



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 137 OF 2004

IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH WAMUKOTA WANDA – DECEASED

AGGREY SIMIYU WANDA1ST ADMINSTRATOR/PETITIONER

RUTH NANYAMA WANDA2ND ADMINSTRATOR/PETITIONER

J U D G M E N T

1. From the outset this is a classic case where family feuds, disputes and greed is epitomised. The issues at a glance appears simple and uncomplicated. However due to failure of the beneficiaries to see beyond their rivalry, this matter has lasted in this court for unnecessarily long time. This matter as a consequence of the siblings rivalry has been handled by more that 7 judges!!

2. The issues are clear and straight forward. The deceased Joseph Wamukota Wandah died on 4/6/2004 intestate. He was a polygamous man so to speak or rather he had 2 houses.

3. His first wife Loice Victoria Wanda predeceased him. Several years later (about 15) he married Ruth Nanyama Wefwafwa whom he stayed with till his death.

4. The first house had the following children.

1. **Aggrey Simiyu wanda**
2. **Thomas Wekesa Wanda**
3. **Magdalene Wanda**
4. **Steve Gerald Wanda**
5. **Joshua Kituyi Wanda**
6. **Bob Kituyi Wanda**

The 2nd house had

1. **Ruth Nanyama Wefwafwa – Widow**
2. **Lucy Nafula**
3. **Isaac Wekesa**
4. **Elizabeth Nanyama**
5. **Esther Nasimiyu**

5. From the history of this matter, the parties proceeded by way of viva voce evidence and called several witnesses. They had all filed various rival affidavits. However on 13/9/2016 they agreed to set aside all the earlier applications and proceeded to have one application dated 20/9/2016 in which Ruth Wefwafwa sought to have the grant issued on 9/6/2016 confirmed.

6. As a consequence thereof the rest of the parties were invited essentially to file their proposal on mode of distribution of the deceased's properties . In her affidavit in support of the application for confirmation Ruth had given her own mode of distribution and this therefore opened the door for affidavit from Magdalene Wanda through her affidavit sworn on 10/11/2016 and Aggrey Simiyu Wanda sworn on 8th November 2016. The parties were equally granted leave to file their written submissions which this court has had the benefit of perusing.

7. It is not disputed that the deceased left behind the following properties.

1. **Kitale Municipality Block 18 Bidii/459 measuring 19.866 acres**
2. **Kitale Municipality Block 17 Bidii/92 measuring 12 Ha**
3. **Kitale Municipality Block 17 Bidii/99 measuring 50.388 acres**
4. **Kitale Municipality Block 17/Bidii/208 measuring 10.5 Ha**
5. **Kitale Municipality Block 17/107 measuring 38.926 acres**
6. **Kitale Municipality Block 17/Bidii/107 measuring 14.463 Ha**
7. **Kitale Municipality Block 18 Bidii/2 measuring 13.794 acres**
8. **Kitale Municipality Block 17 Bidii/99 measuring 50.388 acres**
9. **Kitale Municipality Block 17 Bidii/98 measuring 5.597 acres**
10. **Kitale Municipality Block 17 Bidii/92 measuring 12.90 acres**
11. **Kitale Municipality Block 17 Bidii /107 measuring 38.926 Ha.**

8. He left behind the following machineries

1. **Tractor Registration No. KLZ 494 Messey Ferguson**
2. **Motor vehicle Registration No KAK 342V**
3. **Trailer, Tractor and Disc plough**

9. He left behind several herds of animals which the parties from their submissions seemed to have ignored or in my view may have been disposed in one way or the other.

10. On liabilities, the parties seemed to agree on the following

1. **Loan to Bidii Kenya Ltd**
2. **Sabwani Camp**
3. **Wages due to Shem Lusweti**
4. **Legal fees**

11. Several named purchasers were in principal agreed by the parties. Save that there were those who needed to establish that they have paid the entire purchase consideration.

12. The following are the purchasers who were mentioned by the respective parties who purchased Kitale Municipality Block 17 (Bidii) 208

1. **Francis Kagombe – 2 acres**
2. **Francis Buyayi 2.4 acres**
3. **Benson Sikuku ½ an acre**
4. **Nicholas Nwanamo – 2 acres**
5. **ACK Church ½ an acre**

Kitale Municipality Block 18 (Bidii) 2

- 6. Elizabeth Achoka - 1 acre**
- 7. Kepher S. Kisobo – 2 acres**
- 8. Enock Bunyenya – 1 acre**
- 9. Janet Nangabo – 1 acre**
- 10. Bridgit Awino Okuta – 1 acre out Block 17/Bidii/92**
- 11. Patrick Kwanusu – 2 acres out of Block 17/208**
- 12. John Makokha Nyongesa – 1 acre out of Block 17/258**
- 13. Lucy N. Khaemba 3 ½ Acres out of Block 17/107**
- 14. Titus M. Webola – 1 acre out of Block 17/107**
- 15. Evans Wanderi – 2 acres out of Block 17/208**
- 16. Teresia Wamboi Kimani**
- 17. Richard Visao**
- 15. Namanjala Secondary school**
- 19. Kennedy Simiyu**
- 20. Calvary church**
- 21. Tom Wambeo.**

13. All the parties herein have argued that there are purchasers who were later left behind by either of the parties or erroneously included. The 1st administrator in his affidavit has enclosed evidences of purchasers especially sale agreements and other related undertakings.

