



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 11 OF 2009

(IN THE MATTER OF THE ESTATE OF SIMON NDIBO MUSYOKI-DECEASED)

HENRY WAITA NDIBO.....OBJECTOR/PLAINTIFF

VERSUS

MICHAEL KATUA NDIBO.....RESPONDENT/DEFENDANT

JUDGEMENT

1. Michael Katua Ndibo applied for grant of letters of administration in respect of the estate of his deceased father, Simon Ndibo Musyoki. His step-mother, Mary Mwikali Ndibo (now deceased) filed an objection to the confirmation of the grant. The deceased Mary Mwikali Ndibo was substituted by Henry Waita Ndibo. For the purposes of this judgment Henry Waita Ndibo, the Objector is the Plaintiff and Michael Katua Ndibo, the Petitioner is the Defendant.
2. A perusal of the pleadings, the evidence and the submissions will show that the only issue in this matter is the distribution of the estate of the deceased Simon Ndibo Musyoki. I will henceforth refer to Simon Ndibo Musyoki as the deceased.
3. There was an attempt by the Petitioner to question the legality of the relationship between the late Mary Mwikali Ndibo and the deceased on the grounds that there was no valid marriage since the church wedding between the deceased and the 1st wife, Mariana Ndunge was never dissolved. This issue became moot when Mary Mwikali Ndibo passed away in 2014.
4. The Petitioner/Defendant who testified as DW1 clearly stated that he acknowledged all the children of Mary Mwikali Ndibo as his step-brothers and step-sisters. On his part, the Objector has no issue with the children of his step-mother. I therefore find that the identities of those who are to benefit from the estate of the deceased is not in issue.
5. There appears to be no agreement on the properties left behind by the deceased. In an affidavit sworn on 23rd March, 2015 in support of the summons for confirmation of grant, the Petitioner identifies the following properties:-

(i) PARCELS OF LAND

- (a) L. R. No Muputi/Kiima-Kimwe/1970
- (b) L. R.No. Muputi/Kiima-Kimwe/1750
- (c) L.R.No. Muputi/Kipandini/44
- (d) L.R.No. Muputi/Kiima-Kimwe/1757
- (e) L.R.No. Muputi/Kiima-Kimwe 1755
- (f) Muputi/Kipandini/1028
- (g) Malindi/Shauri Moyo/339
- (h) Iveti/Masakwani/835

- (i) Kitie at Machakos
- (j) Kwa Kauti at Machakos
- (k) Kiembeni at Machakos
- (l) Ianzoni at Machakos
- (m) Katetani at Machakos
- (n) Kya Mbevu at Machakos
- (o) Kiimani at Machakos
- (p) Magarini at Malindi
- (q) Land at Shimba Hills in Kwale
- (r) Musyi, Machakos
- (s) Musyi, Malindi (Kakungu)

(ii) SHARES

- a. Standard Chartered Bank
- b. Machakos Cooperative (KAFOKA)

(iii) BANK ACCOUNTS

- a. Post Bank Malindi Branch
- b. Habib Bank Malindi Branch

6. In a further affidavit sworn on 7th April, 2015 by the Petitioner in support of the summons for confirmation of grant he proposed that the parcels of land at Magarini and Shimba Hills be given to the Objector. He prayed that Kakungu bar and restaurant be shared equally between the Petitioner and the Respondent and income received from the premises by the Objector be taken into account so that the Objector's share be reduced accordingly.

7. Further, that all the shares and accumulated dividends, pension funds and money in bank accounts, and the curio shop and the inventory therein be shared equally between the Petitioner and Objector.

8. Finally the Petitioner proposed that the remainder of the estate goes to the Petitioner. In an affidavit sworn on 22nd April, 2015 in reply to the summons for confirmation of grant, the Objector averred that the deceased had distributed his estate prior to his demise. According to the Objector, if the court finds that there was no prior distribution then distribution should proceed as suggested in paragraph 20 of the affidavit as follows:-

“That in the unlikely event that the Honourable Court finds that there was indeed no prior distribution we propose that distribution be undertaken in the manner hereunder provided:

a) HOMES

- 1. Machakos home to be given to Ndunge's House (The 1st House)**
- 2. Malindi Home be given to Mary's House (The 2nd House)**

b) PARCELS OF LAND

The following parcels of land be given to Ndunge's House to share at will.

