

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION 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 proceedings herein relate to the estate of Bardsley Zephania Msagha, (“the deceased”) who died testate on 29.11.10 at the Nairobi Hospital. Grant of Probate (“the Grant”) of the deceased’s written will was on 16.6.11, issued to the Respondent, the duly appointed executrix thereof. The Grant was confirmed on 9.3.12.

2. In her affidavit in support of her petition for the Grant, the Respondent listed the following, as the persons who survived the deceased:

Clemence Mwahe Javan	mother
Dorothy Mkawana Msagha	widow, (the Respondent)
Javan Kitogho Msagha	son
Faith Nzighe Msagha	daughter
Martin Msafari Msagha	son (the Applicant)
Linda Samba Msagha	daughter
Sharlet Ngoviana Msagha	daughter
Clemence Mwahe Msagha	daughter
Zablon Mwawuganga Msagha	son

3. The Respondent further listed the following properties as forming his estate:

- i) Plot No. Kilifi/Roka/1357
- ii) Plot No. Kwale Chuini/451
- iii) Plot No. Kwale Chuini/145
- iv) Plot No. Kwale Chuini/390
- v) Plot No. Kwale Chuini/448
- vi) L. R. No. 4163/II/MN
- vii) L. R. No. 4079/II/MN
- viii) Plot No. 2161 Shanzu Settlement Scheme
- ix) Plot No. 957 Mikindani
- x) Shares with Mumias Sugar Company

- xi) Shares with Firestone
- xii) Shares with Safaricom
- xiii) Shares with Uchumi
- xiv) Shares with Olympia Capital
- xv) Shares with NIC Bank
- xvi) Shares with Kengen
- xvii) A/c No. 0101147076701 at Standard Chartered Bank
- xviii) Motor vehicle KAW 442X

4. In his will, other than appointing the Respondent as executrix, the Deceased did not make any bequest to any beneficiary. As a result, the question of distribution of the estate has remained contentious. The Applicant did in previous applications accuse the Respondent of failing to distribute the estate thereby leaving him, and his siblings Javan Kitogho and Faith Nzige, all step children of the Respondent, destitute. The Court directed the Respondent to file accounts of the estate to facilitate distribution. Accounts were filed but the beneficiaries could still not agree. Thereafter, the Court on 6.5.19 directed that the parties go for court annexed mediation and a partial agreement was reached. The agreed distribution contained in a settlement agreement dated 18.7.19 is as follows:

Asset	Beneficiary	Shares
Plot No. Kwale Chuini/451 Plot No. Kwale Chuini/448	Dorothy Mkawana Msagha Clemence Mwahe Msagha Zablon Mwawuganga Msagha Sharlet Ngoviana Msagha Linda Samba Msagha	In equal shares
Plot No. Kwale Chuini/145 Plot No. Kwale Chuini/390 L. R. No. 4163/II/MN Plot No. Bura Mwatate 1185 Chawia/Wusi/116	Javan Kitogho Msagha Faith Nzighe Msagha Martin Msafari Msagha	In equal shares
L. R. No. 4079/II/MN	Zablon Mwawuganga Msagha Sharlet Ngoviana Msagha Clemence Mwahe Msagha	In equal shares
Chawia/Wusi/116	Javan Kitogho Msagha Faith Nzighe Msagha Martin Msafari Msagha	In trust for the Msagha family
Shares in Integrated Utilities Service	Javan Kitogho Msagha Martin Msafari Msagha Zablon Mwawuganga Msagha	In equal shares

5. On 23.9.19, the Court set aside the certificate of confirmation of grant dated 12.3.12 and ordered that a fresh certificate of confirmation of

grant be issued in terms of the settlement agreement.

6. Parties were thereafter directed to file proposals for distribution of the remaining properties, the distribution of which they were unable to agree upon. The contested properties are:

- i) Plot No. 957 Mikindani
- ii) Plot No. Kilifi/Roka/1357
- iii) Plot No. 1488/Magongo
- iv) Lake Jipe 965
- v) Plot No. 2840/I/MN, Shanzu
- vi) KAW 442X

7. From the list of contested and uncontested properties, it is apparent that there are properties that were not included in the application for the grant.

