



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO 166 OF 1989**

**IN THE MATTER OF THE ESTATE OF YOHANA ANYIKA, DECEASED**

**JUDGMENT**

1. The matter concerned the estate of the deceased herein, Yohana Anyika. The petitioner herein initiated this cause and obtained a grant of letters of administration intestate for him to administer the estate of the deceased.

2. He brought an application dated 28<sup>th</sup> September 2011, seeking to have the said grant confirmed, and he proposed that the estate of the deceased, comprising of Kakamega/Lugari/269, measuring approximately 8.7 hectares or 21.75 acres, be distributed amongst the beneficiaries as follows: -

- a) Kaitano Inyanza Anyika .....15.5 Acres
- b) Charles Isanya Malungu.....3. Acres
- c) Jared Makanga Anyika.....3 Acres

3. The objectors herein filed objected to the proposed confirmation through an affidavit of protest sworn on 9<sup>th</sup> November 2018. It is their contention being that the proposed distribution of the estate was not proper. they proposed that the estate be distributed as follows: -

- a) Kaitano Inyanza Anyika .....7 Acres
- b) Charles Isanya Malungu.....6 ½ Acres
- c) Jared Makanga Anyika.....6 ½ Acres

4. the petitioner's case is that the deceased had three surviving beneficiaries, being himself and the two objectors. He stated that he was the eldest son of the deceased and that he had taken care of the objectors. He also stated that he had since the death of the deceased taken care of the estate to the extent of paying legal fees in a suit where the land had been trespassed upon, and also in filing of this cause. He urged the court to award him a larger share as he had spent a lot to take care of the estate. He also stated that he had sold part of the estate to one Erick Kingali, and utilized the sale proceeds to file this cause. He proposed that the estate be distributed as follows

- a) Eric Kingali.....4 Acres
- b) Kaitano Inyanza Anyika.....11.75 Acres

c) Charles Isanya Malungu.....3. Acres

d) Jared Makanga Anyika.....3 Acres

5. The 1<sup>st</sup> objector's case was that the said Eric Kingali was not a beneficiary, rather he had bought the land from the petitioner and thus he could not benefit from the estate. he argued that the estate ought to be shared equally between the three survivors of the deceased so the each of them benefited.

6. Having perused through the record, and having heard the parties orally, the issues that I have framed for determination are whether Erick Kingali is a beneficiary of the estate and how the estate ought to be distributed.

7. Regarding the issue as to Whether Erick Kingali is a beneficiary to the estate, the petitioner herein stated that the said Erick Kingali had bought land from him and that he had used the proceeds in filing this cause. It is thus his proposal that the said Erick Kingali should be granted 4 acres from the estate. The other survivors denied this position claiming that they were not aware of the sale, and that the transaction was a matter between the petitioner only and the said buyer, and that it did not involve them.

8. It is now established law that a beneficiary who sells part of the estate of the deceased before confirmation of the grant is intermeddling with the estate of the deceased, contrary to section 45 of the Law of Succession Act, Cap 160, Laws of Kenya. In the case of *Gitau and Two Others vs. Wandai and Five Others* (1989) KLR 231 it was held that entering into an agreement to sell estate property before getting a grant or without such a grant is an act of intermeddling with the estate. In *In Re Estate of M'Ngarithi M'Miriti* [2017] eKLR the court was of the view that –

*'... Courts have said time and again that any person who without the authority of the Law of Succession Act or any other written law or grant of representation, takes possession or disposes of, or otherwise intermeddle with the free property of the deceased is guilty of a criminal offence and is answerable to the rightful executor or administrator of the extent of the assets he has intermeddled with. The 1st and 2nd administrator have alleged that the 3rd administrator without the authority of the law or grant of administration or court sold part of the estate property to a third party one David Gikunda. The 3rd administrator did not respond to those allegations. That notwithstanding, this grant is yet to be confirmed and as such the restriction on distribution of estate's capital or immovable properties under section 55 and 82(b) (ii) of the Law of Succession Act applies. Accordingly, there is nobody yet with authority to sell the estate property herein to any person including David Gikinda. Accordingly, the sale to or acquisition of the immovable property of the estate by David Gikunda is completely in violation of the law, and therefore null and void. Whatever, the 3rd administrator may have attempted to sell is part of the estate to which these proceedings relate and I shall proceed as such. If he is in occupation, he shall be evicted forthwith.'*

9. Further the court in *Re Estate of John Gakunga Njoroge (Deceased)* [2015] eKLR stated that -

*'For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the estate is restricted by the provisions on the powers and duties of the personal representatives under section 82 (b) Proviso (ii), which provides that: -*

*“(ii) no immovable property shall be sold before confirmation of the grant.”*

10. The court in *In the Matter of the Estate of Isaac Kaburu Marete (Deceased) Daniel Gituma Marete vs. Frankline Mutwiri* [2017] eKLR stated as follows: -

