



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 435 OF 2004**

**IN THE MATTER OF THE ESTATE OF ELIJAH KASEKE MAKAU (DECEASED)**

**PHILIP MUTISO MAKAU.....1<sup>ST</sup> ADMINISTRATOR**

**VERSUS**

**1. STEPHEN MWANZIA NTHIWA.....OBJECTOR**

**2. PRIGNNIAS MBINYA MAKAU.....2<sup>ND</sup> ADMINISTRATOR**

**RULING**

**Introduction**

This succession cause was filed in this Court on 15<sup>th</sup> October 2004, when Philip Mutiso Makau (the 1<sup>st</sup> Administrator herein) lodged a Petition to be administrator of the estate of Elijah Kaseke Makau (hereinafter referred to as “the Deceased”). The 1<sup>st</sup> Administrator is a son of the Deceased with his first wife, who was also at the time deceased.

While the Petition was still pending, Susan Mwelu Makau, the then surviving widow and second wife of the Deceased, also filed Petition by way of a Cross-Petition for a grant of representation on 25<sup>th</sup> June 2007, which was settled by a consent recorded on Court on 5<sup>th</sup> October 2009 whereby the 1<sup>st</sup> Administrator and Susan Mwelu Makau were appointed joint administrators of the estate of the Deceased. On 20<sup>th</sup> April 2011, Priginnias Mbinya Makau, the 2<sup>nd</sup> Administrator herein, filed a chamber summons to substitute Susan Mwelu Makau as administrator, after the Susan Mwelu died on 1<sup>st</sup> June 2010. The 2<sup>nd</sup> Administrator is a daughter of the said Susan Mwelu Makau. The prayer for substitution was granted on 11<sup>th</sup> July 2011, and the administrators were thereupon directed to file summons for confirmation of the grant.

On 17<sup>th</sup> September 2013, the 2<sup>nd</sup> Administrator subsequently filed a summons for confirmation of grant dated 26<sup>th</sup> August, 2013. She sought confirmation in terms of an attached schedule that proposed distribution of the Deceased’s assets as follows:

1. That the following properties to be held by Philip Mutiso Makau and Priginnias Mbinya Makau in equal shares in trust for the respective beneficiaries in their houses:

- a) Machakos/Mua Hills 284 (239.687 Acres)
- b) Mitaboni/ Mutituni 912
- c) Kyanzavi Certificate No. 574 of 5 shares (1<sup>1/2</sup> Acres)
- d) Lukenya plot No. 494 (1/8 Acre)
- e) Lukenya (Muthwani) Plot No. 21 (1/2 Acres)
- f) Lukenya Member No. 46 (20 Acres)
- g) KCB Shares Certificate No. 320461
- h) Donyo Sabuk/Kobk Block 1/609 (0.1800 Hectares)

i) Katelembo Share No. 246 Plot No. 499

j) Kyeni Kya Kangundo 2 shares

2. Kwale/Magawani/6 to be transmitted to Patrick Nzuki Joel (Purchaser) and Mbetiza Kombo (Purchaser )

3. Mitaboni/Mutituni/391 to be transmitted to Stephen Nthiwa Mwanzia (Purchaser (whole)

4. Lukenya plot No. 532 Mavoko Town Block 3/199 (40 Acres ) to be transmitted to Boniface Mutua Musyoki (Purchaser (whole)

5. Lukenya Plot No. 961 of 5 Acres (Member No. 7420) to be transmitted to Patrick Makau King'ola (Purchaser (whole).

The consent for distribution was signed by Patrick Musyoki Makau, Benjamin Nzombe Makau, Brooks Mukumbu Makau, Christine Nthenya Ndonge, Christine Ndila Makau, Doreen Muthoki Muthiani, Judy Muthue Makau, Felix Kaseke Makau, Edith Kanini Makau and Dolphine Mueni Makau.