14. In view of this confusion I think it shall be prudent for the family or the administrator to agree on the genuine list of the purchasers. It appears that there could be purchasers who were sold the land by the deceased and others by beneficiaries. Should the respective purchasers reach an understanding the grant could still be rectified to include their respective portions. Any remainder of the land not proven to have been sold, the beneficiaries would be at liberty to make an appropriate distribution for this court to consider.

15. At this juncture I would wish to make reference to the affidavit of Magdalene Wandah who was from the first house.

16. According to her, the deceased used to support her two children (grandchildren) after she separated with her husband. More importantly she prayed that her late mother Loice Victoria Wandah was a very hard working woman and she contributed to the acquisition of the properties left behind by her late father. She enclosed several annexures which went to show that her mother who was a secretary earned sufficient income to have contributed to the joint purchase of the assets with her husband.

17. Consequently she prayed that her household should first of all get 50% of the estate, then thereafter the remainder of the 50% be shared between the 2nd house and her house. She opined that the 2nd house came much later after the deceased had acquired assets and thus essentially she did not contribute anything. In essence I think she meant that save for the 4 children she had with the deceased, the 2nd petitioner did not contribute much to the estate.

18. In my view this was a selfish argument. If her late mother contributed to the acquisition of the properties, there was nothing to have prevented them being registered in the joint names of herself and her husband. Moreover, there is no evidence that the 2nd petitioner did not participate in the sustaining and or improving the properties which she found already purchased.

19. Her 4 children for all intent and purpose belonged to the deceased and have equal rights just like those of the first house including Magdalene. Infact they are still of tender age and have more needs than those from the first house who are all adults with their respective children.

20. For Magdalene, the share she would get due to her house shall be sufficient to take care of her 2 children whom she claimed their grandfather was taking care of them. There was no evidence though that indeed, the deceased took care of them or were for that matter dependent upon the deceased.

21. Turning now to the mode of distribution, it appears that there was no unanimity or agreement on the way the estate shall be distributed.

22. The law relating to such an estate on distribution is premised on Section 40(1) of the Law of Succession Act No. 160 Laws of Kenya which state that;

“ When 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 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.”

23. Although the deceased first wife predeceased him, it is concluded in my view and as earlier suggested that this were 2 houses.

24. I have seen the decision by the clan elders. (Bayundo clan) dated 7/5/2010 and their mode of distribution. Apparently it appears that all the beneficiaries were present and they appended their signatures signifying their acceptance.

25. Another meeting was held on 30/4/2016 which was held under the Chairmanship of the Bayundo clan. Subsequently they did forward their findings to M/S Barongo & Ombasa Advocates.

26. The sum total of the above arbitration was within the provisions of Article 159(2) (c) of the Constitution which provides that;

“159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

a)

b)

c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)”

Clause 3 states that;

“ Traditional dispute resolution mechanisms shall not be used in a way that -

a) Contravenes the Bill of Rights.

b) Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality.

c) Is inconsistent with this constitution or any written law.”

27. I have extensively gone through the above resolution by the said clan elders and I do not think that it compromised on any articles of the Constitution especially the Bill of Rights. I did not find any resolution to be oppressive or offensive. Infact, they attempted to have an equitable distribution of the estate. There was no discrimination of any gender in favour of the other. The 2nd house seemed to have been provided taking into consideration their age and their current positions. In short the elders were cognisant of this fact.

28. The same took into consideration the actual situation on the ground, a fact which this court may not appreciate unless it is invited to visit. It will therefore be upon Ruth, the widow to take care of her tender age children and ensure that they benefit from their father's estate.

29. Magdalene Wanda who has all along been very vocal was equally provided for and her brothers. Her proposition of sharing the estate taking into consideration the contribution of her mother, which I had earlier determined that it would be unfair was rejected rightfully so by the elders.

30. Bob Kituyi and Justine Kituyi who were considered outsiders were taken care of by the elders and they seemed to be contented .

Shem Lusweti who was a manager, and who had not gained support from some section of the family was equally considered and taken care of by being given 2 – acres in lieu of his contribution to the estate.

31. There was also way forward as regarding the purchasers as well as the estate liabilities. In a nutshell, the decision by the Bayundo clan elders in my view cannot be faulted and was worth the parameters anticipated by the constitution.

32. As it were, there would never be equality when it comes to a distribution of the estate. The court would always attempt an equitable distribution. It behoves the parties to utilise whatever that is given to them to advance what their deceased father left behind.

33. There was some suggestions in the pleadings that some of the deceased bank accounts had been plundered but no evidence was given to this court.

