



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCC NO 398 2012

IN THE MATTER OF THE ESTATE OF EUTYCUS MUTHUI.....DECEASED

JAMES KIMATHI MUTHUI.....PETITIONER/1ST RESPONDENT

LINCOLN MUTHUI MUTITA.....2ND RESPONDENT

VERSUS

MIRIAM MUTHUI KENDI.....1ST APPLICANT

CATHERINE KINYA MUTHUI.....2ND APPLICANT

RULING

1. The deceased Eutycus Muthui died intestate on 21st October 2011 leaving behind a widow, 4 sons and 2 daughters as well as a variety of real property, a motor vehicle and shares in banks and Sacco Societies. The names of the dependants and beneficiaries as well as list of assets were forwarded by the District Officer of Miriga Mieru Division to the Deputy Registrar on 22nd of June 2012 showing that the family had agreed that James Kimathi Muthui was to petition for letters of administration. Grant of letters of administration was made to the said James Kimathi Muthui on 3rd October 2012 and by summons dated 12th July 2015 he applied for confirmation of the said grant and made a proposal for the distribution of the estate in terms of paragraph 5 of the supporting affidavit. Annexed to the application was a consent to the mode of distribution signed by all the beneficiaries except for Lincoln Muita Muthui who filed an affidavit of protest complaining that he had been left out of the distribution and yet he was the son of the deceased and entitled to benefit from the estate. Lincoln Muthui Muita urged the court to halt the confirmation until the family sits down and agrees on a scheme of distribution that was fair and equitable to all the beneficiaries.

2. In response to the affidavit of protest the Petitioner James Kimathi Muthui averred that it was agreed that the protester should not get anything else because he had taken title deeds of 7 prime properties when the deceased was gravely sick and incoherent and he disappeared with them to Embu. That the Protester had visited the deceased while he was admitted at Nairobi Hospital and had him sign over to him all the conveyance documents to the 7 prime properties which he had hurriedly transferred to himself and promptly borrowed huge loans to preempt any orders of transfer. The properties were listed by James Kimathi in his replying affidavit as follows:

1.LR NoNyaki/Kithoka/1529

2.LR No.Nyaki/Kithoka/1726

3.LR No.Nyaki/Kitoka/1823

4.LR No.Nyaki/Kithoka/1495

5.LR No.Nyaki/Kithoka/460

6.LR.No Nyaki/Giaki-Kiburine-6

7.LR No.Meru Municipality BlockII /28

3. As a result of the alleged fraud committed by the Protester the Petitioner and the widow of the deceased Emily Karambu filed a suit in ELC No.131 of 2011 seeking that the properties fraudulently transferred by the Protester to his name and to the name of the company owned by himself and his wife be reverted back to the deceased persons name for purposes of distribution.

4. On 22nd of May 2018 the Petitioner and the Protester in the presence of Joel Kithinji , Catherine Kinya, Emily Karambu and Miriam Muthui entered into a written consent dated 14th February 2018, whereby the protest to summons for confirmation was withdrawn and LR No.Nyaki/Kithoka/1774 distributed to the Protester and Emily Karambu the widow of the deceased was given LR Nyaki/Kithoka/1449, 1450 and 1576. The rest of the estate was then distributed in terms of paragraph 5 of the affidavit in support of summons for confirmation sworn by James Kimathi Muthui .

5. By an application under certificate of urgency dated 4th July 2018, Miriam Kendi Muthui and Catherine Kinya Muthui sought that letters of administration to the estate of the deceased that had been confirmed on 22nd of May 2018 to James Kimathi, be annulled and /or revoked .Upon taking viva voce evidence this court found that the grounds upon which that application were made were valid for reasons that James Kimathi did not disclose to the court that he and the 2nd Respondent had benefitted *intervivos* and therefore the distribution that was done on 22nd May 2018 was inequitable and unfair. This court agreed with the applicants that they were merely given tokens from the vast estate of the deceased and therefore their complaint was valid and needed to be reconsidered. By its ruling delivered on 15th May 2019 this court revoked the grant and ordered the parties to file acceptable/equitable mode of distribution within 60 days for consideration by the court.

6. Before the protest herein was withdrawn on 22nd of May 2018 and grant confirmed, the Respondents had compromised Meru ELC NO 131 of 2011 and following that compromise, parcels of land LR No.Nyaki/Kithoka/1726, 1823 and 1495 were transferred to the 1st Respondent/Petitioner despite the fact that he had sued the 2nd Respondent as having fraudulently obtained transfer of the said properties from the deceased person. The court noted that the Applicants herein were never informed of the agreement to withdraw the suit against the 2nd Respondent and to transfer the said parcels to the 1st Respondent who sued as a legal representative to the estate of the deceased.