Stephen Mwanzia Nthiwa, the Objector herein, filed an affidavit in support of the summons for confirmation sworn on 11<sup>th</sup> November 2015, in which he stated that on 2<sup>nd</sup> October 2003, he entered into an agreement with the Deceased for the sale of land parcel No. Mitaboni/Mutituni/391 for the price of Kshs 100,000/=, which he paid in full in three installments. He attached agreements evidencing the said payments, and deponed that the Deceased initiated the process of obtaining the Land Control Board consent, but died before he could appear before the Board and before he could complete the transfer process. However, that the Deceased had turned over possession of the said parcel of land and its title deed to the Objector before his death.

A number of affidavits of protests were filed in response thereto on 25<sup>th</sup> August 2014. Peter Kyaa, who was the chairman of the Deceased's family council of elders, Ngelele Nzioka, a sister to the Deceased, David Nguta a nephew to the Deceased, and the 1<sup>st</sup> Administrator filed affidavits in protest to the confirmation of the grant. They contended that the Deceased entered into a sale agreement with the Objector with respect to the purchase of Mitaboni/Mutituni/391, whereby the Objector paid the Deceased Kshs. 20,000/=, but that after a family meeting in which objections were raised to the sale, the Deceased changed his mind and it was agreed that the Kshs. 20,000/- be refunded. However, that the Objector refused to accept the refund.

The 1<sup>st</sup> Administrator and Objector also filed several applications in the course of the succession cause regarding their access to and use of the property known as Mitaboni/Mutituni/391, and custody of the title deeds to the Deceased properties, which this Court dispensed with on 28<sup>th</sup> July 2014 by ordering that the *status quo* as at that date be maintained by the parties. On 18<sup>th</sup> November 2014 the Court directed that the summons for confirmation of grant proceeds to hearing by way of *viva voce* evidence.

### **The Evidence**

The Objector testified and called one witness during the hearing, while three of the Protestors including the 1<sup>st</sup> Administrator also testified during the hearing. The 2<sup>nd</sup> Administrator testified and called one additional witness during the hearing in support of the proposed distribution.

### ***The Objector's Case***

The Objector testified as PW1, and reiterated that he bought land parcel Mitaboni/Mutituni/391 from the Deceased and paid Kshs 100,000/= as the purchase price, and that the Deceased gave him the title deed. He denied that he only paid Kshs 20,000/= and also denied receiving any letter from the 1<sup>st</sup> Administrator about refund of the said sum.

He further testified that he entered into sale agreements with the deceased which were witnessed by Stephen Kaloki Ndunda, and stated that the Deceased gave him the application for the Land Control Board consent dated 7<sup>th</sup> October 2013 which he produced as Exhibit 2. He confirmed that the Deceased died before the consent was given and transfer was made, and that the 1<sup>st</sup> Administrator thereafter started claiming the land.

Stephen Ndunda (PW2) confirmed that he drafted the sale agreements dated 2<sup>nd</sup> October, 2003, 13<sup>th</sup> October, 2003 and 18<sup>th</sup> October, 2003 between the Objector and Deceased which he produced and the translations thereof as Exhibits 1A to 1D. Further, that he witnessed the payment of Kshs. 20,000/- and another payment for KShs. 50,000/- of the purchase price. He however stated that he did not witness the transfer of the property done. On cross examination, PW2 stated that 1<sup>st</sup> Administrator objected to the sale of land by the deceased.

### ***The Protestors' Case***

The 1st Administrator testified as PW3 and stated that his mother was the Deceased's first wife, and they had eight children. Further, that the Deceased married another wife in 1958 after his mother's death. He objected to the sale of Mitaboni/Mutituni/391 was sold to the Objector because he was not consulted, and because the said land parcel had been given to his mother by her mother-in-law in the year 1940 in accordance with Kamba customs, and it was land that was held by the Deceased in trust. He also stated that the other reason why he objected to the sale is that it was sold for only Kshs. 100,000/-, yet it had 15 bench terraces of coffee, while a single bench terrace currently goes for Kshs. 100,000/-.