*'Acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under the Constitution. Upon meticulous consideration of the protest, all arguments filed and the*

law, I am of the following persuasion. I will restate once again what I stated in the case of *Re the Matter of the Estate of M'Ajogi M'Ikiugu alias Ikiugu Ajogi (Deceased)* on sale of estate property before confirmation of grant as follows: -

*“Sale of estate property before confirmation, courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the law of Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the Law of Succession Act, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the Law of Succession Act. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.”*

*But for completeness of the foregoing discourse, I wish to go two steps up. First, a void transaction is in law a nullity. It is not only bad, but incurably bad. And every proceeding or perceived right which is founded on it is not only bad but incurably bad. On this I can do no better than Lord Denning M.R in the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All ER 1169 at pg. 1172 that:*

*“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”*

11. From the forgoing it is clear that the sale agreement between the petitioner and the said alleged purchaser was null *ab initio* by virtue of the provisions of the law and amounted to intermeddling on the part of the petitioner. as such the purchaser is not entitled to any portion from the estate of the deceased. The contract of sale between the petitioner and the said Erick Kingali was null and therefore he cannot benefit from the estate of the deceased.

12. On distribution of the estate, the evidence before court was that the deceased was survived by three beneficiaries who are all party to this cause. Each party has made their own proposal as to the distribution of the estate with the petitioner claiming a larger portion on the premise that he has been taking care of the estate and the dependants. He also claims that he has maintained the estate. The estate of comprises of a parcel of land measuring approximately 21 acres.

13. The essence of distribution is that the same is to be fair. In *In the Estate of Stanley Kori Kiongo alias Kori Kiongo-Deceased* [2016] eKLR the court stated that “that distribution must be fair, equitable and just.” In *In Re Estate of Wanjau Kihara (Deceased)* [2009] eKLR was of the view that a beneficiary must adduce evidence to support his claim for a larger share of the estate compared to the other beneficiaries. The court in dismissing an objector’s claim stated –

*‘In my view the 1st Protestor’s contention that he deserves a larger parcel of the estate has no legal or factual basis. There was no evidence adduced to support such contention. Indeed, even in his own evidence in chief he did not as much as allude to the fact that he was given a bigger portion of the suit premises as compared to the other two. It only came out in cross-examination. He did not even know the acreage of the portions given out by the deceased to the three. In his own*

words “...I do not know the acreage that was allocated to each one of us by our deceased father....” From the foregoing it is quite clear that none of the parties knew the acreage of the land allocated to them. On what basis therefore should the 1st Protestor claim more land than the rest? I do not see any basis. He did not call any evidence to back up his claim to more land than the rest. None of the two witnesses that he summoned supported his claim to more land than the rest. Indeed, in his own evidence he concedes that “...My father never specifically told me that I should have 3.2 acres. However, that is how he planted trees...” When pushed to justify the basis of his claim to a larger portion of the suit premises in cross-examination by the petitioner, the 1st Protestor stated that he was given a larger portion of the suit premises by the deceased because he used to take care of the parents and or that, that is how the deceased wanted it. Again other than this blunt statements the 1st Protestor never adduced any other cogent evidence to beef up the claim. I am thus far from being persuaded that the 1st Protestor was entitled to more land from the suit premises than his other siblings on the basis that that was the wish of the deceased and or because he took care of his parents.’

14. In *In Re Estate of John Musambayi Katumanga – Deceased* [2014] eKLR it was held: -

*‘... The spirit of Part V, especially sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in section 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.’*

15. In this cause the petitioner has made a proposal to get 11.75 acres while his brothers get 3 acres each. He has not established why he should get such a share that is about thrice the share of the other beneficiaries. It is understandable that the petitioner has spent money in filing the suit and maintaining the estate, however the proposal is way above what the principles of justice and equality provide. The objectors herein propose that they get 6½ Acres each while the petitioner benefits from the rest of the estate. It is my opinion that the proposal by the 1<sup>st</sup> Objector is fair as the beneficiaries would more or less equally benefit.

16. In the end I do hereby dispose of the matter as follows: -

**(a) That I hereby declare that the deceased was survived by three individuals, being Kaitano Inyanza Anyika, Charles Isanya Malungu and Jared Makanga Anyika;**

**(b) That it has been established that the deceased died possessed of only one asset, being Kakamega/Lugari/269;**

**(c) That the estate be distributed as follows –**

**(i)Kaitano Inyanza Anyika.....8.75 acres**

**(ii)Charles Isanya Malungu.....6.5 acres**

**(iii)Jared Makanga Anyika.....6.5 acres**

**(d) That the grant herein shall be confirmed on those terms and a certificate of confirmation shall accordingly issue to the administrator;**

**(e) That each party shall bear its own costs; and**

**(f) That any party aggrieved by the orders that I have made herein above shall be at liberty to challenge the same on appeal at the Court of Appeal within twenty-eight (28)**

**days.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10<sup>th</sup> DAY OF  
April, 2019.**

**W MUSYOKA**

**JUDGE**