



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**SUCCESSION CAUSE NO. 145 OF 2007**  
**IN THE MATTER OF THE ESTATE OF MUNYAO MUSAI (DECEASED)**

**1. ELIJAH MUSYIMI MUNYAO**

**2. RICHARD MUTHINI MUEMA.....PETITIONERS**

**VERSUS**

**1. J.B. MUNYAO**

**2. WILLIAM MUNYAO.....OBJECTORS**

**RULING**

**Introduction**

The Petitioners and Objectors herein are all sons of the late Munyao Musili (hereinafter “the Deceased”) who died on 23<sup>rd</sup> June 1985. On 9<sup>th</sup> July 2010, the 1<sup>st</sup> Petitioner filed an amended Summons for Confirmation of Grant dated 6<sup>th</sup> July, 2010, in which he sought to have the grant of letters of administration made on 17<sup>th</sup> November, 2008 to John Bosco Munyao, Elijah Musyimi Munyao and William Mutisya Munyao with respect to the estate of the Deceased confirmed.

In his affidavit in support of the said summons, the 1<sup>st</sup> Petitioner stated that the deceased was survived by Mukonyo Munyao, Mutisya Munyao, Joseph Mutuku Munyao, Nduku Muema, Nzula Muli, Patrick Kioko Munyao, Musyoka Munyao, Muteti Munyao, Muindi Munyao and himself. Further, that the property of the Deceased, being parcel number Matungulu/Kyaume/858 have been subdivided as follows:

a) Each party occupy where they already are in Matungulu/Kyaume/858 in accordance with a consent order recorded in court on 23<sup>rd</sup> March, 2009 save for 1.9 acres.

b) That the coffee portion in dispute measuring 1.9 acres be distributed as hereunder:

Mukonyo Munyao’s homestead (3<sup>rd</sup> wife) – 0.47 acres

Mwongeli Munyao’s homestead (1<sup>st</sup> wife) – 0.75 acres.

Mwelu Munya’s homestead (2<sup>nd</sup> wife) – 0.68 acres.

And the above distribution be as per current usage of the said portion in Matungulu/Kyaume/858.

He prayed that the court grant the application and confirm the grant pursuant to section 71(2) (4) of the Law of Succession Act, to enable the land registrar issue him with land certificate.

The 1<sup>st</sup> Objector subsequently filed an affidavit of protest against confirmation of the Amended summons on 14<sup>th</sup> February, 2013 on behalf of the Objectors. In the course of the proceedings, the 2<sup>nd</sup> Objector died and was substituted upon consent of the parties by Joseph Mutuku Munyao. The Objectors acknowledged that the deceased's property was by way of a consent dated 23<sup>rd</sup> March, 2009 distributed as per the occupation of each party, save for a portion of coffee on Matungulu/Kyaume/858.

Further, that it was agreed that the distribution of the portion of Matungulu/Kyaume/858, which is in dispute be determined by way of *viva voce* evidence. According to the 1<sup>st</sup> Objector, the Deceased's wish was that the said portion be distributed equally among the three households. He further stated that the said portion measures 1.22 acres and not 1.9 acres.

### **The Evidence**

On 23<sup>rd</sup> March 2009, the following consent order was recorded in Court:

1. "All the parcels of land forming the estate of Munyao Musai to be distributed as per the occupation of each party as of today
2. The portion of Matungulu/Kyaulu/858 in dispute to be determined by way of *viva voce* evidence on 21<sup>st</sup> September 2009"

The parties thereafter commenced the hearing with respect to the distribution of the contested portion of Matungulu/Kyaume/858 by way of *viva voce* evidence on 10<sup>th</sup> June 2013, due to various transfers of the judges of the Court. They also filed their respective witnesses' statements.

The 1<sup>st</sup> Objector, John Bosco Munyao, testified as PW1. It was his testimony that it was the deceased's wish that the property in question be equally distributed among his three households. He produced as his exhibit a will and translation thereof he said the Deceased made to that effect, that was dated 14<sup>th</sup> December 1979. He stated that his mother's (Mukonyo's) house had not been given their share of the coffee plantation, which was being cultivated by Musyimi and Muema, who are sons of the 1<sup>st</sup> house.