That due to the objection, a meeting was convened where all the family members were in attendance including Peter Kyaa who was the clan chairperson. PW3 testified that it was resolved at the meeting that the land should not be sold, and the Deceased agreed to refund the deposit of Kshs. 20,000/-. He stated that the sale did not go before the Land Control Board.

On cross-examination, PW3 stated that he registered a restriction on the land which was later lifted by his father (the Deceased), and acknowledged that if the Deceased bought the land then he had a right to sell it. He also testified that he had no objection to the Deceased's property being divided equally between the two houses of the Deceased, or some of the small parcels being sold and the proceeds shared equally between the said houses.

Ngelele Nzioka (PW4) who is the Deceased sister, testified that the Deceased informed her that he had sold land without informing his children. That Beatrice Loko, who was the Deceased's first wife had been given that land by her parents-in-law when she gave birth to Philip Mutiso Makau, to use it for taking care of the children. When the land was sold, the Deceased's family members objected to the sale since it was land given as a gift to the first wife's family. She also indicated that the Deceased had mental problems at the time of the sale transaction. On cross examination, PW4 stated that she was informed by her mother that the land was so given.

Peter Kyaa (PW5), the Deceased's clan chairperson, testified that under Kamba Customary Law, a woman is normally given land by her mother in law to till and feed the children. That Beatrice Loko, the Deceased's first wife, was so given the subject land by her mother-in-law. That Beatrice died before the Deceased married the second wife. He recounted that the Deceased called him seeking his intervention since he had sold the land for Kshs. 100,000/- and the children were unhappy about it.

Further, that at a meeting in which all members of his family were present, it was agreed that the land should not be sold and that the children should raise the purchase money to be refunded to the buyer, but that he did not know if the money was refunded. On cross examination he denied that the Deceased was mentally instable. He stated that the Deceased's first wife had 5 sons and 2 daughters while the second wife had more than seven children. Further, that all the first wife's children and all except one son of the second wife's were in the meeting.

### ***The 2<sup>nd</sup> Administrator's Case***

Priginnias Mbinya Makau, the 2<sup>nd</sup> Administrator, testified as DW1 and listed the Deceased's children as follows. The first wife's children are Philip Mutiso, John Musau, Rhoda Syokau, Andrew Maingi, David Makau, Regina Ndunda, Mwanja Munyau, Pauline Ndunge and Francis Kingola. That the second wife's children are Patrick Musyoka, Benjamin Nzombe, Brooks Mukumbu, Mbinga Makau, Christine Ndongye, Christine Ndila, Dolphine Mueni, Doreen Muthoki, Judy Muthue, Felix Kaseke and Edith Kanini. She stated that the Deceased was of sound mind and sold Mitaboni/Mutituni/391 to Stephen Mwanzia, and that he had a right to sell the property. She contended that the said property was given to the Deceased by their grandmother. She stated that she was not aware that the agreement between the Deceased and Objector was meant to be considered by the Land Control Board.

On the other purchasers of the Deceased's properties, DW1 testified that she knew Boniface Musyoki and Patrick Kingola. Further that she had not met the other purchasers of the land in Kwale, and that she found their sale agreements among the Deceased's documents after her mother died.

She also stated that the 1<sup>st</sup> Administrator never took care of the Deceased and never even visited him when he was at Mater Hospital before his death.

Boniface Musyoki one of the alleged purchasers, testified as DW2, and stated that he bought Mavoko Town Block 3/1991 from the Deceased when it was still known as Lukenya Plot 532, and that they signed a sale agreement. Further, that a survey was done which revealed that the land was 40 acres. The consideration for the land was Kshs. 2,000,000/- at the time. He paid a deposit of Kshs. 200,000/-. DW2 testified that according to the sale agreement, the balance was to be paid within 7 months which he paid in cash, and also paid hospital bills of the Deceased of Kshs 96,367/=. However, that the Deceased died before he could transfer the property to him.

