2017. The Protest was heard via viva voce evidence.

**Protestor's case**

5. **OB PW1, Josephine Nzilani Kinyowe** testified that she is one of Samuel Kinyowe Nzau (Deceased)'s daughters. She stated that the deceased herein Samuel Kinyowe Nzau's death occurred on 10<sup>th</sup> July 1990. She stated that the deceased had two wives namely Mbeke as the first wife while Naomi Mumbua as the second wife. According to her, Naomi Mumbua had five sons namely *Jimmy Kioko, Peter Sila, Philip Kilonzo, Henry Wambua, Raphael Nzau* and three daughters namely *Beth Mueni, Susan Mbithe* and *Josephine Nzilani*. She stated that she had come to court on her behalf and on behalf of the children of her late sister Beth Mueni. She stated that her affidavit in protest shows how the properties were shared. According to her, Jimmy Kioko was given several properties. She objected to the Petition because some other assets were left out as indicated in paragraph 12 of her affidavit. According to her, some of the properties given to her late sister's children have been taken by other people. She stated that her sister's children were not included in filing of the Petition. She lamented that Lawrence Nzau Kinyowe's statement reveals new properties like Muka Mukuu Farmers' Co-operative Society 25 (Shares) and other several assets now

being revealed yet they had not been included in the initial Petition for Grant. She stated that the properties should be shared in a manner that those who received less be considered. According to her, during their father's illness, her brothers took advantage and had themselves registered as the owners of the properties. According to her, Henry Wambua Kinyowe has taken over 100 acres of land at Komarock leaving the rest of them out. She stated that she has received threats. According to her, she was not given sufficient assets. She urged the court to protect the beneficiaries who are being oppressed. According to her, three of her brothers have the documents for the family properties.

6. On being cross-examined by Mr. Muthama for the respondents, the Protestor stated that Ruth Namisa and Katheu are her step sisters. She stated that it was possible that her other sisters were satisfied with the distribution. She confirmed that her late sister Beth Mueni's name is listed in the 1<sup>st</sup> Respondent's supporting affidavit to the summons for confirmation of grant. According to her, she was not aware that her earlier application had been dismissed. She stated that she had conducted searches which established that the properties are not in the names of their late father. It was her testimony that her late sister's children are adults but they have not given her the authority to lodge the protest on their behalf. She stated that she doesn't have the documents of her late father. She admitted to have lodged the complaint with the DC but was advised it's a court case. She stated that she didn't have the DC's letter. According to her, Mbeke's children ought to benefit and that she has lodged the Protest so as to protect the children of her late sister to fight injustice. That she came out to fight an injustice.

7. In re-examination, she stated that the respondents have locked out her sister's children. According to her, the searches show registration took place after the death of the deceased herein. She stated their father had only authorized sale of one parcel of land to get money for paying for release of the title deeds. According to her, there is discrimination. She asserted that she came to court for justice and that the properties should be laid bare. According to her, the respondents have started to reveal their father's assets.

#### Respondent's case

8. **RW1, Raphael Muema Mbatha**, stated that he is a cousin to both the Protestor and the 1<sup>st</sup> Respondent. He relied on his recorded witness statement filed in court on 17<sup>th</sup> May 2017. According to him, one of the bags belonging to the deceased got lost and that the chairman of their Clan one Reuben Ndonge took up the matter by calling the entire family to meet at the deceased's home whereby he handed over the bag to Lawrence Nzau. He stated that Josephine Nzilani Kinyowe had been ordered to appear but did not appear. According to him, Lawrence Nzau opened the bag but only found a book without the shares belonging to the deceased.

9. On being cross-examined by Mr. **Amutala** for the Protestor, he stated that he has not benefited from the estate of the deceased. He confirmed that the deceased's bag got lost but could not recall the dates. He maintained that the bag belonged to the deceased although he was not present when it was bought by the deceased. According to him, the loss of the bag was not reported to the chief or police but the Chairman who knows the details of the loss but unfortunately he is deceased. According to him, he heard that it was Josephine Nzilani Kinyowe who had made off with the bag. In re-examination, he stated that the bag was opened in his presence. He lamented that it was upon the family to report the loss of the bag to the police.

