



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 874 OF 2011

IN THE MATTER OF THE ESTATE OF NDOLO MUMO-(DECEASED)

STEPHANO NDOLO MUMO.....1ST APPLICANT

JULIUS TATHA NDOLO.....2ND APPLICANT

VERSUS

PHILEMON NDOLO..... OBJECTOR

RULING

1. The deceased, **Ndolo Mumo**, passed away on 10th April, 1998 and on 22nd October, 2018, the parties by consent agreed that letters of administration intestate be issued to **Philemon Kilihi Ndolo, Julius Taatha Ndolo** and **Stephano Ndolo Mumo**.
2. By summons dated 2nd December, 2019, supported by an affidavit sworn by **Stephano Ndolo Mumo** and **Julius Tatha Ndolo**, a proposal for confirmation of the grant was made.
3. That proposal was however objected to by the Objector herein, **Philemon Kilihi Ndolo**. According to the Objector, the deponents of the affidavit in support of the summons for confirmation of grant (hereinafter referred to as the applicants) concealed from the Court the fact that they had already allocated themselves twenty one (21) acre portion of the deceased's estate and sold it before the confirmation of the grant. The said action was done without consultation of all the beneficiaries. It was contended that the proposed distribution of the deceased's estate was discriminatory since the applicants had allocated to each of the 6 brothers 8 ha each while allocating to the 5 sisters 12 ha. According to the Objector, the medium of measurement itself was misleading since the total acreage of the deceased's land was 48 acres and not 60 acres or 60 hectares as alleged by the Applicants. He added that the figure of 60 however comes from the additional areas the applicants allocated to different beneficiaries in their supporting affidavit.
4. Contrary to the supporting affidavit, the Objector stated that not all the beneficiaries live on the subject land since all their five sisters are married and stay with their families in other parts of the country. Similarly, the objector does not live thereon. It was further disclosed that the mother, **Florence Kavuu Ndolo**, who passed away in September, 2015 is for unknown reasons listed by the applicants as a beneficiary to the estate of the deceased.
5. In cross-examination the Objector conceded that all his siblings are entitled to inherit the deceased's land in equal measure. However, they never sat down to subdivide the land. He averred that his brother **Onesmus** resides on the land though he himself has not done anything thereon and denied having leased the land. He however conceded that the said **Onesmus** has the freedom to settle anywhere on the land pending its subdivision. According to him, another brother, **James Nyelele Ndolo** has a school thereon but stated that he has not visited the land and does not live there. He however admitted that the said **James** as a son of the deceased can build anywhere and left the matter to the Court to decide how to apportion the land though he had no objection to the land being divided equally but insisted that anyone who has acquired a portion thereof, that acquisition ought to be taken into account.
6. The Objector called the said **Onesmus Nzioka Ndolo** as his second witness. In his statement which he relied on as his examination in chief, OW2 supported the Objector's proposal regarding the sharing of the deceased's estate. According to him, the applicants ganged up with their sister in law, **Rehema Mbeke Kivwalu**, and secretly sold a twenty one (21) acre portion of their late father's land, an act that led to a lot of disunity in the family as the Purchasers were not part of their father's family but strangers. The applicants have however been fighting to retain the strangers in the said land against the wish of their siblings and before the land is shared to the beneficiaries as ought to be.
7. He averred that the applicants have never invited them to state their stand on their being given the rights to become administrators of the

estate. He averred that their consent as regards the distribution of the estate by the applicants was never sought and contended that this was intended to legalize the wrong they did in selling part of their father's land. He similarly contended that the proposed distribution by the applicants has not been done fairly as the males have 6 acres whereas the ladies are allocated 12 acres being five (5) of them.

8. In cross-examination he admitted that he stays on the deceased's land and he preferred to build on the higher side since he loves nature where he has fenced about half an acre. However, the land has not yet been distributed as the same could not have been done in the absence of heir sisters. He however admitted that there was a school on the land but denied that it was fenced. He denied that the fenced part is evidence that the land belongs to **James Nyelele Ndolo**. He insisted that the applicants sold part of the deceased's land without authority from the court. According to him the deceased's children who are entitled to inherit the estate are 5 daughters and 6 sons and the land is 48 acres which ought to be divided equally among the said beneficiaries with each person getting 4.36 acres.

