



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CASE NO. 30 OF 2017

IN THE MATTER OF THE ESTATE OF SIMON NDUNGU KIMANI (DECEASED)

JUDGMENT

1. The deceased herein is **Simon Ndungu Kimani**. He and his second wife **Hannah Wangari Ndungu** were apparently shot dead on 28th August 2009. His first wife, **Miriam Nyambura** had died intestate on 2nd August 1975 and succession proceedings under taken. It would appear that the deceased married his second wife sometime after the death of the first wife. The deceased had three children with his first wife, namely:

- a. Joseph Kimani Ndung'u – Co-administrator/Respondent
- b. Peter Mwangi Ndung'u (deceased and represented in these proceedings by his wife Peninah Muthoni Mwangi)
- c. Valentine Njeri Ndung'u "A"

2. With his second wife the deceased sired five children as follows:

- a. Valentine Njeri Ndungu "B" - Co-administrator/Applicant
- b. Caroline Ngonyo Ndungu
- c. Gladys Nungari Ndung'u
- d. Douglas Guchu Ndungu
- e. Cecilia Kabura

3. Pursuant to a consent recorded before **Muigai J** on 8.10.14, letters of administration were issued in favour of **Joseph Kimani Ndungu** (son of first wife) and **Valentine Njeri "B"** (daughter of second wife). Subsequently, **Musyoka J** in his Ruling dismissing an application brought by two alleged purchasers of portions of one of the estate assets being **LR 13537/47**, namely, **Samuel Kenju Kamau** and **Joseph Njoroje Muriu** gave directions, inter alia, that the administrators file summons for confirmation of the grant.

4. On 21st December 2017 **Valentine Njeri Ndung'u "B"**, (the Applicant) filed the summons for confirmation of grant which is the subject of the instant judgment. In the said summons, she listed the assets of the estate and proposed the mode of distribution thereof. The assets listed are as follows:

1. Land parcel Ngenda/Mitero/T139
2. Land parcel Ngenda/Mitero/T138
3. Shares No.132 in Kyanjau Housing Society Ltd.
4. One (1) share in Ngenda Location Ranching Co. Ltd
5. Gatukuyu Coffee Growers Co-op Society Ltd – 50 shares on property 1 and 2
6. Motor vehicle registration No.KKE 313

7. Land Parcel No.LR 13537/199 – Juja
8. Land Parcel No. LR 13537/46 – Juja
9. Land Parcel No. LR 13537/47 – Juja
- 10.Land Parcel No. LR 13437/224 – Juja
11. Plot No. 1064 – (with rental houses)
12. Plot No. 1619 – Industrial Plot

5. In her proposed distribution, the assets No. 1, 2, 5 should devolve upon the second family exclusively, while the 1st family would receive assets No. 3, 11 and 12 exclusively.

6. She proposed that asset No. 7 and 10 be sold and proceeds shared equally among the beneficiaries. With regard to asset No.8 she proposed equal distribution. As for asset No. 9 she proposed that the part (size unstated) adjoining the highway be sold and proceeds shared equally and the balance of the land be shared, with the second family receiving a smaller share.

7. The application provoked the so-called Replying affidavit, which is properly an affidavit of protest, by **Joseph Kimani Ndungu** (the Respondent) to the effect, that the assets listed as Nos. 11 and 12 and a plot described as **No. 314 King’oki** were part of the estate of his deceased mother and did not form part of the estate of the deceased herein.

8. Moreover, that the said estate was distributed finally in **Nairobi High Court Succession Cause No. 1768 of 2006** to the members of the first house *vide* the Rectified Certificate of Confirmation of Grant issued on 27th September 2016; that asset No. 4 always belonged to the Respondent. The Respondent conceded asset No. (1) to the second family but asserted that asset No. 2 contained the grave of his mother and ought to devolve upon the first family. He also conceded assets No. 5, 6, 7 to the second family. He stated concerning asset No.9 that, the portion fronting the Thika Highway ought to be sold and proceeds shared by all beneficiaries. Of the balance thereof, he proposed that the portion developed with shops ought to devolve upon the second family while the first family receives the remaining undeveloped portion.

10. He highlighted the fact that purchasers of part of the said asset had already taken possession of their respective parcels. He asserted that the asset listed as No. 10 was sold by the deceased prior to his death and that the parcel identified as **plot 1064** does not exist.

11. In a further affidavit, the Applicant sought to correct the share certificate number of the asset No. 3 to read No. 122. She claimed that the deceased herein contributed to the purchase of the said share and that the same is available for distribution as part of his estate. She also annexed a share certificate in respect of asset No.4 bearing the name of the deceased herein. She complained that the Respondent and his siblings had intermeddled with the estate, sold off some assets and that their demand for equal distribution would lead to unjust enrichment on their part.