8. The Respondent's proposal for distribution of the contested assets is as follows:

Asset	Beneficiary	Shares
Plot No. 957 Mikindani	DorothyMkawana Msagha	In equal shares
Plot No. Kilifi/Roka/1357	Dorothy Mkawana Msagha Clemence Mwahe Msagha Zablon Mwawuganga Msagha Sharlet Ngoviana Msagha Linda Samba Msagha	In equal shares
Plot No. 1488/Magongo	Javan Kitogho Msagha Faith Nzighe Msagha Martin Msafari Msagha	In equal shares
Lake Jipe 965	Javan Kitogho Msagha Faith Nzighe Msagha Martin Msafari Msagha	In equal shares
Plot No. 2840/I/MN, Shanzu	Clemence Mwahe Msagha Zablon Mwawuganga Msagha Sharlet Ngoviana Msagha Linda Samba Msagha	In equal shares
Motor vehicle KAW 442X	Dorothy Mkawana Msagha	Absolutely

9. The Respondent based her proposal on the consideration that in the mediation agreement, the Applicant and his 2 siblings got a maisonette on Plot No. Chawia/Wusi/2116 and a total of 19.4 acres of land. Each of them will therefore get approximately 6.5 acres each. On the other hand, she and her children got a total of 8.65 acres, translating to 1.77 acres each. According to the Respondent, therefore, the above distribution will enable each beneficiary get the benefit of a house and a share in land and compensate those who got less in the mediation agreement. The Respondent further stated that she and the deceased purchased Plot No. 957 Mikindani and she developed the same.

10. The Applicant proposes the following distribution of the contested assets:

Asset	Beneficiary	Shares
Plot No. 957 Mikindani	Javan Kitogho Msagha Faith Nzighe Msagha Martin Msafari Msagha	In equal shares
Plot No. Kilifi/Roka/1357	Dorothy Mkawana Msagha Clemence Mwahe Msagha Zablon Mwawuganga Msagha Sharlet Ngoviana Msagha Linda Samba Msagha Javan Kitogho Msagha Faith Nzighe Msagha Martin Msafari Msagha	3.2 cares 3.2 cares
Plot No. 1488/Magongo	Dorothy Mkawana Msagha Clemence Mwahe Msagha Zablon Mwawuganga Msagha Sharlet Ngoviana Msagha Linda Samba Msagha	In equal shares
Lake Jipe 965		
Plot No. 2840/I/MN, Shanzu	Javan Kitogho Msagha Martin Msafari Msagha	In equal shares
Motor vehicle KAW 442X		

11. Opposing the distribution proposed by the Respondent, the Applicant claimed that the properties to be given to him and his siblings are of much less value than those proposed for the Respondent and her children. He denied that the land he and his 2 siblings got amounts to 19.4 acres, which figure the Respondent arrived at arbitrarily. He accused her of receiving dividends from Integrated Utilities Service without accounting for the same. The Respondent has also been collecting rent from Plot No. 957 Mikindani to the exclusion of the Applicant and his siblings. He further stated that the Respondent and her children live on Plot No. 3043/II/MN and further receives rent from 2 Swahili houses on Plot No. 98/I/MN and maisonette constructed by the deceased on Plot No. 787/II/XVII. As regards Lake Jipe 965, the same was distributed in Succession Cause No. 59 of 2004 relating to the estate of the deceased's father Javan Kitogho Mwakio and does not form part of the estate herein. Motor vehicle KAW 442X was traded in for Motor vehicle KBX 880D valued at Kshs. 4,400,000/=, which is used by the Respondent. The Applicant proposed that this value as well as past benefit to any beneficiary be taken into account as part of the share of the Respondent and her children. The Court notes that the trade-in value of KAW 442X was given at Kshs. 520,000/=. In a bid to justify his proposal relating to Plot 2840/I/MN, the Applicant stated that when the Court distributed the same to the estate of the deceased in Succession Cause No. 59 of 2004, he and his family moved into the property. He then completed the construction of 2 bedsitters which he is currently occupying.

12. The Court notes that the exhibited consent dated 20.3.18, in Succession Cause No. 59 of 2004 relating to the estate of the deceased's

father, Javan Kitogho Mwakio, Plot No. Lake Jipe 965 was distributed in that cause. As such, the same does not form part of the estate herein. The Court further notes that the Applicant has included Plot No. 3043/II/MN, 2 Swahili houses on Plot No. 98/I/MN and maisonette constructed by the deceased on Plot No. 787/II/XVII. None of these properties appears to be in the list of assets of the estate of the deceased. Without any information regarding the same, the Court is unable to make any finding on the same.

13. This Court has considered the rival submissions of the parties. In order to arrive at an informed decision as to the fair distribution of the disputed assets, it is necessary that a valuation of the assets be carried out. Once the values of the assets are ascertained, this Court will be in a position to make a determination on the distribution. For this reason, I make the following orders:

i) The following assets shall be valued within 90 days from the date hereof.

a) Plot No. 957 Mikindani

b) Plot No. Kilifi/Roka/1357

c) Plot No. 1488/Magongo

d) Plot No. Lake Jipe 965

e) Plot No. 2840/I/MN, Shanzu

ii) The cost of valuation shall be catered for by the rent from Plot No. 957 Mikindani.

iii) Mention on 21.9.2020 for directions.

DATED, SIGNED and DELIVERED in MOMBASA this 19th day of June, 2020

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicant**

.....**for the Respondent**

.....**Court Assistant**