### **The Issues and Determination**

The parties were directed to file and serve written submissions after the hearing. O.N. Makau & Company Advocates for the Objector filed submissions dated 30<sup>th</sup> October 2017, while Kiruja Mbaya & Company Advocates for the 1<sup>st</sup> Administrator filed submissions dated 4<sup>th</sup> September 2017. The Advocates for the 2<sup>nd</sup> Administrator, B.M. Mung'ata & Co Advocates, filed submissions dated 29<sup>th</sup> September 2017.

It was the 1<sup>st</sup> Administrator's submission that the six sale transactions were illegal and no legal right of the Deceased's property could be passed to the buyers. It was further submitted that the transaction with the Objector cannot stand due to failure to obtain a consent from the Land Control Board under whose jurisdiction the transaction occurred. To support this argument the 1<sup>st</sup> Administrator relied on **Karuri v. Gituru, Civil Appeal No. 25 of 1980.**

As regards the sales to Patrick Nzuki Joel, Mmbetza Kombo, Patrick Makau King'ola and Joseph Kaseki, the 1<sup>st</sup> Administrator urged the court not to give effect to the sale agreements in respect to their transactions, for the reason that the sale agreements were not backed by their testimonies having failed to be called as witnesses.

With regard to Mitaboni/Mutituni/391, it was submitted that the testimonies in court sufficed since the same gave evidence of the existence of a trust under Akamba Customary Law and reliance was placed on the decision in **Ernest Kinyanjui Kimani v. Muiru Gikanga & Another, Civil Appeal No. 17 of 1965.** It was further submitted that the 2<sup>nd</sup> Administrator and the Objector furnished no evidence that the Deceased acquired the land through purchase, but rather that the evidence in court was that the Deceased was given the property by his grandmother under furtherance of a customary trust.

The Objector on his part submitted that neither the Deceased's family nor clan had any right to purport to deal with the property registered in the Deceased's name in a meeting, and that any purported resolution would not be of any effect. Further, that the 1<sup>st</sup> Administrator did not succeed in establishing the existence of a customary trust. He cited **Salesio M' Itonga v. Mithara & 3 Others (2015) eKLR** and **John Gacheru Mugo v. Daniel Motoku Kirori & another (2016) eKLR** in support of this position. It was further submitted that the Deceased had already filled the application forms for Land Control Board consent as at 7<sup>th</sup> October, 2013 and was only delayed by the restriction lodged by the 1<sup>st</sup> Administrator.

The 2<sup>nd</sup> Administrator submitted that the Objector met the evidentiary burden of proof under section 67 of the Evidence Act, by producing the sale agreement. It was further submitted that the 1<sup>st</sup> Administrator on cross examination confirmed that the signature on the agreement belonged to the Deceased and his wife. It was further submitted that the land in question was an excluded transaction from the provisions of the Land Control Act by virtue of section 6 (3) (a) of the said Act. Lastly, it was submitted that the Deceased was a polygamous man, and that his estate ought to be distributed in accordance with section 40 of the Law of Succession Act.

I have read and carefully considered the pleadings, evidence and submissions made by the Objector, Protestors and 2<sup>nd</sup> Administrator. As the properties of the Deceased are not in dispute, there are two issues for determination arising from the evidence and arguments made by the parties. The first is whether the Objector and other alleged purchasers listed in the Summons for confirmation of grant are entitled to the Deceased's property; and secondly, how the property of the Deceased should be distributed among his beneficiaries.

On the first issue, the Objector and Boniface Musyoki (DW2) claimed to have bought land from the Deceased during his lifetime, and brought evidence of the sale agreements. The Objector alleged to have completed payment and brought evidence of the same. He however admitted that no Land Control Board consent was given for the transaction. DW2 also alleged completion of the sale but only brought evidence of payment of a deposit of Kshs 200,000/=, and stated that the balance was paid in cash. No transfer of the two transactions was effected by the Deceased before his death.