- 1. Kitie at Machakos**
- 2. Kiembeni at Machakos**

3. Lenzoni at Machakos
4. Kiimani at Machakos
5. Shimba Hills at Kwale

The following parcels of Lands be given to Mary's house to share at will.

1. Katetani at Machakos
2. Kwa Kauti at Machakos
3. Kyambovu at Machakos
4. Magarini in Kilifi

c) SHARES/BANK ACCOUNT

All shares/accumulated dividends/pension fund and any money in the Bank to be shared equally between the two houses.

d) OTHERS

The curio shop and all the stock therein be equally shared between the two houses.”

9. It is noted that the Objector who testified as PW10 produced 9 copies of title deeds as exhibits. The court inspected the originals before the copies were produced as exhibits.

10. The Petitioner did not produced any documentary evidence to show that the properties he talked of actually belonged to the estate of the deceased. I will therefore proceed on the presumption that the properties identified by the Objector are the only properties available for distribution.

11. Before proceeding further, I must determine the question as to whether the deceased distributed his estate prior to his death. The Objector's case is that the deceased made a will before he died. The Petitioner's position is that there was no such will and what the Objector produced as the will of the deceased were actually minutes of family meetings.

12. Part II (Sections 5-24) of the Law of Succession Act, Cap. 160 (L.S.A.) deals with wills. Section 9 provides that:-

“Oral wills

(1) No oral will shall be valid unless—

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will: Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.”

13. The last written notes in regard to the alleged will of the deceased were made on 28th January, 2002. The deceased passed away on 8th October, 2005. As per Section 9 of the L.S.A., it cannot be said that the deceased left an oral will. The law requires that for an oral will to be valid, where the maker is not a member of the armed forces or merchant marine in active service, the maker has to die within three months from the date the oral will is made. There should also be no written will made prior or after the date of the oral will. An oral will is therefore inferior to a written will and where existence of a written will is proved, an oral will made by the deceased is automatically invalidated.

14. Did the deceased leave a written will? Section 11 of the L.S.A. states that:-

“No written will shall be valid unless—

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall

appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

15. Nowhere in their testimony did any of the ten witnesses called by the Objector testify seeing the deceased append his signature to the alleged will. Indeed the Petitioner is correct that what the Objector claims to be a will are minutes of family meetings that took place on different dates.

16. The documents produced by the Objector shows that the first meeting took place on 10th October, 1976, the second meeting was held on 24th October, 1978 and the last meeting took place on 28th January, 2002. The theme running throughout these meetings was an attempt by the deceased's relatives and clan members to make the deceased distribute his property in a certain manner. That cannot be equated to a will.

17. That the deceased did not make a will is also confirmed by the fact that even after the last family meeting the deceased went ahead and transferred L.R. No. Machakos/Block 3/548-Katelembo, which had allegedly been earmarked for his second wife (Mary Mwikali Ndibo), to his first wife (Mariana Ndunge). This was done notwithstanding protestations by PW9 David Munyao Mwema who was a member of the Land Control Board and who was privy to the alleged distribution of the deceased's properties.

18. The summary of it all is that the deceased passed away without leaving either an oral or a written will. He therefore died intestate and the applicable law is that which governs the distribution of estates of persons who die intestate.

19. The deceased had two houses and Section 40 of the L.S.A. provides that:-

“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.”

20. The property that attracted great disagreement is the Kakungu property in Malindi town. The Objector's view is that the same was the matrimonial home of the late Mary Mwikali Ndibo and the same should go to the second house. On the other hand, the Petitioner stated that the said property was not matrimonial property but a commercial property which should be shared equally between the two houses.

21. The undisputed evidence that emerged in respect of the Kakungu property is that the same was bought by the deceased while working as a police officer in Malindi. PW1 Pauline Wayua, PW2 Michael Matheka Mbithi, PW3 Nicholas Ngila Nthakyo, PW4 Pius Mwangangi Nguwu, PW5 Florence Kimeu Wambua, PW6 Joseph Michael Mutiso and PW7 Samwel Mwangangi Ngunu all confirmed this fact.