12. The court directed that the summons for confirmation be heard by way of *viva voce* evidence. **Valentine ‘B’** and the Respondent testified at the hearing, adopting their respective affidavits. Two issues emerged from the evidence of the parties, namely, the extent of the estate and distribution between the beneficiaries who, are not in dispute.

13. The Court having considered the parties’ evidence which at times prevaricated, as well as the submissions filed takes the following view of the matter. **Parcels No.1065, 1069** (industrial plot) which were apparently acquired on account of shares purchased by the first wife of the deceased from **Kyanjau Farming/Housing Society** must be excluded from the estate of the deceased in light of the Rectified Certificate of Confirmation of Grant dated 27th September 2016, in respect of the estate of **Miriam Nyambura** in **Succession Cause No.1768 of 2006 Nairobi** (Annexure JKN5 to the Replying affidavit).

14. Although it would appear that in earlier proceedings in the lower court, in **Thika Succession Case No.64 of 1995**, the deceased herein had received a share of the plots emanating from the Kyanjau Farming/Housing Society share, while holding the remainder in trust for the children of the first wife, it seems that subsequently, the High Court distributed the assets exclusively among the children of the first wife.

15. Valentine ‘B’ did tender some evidence in the form of a receipt, annexure **VNN2** to her Further affidavit to shore up her claims that the deceased herein contributed to the purchase of shares by the deceased first wife from Kyanjau Farming/Housing Society. She also protested that she was unaware of the proceedings taken in **High Court Succession Cause No. 1768 of 2006** regarding the plots resulting from the shares. The certificate of confirmation of grant in that case has not been challenged or revoked, and this court cannot proceed to re-distribute properties already distributed in that cause which was brought in respect of the estate of the deceased’s first wife. Thus the parcels of land obtained under shares brought from Kyanjau Farmers/Housing Society must be excluded from the estate of the deceased herein.

16. With regard to the assets described as **LR. 13537/199, LR. 13537/224** and **plot No. 1064**, I cannot find on record any evidence that such assets constituted the deceased’s free property at the time of his death. No certificate of search or other documents were tendered by any of the parties.

17. However, according to Valentine ‘B’ the asset **LR 13537/199** is the subject of litigation due to the presence thereon of squatters. She disputed that **LR 13537/224** had been sold, during her evidence, but did not tender any documentary proof as to its current ownership. The subsequent attempt by the Applicant’s advocate to tender a sale agreement in respect of the said asset through submissions, is irregular and the court cannot consider such evidence at this stage. The Applicant’s assertions with regard to plot 1064 (asset No. 11) suggests that she assumed it to be property claimed as belonging to the estate of the deceased’s first wife. The correct number of the plot should therefore be

No. 1065 and not 1064.

18. For his part, the Respondent confirmed that asset No.8 i.e. **LR 13537/199** is the subject of litigation. He asserted that asset No. 10, namely **LR 13537/224** was sold long ago. He did not elaborate even when pressed during cross-examination. In the absence of firm evidence as to the ownership of the assets No. 8 and 10, and the admitted litigation regarding the former, this court will exclude these assets from the estate of the deceased. Reference made to **Plot No. 1064** as earlier indicated appears to be an erroneous reference to **Plot No. 1065** which I have already excluded as property already distributed under the estate of the deceased's first wife. Asset No. 11 will therefore not be considered in the distribution of the estate of the deceased herein.

19. Concerning asset No. 4 which is one share in **Ngenda Location Ranching Co. Ltd, Valentine 'B'** tendered a share certificate (annexure **VNNI**) to the Further Affidavit, which shows that the deceased herein purchased one share in **Ngenda Location Ranching Co. Limited** and received a certificate **No.3461** dated 25th November 1983. The Respondent has claimed that this asset was 'always' his property, not the deceased's. To support his claim the Respondent attached to his Replying affidavit a copy of certificate marked annexure **JKN 6**. This annexure is a share certificate No.616, issued by **Ngenda New Farmers Co. Ltd** purportedly in respect of the purchase of one share in 2005. Evidently this is a different company from Ngenda Ranching Company Ltd.

20. During cross-examination the Respondent was taken to task concerning the two certificates. On being referred to the certificate annexed to the Further Affidavit as **VNN1**, he stated:

"I don't relate this with my annexure JNK 6 (share certificate by New Ngenda Farmers Co. Ltd) and I don't know where the property for the former certificate (annexure VNN1) is. The latter is my personal property. I don't have any demand on (asset No.4) because I don't know whether the two certificates refer to the same property. The certificate I have is in my name. As administrator, I don't know where the property) is".

21. In the circumstances, the court accepts the evidence by Valentine "B" that the deceased died possessed of one share in Ngenda Location Ranching Co. Ltd and that this share forms part of his estate. The Respondent's certificate clearly refers to a different company and there is no evidence that the certificate in his possession has any bearing on asset No. 4.