On cross-examination, he stated that he was present when an agreement dated 2<sup>nd</sup> December, 1979 as to the distribution was made. He also acknowledged that the will of 14<sup>th</sup> December 1979 did not bear the Deceased's signature. Further, that the said will talks of terraces and not lines, and that one terrace had several lines. He denied that his household has sold a portion of the land and has received coffee dividends.

Joseph Mwindi Munyao (PW2) reiterated what PW1 stated that it was the deceased's wish that the property in question be distributed equally among the three households.

On the other hand, the 1<sup>st</sup> Petitioner, Elijah Musyimi Munyao (DW1), testified that the Deceased distributed the disputed property before his death. That the deceased gave 13 lines of coffee to the 1<sup>st</sup> household, 12 lines of coffee to the 2<sup>nd</sup> household and 8 lines of coffee to the 3<sup>rd</sup> household. He produced copies of the agreement and translation thereof as to the said distribution dated 2<sup>nd</sup> December 1979 as his Exhibit 1A and 1B. Further, that everyone was satisfied with the distribution and it was after the Deceased's death that the dispute arose. DW1 stated that he was present at the family meeting held on 11<sup>th</sup> April, 1996 to agree on how the coffee would be distributed, and produced the minutes thereto and translation thereof as Exhibit 2A and 2B.

Johnson Ndangiwe Nguti (DW2), who was the then assistant chief of Sengani sub-location, testified that on 14<sup>th</sup> December 1979, the Deceased called and informed him and other elders that he would like his properties to be distributed including the coffee plantation. Further, that the deceased put down his said wish in writing. He stated that the Deceased gave the 1<sup>st</sup> household 13 lines of coffee, to the 2<sup>nd</sup> household 11 lines, and 3<sup>rd</sup> household 8 lines. He further stated that he was present at the meeting of 11<sup>th</sup> April, 1996 where the deceased's family agreed on the mode of distribution of the properties.

### **The Determination**

It is not disputed that the Deceased had three wives and households, namely, Mwongeli's house, Mwelu's house and Mukonyo's house. The survivors and properties of the Deceased are also not in dispute. There are only two issues for determination arising from the evidence and arguments made by the Objectors and Petitioners. The first is whether the Deceased had made a valid will that indicated his wishes as to the distribution of his estate. Second is how the property of the Deceased should be distributed among his beneficiaries.

On the first issue, the Objectors submitted that the will of the Deceased dated 14<sup>th</sup> December 1979 met the standards of a valid will as set out in section 11 of the Law of Succession Act, as it was signed by the testator and witnessed by three (3) competent witnesses. It was contended that the will was made on 14<sup>th</sup> December, 1979 after the meeting of 2<sup>nd</sup> December, 1979. The Objectors relied on the case of **James Maina Anyanga v. Lorna Timbiba Ottaro & 4 others, Succession Cause No. 1 of 2000** where the court upheld the wishes of a testator.

The Petitioners' submissions were that the alleged will is not in conformity with the rules with regard to attestation, production and preparation of wills, for reasons that the 1<sup>st</sup> Objector averred that he was not present during the preparation of the will and that he was not the author of the said will. Further, that the Objectors did not call the maker of the said will to state that he indeed prepared the will and establish its authenticity.

It was further submitted that the objectors did not also call the witness to the will to confirm that the will was drafted according to the Deceased's wishes. Citing section 11 of the Law of Succession Act, it was submitted that having said that they were young men at the time of the making of the will, the Objectors could not confirm the authenticity of the said will.

On the second issue, the Objectors submitted that the Deceased in his will directed that the property in question be distributed equally among the three (3) households, but that the Petitioners have been working and harvesting coffee from the property solely benefiting their household. The Petitioners on the other hand urged that the Deceased wrote down how the property in question was to be distributed, and that DW2 established the authenticity of the said document and that it was only fair that the Deceased's wishes be done.

On the first issue, it is the finding of this Court that the Deceased's will dated 14<sup>th</sup> December 1979 that was produced by the Objectors in evidenco does not meet the required formalities. In this regard, section 11 of the Law of Succession Act, provides for the formal requirements of a valid will as follows;

**“ 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.**

From the above provisions, it is required that the testator must append his signature on the will with an intention of giving it effect as his last will and testament, and the said will must be confirmed by at least two witnesses. The will dated 14<sup>th</sup> December 1979 produced by the 1<sup>st</sup> Objector was not signed by the Deceased or any witnesses and is therefore not a valid will.