7. The proposed mode of distribution by the 1st Respondent was filed on 29th of November 2019 and it provides as follows :

a. Linco Stores Ltd owned:

i. LR No.Nyaki/Giaki/06

ii. LR. NoNyaki/Kithoka 460

iii. LR.NoNyaki/Kithoka 1726

iv. LR.NoNyaki/Kithoka 1495

v. LR.NoNyaki/Kithoka 1529

vi. Meru Municipality block 2/28

b. Lincoln Stores Ltd owned;

i. LR No.Nyaki/Kithoka/ 1823

c. 1st Respondent James Kimathi

i. Plot No.C91 Chuka

ii. LR No.Ntima/ Igoki/4668

8. The 1st Respondent submitted that these properties were not part of the estate and should not be liable for distribution.

9. The 1st Respondent submitted that LR NO.Nyaki/Kithoka /4023 was subject of ELC No 166 of 2017 and should await the outcome of the suit before the same should be distributed. At paragraph 18 of his submissions, the 1st Respondent also claimed that parcels of land No.Nyaki/Kithoka/1823 and 1726 were subject of pending cases in court and he did not know the outcome but did not give particulars of the said suits.

10. The Petitioner 1st Respondent also proposed that LR No.Nyaki/Kithoka No. 1448, 1732, 1842, 2279, plot No.2 at Gakoromone should go to him because he used this personal money to pay loans left by the deceased to redeem Nyaki/Kithoka/1448, 1449, 1450 and 1573 and that he was in possession and had develop LR 1448 extensively by planting coffee and that the deceased left him on the said land; he also claimed that he had extensively developed Nyaki/Kithoka/1732 which has fish ponds, irrigation, fruit trees, a forest and his workers houses. He also said that he had planted a forest on LR No.Nyaki/Kithoka/ 1842 and planted coffee on Nyaki/Kithoka 2279 and has been doing business since 1986 in commercial plot no 2 at Gakoromone. The 1st Respondent urged the court to consider where each beneficiary has built and developed in distributing the estate of the deceased.

11. Although the 1st Respondent claimed that he used his personal money to pay loans to redeem some of the estate properties and secure and preserve the estate through the various cases that had been filed for or against the estate and to locate some of the properties forming part of the estate, he did not avail particulars of the resources used.

12. The 2nd Respondent also made submissions as to distribution of the estate of the deceased and reiterated the 1st Respondents submissions that the properties listed by the 1st Respondent were transferred to him during the deceased lifetime as gift *intervivos*. He said that the said properties were owned by a company known as Muthui Trade Development Ltd for which the Deceased was one of the Directors and which transferred the properties to Linco Stores Ltd on 11th May and 13th May 2011 respectively. He filed certificates of search and green cards for the said properties and submitted that the court has no jurisdiction to distribute the properties that were not in the name of the deceased save that it can take into account the assets given to the 2nd Respondent as gift *intervivos* as per Section 28 D of Law of Succession Act.

13. The 2nd Respondent was in agreement with the proposal by the 1st Respondent and the Applicants in distributing to him LR No.Nyaki/Kithoka/1774 measuring 0.5 acres. He said he was contented in getting this sole property considering he benefitted *intervivos*. He said he does not oppose the mode of distribution proposed by the 1st Respondent and proposed the grant be confirmed in those terms.

14. The Applicants and the 3rd Respondents made proposals dated 12th July 2019 which they said will result in a reasonable and fair distribution of the estate of the deceased as follows;

a. That LR No.Nyaki/Giaki-Kiburine /6 measuring 20 acres be distributed equally to the wife and to the children of the deceased. From the copy of green card supplied to the court by the 2nd Respondent, the parcel of land in question was transferred to Lincoln Muthui Muiita as a gift on 16th December 2010, long before the deceased died on 21st October 2011.

b. LR No.Nyaki/Kithoka /460 measuring 18 acres is proposed to be distributed to James Kimathi 2 acres, Lincoln Muthui 10 acres, Miriam Kendi 5 acres and Francis Gikundi Muthui 1 acre. This particular parcel of land is registered in the name of Linco Stores Ltd as at 5th of April 2011.It is therefore not available for distribution.