22. In the result the court concludes that the deceased's estate was comprised of the following assets:

1. Land parcel LR Ngenda/Mitero/T.139 – 0.132 ha
2. Land parcel LR Ngenda/Mitero/T.138 0.180 ha
3. One share in Ngenda Location Ranching Co. Ltd
4. Gatukuyu Coffee Growers Co-op Society Ltd - 50 shares
5. Motor vehicle Reg. No. KKE 313
6. Land Parcel LR No.13537/46 Juja
7. Land Parcel LR No.13537/47 Juja

23. Turning to the question of distribution, the Applicant maintains that the court should consider that the Respondent's family has already benefited from property devolved upon it from their deceased mother. The Respondent's answer is that the second family has not disclosed what property devolved upon it from their own mother. To my mind, the assets received from the estate of the deceased's first wife have no relationship to the estate of the deceased herein. Nor were they shown to be gifts made to the first family by the deceased as anticipated in Section 42 of the Law of Succession Act. This court declines the invitation to consider these assets which have at any rate been already distributed, for purposes of distribution of the instant estate.

24. The deceased was not a polygamous man as the proposed modes of distribution and the Applicant's submissions suggest. However, the deceased sired two sets of children with his first and second wives, the second of whom he married upon the demise of the first. Thus the Applicant's submission that Section 40 of the Law of Succession Act applies in this case is inaccurate. The relevant Section is Section 38 of the Law of Succession Act which provides that:

"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42 devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

25. As the court has already indicated Section 42 of the Law of Succession Act has no application to the instant matter. The deceased was survived by 8 children. With regard to land parcels **LR. No. Ngenda/ Mitero/T 139** and **LR No. Ngenda /Mitero/ T 138**, there was conflicting evidence as to the location of the graves of the three parents of the rival siblings. Moreover, these pieces of land are not equal in size. The court also notes that whereas the first wife had three children with the deceased, the second wife had five children. In order to achieve some equity, the court will order that the parcel no. **LR. Ngenda/Mitero/ T138** which measures 0.180 ha. will devolve upon the five siblings of the second family who will share it equally.

26. The three siblings of the family of **Miriam Nyambura Simon** will share equally the parcel **No. LR. Ngenda /Mitero/T138** which

measures about 0.132 ha. With regard to the one share in **Ngenda Location Ranching Co. Ltd**, each of the eight siblings is entitled to ? of the said share. The shares in respect of **Gatukuyu Coffee Growers Society Ltd** are not contested. The Respondent had proposed that they go exclusively to the family of the Applicant. These will be shared between the five siblings of the said house. The motor vehicle KKE 313 is reportedly written off. The Respondent expressed that he has no interest in it. The salvage may be sold for the benefit of the Applicant's family and proceeds shared equally between the siblings in that family.

27. **Land parcel LR 13537/46** will be shared equally between the eight beneficiaries. As regards the parcel **LR 13537/47**, it is clear from the ruling of **Musyoka J** of 3rd February 2017 that two persons, namely, **Samuel Kenju Kamau** and **Joseph Njoroge Muriu** had staked claims to portions measuring $\frac{1}{4}$ and ? respectively therefrom, which claims were readily admitted by the Respondent before **Musyoka J**, and before this court. Although **Musyoka J** had directed that these persons be served with the summons to confirm grant, there is no evidence of compliance.

28. Nonetheless the Respondent confirms that these persons are already in possession. In her evidence before this court, **Valentine "B"** accepted that portions of the said parcel had been sold to some parties. She also admitted that she collects rent from shops developed thereon. While the Respondent claimed to have settled on the said property asserting, without providing proof, that he and his siblings had carried out certain developments thereon, earlier in his evidence -in- chief, he had been willing to go by the proposal in the application concerning that asset. This was also the gist of paragraph 13(f) of his Replying affidavit.

29. In the light of the foregoing, and to ensure equitable distribution, the court will distribute the said asset (**LR. No. 13537/47**) as follows. The portions admittedly sold to **Samuel Kenju Kamau** ($\frac{1}{4}$ acre) and **Joseph Njoroge Muriu** (? acre) are to be set aside for the said purchasers and will devolve upon them. Thereafter, the two families will share the remaining portion as follows. The part of that parcel which admittedly consists of a frontage area abutting the Thika Highway, as well as the built- up area adjoining it are to be sold, and the proceeds shared equally between the eight siblings. The balance of the parcel, said to consist of undeveloped land, will be shared equally between the eight siblings. Parties will bear their own costs.

30. In the event that the litigation in respect of parcel **LR. no. 13537/ 199** resolves in favour of the estate of the deceased, the administrators will be at liberty to apply for the distribution of the said asset.

DELIVERED AND SIGNED AT KIAMBU THIS 24TH DAY OF OCTOBER 2019

.....

C. MEOLI

JUDGE

In the presence of:

Miss Nakato for Applicant

Mr. Muibu holding brief for Mr. Githaiga for Interested Parties

Respondent in person

Court Assistant - Kevin