



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO 50 OF 2011

IN THE MATTER OF THE ESTATE OF BARDSLEY ZEPHANIA MSAGHA(DECEASED)

MARTIN MSAFARI MSAGHA.....APPLICANT

VERSUS

DOROTHY MKAWANA MSAGHA.....RESPONDENT

RULING

1. The deceased herein died testate on 29th November, 2010. A grant of probate of written will was issued to the executrix/respondent herein on 16th June, 2011 and confirmed on 9th March, 2012. According to the affidavit in support of the petition for a grant filed on 17th February, 2011 the deceased was survived by;

- (1) Clemence Mwahe Javan (mother)**
- (2) Dorothy Mkawana Msagha - widow**
- (3) Javan Kithogo Msagha-son**
- (4) Faith Nzighe Msagha-daughter**
- (5) Martin Msafari Msagha-son**
- (6) Linda Samba Msagha-daughter**
- (7) Sharlet Ngoviana Msagha-daughter**
- (8) Zablon Mwawuganga Msagah-son**

2. The following properties were listed as comprising the estate.

- (1) Kilifi/Roka/1357
- (2) Kwale /Chuini/451
- (3) Kwale/Chuini /145
- (4) Kwale/Chuini/390
- (5) Kwale/Chuini/448
- (6) L.R.Sub-division 416 (Orig. No 180/30 Section 1/ MN
- (7) LR Sub-Division No 4079(Org. No 180/15 Section 1/ MN
- (8) Plot No 457 Mikindani

- (9) Plot No. 2161 Shanzu Settlement scheme
- (10) Shares with Mumias sugar company
- (11) Shares with Firestone
- (12) Shares with Safaricom
- (13) Shares with Olympia Capital
- (14) Shares with NIC Bank
- (15) Shares with Kengen
- (16) Shares with Uchumi
- (17) A/C No 010xxxxxxxxxx at Standard chartered bank
- (18) Motor vehicle KAW 442 X.

3. When the grant was confirmed on 9th March, 2012, the court directed that the estate was to be distributed as per the written will. Unfortunately, the will did not make any bequest to any beneficiary hence distribution was hindered.

4. Consequently, vide an application dated 19th September, 2017, Martin Msafari Msagha sought for orders directing the executrix to give a full inventory and accurate statement of accounts in respect of the estate which had remained undistributed for a long time. He (applicant) claimed that he and his siblings Javan Kitogho and Faith Nzighe being step children of the respondent had suffered as they were not benefiting from the estate.

5. Subsequently, vide a Chamber Summons dated 18th December, 2017, Martin sought revocation of the grant on grounds that it was obtained fraudulently through concealment of material information as the petitioner did not disclose that the deceased had died a polygamous man having been married to Dolphine Kulala Msagha his mother and that of his siblings. He also claimed that some properties were left out of the list of estate assets.

6. Through its ruling dated 6th April, 2018, the court dismissed the revocation application and rejected the claim that Dolphine was a wife to the deceased. The court also refused the prayer for inclusion of some of the assets as there was no proof that they belonged to the deceased. The court ordered for submission of accounts within 60 days. It took quite a long time for parties to agree on the actual mode of distribution of the estate.

7. On 6th May, 2019, the court directed for court annexed mediation. Vide a partial settlement agreement dated 18th July, 2019, parties agreed on distribution of some of the un-disputed properties. The same was adopted on 23rd September, 2019 as an order of the court. A certificate of confirmation issued on 12th March, 2012 was set aside and a fresh one issued. The court gave parties an opportunity to settle on the remaining disputed assets. The court further directed all rental income due from plot No MN/1/2840 be collected by the administrator and deposited in court.

8. According to the partial settlement agreement the estate was shared out as follows;

- (1) Plots No. Kwale /Chuini /451 and 448 to be shared equally between Dorothy Mkawana, Clemence Mwahe, Zablon Mwawuganga, Sharlet Ngoviana and Linda Samba
- (2) Plot No. Kwale/Chuini/145 and 390, LR No.4163/11/MN, Plot No Bura Mwatate 1185 and Chawia/Wusi/116 to; Javan Katogho, Faith Nzighe and Martin Msafari Equally.
- (3) L.R 4079/11/MN to; Zablon Mwawuganga Msagha, Sharlet Ngoviana Msagha and Clemence Mwahe Msagha in equal shares
- (4) Chawia/Wusi/116 to; Javan Kitogho Msagha, Faith Nzighe Msagha and Martin Msafari Msagah in trust for Msagha family.
- (4) shares in integrated utilities service to; Javan Kitogho Msagha, Martin Msagha, Zablon Mwawuganga Msagha in equal shares.

9. However, parties were directed to agree and file a proposal on how to share the remaining properties interlia;

(1) Plot No 957 Mikindani

(2) Plot No. Kilifi/Roka/1350

(3) Plot No. 1488/Magongo

(4) Lake Jibe 965

(5) Plot No 2840/II/MN/Shanzu

(6) Kaw 442 X

10. Subsequently, the respondent came up with a proposal as follows;

(1) Plot 957 Mikindani to; Dorothy Mkawana Msagha in equal shares,

(2) Plot No Kilifi//Roka/1357 to; Dorothy, Clement, Zablou, Sharlet and Linda in equal shares

(3) Plot No 1488 Magongo to Javan, Faith and Martin in equal shares

(4) Lake Jibe 965 to Javan, Faith and Martin in equal shares

(5) Plot No 2840/II/MN Shanzu to Dorothy, Clement, Zablou, Sharlet and Linda

(6) Motor vehicle KAW 442 X Dorothy absolutely

11. On his part, the applicant proposed as follows;

(1) Plot No 957 Mikindani to; Javan, Faith and Martin in equal shares.