10. **RW2, Lawrence Nzau Kinyowe** adopted the contents of his witness statement dated 5<sup>th</sup> May 2017 and filed on 17<sup>th</sup> May 2017 as his evidence. He stated that the deceased was his father and that the Protestor is his sister while the other Protestors are his nephews. He admitted that his father had two wives namely Mbeke Kinyowe and Naomi Mumbua Kinyowe. He testified that Mbeke Kinyowe had five children while his mother Naomi Mumbua Kinyowe had eight children. According to him, they met as a family whereby the deceased directed that the unmarried daughters were to get 10 acres in Mavoloni, the married ones to get 5 acres each in Mavoloni but one was to get 5 acres in Yatta ranch. He stated that after the death of their father they later met again and reached an agreement as per the minutes listed as No.4 in the list of documents dated 5<sup>th</sup> May 2017. He stated that the Protestor was not married and who was given 10 acres but has since sold 5 acres to a certain lady. According to him, they blocked the sale since she had seven children who are to benefit under her. He stated that the deceased had already given out the assets to the beneficiaries. According to him, there was a bag recovered from the house of the deceased that contained valuable documents but which had been collected by the 1<sup>st</sup> wife. He stated that the clan elder had deliberated upon the matter as per the minutes. According to him, the Protestor refused to attend the meeting. He stated that the Protestor had filed other suits which were dismissed by courts. According to him, they did not manage to get the lost documents. In conclusion, he stated that he had shared the assets properly.

11. On being cross-examination by Mr **Amutala**, he admitted that his affidavit was silent on the fact that the deceased had two wives and their respective children. According to him, the female children are entitled to the property but if the deceased gave directions they should obey them. He admitted that he was given 5 acres in Mavoloni and shares in Kyanzave, Kyayata, Matungulu and Kwendano. He further confirmed that Henry Kinyowe, Philip Kilonzo Kinyowe and Peter Sila got 100 acres each in Komarock. According to him, the Protestor had been taken care of. He stated that the children of Beth Mueni Waita should get the remaining shares in Yatta. He stated that Jimmy Kioko Kinyowe got the Matungulu House in Matungulu Estate. He lamented that the reason why he did not list all properties was because the Protestor went away with the receipts and the matter had been reported to the clan elder and chief. He stated that he was to abide by the decision of the clan elder although the court has the overall power. According to him, what he owns was given to him by their father. He lamented that the Protestor refused to give him the documents and receipts. He asserted that the affidavit in protest shows the existence of the properties of the deceased. He confirmed that his witness statement shows that there are 25 shares in Muka Mukuu Farmers' Co-operative Society which should be shared equally among the children of the deceased. According to him, the distribution was not to be made to the deceased's beneficiaries even if they had children. He stated that the Protestor had filed suits against administrators in the past. In re-examination, he stated that the deceased's wives are dead and all the children had been listed in his affidavit. According to him, their father gave their sisters shares of land. In conclusion he said that he had no problem with the properties being shared equally.

12. **RW3, Jimmy Kioko Kinyowe**, stated that the deceased was his father and that the Protestor is his sister while the 2<sup>nd</sup> and 3<sup>rd</sup> Protestors are grandchildren of the deceased. He stated that the consent to the distribution was not signed by the Protestor. According to him, all the Protestors were given assets of the deceased. He stated that the assets not distributed are the ones in the summons for confirmation and that the land given to him is in his name. According to him, the Protestor was given 10 acres in Mavoloni by their late father which she sold 5 acres as per the sale agreement. According to him, the Protestor filed an application for revocation of grant in 1998 which was dismissed. He stated that Plot No.716 in Syokimau was sold to cater for the medical expenses of their father. He stated that he couldn't recall the remaining acreage. He urged the court to uphold the proposed mode of distribution as indicated in the schedule in support of the summons

for confirmation of grant.