34. Consequently, this court shall adopt the mode of distribution by the Bayundo clan meeting held on 7/5/2010 and the subsequent

modification on 30/4/2016 as contained in the letter dated 15/5/2016 addressed to M/S Barongo & Ombasa Advocates.

Conclusion

In conclusion, let the deceased estate be distributed as follows

A) Kitale Municipality Block 17(Bidii) 99 measuring 50.388 acres

1. Aggrey Simiyu Wanda - 10.4065 acres
2. Thomas W. Wanda - 10.4065 acres
3. Mary L. Wanda 7.0963 acres
4. Steve G. Wanda – 10.4065 acres
5. Joshua K. wanda – 10.4065 acres
6. Bob Kituyi – 1.6666 acres

2nd House – Ruth Wefwafwa

B) Kitale Municipality Block 17 (Bidii) 107 measuring 32.484 acres

- i) 2nd house – 31.152 acres
- ii) Bob Kituyi – 1.333 acres

C) 1st House

- i) Kitale Municipality Block 18 (Bidii) 459 – 16.555 acres plus the house.
- ii) Kitale Municipality Block 17(Bidii) 99 measuring 48.721 acres
- iii) Kitale Municipality Block 17(Bidii) 98 measuring 2.597 acres
- iv) Kitale Municipality Block 17 (Bidii) 107 measuring 3.311 (Maria

2nd House

- v) Kitale Municipality Block 17 (Bidii) 97 2.439 acres

2nd House

- i) Kitale Municipality Block 18 (Bidii) 459 measuring 3.312 acres
- ii) Kitale Municipality Block 17 (Bidii) 107 – measuring 31.151. acres
- iii) Kitale Municipality Block 17 (Bidii) 92 measuring 0.1990 acres
- iv) Kitale Municipality Block 18 (Bidii) 92 measuring 6.450 acres
- v) Kitale Municipality Block 17 (Bidii) 97 measuring 2.349 acres
- vi) Kitale Municipality Block 17 (Bidii) 98 – 1 acre plus the house
- vii) Kitale Municipality Block 18 (Bidii) 2 measuring 5 acres

E) Bob Kituyi

- i) Kitale Municipality Block 17 (Bidii) 99 measuring 1.667 acres
- ii) Kitale Municipality Block 17 (Bidii) 107 measuring 1.333 acres

F) Shem Lusweti 2 acres out of Kitale municipality Block 17 (Bidii) 98

The list of the approved purchasers was as hereunder;

I) Kitale Municipality Block 18 (Bidii)

1. Elizabeth Achoka – 1 acre
2. Kepher S. Kisobo – 2 acres
3. Enock Binyenya – 1 acre
4. Janet Nangabo – 1 acre

II) Kitale Municipality Block 17 (Block) 92

1. Felistus Namaemba – 1 acre
2. Hellen Nanjala – 1 acre

III) Kitale Municipality Block 17 (Bidii) 107

1. Moses N. Sifuna – 1 acres
2. Edward Nalobile Rare – 2 acres
3. Simiyu B. Wambulwa - 3 acres
4. Maxwell L. Laisa – 2 acres
5. Wycliffe B. Juma – 4 acres
6. Lucy N. Khaemba 3/12 acres
7. Kennedy Simiyu – 2 acres
8. Thomas Simatwa ¼ acres
9. Calvary church – 0.7 acres
10. Joseph Apili – ½ acres
11. James Lusweti – ½ acres
12. Raphael Omunyini – ½ acres
13. Titus M. Webola – 1 acres
14. Tom Wamboo – 1 acre

IV) Kitale Municipality Block 17 (Bidii) 208

1. Evans Wanderi – 2 acres
2. Francis Buyayo 2 ½ acres
3. A.C.K. Church ½ acre
4. Martin Sikuku – ½ acres
5. Nicholas Bwanamo – 4 acres
6. Tom Wamboo – 1 acre

V. Machinery

(i) Motor Tractor Registration No. KLZ 194 Messey Ferguson to the 1st house

ii) Motor vehicle Registration No. KAK 342 V Pick Up to the 2nd house

VI. Liabilities

The family or the Administrators shall agree on the portion of land to be sold measuring 4 acres to offset the liabilities due to the estate namely loans, survey fees and the legal fees.

35. The purchasers who have not completed their purchase consideration should not have their portions transferred to them till they settled with the administrators. Should there be any genuine purchasers who were left behind they should be at liberty to apply. This rider is taken into consideration as there seemed to have not been an outright consensus in the list of purchasers.

36. Finally, nothing stop the beneficiaries from undertaking what I may call “ local arrangements” in terms of settling some smaller issues on the ground especially as regards actual positioning. Nothing stops them from ceding ground to each other as long as there is mutual understanding .

37. Let the grant therefore be confirmed in the manner stipulated above. This being a family dispute, each party shall bear their respective costs.

Delivered, signed and dated at Kitale this 30th day of May 2018.

H.K. CHEMITEI

JUDGE

30/5/18

In the presence of:

Khisa for Barongo for Petitioners

Athung'a for Okile for Respondents

Judgment read in open court.