On the second issue, the 1<sup>st</sup> Objector and 1<sup>st</sup> Petitioner produced documents which they alleged to showed the mode of distribution of the contested portion of the land that was proposed by the Deceased. The 1<sup>st</sup> Objector relied on the invalidated will he says was made by the Deceased on 14<sup>th</sup> December 1979. The relevant paragraph of the English translation of the said will states as follows:

**“I distribute my coffee as follows. I have divided into 3 portions.**

**(a) Musyimi Munyao one terrace**

**(b) Muema Munyao one terrace**

**(c) Mukonyo Munyao one terrace**

**I have divided the coffee for purposes of cultivating and harvesting for me then I thereafter will leave those people as the owners. I Munyao have said so.”**

As has been found by this Court, the said will was not signed by the Deceased nor witnessed.

The agreement relied on by the Petitioner is dated 2<sup>nd</sup> December 1979 and states as follows:

**“Today the above written date is when Munyao Masai has seen it fit to divide his coffee plantation to every house between the three houses (he has divided as herein)**

**1. The upper bench bordering Joseph Mutuuku Munyao has been given to the third or last wife (Mukonyo Munyao 8 lines)(8) only of coffee to cultivate and own**

**2. Second bench he has given Mwongeli Munyao his first wife thirteen lines (13) only.**

**3. The last bench bordering his home he has given to his second wife (Mwelu Munyao) twelve lines (12) lines.**

**This is Munyao Musai’s decision 2/12/79.**

**All those people to continue harvesting for Munyao Musai the coffee plantation including cultivating where each has been given, The coffee produce will be Munyao’s till when he will stop. Then each person will now benefit from his share.”**

The said agreement is stamped and signed by an Assistant Chief by the name Johnson N. Nguti who testified as DW2.

Both the 1<sup>st</sup> Objector (PW1) and PW2 testified that they are sons of Mukonyo Munyao who is the third wife of the deceased and is still living. On cross-examination, the 1<sup>st</sup> Objector stated that Musyimi

Munyao and Muema Munyao who are named in the will are sons of the 1<sup>st</sup> wife of the Deceased. Therefore, the purported will produced as evidence by the Objectors does not support their argument that the Deceased distributed the coffee equally among his households, as the second household is clearly missing from the said distribution.

In addition, the 1<sup>st</sup> Objector did admit being present at the meetings of 2<sup>nd</sup> December 1979 when the Deceased stated his wishes as to the distribution of the coffee, and the family meeting held on 11<sup>th</sup> April 1996 when these wishes were confirmed. Lastly, DW1, who was an independent witness and who was present at both meetings testified as to the wishes of the Deceased in this regard. I therefore find that the Petitioners have established on a balance of probabilities that the Deceased did in his life time indicate how he wanted the coffee distributed, and this Court is obliged to give effect to those wishes.

These findings notwithstanding, this Court notes that the consent as to the distribution recorded by the parties on 23<sup>rd</sup> March 2009, and the finding herein as to the distribution of the contested portion of the Deceased property, cannot be effectively distributed without a survey to ascertain the actual share occupied by each beneficiary, and the size of the disputed portion of land allocated to each household by the Deceased.

Therefore, to facilitate the confirmation of the grant issued herein, I accordingly order as follows:

1. The Petitioners and Objectors shall within 90 days of today's date undertake a survey of the Deceased' properties and the portions thereof occupied by each beneficiary that were agreed to be distributed in accordance with the consent recorded in Court on 23<sup>rd</sup> March 2009, and of the portions of Matungulu/Kyaulu/858 under coffee cultivation allocated to each household by the Deceased in the agreement dated 2<sup>nd</sup> December 1979.
2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> households of the Deceased shall equally share the costs of such survey.
3. The Petitioners shall thereafter file in Court and serve a further affidavit on the distribution within 30 days, indicating the names of all the beneficiaries and their respective shares of the Deceased's properties in accordance with the findings of, and orders in this ruling for final orders of confirmation.
4. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21<sup>st</sup> February 2018.

**P. NYAMWEYA**

**JUDGE**