13. On being cross-examined by Mr. *Amutala*, he stated that he was the first born son in the second house of Naomi Mumbua. According to him, the first wife Mbeke Kinyowe had four children while his mother Naomi Mumbua had eight children inclusive of him. He admitted that the respondents had not listed the two houses of the deceased and that the list of dependents is mixed. According to him, Lawrence Nzau Kinyowe (1<sup>st</sup> Respondent/administrator) had been given more properties than the rest. He stated that the Protestor had been given a plot in Mavoloni and Syokimau Farm Limited while the 2<sup>nd</sup> and 3<sup>rd</sup> Protestors in Yatta Matungulu Ranching Scheme. He lamented that the Protestor did not sign the consent to the confirmation and distribution of the deceased's assets. According to him, there were many properties of the deceased left out. It was his view that all the beneficiaries are entitled to the assets. According to him, he bought some of his properties. He stated that the administrator has not purchased some of his properties. He confirmed that the deceased subdivided the properties. According to him, the assets listed at paragraph 10(a) of the Protestor's affidavit were acquired by him. He confirmed that he had seen the schedule proposed by the Protestor. He lamented that the female children were given less property yet the properties should be shared equally among beneficiaries. He urged the court to rely on his proposed distribution as listed in his witness statement. He confirmed that the Protestor had filed earlier summons for revocation of grant.

14. The Protestors and Respondents cases were closed and thereafter filed written submissions which are on record.

#### Submissions

15. According to the Protestor, the 1<sup>st</sup> Respondent failed in his basic duty as the administrator of the estate to identify all the beneficiaries of the deceased. It is submitted that the administrator did not disclose all the deceased's properties in his supporting affidavit sworn on 6<sup>th</sup> January 2017. According to the Protestors, the administrator in his supporting affidavit dated 6<sup>th</sup> February 2017 has disclosed a paltry 12 of the deceased's properties and from the 12 properties, the administrator proposed to have 7 properties to himself while the other 4 properties be divided amongst other siblings hence an unfair distribution. According to the Protestor, the 1<sup>st</sup> Respondent never bought any of this properties. It is submitted that the Protestor has disclosed a list of more than 17 properties in her affidavit that the administrator has neglected, refused or blatantly decided not to include in the supporting affidavit. The Protestor urged the court to follow section 40(1) and (2) of the Law of Succession Act for distribution purposes. As regards whether the Protestors are entitled to equal shares, it is submitted that the daughters of the deceased have been unfairly discriminated. Reliance was placed on the case of ***Daniel Mwongera M'Iringo vs. Lucy Karambu M'Ikao [2017] eKLR*** where several decisions in regard to discrimination of daughters in inheritance were cited by the court.

16. According to the Protestor, the testimony of RW3 corroborated paragraph 10 of the Protestor's Affidavit in Protest as to who was given which property. It is submitted that a beneficiary who has been given more than 100 acres should not get an equal share of the remaining properties. As to whether the properties not listed by the administrator are available for distribution, it is submitted that the administrator never filed a further affidavit to refute the assertions by Protestor. According to the Protestor, the administrator and RW3 Jimmy Kioko Kinyowe have adopted the Protestors list of properties in their witness statement. It is submitted that pursuant to section 120 of the Evidence Act, they are estopped from denying the existence of the properties. The Protestor urged the court to invoke its inherent power conferred by section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to stop injustice. According to the Protestor, she has only 10 acres and her late sister 3 acres while other beneficiaries have 100 acres which is a lot for one person. In conclusion, the Protestor submitted that; *the proposed mode of distribution is unfair and unreasonable; there should be equal distribution among all the children; and the court should take into account the shares bequeathed to the beneficiaries.*

17. On the Respondents' part, they contend that the application dated 18<sup>th</sup> December 2019 is *Res Judicata* pursuant to section 7 of the Civil Procedure Act. The Petitioners relied on the cases of ***Henderson vs. Henderson (1843-60) ALL E.R.***, ***Eric Oluoch Olele vs. Kenneth O. Obae ELC No. 322 of 2009, IEBC vs. Maina Kiai & 5 Others [2017] eKLR*** and ***E.T vs. AG & Another [2012] eKLR***. According to the Respondents, the 1<sup>st</sup> Protestor had filed a previous affidavit of protest that raised same issue as the affidavit of protest before court vide an application dated 5<sup>th</sup> November 1998. That the application was dismissed by ***Lenaola J.*** vide a ruling delivered on 4<sup>th</sup> November 2008 and no appeal or review was preferred by the Protestor. The same application had same parties as the parties in the present affidavit of protest hence *Res Judicata*. According to the Respondents, the Protestors are trying to hoodwink the court by filing same protest under a different advocate and using a different title when the ruling of ***Lenaola J.*** heard and determined on the same issues.

