



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

SUCCESSION CAUSE NO. 447 OF 2017

FORMERLY; MACHAKOS H.C P&A No. 109 of 2010)

IN THE MATTER OF THE ESTATE OF KASOA NTHIWA alias MULI NTHIWA (DECEASED)

HENRY MUMBIKA KASOA.....1ST PETITIONER/RESPONDENT

PIUS NTHIWA KASOA.....2ND PETITIONER/RESPONDENT

VERSUS

MUTUA KASOA.....1ST PROTESTOR

ALICE KASENDI KASIMU.....2ND PROTESTOR

RULING

Introduction

1. The deceased herein died intestate on 25/10/2001 aged 98 years.
2. Henry Mumbika Kasoa and Pius Nthiwa Kasoa (*sons of the deceased*) petitioned for grant of letters of administration intestate to the deceased's estate and a grant was subsequently issued to them on 21/04/2010.
3. The assets of the deceased are said to be **Nzaui/Kilili/37** and **Makueni/Kiangini/1351**.
4. On 24/11/2016, the administrators applied for confirmation of the grant and listed the beneficiaries as follows;

1st House

a) Francisca Mbeneka Wambua -adult daughter

(has renounced her right via letter)

b) Veronica Mukenye Kasoa -adult daughter

c) Henry Mumbika Kasoa -adult son

d) Mutua Kasoa -adult son

2nd House

a) Mukulu Kasoa -deceased widow

b) Mueke Kasoa -deceased daughter

(to be replaced by her daughter-Pauline Mueni Mutua)

c) Nzivo Kasoa -deceased son

(to be replaced by his wife-Dorris Mutete Maluli alias Mutete Nzivo)

d) Koki Kasoa -deceased daughter

(Widower Peter Nzuba Musyoka has renounced his right via affidavit)

3rd House

a) Kavindu Kasoa Nthiwa -widow

b) Esther Nduku Kasoa -adult daughter

c) Regina Mwikali Kasoa -adult daughter

d) Pius Nthiwa Kasoa -adult son

e) John Kilonzo Kasoa -adult son

f) Jennifer Kalewa Kasoa -adult daughter

g) Lilian Mwendu Kasoa -adult daughter

h) Nthiwa Kasoa Benson -adult son

i) Mirriam Munyiva Kasoa -adult daughter

5. They proposed that the aforementioned property be distributed as follows;

No.	Description of property	Beneficiaries	No. of shares
1.	Nzaui/Kilili/37	Henry Mumbika Kasoa	10.5 ha
		Dorris Mutete Maluli alias Mutete Nzivo	10.5 ha
		Mutua Kasoa	10.5 ha
2.	Makueni/ Kiangini/1351	Pius Nthiwa Kasoa	10.5 ha
		John Kilonzo Kasoa	10.5 ha

	Nthiwa Kasoa Benso	10.5 ha
	Veronica Mukenye Kasoa Pauline Mueni Mutua Kavindu Kasoa Nthiwa Esther Nduku Kasoa Regina Mwikali Kasoa Jennifer Kalewa Kasoa Lilian Mwendu Kasoa Mirriam Munyiva Kasoa	To get 3.8975 ha each from the remaining 31.18ha which in the wishes of the deceased was to remain in the names of Kasoa Nthiwa

6. In the alternative, they propose that the assets be distributed among all the eligible beneficiaries in equal shares.

The protests

7. On 22/02/2016, the 1st protest was filed by Mutua Kasoa. The gist of his protest is three-fold. Firstly, that the 2nd protestor has been omitted from the list of distribution yet she is a wife of the late Nzivo Kasoa (2nd house), Secondly, that he jointly acquired the properties with his father, the deceased herein. Thirdly, that he financed some litigations concerning the estate to the tune of kshs 466,000/= and there was a family meeting where all the beneficiaries agreed that he should be compensated as a creditor by getting extra portions of land from the two parcels. He therefore proposes that the estate be distributed as follows;

Nzaui/ Kilili/37	Henry Mumbika	9.5 ha
	Dorris Mutete	Both 9.5 ha
	Alice Kasendi	
	Mutua Kasoa	12.5 ha
Makueni/Kiangini/ 1351	Pius Nthiwa	9.5 ha
	John Kilonzo	9.5 ha

	Mutuku Kasoa	9.5 ha
	Mutua Kasoa	9.18 ha
Veronica	24 ha to be shared equally among them	
Pauline		
Kavindu		
Esther		
Regina		
Jennifer		
Lilian		
Miriam		

8. The 2nd protest was filed on 21/04/2017 by Alice Kasendi Kasimu. The gist of her protest is that she is a beneficiary of the estate by virtue of having been married to the late Nzivo Kasoa (2nd house). She deposes that they were blessed with five children and that two of her sons have already settled on the portion that belongs to their dad in Nzaiu/ Kilili/37. She also deposes that there was a clan meeting on 19/07/2014 and it was resolved that she was entitled to 5.335ha in Nzaiu/ Kilili/37. Further, she deposes that the 1st protestor is entitled to a larger share in the estate for incurring expenses in several cases in which the deceased herein was a party.