22. The Objector's case is that the late Mary Mwikali Ndibo played a role in the development of the Kakungu property. The Petitioner's position is that he and his sister Teresia assisted the deceased in the construction of the Kakungu property.

23. A review of the evidence adduced by the witnesses called by the Objector shows that the late Mary Mwikali was a hardworking woman. She assisted the deceased in running his businesses which included a curio shop and a bar.

24. At the time the Kakungu property was being developed the Petitioner had just been employed as a police officer. His sister was working as an untrained teacher. It is difficult to accept the Petitioner's claim, which is not supported by any documentary evidence, that he supported the deceased in developing the property.

25. It is noted that the mother of the Petitioner rarely visited Malindi and it cannot be said that she made any contribution to the development of the property at Malindi. I therefore find that the late Mary Mwikali Ndibo is, owing to her monetary and non-monetary contribution, entitled to half the share of Kakungu property. The remaining half share belongs to the estate of the deceased. I will come back to this issue in due course.

26. There is an agreement between the Objector and the Petitioner on the distribution of the following properties:-

A. First House

i) Kitie at Machakos,

ii) Kiembeni at Machakos,

iii)Lenzoni at Machakos,

iv)Kilimani at Machakos,

B. Second House

Magarini Farm in Kilifi

C. To be shared equally

Shares, accumulated dividends, pension, money in bank accounts, stock in curio shop at Malindi and the curio shop itself in Malindi.

27. The evidence adduced by the Petitioner to the effect that all land parcels in Machakos are small pieces was not rebutted by the Objector.

28. The 1st house had more children, and therefore more units, than the 2nd house. The Petitioner offered the Shimba Hills farm in Kwale to the 2nd house although the Objector proposed that this parcel of land should be given to the 1st house. The evidence disclosed that the first wife and her children are based in Machakos. This parcel of land may be more useful if given to the 2nd house whose base is in the coastal region. I therefore allocate the Shimba Hills land to the 2nd house.

29. As already noted the 1st house has more units to be taken care of. In my view, it would be an unnecessary expense on the estate to order for valuation of the properties with a view to arriving at mathematical precision in the distribution of the estate. I therefore allocate all the pieces of land in Machakos to the 1st house.

30. What remains for distribution is the deceased's half share in the Kakungu property. The children of the 2nd house have known this property as their home. They grew up in the property. It is a town property not far from the cemetery in which their mother Mary Mwikali Ndibo was buried. It is a home as well as a commercial property. In my view, it is unfair to ask the members of the 2nd house to cede part of what they have known as their home to the members of the 1st house. Members of the 1st house may as well sell their share to a third party and this may not augur well for the members of the 2nd house. The 2nd house is therefore allocated the half share of the deceased in the Kakungu property. Since the other half share has been found to belong to the late Mary Mwikali Ndibo, the entire Kakungu property is therefore allocated to the second house.

31. Distribution will therefore be as follows:-

A. 1ST HOUSE:

i. Kitie at Machakos,

ii. Kiembeni at Machakos,

iii. Lenzoni at Machakos,

iv. Kilimani at Machakos,

v. Katetani at Machakos,

vi. Kwa Kauti at Machakos,

vii. Kyambovu at Machakos, and

viii. Any other undistributed property at Machakos.

B. 2ND HOUSE:

(a) Kakungu property in Malindi,

(b) Parcel of land in Magarini in Kilifi,

(c) Parcel of land in Shimba Hills in Kwale, and

(d) Any other undistributed property in Malindi

C. PROPERTIES TO BE SHARED EQUALLY BETWEEN THE TWO HOUSES:

(a) Shares,

- (b) Accumulated dividends,
- (c) Pension,
- (d) Money in bank accounts,
- (e) Curio shop, and
- (f) Stock in curio shop.

32. In order to enable the Court to issue a certificate of confirmation of grant, the Objector and the Petitioner are directed to file consents by the respective members of their houses on the distribution of the properties allocated to each house. This should be done within sixty (60) days from the date of the delivery of this judgment.

33. As for costs, I direct each party to meet own costs of the proceedings.

Dated and Signed at Nairobi this 28th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 28th day of June, 2019

R. Nyakundi,

Judge of the High Court