18. According to the 1<sup>st</sup> Respondent, the Protestor has not established whether the 1<sup>st</sup> Respondent has failed in the estate administration or mismanagement. According to him, there is no evidence that the 1<sup>st</sup> Respondent is enriching himself. The 1<sup>st</sup> Respondent blames the Protestor for disappearing with the deceased's bag that contained ownership documents of the deceased's properties hence he included only the properties which he had documents in support. It is submitted that the 1<sup>st</sup> Respondent would not include properties he was not aware of hence the reason why the 1<sup>st</sup> Respondent filed a supplementary affidavit of distribution to include properties averred by the Protestor. The 1<sup>st</sup> Respondent urged court to note that it is only the Protestor who had issues with the mode of distribution.

19. In conclusion, the 1<sup>st</sup> Respondent urged the court not to take into consideration the bequeathed properties of the deceased. According to the 1<sup>st</sup> Respondent, the Protestor has not demonstrated that the deceased was unfair, discriminatory or unjust against any of the beneficiaries when distributing his assets. According to the Respondent's, what had been bequeathed should not form part of the assets for distribution as that would tantamount to going against the wishes of the deceased. Reliance is placed on the cases of ***Martha Wanjiku Waweru vs. Mary Wambui Waweru*** and in ***Paul Kiruhi Nyingi & Another vs. Francis Wanjohi Nyingi***. The respondents urged the court to dismiss the affidavit in protest with costs.

#### Determination

20. I have considered the affidavit in protest, the summons for confirmation of grant as well as the *viva voce* evidence and written submissions by respective parties.

21. It is not in dispute that some properties were not listed in the schedule of the deceased assets for distribution. It is not in dispute that the deceased had bequeathed some of his properties to his children. It is disputed that the bequeathed properties should be taken into account during the distribution. It is disputed by the Protestor that the properties were not properly distributed hence unfair distribution tantamount to discrimination. Under the provisions of *Rule 73 of the Probate and Administration Rules*, the court has inherent power to make such orders as are expedient to meet the ends of justice. The same provides as follows:-

***“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

22. I find the issues that fall for determination are:-

***(a) Whether the affidavit in protest is res judicata.***

***(b) Whether some properties in the estate of the deceased were omitted in the schedule of distribution.***

***(c) Whether bequeathed properties should be taken into account during the distribution.***

***(d) What orders may the court make?***

23. On the first issue, the Petitioners contend that the application dated 18<sup>th</sup> December 2019 is *Res Judicata* since the parties and the issues raised were same in an application dated 5<sup>th</sup> November 1998 that had been dismissed by **Lenaola J.** vide his ruling delivered on 4<sup>th</sup> November 2008.

24. Under section 7 of the Civil Procedure Act:-

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

25. In ***Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR***, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

***"(a) The suit or issue was directly and substantially in issue in the former suit.***

***(b) That former suit was between the same parties or parties under whom they or any of them claim.***

***(c) Those parties were litigating under the same title.***

***(d) The issue was heard and finally determined in the former suit.***

***(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”***

26. A cursory perusal of the court records and upon reading the orders of **Lenaola J** of 4<sup>th</sup> November 2008, I note that the application mentioned by the Petitioners/Respondents was a summons for revocation or annulment of grant dated 5<sup>th</sup> November 1998 seeking to revoke and/or annul the letters of administration issued to Naomi Mumbua and Joseph Nyingi Kinyowe for being obtained falsely, fraudulently and through concealment of material facts. However, I note that in a chamber summons dated 27<sup>th</sup> July 2006 filed on behalf of Naomi Mumbua and Joseph Nyingi Kinyowe, the administrators then, sought for the dismissal of the said Protestor's summons for revocation and/or annulment of the grant for want of prosecution for over three months. The evidence on record show that **Lenaola J** allowed the administrators chamber summons since it was unopposed hence the Protestor's summons stood dismissed for want of prosecution. It follows therefore that the summons was not heard and determined on merit. The dismissal was not on merit hence the plea of res judicata cannot therefore be raised in the circumstances. Further, it is noted that the purported application dated 19/12/2019 does not exist since none is on the file. In any case, the matters in contention relate to the year 2017 and not 2019. The present affidavit in protest relates to the protestor's complaint on the distribution of the estate but not an application to revoke a grant. Hence the submission by counsel for the petitioner and respondents regarding issues of res judicata is misplaced and must be rejected.