c. LR No. Nyaki/Kithoka/1448 measuring 1acre which is proposed to be distributed to Miriam Kendi Muthui. The Petitioner claimed that he and his mother paid over Ksh.600,000 to release titles No Nyaki/Kithoka 1448, 1449 and 1450 and the Applicants had not made a refund of the same and he said he was in possession of parcel No 1448 which he had extensively developed by planting coffee and that the deceased left him on that land. The 1st Respondent did not produce evidence that he paid the bank for the discharge of titles to the above properties and the initial proposal in the summons for confirmation and consent to distribution did not give the criteria for distribution as payment of a loan.

d. LR No.Nyaki/Kithoka /1449 measuring 1 acre was proposed to go to Miriam Kendi Muthui.The 1st Respondent proposed that 1449 and 1450 go to the widow of the deceased Emily Karambu Muthui.

e. LR No.Nyaki /Kithoka/1450 measuring 1 acre is proposed to go to Miriam Kendi Muthui and not Emily Karambu as proposed by the 1st Respondent.

f. LR No.Nyaki/Kithoka/1732 measuring 3.1 acres is proposed to go to Miriam Kendi Muthui whereas the 1st Respondent claims that he has developed the same and that it has fish ponds, irrigation, fruit trees, a forest and the petitioners workers houses and that the deceased left him on this parcel of land and that it should go to him.

g. LR No. Nyaki/Kithoka/1576 there is no dispute that it should go to Emily Karambu Muthui

h. LR No.Nyaki/Kithoka/1726 measuring 5 acres has been proposed to go to James Kimathi Muthui and James Kimathi Muthui has claimed that this parcel of land together with No.1823 have pending cases in court, but he has not given the particulars of the cases and when he and the 2nd Respondent entered into a consent in Meru ELC No 131 of 2011 LR Nos. Nyaki/Kithoka/ 1726, 1823 and 1495 were transferred to him by the 2nd Respondent. He has failed to explain how that was possible if there was a dispute involving the 2 parcels of land. In the event that it is established that that parcel of land is in dispute in court then its distribution to James Kimathi Muthui will be kept in abeyance pending the determination of the alleged suit, but for now it goes to James Kimathi Muthui in whole.

i. LR No. Nyaki/Kithoka/1823 measuring 1 acre has also been proposed by the applicants and the 3rd Respondent to go to James Kimathi and similar orders to LR 1726 will apply.

j. LR No. Nyaki/Kithoka/1573 measuring 2 acres was proposed by the 1st Respondent to be shared equally by the Applicants whereas the Applicants and the 3rd respondent have proposed that it goes wholly to the 1st Respondent James Kimathi Muthui.

k. There is one acre of land at Nyaki/Kithoka referred to as Karamana's Shamba which does not have reference number which has been proposed to go to James Muthui.The existence of this particular land has to be established by way of a green card or certificate of search before the court can make orders of distribution.

l. LR No. Nyaki/Kithoka/1495 measuring 2 acres which has been proposed to be distributed to Joel Kithinji Muthui, however this particular land was registered on 11th May 2011 in the name of Linco Stores Ltd as a gift but was subsequently transferred to James Kimathi by the 2nd Respondent in lieu of the 2nd Respondent getting LR Nyaki/Kithoka/1774 measuring 0.5 acres. The transfer to James Kimathi should be cancelled and the same made to Joel Kithinji.

m. LR No. Nyaki/Kithoka/1842 measuring 1 acre has been proposed to go to Joel Kithinji Muthui and the 1st Respondent claims that he has planted a forest and it should go to him.

n. LR No.Nyaki/Kithoka/1774 which has been proposed by the Applicants and the 1st and 3rd Respondents to be devolved to Lincoln Muthui Muita measuring 0.5 acres .There being no dispute the said parcel of land is distributed to Lincoln Muthui Muita

o. LR No.Nyaki/Kithoka/ 1632 and 1633 is proposed to be owned jointly by Emily Karambu and Francis Gikundi Muthui and the 1st Respondent does not have a dispute as to the proposal by the applicants and the same is allowed distribution

p. LR No. Nyaki/Kithoka/1529 measuring 5 acres is proposed to go to Catherine Kinya Muthui, however the same is shown to have been registered on 13th May 2011 to Linco Stores Ltd as a gift.

q. LR No.Nyaki/Kithoka/2279 measuring 1 acre is proposed to go to Catherine Kinya Muthui but the petitioner alleged that he was left on this parcel which he has developed by planting coffee which he harvests.