(2) Plot No Kilifi/Roka/1357 to Dorothy, Clemence, Zablou, Sharlet and Linda to equally share 3.2 acres and Javan, Faith and Martin 3.2 acres.

(3) Plot No 1488/Magongo to Dorothy, Clemence, Zablou, Sharlet and Linda in equal shares.

(4) Lake Jibe 965 -nil

(5) Plot No 2840/1/MN Shanzu to; Javan and Martin in equal shares

(6) Motor vehicle KAW 442 X Nil

12. Upon considering these competing proposals and interests, the court removed lake Jibe 965 from the list of assets as it had been distributed in the estate of the deceased's father Javan Kitogho Mwakio in Succession No 59 /2008. The court went further to direct for valuation of the disputed properties before determining who is to get what.

13. Consequently, parties agreed on two valuers who filed a joint report. The two valuers namely; Njihia Muoko Rashid Co Ltd and Value Consult Limited filed a joint valuation report dated 10th May 2021 and filed on 11th May, 2021.

14. Both parties invited the court to make a ruling and distribute the disputed properties based on the said valuation report.

Determination

15. Parties having disagreed on the mode of distribution, the court directed that the disputed properties be valued by jointly agreed valuer. Consequently, a joint valuation report was filed by Njihia Muoka Rashid Co. Ltd and value consult Limited on 11th May, 2012. The properties valued were;

(1) Mikindani 957 at Kshs 11,800,000.

(2) MN/1/2840 CR.No. 42149 Shanzu valued at Ksh 8,400,0000

16. However, the joint valuation report does not comprise all disputed properties.

17. The court has been left with the task of distributing the contested properties. The deceased was polygamous and parties are unable to agree. Where the testator does not make a bequest in a situation where he was polygamous, in my opinion, distribution shall be as provided under section 40(1) of the law of Succession. The only option left for this court to exercise in determining the mode of distribution of the estate is use of the applicable and relevant provision in this case section 40 of the Law of Succession. There is no dispute that the deceased had two houses. The first house has three units comprising of three children namely; Javan, Faith and Martin. The second house has four children namely; Zablou, Clemence, Sharlet, and Linda. The four children have a mother one Dorothy Mkawana who shall be added as an additional unit.

18. Section 40 (1) of Law of Succession provides that;

“where an intestate has married more than one wife under a system of law permitting polygamy, his personal and household assets and the value 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 surviving him as an additional unit to the number of children”.

19. In view of Section 40 (1) above quoted, the deceased’s property unless where agreed by consent, shall be shared in accordance with that section. In the case of re estate of Ikubu Kinyungu Mwaga (deceased) 2017) e KLR the court held that;

“...the appellant’s contention that the estate of his father ought to be divided into equal shares between the two houses is unfounded”

20. In the case of In re estate of Kimitei Cherop (deceased) (2021) e KLR the court held that;

“It is manifest therefore that, guided by the provision of Section 40 (1) of the law of succession Act, the estate herein ought to be distributed equally amongst children of the deceased and the surviving widow, thus making 10 units... that being the case, it is the 15.5 Hectares that must be shared equally amongst the 10 units aforementioned”

21. Similar position was held in the case of Mary Rono Vs Jane Rono & another (2005) where Omolo JA stated that;

“...I do not understand the learned judge to be laying down any principle of law that the Law of succession Act, Cap 160 of the Laws of Kenya , lays down a requirement that heirs of a deceased person must inherit equal portion of the estate where such deceased dies intestate and that a Judge has no discretion but to apply the principle of equality...if parliament had intended that there must be equality between houses, there would have been no need to provide in the section (Section 40(1) that the number of children in each house be taken into account...”

22. Therefore, the application of Section 40 (1) of the law of Succession means that, a house with more children will cumulatively get a bigger share than a house with fewer children. See in re estate of Kimitei Cherop (Supra).

23. Having held as above, the disputed properties shall be distributed equally between the 8 units. For avoidance of doubt, the affected properties to be shared as above are;

(1) Plot No 957 Mikindani

(2) Plot No 14488/Magongo

(3) Plot No. 2840/1/MN shanzu

(4) Plot No. Kilifi/Roka/1357

24. Since the applicants did not lay claim over motor vehicle KAW 443X, the same shall remain the property of Dorothy Mkawana absolutely.

25. In view of the above, the partial confirmation of grant of probate herein is reviewed and amended and the estate distributed as a greed and under the mode directed in respect of the disputed properties. Accordingly, a certificate of confirmation of a full grant shall issue reflecting distribution of the whole estate.

26. In the event of Properties that are not capable of division, the same can be sold through public auction and proceeds shared as directed above.

DATED SINGED AND DELIVERED VIRTUALLY THIS 22ND DAY OF OCTOBER, 2021

J.N ONYIEGO

JUDGE