27. As regards the second issue, the Protestor stated that the 1<sup>st</sup> Respondent's statement revealed new properties like Muka Mukuu Farmers' Co-operative Society (25 Shares) and other several assets now being revealed yet they had not been included in the initial Petition for Grant. According to the 1<sup>st</sup> Respondent, it was not possible to include all the properties since the Protestor had disappeared with the deceased's bag that contained ownership documents of the deceased properties. The Respondent has submitted that the reason why the 1<sup>st</sup> Respondent filed a supplementary affidavit of distribution was to include properties averred by the Protestor. According to the Protestor, all the documents in respect of the family properties are in possession of his three brothers. I note that RW3 stated that their father had only authorized sale of one parcel of land to get money for paying for release of the title deeds. In their witness statement, RW2 and RW3 stated that they wish to further distribute the estate of the deceased. A list of the properties for further distribution has been furnished to that effect.

28. Based on the evidence on record, it is clear that there are properties that have been omitted in the distribution. The Petitioner and the respondents seem to have admitted that there are properties which were omitted and are willing that they be shared equally if available for distribution.

29. On the third issue, it is not in dispute that the deceased in a family meeting bequeathed properties to his children. It is submitted by the 1<sup>st</sup> respondent that the bequeathed properties should not be taken into account as it would be against the wishes of the deceased herein. According to the Protestor, the properties bequeathed should be taken into account to know what each beneficiary should receive in the remaining properties. The Protestor urged the court to rely on RW3's oral testimony, that there are beneficiaries who had received more than 100 acres. Consequently, they should not get equal shares to disadvantage the other beneficiaries who barely got 10 acres. The Protestor did complain about other beneficiaries who got more properties than others in the proposed distribution. It would be fair and just that all the assets be laid on the table and that the same be distributed equitably and reasonably and taking into account what the deceased had bequeathed to the beneficiaries.

30. Section 42 of the Law of Succession act is instructive on this as it provides

**Where:-**

***(a) An intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child, grandchild or house.***

31. Section 42 provides that during the distribution of the estate, previous benefits be taken into consideration when determining the share of each child. In my view the Protestor raised sufficient grounds in her affidavit in support of her protest. Indeed, there is sufficient evidence that the mode of distribution was unfair. RW3 did support the position that the female children had been given less properties. The bequeathed properties then have to be taken into account to ascertain the share given to each child of the deceased. As the petitioner is in agreement that some assets were left out and that the new assets be shared equally, then it is now imperative that a fresh schedule of distribution should be filed by the petitioner incorporating all the assets as well as the proposed scheme of distribution to the beneficiaries.

32. In the result it is my finding that the protestor's protest has merit. The same is allowed. The following orders are hereby issued:

***a. The proposed mode of distribution presented by the petitioner/1<sup>st</sup> respondent is hereby struck out.***

***b. The petitioner/1<sup>st</sup> respondent is directed to meet all beneficiaries and agree on an acceptable mode of distribution and thereafter file a supplementary affidavit annexing the mode of distribution of all assets of the deceased to all beneficiaries in the estate together with a signed consent by all beneficiaries within sixty (60) days from today.***

***c. Upon compliance of (b) above, the petitioner/1<sup>st</sup> respondent to set down the summons for confirmation of grant on priority basis.***

***d. Each party to bear their own costs.***

It is so ordered.

**DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.**

**D. K. KEMEI**

**JUDGE**

**DELIVERED AT MACHAKOS THIS 25TH DAY OF OCTOBER, 2021.**

**M. W. MUIGAI**

**JUDGE**