r. LR No.Kianjai/Mituntu/273 measuring 3 acres has been distributed to Emily Karambu Muthui, this parcel of land has not been referred to by the 1st Administrator and the proposals by the Applicants and the 3rd Respondents are allowed.

s. LR No. Ntima/Igoki/4668 has been proposed to go to James Kimathi Muthui in whole, the title deed for this particular parcel of land shows that it was registered in the names of James Kimathi Muthui on 29th December 2005 having been a gift from the deceased person during his life time. This therefore confirms that James Kimathi Muthui benefitted intervivos during the lifetime of the deceased.

t. Gakoromone Commercial plot no 2, which has. been proposed to be shared equally between Emily Karambu Muthui and Francis Gikundi Muthui. The 1st Respondent on the other hand claims that he has been doing business on this plot since 1986 and that the plot should go to him. In consideration that the Applicants and the 3rd Respondent have not shown any interest in the Gakoromone plot and are merely proposing that Emily Karambu and Francis Gikundi Muthui are given the plots and in consideration that it has not been disputed that James Kimathi has been doing business on this plot since 1986 this court finds that it would be prudent to devolve the same to James Kimathi.Emily Karambu and Francis Gikundi have also not shown interest in the Gakoromone plot

u. Plot no F30 Isiolo has been proposed to be devolved to James Kimathi and there is no opposition to the same and therefore it will go to James Kimathi.

v. Commercial plot no C91 Chuka town is proposed to go to James Kimathi Muthui, this plot is shown to have been allotted to James Kimathi by a letter dated 31st January 1994, it is therefore not an asset forming part of the deceased estate and there is nothing to show that it belonged to the deceased.

w. LR No.Ntima/Igoki/5454 commercial plot at Makutano in Meru is not disputed that it should go to Joel Kithinji Muthui.

x. Madaraka Estate Commercial Plot No 37 at Makutano in Meru agreed to go to Joel Kithinji Muthui.

y. Timau Residential Plot Block 36/36 has been proposed to go to Joel Kithinji Muthui whereas 1st Respondent proposes it goes to Miriam Kendi.

z. Municipality Block 2/28 Commercial Plot at Meru Town has been proposed to go to Lincoln Muthui Muita, this property according to green card certified on 14th September 2011 this property was gifted to Lincoln Muthui Muita on 22nd March 2011.

aa. Ntima/Igoki/949 Commercial Plot at Meru town has been proposed to go to Miriam Kendi Muthui and the 1st Respondent has no dispute as to that proposal.

bb. Ntima/Igoki/1166 was proposed by the applicants and the 3rd Respondents to go to Catherine Kinya Muthui and the Respondent does not have a dispute as to that proposal

cc. Motor Vehicle No.KAA 997M was unanimously devolved to Joel Kithinji Muthui

dd. The Applicants and the 3rd Respondent are in agreement that shares at:

i. Nation Media group Ltd Acc No.0832950

ii. Centum Investment Co Ltd Acc No.8172

iii. Standard Chartered Bank Kenya Ltd Acc No.15651

iv. Ntimanyakiru Sacco Acc No.5157

v. Ntima Society Acc No.484

vi. Kengen Co Ltd. Acc No 83006

vii. Kenya Airways Ltd

Acc No.82653

viii. Mumias Sugar Co Ltd

CDSC B/4769392/LI-0

Should be allocated to James Kimathi Muthui.

15. From the proposed modes of distribution made by the Applicants and the Respondents the following properties and their distribution are not disputed;

a. Plot No.2 Gakoromone Market had been proposed to go to Emily Karambu and Francis Gikundi by the Applicants but the said Emily Karambu and Francis Gikundi have not sworn an affidavit to show that they are interested in the property. On the other hand James Kimathi Muthui submitted that he has been in occupation and doing business on the said premises since 1986 and this fact has not been controverted either by the Applicants and the 3rd respondent nor by Emily Karambu and Francis Gikundi. This court finds that it will not be just to unsettle James Kimathi from the said premises and therefore it is devolved to him in whole.

b. LR No.Nyaki/Kithoka/1774 goes to the 2nd Respondent Lincoln Muthui Muita

c. LR No.Nyaki/Kithoka/1576 goes to Emily Karambu Muthui

d. LR No.Nyaki/Kithoka/1726 goes to James Kimathi Muthui the 1st Respondent. He claimed that this particular property is subject of a court case together with LR Nyaki/Kithoka 1823 but he did not give the particulars of the case. He did not explain how the properties could have been transferred to him in ELC 131 of 2011 if it was subject to a court dispute.