9. The third witness was **July Mumo Mutisya Nthiw'a**, a daughter of the deceased. In her statement, she stated that she was in support of the Objector, **Philemon Kili Ndolo's** position. According to her, the applicants herein secretly sold part of their late father's land and since the year 2011, they have been working to see that their father's land goes out to strangers and not to the very heirs that survived him. According to her, a document from the applicants' advocates shows that five (5) of the sisters are allocated less land than their brothers because the applicants hold the view that daughters ought not to be allocated land from their fathers.

10. In cross examination she similarly insisted that the deceased's land ought to be distributed to everybody in equal portion.

11. At the close of the Objector's case, the applicants opted not to call any evidence.

12. In his submissions the Objector relied on Consequently, section 38 of the **Law of Succession Act** (Cap 160).

13. It was submitted that since all the children of the deceased are grown-ups, none affected by sections 41 and 42. It was further submitted that since land is a capital asset the dependants cannot distribute it before a confirmed grant of administration is issued based on section 55 of the said Act.

14. According to the Objector therefore the allocation of the land by **Stephano Ndolo Mumo, Julius Tatha Ndolo and Rehema Kivwallu** (sister in law) to themselves and consequent selling was illegal.

15. The Objector disclosed that since the deceased died intestate, his eleven (11) children, six (6) sons and five (5) daughters should share his estate equally as he had no favourites neither did he gift any of them with any part of his estate. Accordingly, land parcel Makueni/Mubau/534 ought to be divided equally.

16. On behalf of the Applicants, it was submitted that from the evidence adduced in court, two of the beneficiaries are utilizing the land despite the fact that the protestors claim that the land had never been sub divided. There is a school belonging to **James Nyelele Ndolo** which occupies an unspecified parcel of land and a permanent dwelling place to **Onesmus Nzyoka Ndolo** who claims to be occupying half an acre. The 3rd witness wanted the land to be sub divided and her to inherit her share. It was appreciated that indeed it seems that some beneficiaries are enjoying the land at the detriment of the others. The Court was therefore urged to confirm the grant and level the playing field for all the beneficiaries.

17. It was submitted that the only issue that arose during trial was that the co-administrators had sold part of the deceased land. However, this issue was resolved in the court's ruling by **Muriithi, J** dated 20th march 2018 where the respondents were evicted from the deceased land and it was agreed by consent that the estate of the deceased be preserved. Accordingly, the only issue the court ought to be interested in is the mode of distribution since the beneficiaries seems not to agree on the mode and finalize the matter.

Determination

18. I have considered the issues raised hereinabove. From the evidence adduced before me, the only issue that falls for determination is the distribution of the estate of the deceased.

19. There is no dispute as to who the beneficiaries of the estate of the deceased are. It is not in dispute that the deceased had eleven (11) children: six (6) sons and five (5) daughters and that his only known asset was land parcel Makueni/Mubau/534 measuring 48 acres.

20. Section 40 of the **Law of Succession Act** provides that:-

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the next 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.”

21. This provision was extensively dealt with by the Court of Appeal in **Scolastica Ndululu Suva vs. Agnes Nthenya Suva [2019] eKLR** where the Court expressed itself at paras 15-21 as hereunder:

“In Mary Rono vs Jane Rono & another (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis. In the same judgment, Omollo JA stated the position more clearly as follows:

‘My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.’

In Douglas Njuguna Muigai & vs John Bosco Maina Kariuki & another (supra) this Court noted the absurdity of a blind application of section 40(1) of the Law of Succession Act as follows:

‘Back to section 40(1) of the Law of Succession Act, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased’s estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and, in our view, that failure to recognize her contribution is tantamount to discrimination.’

