



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC. P&A NO. 10 OF 2018

IN THE MATTER OF THE ESTATE OF MUTUA

NZENGU MWEU ALIAS NZANGU MWEU (DECEASED).

KOKI MUTUA.....1ST PETITIONER/RESPONDENT

-VERSUS-

NGINA MUTUA.....2ND PETITIONER/PROTESTOR

JUDGEMENT

INTRODUCTION

1. The application before Court is dated 04/10/2016 and seeks that the grant of letters of administration intestate made to Koki Mutua and Ngina Mutua on 28/12/2010 be confirmed.
2. It is supported by the affidavit of Koki Mutua who deposes that there are no pending applications or estate duty payable towards the deceased's estate. She also deposes that the deceased had two houses and proceeds to list the members of each house. She proposes that the only asset of the estate i.e. Machakos/Ulu/82 be registered in her name wholly.
3. A protest against distribution was filed by Ngina Mutua on 24/01/2017. She calls it a 'Replying Affidavit'. The gist of her protest is that the deceased was polygamous and his estate should be distributed according to the provisions of the Law of Succession Act.
4. The protest was canvassed by way of *viva voce* evidence.
5. PW1 was the protestor. She testified that the deceased's property was land and gratuity. That the suit land belonged to their father-in-law and was registered from him to the 1st Petitioner as their husband was dead. That the clan shared it equally between the two houses and she never agreed that the 1st Petitioner should have the land alone.
6. That she has 13 children with the deceased and they live on the suitland. That the Suitland is currently registered in the 1st Petitioner's name but the Court should share it equally between the two houses.
7. On cross examination, she said that she was 74 years old and was married a long time ago. That she was not married when land was acquired but deceased was in the process of acquiring it. That the deceased had Kshs. 1,250/= to buy it. That the land was in her father in law's name but was bought by the deceased.
8. That when she got married, her father-in-law was already dead. That the deceased and 1st Petitioner were in occupation of the land. That the land was given to her father-in-law and not her husband. She was not aware that the father-in-law died in 1960.
9. That she just found land occupied by deceased and Petitioner. That the clan shared the land and the 1st Petitioner agreed to share equally.
10. PW2 was Japheth Ngugi Muumbi from Kilungu. He said he knew the parties and was the chairman of the Aombe clan for 15 years. That the 2 parties are co-wives of the deceased who died in 2004.
11. That on 09/09/2004, they were called by both parties to assist in sharing the land which belonged to their father in law. He went with the

clan members and after deliberations, the parties agreed to share equally.

12. He also testified that he knew the deceased and that he (deceased) used to live with his 2 wives and had built for each of them. That the meeting was at the 1st wife's house and the parties signed. That they even put a border of the two portions in the presence of the parties and their children.

13. Further, he testified that the land was in the name of the parties' father-in-law and was ancestral land. He did not know how it was acquired

14. On cross-examination, he said that as the chairman of the clan, he used to meet the deceased. He didn't know the deceased's father and in 1960, he didn't know the parties.

15. That the deceased died in 2004, the same year they went for the meeting. He agreed that he had not produced minutes. That the land was owned by Nzangu and his son Mutua was to inherit. He didn't know when the parties were married.

16. The protestor closed her case at that juncture.

17. DW1 was John Mulinge Mutua, a son of the 1st Petitioner. He testified that he was born in 1956 and that the suitland was in his grandfather's name. That his grandfather died in 1960. That his father was working at a ranch owned by a white man and was chased away from the land.

18. That they moved to a brother of their grandfather. That the land was bought by the 1st Petitioner and she paid Kshs. 200/= in 1963 and a further Kshs. 1,000/= in 1964.

19. That the 1st Petitioner registered the land in her father-in-law's name. That she never used to work but her brother's helped her. That he did not witness any payment. That the 2nd Petitioner was married in 1975 and wouldn't know how the land was acquired.

20. On cross examination, he said that he had nothing to show that his mother paid for the land and did not know how much help she got from her brother. That his father used to work in that land and was chased in 1961, before independence. That his father died in 2004 and his grandfather in 1960.

21. That he had no evidence to show that the deceased was living with the 2 parties as his wives. That his father built a house for the 2nd Petitioner and was not taking care of his mother but Ngina only. That his mother was objecting Ngina's settlement on the land.

22. In re-examination, he said that he could not accompany his mother for payments as he was a child. That they live on the suitland. That women never used to own or hold property. That his father's name could not be used as he had been chased by the whites

23. DW2 was Koki Mutua. She adopted her replying affidavit sworn on 17/06/2014 and supporting affidavit sworn on 04/10/2016. In the former, she deposed that she is the sole owner of the suit land because her late husband did not contribute to it's acquisition.