The issue which is contested by the 1<sup>st</sup> Administrator is whether the Deceased's property passed to the Objector and DW2 as a result of the said transactions, and he also claims that Mitaboni/Mutituni/391 was land that was held in trust by the Deceased which he had no capacity to sell. This is an issue which this Court, sitting as a succession Court, is not empowered to adjudicate on. Musyoka J. in this regard in **In Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction as follows:

**“...The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.**

**27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.**

**28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –**

***‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’***

**29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.**

The questions as to who between the Deceased and the Objector is owner of Mitaboni/Mutituni/391, and who as between the Deceased and Boniface Musyoki (DW2) is entitled to Mavoko Town Block 3/1991, are purely disputes as regards ownership of land, and not one of succession to the Deceased property, and therefore outside the jurisdiction of this Court. It is also a dispute that arose during the Deceased's lifetime and before the succession proceedings herein.

Disputes primarily and solely concerning ownership and title to land fall within the jurisdiction of the Environment and Land Court as provided by Article 162 (2)(b) of the Constitution and section 13(1) and (2) of the Environment and Land Court Act. This Court will also need to operate outside the framework of the Law of Succession Act and apply other laws to determine the disputes, which them not

appropriate for determination by this Court sitting as a succession Court. The two properties will therefore continue to vest in the two administrators and will be excluded from distribution pending resolution of the disputes in the appropriate forum.

The other alleged purchasers did not testify as to having bought land from the Deceased. Their existence and identity cannot thereby be confirmed by this Court, nor can this Court confirm or rule on the alleged sale transactions in the absence of this evidence.

Coming to the second issue of the distribution of the Deceased's properties, as explained in the introduction to this ruling, the only surviving wife of the Deceased died during the pendency of this succession cause. The distribution of the property of an intestate who has no surviving spouse but has surviving children is governed by section 38 of the Law of Succession Act which provides as follows:

**‘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..’**

In effect this section requires equal distribution among all the children while taking into account any gifts or settlements that may have been made by the deceased during his lifetime

The 2<sup>nd</sup> Administrator, however in her schedule on distribution proposed an equal distribution of the Deceased's properties between the two houses of the Deceased, which the 1<sup>st</sup> Administrator was not averse to during the hearing. I also note that the 2<sup>nd</sup> Administrator provided copies of the title deeds and documents of the Deceased's properties, but did not include some such as Kwale/Magawani/2 and Mitaboni/Mutituni/2174 in her schedule of distribution. She also gave a mis-description of some of the properties. All the relevant information therefore needs to be availed to the Court before final orders can issue.

I accordingly order as follows:

1. The 2<sup>nd</sup> Administrator shall file in Court and serve the 1<sup>st</sup> Administrator with certified copies of the title documents to all of the Deceased's properties that are in her possession within 30 days of today's date.
2. The properties known as Mitaboni/Mutituni/391 and Mavoko Town Block 3/1991 are hereby excluded from distribution and shall continue to vest in the 1<sup>st</sup> and 2<sup>nd</sup> Administrators, pending resolution of the dispute as to ownership of the said properties as between the Deceased and alleged purchasers by the Environment and Land Court.
3. All the remaining properties of the Deceased Elijah Kaseke Makau shall be distributed equally between the houses of the Deceased's 1<sup>st</sup> Wife, the late Beatrice Loko and the Deceased's 2<sup>nd</sup> Wife, the late Susan Mwelu. Each house shall in turn agree on the allocation of their respective share of the said properties to each of the Deceased's beneficiaries in that house.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Administrators shall within 90 days of the date of this ruling file in Court and serve further affidavits indicating the names of all the beneficiaries in their respective houses, and the allocation to each beneficiary of their house's share of the Deceased's properties for final orders of confirmation.
5. There shall be no order as to costs.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 28<sup>th</sup> day of March 2018.**

**P. NYAMWEYA**

**JUDGE**