9. Directions were given that the matter be canvassed by way of *viva voce* evidence and the parties' affidavits were to be treated as their statements. Further, they were directed to file witness statements which they did.

1st protestor's case

10. **PW1, Mutua Kasoa** reiterated the contents of his affidavit and referred to minutes of a family meeting marked MK1(a) & (b). He attempted to introduce a document to show the existence of PMCC 79/73 but an objection was raised by the petitioner's Counsel, Mr. Kituku. In sustaining the objection, the Court observed that the document did not show how the amount alleged had been incurred and there was no explanation as to why it was not attached to the affidavit.

11. On cross examination, he said that Nzivo Kasoa, his step brother had 3 wives; Wanza (deceased), Kasendi (2nd protestor) and Mutele. That the 2nd protestor had children with his step brother and didn't know why she was omitted. That the 2nd protestor lives with her children in one of the deceased's properties i.e Nzaiu/ Kilili/37. He agreed that he had not annexed PMCC 79/73 and had not shown any receipts of payment.

12. He said the receipts got lost but agreed that he had not police report. He also agreed that he had no agreement with deceased over any liability. He said that Nzaiu/ Kilili/37 was registered in 1976 and the title issued in 1993 in the deceased's name as the sole owner and he had never lodged a claim over the same. That the annexure marked MK1 (a) was in his handwriting and only had his signature. Further, he said that he did not witness the 2nd protestor's dowry negotiations. He also said that he took minutes of the meeting held on 24/04/2000 and it was agreed that no one should raise an issue with regard to costs of Mwilu land (37) for the sake of harmony. He also said that he lived in Nairobi and was the one who helped his parents.

13. In re-examination, he confirmed that no costs were to be claimed and that the minutes by the petitioners were not recorded by him but by John. That the costs alluded to in paragraph 5 of his affidavit are not in Court as they disappeared in his brother's house. That while attending to his case in Nairobi, the deceased stayed in his house and he (PW1) paid expenses for him and his witnesses.

14. **PW2 was Titus Nzomo Nthuku.** He adopted his statement dated 13/11/2017 as his evidence. His evidence is that the deceased was his neighbour as his land, Nzaiu/ Kilili/37, is near the land where his family resides. That sometimes in 1985, he was employed by the 1st protestor as a gardener and was in charge of a parcel of land across the river. That the 1st protestor had been given the land by his parents after winning a Court battle over land. That the deceased and his wife told him (PW2) that it was the 1st protestor who had paid legal expenses for the case hence the reason for giving him the land.

15. On cross examination, he said that he knew Nzivo's wives. One is deceased, two are alive and they live in Kilili. He agreed that he had nothing to show that the 1st protestor was given land by the deceased, had no documents of the case he had referred to in his statement and did not witness PW1 expending the alleged amounts. That he knew the 2nd protestor but did not witness *ntheo* payment for her.

16. **PW3, James Muia Kiithya** adopted his statement dated 08/11/2017. His evidence is that the deceased was his uncle. That in the 1950's, the deceased, his father (Kiithya Nthiwa) and Mbithi Nthiwa had settled in Masii. That the deceased went to graze his cattle in Makueni and found land in Kilili which had not been settled on. That as it was the practice those days, they cleared the said land and settled there. That it was only the 1st protestor and his brother Muumbika who moved with their parents to Makueni as their elder sister had gotten married.

17. That later, the 1st protestor went back to Masii and requested PW3 to accompany him to Makueni where he showed him both parcels of land.

18. On cross examination, he said he was 72 years old and was aware of what was happening in 1950's. That the deceased had a land case and the 1st protestor helped him. That Nzivo was his cousin and had 3 wives. That he knows the 2nd protestor, her children and that she lives in Kilili on the deceased's land. That it was the clan which showed the 2nd protestor where to settle. That the other name of the 2nd protestor is Kasimu but didn't know who Kasimu was. That he never attended the 2nd protestor's *ntheo* payment. That he had nothing to show that the 1st protestor had helped the deceased in his land cases.