e. LR No. Nyaki/Kithoka/1823 goes to James Kimathi Muthui.

f. LR No.Nyaki/Kithoka/1495 goes to Joel Kithinji Muthui. This is one of the properties that the 2nd Respondent transferred to the 1st Respondent while compromising ELC No 131 of 2011.

g. LR.No.Nyaki/Kithoka/1632 goes to Emily Karambu and Francis Gikundi in equal shares

h. LR No. Nyaki/Kithoka/1633 goes to Emily Karambu and Francis Gikundi in equal shares

i. LR No. Kianjai/Mituntu/273 goes to Emily Karambu in whole

j. Plot No. F30 Isiolo goes to James Kimathi in whole

k. LR No. Ntima/Igoki/5454 goes to Joel Kithinji Muthui in whole

l. Madaraka Estate Commercial Plot No.37 goes to Joel Kithinji Muthui in whole

m. Timau residential plot goes to Miriam Kendi in whole

n. LR.No.Ntima/Igoki/949 goes to Miriam Kendi Muthui in whole .

o. LR No. Ntima/Igoki/1166 goes to Catherine Kinya Muthui in whole

p. Motor Vehicle Reg No. KAA 997M to Joel Kithinji Muthui

q. Although the Applicants and the 3rd Respondent have proposed that all the shares be allocated to James Kimathi Muthui, the courts order will be that the shares be dealt with according to the records kept by the respective companies if the deceased gave the name of nominees. In the absence of nominees then the shares should be allocated to James Kimathi Muthui.

16. The Applicants and the Respondents did not agree on how to distribute the following properties:

a. LR No. Nyaki/Kithoka/1448

b. LR No Nyaki/Kithoka/1449

c. LR No.Nyaki/Kithoka/1450

d. LR No.Nyaki/Kithoka/1732

e. LR No. Nyaki/Kithoka/1842

f. LR No. Nyaki/Kithoka/2279

17. According to the 1st Respondent, he and Emily Karambu paid Ksh. 600,000 to redeem LR.Nos.Nyaki/Kithoka/ 1448,1449 and 1450 without the input of the Applicants and the 3rd Respondent .He said he had developed LR Nyaki/Kithoka/1448 extensively by planting coffee. He did not produce evidence of such money allegedly paid to redeem the 3 properties. Similarly, he claimed that the deceased left him on this parcel of land as well as on parcel of land LR No.Nyaki/Kithoka/1732 upon which he had fruit trees, a forest and his workers houses. It is instructive to note that the deceased died intestate and did not leave a will as to the distribution of his estate and the claim that the deceased willed any of his properties is not supported.

18. The 1st Respondent has also claimed that the deceased left him on parcels of land LR No. Nyaki/Kithoka/1842 and 2279 upon which he has planted a forest and coffee respectively and therefore he is entitled to the 2 parcels. The Applicants have proposed that Joel Kithinji and Catherine Kinya benefits from these parcels of land exclusively.

19. In consideration of the proposed modes of distribution by the Respondents and the Applicants, in consideration of the benefits of the 1st and 2nd Respondents during the lifetime of the deceased pursuant to Section 42 of the Law of Succession Act, in consideration of Article 27 of the Constitution of Kenya 2010 as well as the provisions of Section 35 of the Law of Succession Act, I do find that the disputed assets should be distributed in the following manner;

- a. LR.No.Nyaki/Kithoka/1448 to go to the 1st respondent James Kimathi
- b. LR No. Nyaki/Kithoka/1449 to go to Miriam Kendi Muthui
- c . LR No.Nyaki/Kithoka/1450 to go to Catherine Kinya
- d. LR No.Nyaki/Kithoka/1732 measuring 3.1 acres to go to
 - i. James Kimathi 1.10 acre
 - ii. Myriam Kendi 1.0 acre
 - iii. Catherine Kinya 1.0 acre
- e. LR No.Nyaki/Kithoka/1842 to go to Joel Kithinji in whole
- f. LR No. Nyaki/Kithoka/2279 to Catherine Kinya Muthui

20. In the circumstances a certificate of confirmation shall be issued in accordance to the distribution made above in regard to the disputed and undisputed properties. The parties herein shall bear their own cost of the application in consideration that they are family members.

HON.ANNE ADWERA ONGINJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 27TH DAY OF APRIL 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.ANNE ADWERA ONGINJO

JUDGE