It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate. In regard to the question whether the respondent contributed towards the purchase of the two (2) properties, the trial judge had this to say:

‘The protester testified that she was married to the deceased in the year 1983 and found the applicant already married to the deceased. She further stated that she found the two properties in issue herein had already been acquired, though she was not sure of the exact year of the acquisition. It was her testimony that at the time of her marriage to the deceased she found him living together with the applicant on the same land. It is thus safe to hold that the protester never contributed to the purchase of the two properties herein. It also emerged that the applicant herein was gainfully employed as a teacher in the year 1973 and retired in the year 2005. It was admitted by the protester and her witness Johnson Musyimi Suva that the applicant was working as a teacher when the deceased bought the parcels, she signed one of the agreements as the purchaser. I accept her evidence that she contributed financially towards the acquisition of the two parcels; Kathekani/76 and Kathekani/730. In the circumstances, it would be unfair to share the proceeds half - half between the two (2) widows of the deceased, or to find that each beneficiary should get equal proceeds of the share.’

On our own evaluation of the evidence, we are entirely in agreement with the conclusion that the trial judge arrived at that the respondent contributed financially to the acquisition of the two properties. We are alive to the fact that what was before the learned judge was a succession cause and not a matrimonial dispute. However, the succession cause was anchored on the matrimonial circumstances of the deceased. The fact that the deceased acquired the two (2) properties during the subsistence of his marriage to the respondent, before the appellant came into the scene, and the fact that the respondent was employed, clearly, supported her allegation that she contributed to the acquisition of the two (2) properties. It would not therefore be fair nor just to treat the appellant and the respondent equally in the distribution of the estate. The following excerpt of the judgment reflects the distribution adopted by the trial Court as follows:

‘All the 13 beneficiaries (including the applicant and the protester) entered into a consent on 10/2/2015 and shared Kshs11,000,000/= equally. The balance from the proceeds of the parcels at Kshs11,908,595/=(sic). In the circumstances of the case, I ask (sic) that 40% of the Kshs11,908,595/= shall go to the applicant Agnes Nthenya. It works to Kshs.4,763,438/=. The protester Scholastica Ndululu Suva, Mark Maweu Suva, Felix Munyoki Suva, Barnaba Iwia Suva, Clement Moki Suva, Jonathan Kaloki Suva, Methussella Kivila Suva, Isaac Ngolano Suva, Roy Silas Suva, Metes Mwangi Suva, Abednego Andrew Munyoki and Sarah Muiyoki Suva shall equally share the balance of Kshs7,145, 157/=. Each will get Kshs.595,429/75. Lastly the proceeds of the treasury Bills Nos A0009717 and A0009718 shall be equally shared among all the 13 Beneficiaries.’

From the above it is apparent that apart from the amount of Kshs11,908,595/= of which the respondent received 40 percent, the rest of the proceeds were shared out equally. An arithmetical calculation reveals that the respondent actually got only about 25 percent of the total sum whilst the rest was shared out equally amongst the remaining 12 beneficiaries. In the circumstances the appellant’s contention that the distribution was unfair has no substance.”

22. How then should the distribution be undertaken? From the evidence on record, it is clear that all the said beneficiaries were siblings. No exceptional circumstances were placed before me that would justify this Court in deviating from the provisions of section 40 aforesaid.

23. Accordingly, I hereby direct that land parcel Makueni/Mubau/534 shall be divided equally amongst all the 11 beneficiaries of the estate of the deceased with each beneficiary getting 4.36 acres from the said 48 acres. In determining the said distribution, the beneficiaries who are in occupation of the said land shall continue occupying and using the portions of the said land as long as the said portions do not exceed the said 4.36 acres. Where a beneficiary’s occupied portion exceeds the said 4.36 acres, the portion in excess shall be relinquished to the other beneficiaries unless the occupying beneficiary enters into an agreement with a particular beneficiary on the mode of compensation.

24. To effectuate the distribution, a survey will be undertaken by the County of Machakos County Surveyor who will demarcate the said parcel in accordance with the terms of this judgement. The costs of doing so shall be shared equally amongst the beneficiaries.

25. For avoidance of doubt, in terms of the ruling delivered by **Muriithi, J** herein on 20th March, 2018, any third party who purported to have acquired any part of the said parcel is at liberty to look to the person who purported to have sold to him the same.

26. The matter will be mentioned to confirm compliance with this order and for further orders.

27. There will be no order as to costs.

Read, signed and delivered in open Court at Machakos this 21st day of September, 2020.

G V ODUNGA

JUDGE

In the presence of:

The Objector in person

NA for the Applicant

CA Geoffrey