2nd Protestor's case

19. **2PW1, Alice Kasendi** relied on the contents of her affidavit and a statement file on 30/05/2018

20. On cross-examination, she said that she was married to the late Titus Nzivo, a son of the deceased and was therefore entitled to a share of the estate. That she had five children with Nzivo who had also been omitted from the estate. That she was aware there were cases over the deceased's lands and the 1st protestor was catering for the expenses. That there was agreement for the 1st protestor to be given extra portions of land to take care of the expenses.

21. Further, she said that there was *ntheo* ceremony over her marriage in 1993. That there was a goat taken from Nzivo and given to Kyengo to give to Kasimu in 1993. That she was already married to Nzivo since 1989 and a goat of *ulee* (divorce goat) was taken in 1993. That Kasimu was her first husband and she had been married by him in 1990. That Kasimu died in April 1993.

22. She agreed that she had not attached her children's birth certificate but Wavinya Nzivo was born in 1986 before her marriage to Nzivo. She didn't know the case numbers or the amount of expenses.

23. In re-examination, she said that husband Nzivo accepted all her children and that she built where Nzivo was born.

24. On 08/11/2018, the parties recorded a consent in the following terms;

“That the share of beneficiary Nzivo Kasoa to remain in his name until succession of his estate is filed and determined”

25. Parties were then directed to file submissions on distribution in view of the above consent. When the matter was mentioned on 21/02/2019 to confirm compliance, the petitioners indicated that they would rely on the affidavit in support of confirmation of grant, the 1st protestor had filed submissions and the 2nd protestor relied on the filed statements.

The 1st protestor's submissions

26. Basically, the 1st protestor submits that the deceased was polygamous and as such, his estate should be distributed according to Section 40 (1) of the Law of Succession Act. The section provides that such an estate should be distributed according to the number of children in each house plus the wife as an additional unit. He however maintains that he has proved his entitlement to a larger share from the estate and submits that the estate should be distributed as per his affidavit of protest (*indicated above*).

Analysis and determination

27. The effect of the consent highlighted in paragraph 24 above is to eliminate the issue, of whether the 2nd protestor was a wife of Nzivo Kasoa, from being determined in these proceedings. Accordingly, the remaining issues for determination are;

- a) Whether the 1st protestor has established that he is entitled to a larger share in the estate.
- b) Depending on the outcome of issue (a) above, how should the estate be distributed?

Whether the 1st protestor has established that he is entitled to a larger share in the estate.

28. The minutes of the family meeting held on 24/04/2000 is the main document relied on by the 1st protestor to claim a larger share from the estate. The existence of the meeting was not challenged. The only issue raised in cross examination was that the minutes were written by the

1st protestor and were only signed by him. It is obvious that recording of proceedings in a meeting is a task undertaken by one person, usually the secretary. There is no indication that the others members present were opposed to the 1st protestor taking the minutes. It is therefore my considered view that, on a balance of probability, the 1st protestor has demonstrated that indeed there was a family meeting on 24/04/2000.

29. From the deliberations in the said meeting, it is clear that the estate was involved in litigation in various cases and the 1st protestor incurred expenses which were to be reimbursed by giving him extra acreage from the estate. On a balance of probability again, I am satisfied that the 1st protestor incurred the amount indicated in paragraph 5 of his affidavit of protest i.e kshs 466,000/= and should get a refund from the estate.

How should the estate be distributed?

30. A portion of land equivalent to the expenses kshs 466,000/= incurred by the 1st protestor should be excised from Makueni/Kiangini/1351 and be registered in the 1st protestor's name (*valuation may be necessary*). I have picked that parcel because it is the one with a bigger acreage.

31. The remaining parcel (Makueni/Kiangini/1351) plus Nzau/ Kilili/37 should then be distributed according to the provisions of section 40 of the Law of Succession Act to all the eligible beneficiaries, including the 1st protestor.

CONCLUSION

32. The court therefore finds that, the 1st protest has merit and thus same is hereby be allowed with effect that;

a) A portion of land equivalent to the expenses kshs 466,000/= incurred by the 1st protestor shall be excised from Makueni/Kiangini/1351 and be registered in the 1st protestor's name (provided that valuation shall be done first to ensue portion exercised is of value equal to wxpenses being compensated).

b) The remaining parcel (Makueni/Kiangini/1351) plus Nzau/ Kilili/37 shall then be distributed according to the provisions of section 40 of the Law of Succession Act to all the eligible beneficiaries, including the 1st protestor.

c) No orders as to costs.

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF MAY, 2019, IN OPEN COURT.

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C. KARIUKI

JUDGE