24. That her late husband refused to work for the white settler and land was only available to those who agreed to work. In the latter, she proposes that the suit land be registered in her name wholly.

25. DW3 was 98 year old David Mutevu Luna. He testified that the suitland was bought by the 1st Petitioner but did not witness the buying. That she was staying at his place when she bought the land. He didn't know how much the purchase price was.

26. That her husband had been chased from the land by white men. That if she used her husband's name, she would not get the land. That then the suitland was being bough, Nzengu was not alive.

27. That the Petitioner left the 1st Petitioner at his (DW3) place and went to work in Kajiado after which the 1st Petitioner bought the land alone. That the 1st Petitioner was a casual worker at the white men's land.

28. On cross examination, he said that the 1st Petitioner went to live with him because they had been chased by the whites and not because her husband had chased her. That he was told by the 1st Petitioner that the purchase price was 2,500/=. He didn't know when the protestor was married but the deceased was living with the two parties as his wives.

29. Further, he testified that Nzengu used to work at the white men's land when land was sub-divided and that land could not be sold to a non-worker of the white men's land.

30. In re-examination, he said that the 1st Petitioner bought land when her husband was away working. That the land belonged to her and not Zengu.

31. The Petitioner's case was closed at that juncture and parties agreed to submit but by the time the Court retreated to write this ruling, there were no submissions on record.

32. Having looked at the protest and the evidence of the parties, the following issues arise for determination.

a. Whether Machakos/Ulu/82 forms part of the deceased's estate.

b. If (a) above is answered in the affirmative, how should the estate be distributed?

WHETHER MACHAKOS/ULU/82 FORMS PART OF THE DECEASED'S ESTATE.

33. The evidence of the protestor and DW1 is to the effect that at some point, the suitland was registered in the name of the parties' father-in-law (Nzengu). The protestor (herein after '2nd wife') contends that despite such registration, the suitland was bought by the deceased.

34. On the other hand, the 1st Petitioner (herein after '1st wife') contends that she was the sole purchaser of the suit land. Her son (DW1) says that her mother bought the land but caused it to be registered in Nzengu's name. I find this curious because, if the 1st wife bought the land in 1963, yet Nzengu died in 1960, how did she cause registration of land in the name of a deceased person?

35. It is trite that he who alleges must prove, accordingly, the 1st wife bears the burden of proving that she was the sole purchaser. In an attempt to attain such proof, she seems to be relying entirely on the oral evidence given in Court.

36. I appreciate that this dealing is said to have taken place in the 60's but I am not convinced that it was so casual to the extent of being devoid of any paper work. There was not even a tattered piece of paper in the parties' native language. Interestingly, none of the parties mentioned who the seller was. The Court is left wondering whether the whole lineage of the seller is extinct.

37. Even if the Court was to resort to the oral evidence, the witnesses were of little assistance. DW1 testified that the suitland was bought by the 1st wife at a price of Kshs. 1,200/= between 1963 and 1964 but admits that he did not witness any payment. DW3 testified that the suitland was bought by the 1st wife but also admits that he did not witness the buying. He also admits not knowing how much the purchase price was.

38. Further, there is certificate of official search on record showing that the suitland was registered in the deceased's name in 1974. The deceased died in 2014. So, for 40 years, the land remained registered as such and the 1st wife contends that she was the sole purchaser but did not do anything to try and change the situation.

39. Again, there is evidence to show that the 2nd wife has been living and is still living on the suitland. It is therefore not a situation that has caught the 1st wife by surprise.

40. In my view, 40 years was a period long enough for her to have realized the anomaly in registration and assert her claim of total ownership.

41. The upshot is that there is really no evidence upon which the Court can make a finding that the Suitland was purchased by the 1st wife. The most likely scenario is that the land was ancestral and that is how the deceased got registered as the proprietor. Accordingly, the suitland is part of the deceased's estate.

DISTRIBUTION

42. It is not in dispute that the deceased was polygamous and the two parties were his wives. Section 40 of the Law of Succession Act is therefore applicable. It provides as follow;

40. Where intestate was polygamous;

(1) 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 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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

43. According to the affidavit in support of summons for confirmation of grant, the 1st wife has 7 children and the 2nd one has 10. Accordingly, for purposes of the above section, the first house has 8 units and the second one has 11 units.

CONCLUSION

44. The court therefore finds that the protest has merit and same is allowed. Suitland shall be distributed as follows;

i. The land shall be shared equally to all 19 units(beneficiaries) of the deceased, Such that;

a. The first wife will get $\frac{8}{19}$ of the suit land.

b. The second house will get $\frac{11}{19}$ of the suit land.

ii. Parties to bear their own costs.

DATED, DELIVERED, SIGNED THIS 24TH DAY OF JANUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE