



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 928 OF 2009**

**IN THE MATTER OF THE ESTATE OF JOEL MULOVE WAMBUA (DECEASED)**

**PETER WAMBUA JOEL )**

**JUSTUS KIOKO JOEL ).....PETITIONERS**

**RULING ON DISTRIBUTION OF ESTATE**

**Introduction**

This is a ruling on application for Confirmation of Grant in the above named Estate. The application was supported by the affidavit of the 1<sup>st</sup> Petitioner purportedly on behalf of his co-Administrator and seeking distribution of the Estate as proposed in the affidavit based on the houses of the deceased rather than the number of children beneficiaries of the deceased, as follows:

***“SUPPORTING AFFIDAVIT OF PETER WAMBUA JOEL***

*2. That a grant of Letters of Administration Intestate of the Estate of **JOEL MULOVE WAMBUA** who died intestate was made to me on 5<sup>th</sup> day of December, 2011 (Annexed hereto and marked as “PWJ 1” is a copy of the said grant ).*

*3. That the deceased was survived by the following beneficiaries:-*

- i. Annah Nduume Mulove – Wife*
- ii. Philip Mbithi Joel – son*
- iii. Isaiah Muinde Joel – son*
- iv. David Mutua Joel – son*
- v. Erick Mweu Joel – son*
- vi. Albanus Wambua Joel – son*
- vii. Sabeth Mutio – daughter*
- viii. Susan Kalwela – daughter*
- ix. Doris Nduku – daughter*
- x. Rodah Mueni- daughter*
- xi. Caroline Mueni Joel – daughter*
- xii. Rebecca Joel – daughter*
- xiii. Rose Mwelu*

4. That the deceased was not survived by any other dependent
5. That no application for provisions for dependant is pending
6. that the identification and shares of all persons beneficially entitled to the said Estate have been ascertained as follows:-

i) MAVOKO TOWN BLOCK 3/2717 – 40 ACRES .....to be sub-divided as follows:-

a) Peter Wambua Joel – 15 acres (to hold for himself and in trust for members of his house).

c) Martin Mutunga Munyao – 5 Acres

b) Justus Kioko Mulove – 20 Acres (to hold for himself and in trust for members of his house).

ii) MAVOKO TOWN BLOCK 33143 – 20 ACRES .....to be sub-divided into two equal parts and registered in the names of PETER WAMBUA JOEL and JUSTUS KIOKO JOEL separately, to hold for themselves and in trust for each other beneficiaries in their respective houses. (Annexed hereto are copies of official searches marked “PWJ 2 & 3” respectively)”

**Respective cases for the parties**

The proposed distribution was opposed by the co-Administrator, Justus Kioko Joel who in an affidavit dated 25<sup>th</sup> November, 2013 proposes a distribution according to the children of the deceased and taking into account the surviving spouse as follows:

**“2<sup>ND</sup> PETITIONER’S AFFIDAVIT OF PROPOSED DISTRIBUTION**

1. That I am a co-petitioner with Peter Wambua Joel and I am entitled and competent to swear this affidavit, all the matters pertinent to the petition being with my personal knowledge

2. That the free property of the Estate of the deceased consist of the following:

i) Title Number **MAVOKO TOWN BLOCK 3/2717**

ii) Title Number **MAVOKO TOWN BLOCK 3/3143**

3. That the beneficiaries of the deceased entitled to benefit from the Estate of the deceased are:-

i) Anna Nduume Mulove (the surviving widow of the deceased)

ii) Peter Wambua Joel – son

iii) Justus Kioko Joel – son

iv) Philip Mbithi Joel – son

v) Isaiah Muinde Joel – son

vi) David Mutua Joel – son

vii) Erick Mweu Joel – son

viii) Albanus Wambua Joel – son

ix) Doris Nduku Joel – unmarried daughter

x) Rodah Mueni Joel – disable unmarried daughter

4. That I propose that the land title number **MAVOKO TOWN BLOCK 3/3143** which is 20 acres be distributed as hereunder:-

i) Annah Nduume Mulove.....1.87 acres

ii) Peter Wambua Joel.....1.87 acres

iii) Justus Kioko Joel.....1.87 acres

- iv) Philip Mbithi Joel.....1.87 acres
- v) Isaiah Muinde Joel.....1.87 acres
- vi) David Mutua Joel.....1.87 acres
- vii) Erick Mweu Joel.....1.87 acres
- viii) Albanus Wambua Joel.....1.87 acres
- ix) Doris Nduku Joel.....2.50 acres
- x) Rodah Mueni Joel.....2.50 acres

5. That I propose that the land title number **MAVOKO TOWN BLOCK 3/2717** which is 40 acres be sub-divided into 8 equal parts of 5 acres each to be given to the beneficiaries named herein excluding Doris Nduku and Rhoda Mueni who are adequately provided in title number **MAVOKO TOWN BLOCK 3/3143.**”

An Interested Party who apparently purchased a portion of land in the Estate asset plot No. Mavoko Town Block 3/1717 entered appearance as beneficiary through M/S Ngolya & Co. Advocates.

The parties failed to agree a negotiated settlement and reserved the question for determination by the Court. The 1<sup>st</sup> Administrator’s Counsel, Mr. R. M. Matata, filed submissions dated 18<sup>th</sup> February, 2014 on the question and urged as follows:

**“1<sup>st</sup> PETITIONER’S SUBMISSION ON DISTRIBUTION**

Mr. Peter Wambua Joel, the 1<sup>st</sup> petitioner herein has filed an affidavit on which he considers to be the best mode of distribution of the two parcels of land belonging to the Estate of their deceased father, namely **MAVOKO TOWN BLOCK 3/2717** measuring Forty (40) acres and **MAVOKO TOWN BLOCK 3/3143** measuring Twenty (20) acres respectively, in his affidavit dated 30/4/2013.

Whilst the 2<sup>nd</sup> petitioner **JUSTUS KIOKO JOEL** has also filed an affidavit proposing a mode of distribution based on the number of children and/ or beneficiaries while that of his brother the 1<sup>st</sup> petitioner, is based on house.

It is not in doubt that the petitioners deceased father died intestate and without any written will and in the circumstance of this case and in the view of the provision of section 40 of the Law of Succession Act, there is no doubt that it is the deceased’s customary Law that must be applied in respect of the present distribution.

The deceased had two wives and therefore polygamous and the Kamba Customary Law is clear that any distribution to be undertaken must be in accordance with the “houses” and as there were two wives then this means that there are two “HOUSES” and as such the two parcels of Land must of necessity be shared equally between the two houses which are duly and properly represented by the petitioners each representing one house.

It is then the duty of the duly appointed representative of each house to share to its representative of each house and the whole rationale of this customary Law is to avoid differences and the family wrangles. This is the best mode of distribution as provided for under the Kamba Customary Law and we urge your Ladyship to approve the parcel of land be shared equally between the two houses represented by the 1<sup>st</sup> petitioner **PETER WAMBUA JOEL** and the 2<sup>nd</sup> petitioner **JUSTUS KIOKO JOEL** and the petitioners each to be registered as holding the portions allocated to them in trust for the heirs in their respective house.”

Counsel for the 2<sup>nd</sup> Administrator, Mr Kyalo for Mr. F. M Mulwa Advocate relied on the affidavit of the 2<sup>nd</sup> Administrator on proposed distribution set out above without filing any separate submissions, while one, Martin Mutunga Munyao who was shown in the supporting affidavit of the 1<sup>st</sup> Administrator as a beneficiary with respect to 5 acres of the Estate asset No. MAVOKO TOWNBLOCK 3/2717 presumably as a purchaser of the said portion.

**Issue for determination**

The issue for determination in this application is the Lawful distribution of the deceased’s Estate among his children and spouse from his two houses.

**Determination**

**Formulae for Distribution of Intestate Estate where there are children and a spouse in different houses**

Having perused the *REstatement of African Law: the Law of Succession*, Vol. 2 on Kamba at p. 23 by Eugene Cotran, (1969), I confirm that in accordance with the Kamba Customary Law, in case of Estate of a married man with two or more wives, sons, and daughters –

***“The general principle here is that the house of each wife gets an equal share of the property, irrespective of the number of children in each house.”***

However, this position changed with the coming into force of the Law of Succession Act on 1<sup>st</sup> July 1981.

The Law of Succession Act defines a house as follows:

***““house” means a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife”.***

The Law of succession is clear as to how to deal with the succession of Estate in which there are two or more houses of beneficiaries as follows:

#### **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.*

The formulae under section 40 the Law of Succession Act therefore requires two tier application as follows:

1. ***“in the first instance, be divided among the houses according to the number of children in each house”***; and
2. secondly ***“adding any wife surviving him as an additional unit to the number of children.”***

For example, as I understand the Law, in a Deceased’s family made up of two houses, **A** and **B**, each with one child and one house, **A**, with the spouse surviving the Deceased, the two tier process of distribution will occur as follows:

Step 1: Each child gets a share - there are two heirs so two units of distribution shares; and

Step 2: Add one share for the spouse in house **A**, making three units of shares in the Estate.

The Estate of the Deceased in this example will, therefore, be divided into three equal parts, but as between the houses, they will have taken **two units** of the shares to house **A** and house **B**, where there is no surviving spouse **one unit** of share to the Estate.

Naturally, more shares in the Estate, and therefore a larger share thereof, will go where there are **more children** in one of the houses, or where there is a **surviving spouse** in case of equal number of children for two or more houses.

Then Law of Succession Act is applicable to all succession for Estates of person dying after that date of commencement. There is, accordingly, no room for application of the Kamba Customary Law to the Estate of a person dying after 1981, if it is inconsistent with the provisions of the Act. Section 2 of the Act provides for its application as follows:

#### **“2. Application of Act**

*(1) Except as otherwise expressly provided in this Act or any other written Law the provisions of this Act shall constitute the Law of Kenya in respect of, and*

*(2) shall have universal application to, all cases of intestate or testamentary succession to the Estates of deceased persons dying after, the commencement of this Act and to the administration of Estates of those persons.*

***(2) The Estates of persons dying before the commencement of this Act are subject to the written Laws and customs applying at the date of death, but nevertheless the administration of their Estates shall commence or proceed so far as possible in accordance with this Act.***

*(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the Estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the Estate of any such person shall be governed by Muslim Law.*

*(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of Estates shall where they are not inconsistent with those of Muslim Law apply in case of every Muslim dying before, on or after the 1st January, 1991.*

[Act No. 16 of 1977, Sch., Act No. 13 of 1978, Sch., Act No. 21 of 1990, Sch.]”

The Act only permits application of customary Law in circumstances shown in section 2 (2) for Estates of persons dying before the Act came into force or, **which is not applicable here**, in certain assets – **agricultural land and crops or livestock in specified districts set out in section 32**, under section 33 of the Act which provides as follows:

**“33. Law applicable to excluded property**

*The Law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the **Law or custom applicable to the deceased’s community or tribe**, as the case may be.*

[Act No. 8 of 1976, s. 6.]”

As regards the Interested Party, the Law of succession does not permit distribution of capital assets before Confirmation of Grant and he, therefore, cannot have entered into a valid sale agreement. Section 55 of the Law of Succession Act is in the following terms:

**“55. No distribution of capital before confirmation of grant (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71. (2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the Estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death. [Act No. 8 of 1976, s. 11, Act No. 18 of 1986.]”**

And even if the sellers of the portion of the Estate land were the Administrators themselves, section 82 (b) (ii) of the Law of Succession Act prohibits premature sale by personal representative of **immovable property** of the Estate, as follows:

**“(ii) no immovable property shall be sold before confirmation of the grant”.**

Neither was it shown that the Interested Party had purchased his interest in the property pursuant to a valid disposal by a spouse during life interest with leave of Court as required under section 37 of the Law of Succession Act, which provides as follows:

**“37. Powers of spouse during life interest**

*A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the Consent of all co-trustees and all children of full age, or with the Consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:*

**Provided that, in the case of immovable property, the exercise of that power shall always be subject to the Consent of the court.**

[Act No. 8 of 1976, s. 9.]”

The said interested party, herein, must therefore pursue the beneficiary who allegedly sold a portion of land to him and recover the same from the said beneficiary’s share of the Estate after distribution.

**Distribution of the Estate**

***The principle***

Accordingly, this Court finds that the Estate of the Joel Malove (Deceased) who died on falls to be distributed in accordance with section 40 of the Law of Succession with the result that the Estate assets shall be shared between the two houses of the Deceased accordingly to the number of child in each house and adding the surviving spouse as an additional share and without discriminating between the female and male child.

**Assets**

The assets of the Estate were agreed as two parcels of land, namely Title Number **MAVOKO TOWN BLOCK 3/2717** measuring 40 acres and Title Number **MAVOKO TOWN BLOCK 3/3143** measuring 20 acres. No valuation of the parcels was presented to the court and the Court must, therefore, assume that the one acre in the one parcel of land is equal in value to the same portion in the other parcel of land, for purposes of distribution.

**Beneficiaries**

The Law of Succession Act does not discriminate between children, female or male; married or unmarried. There is no dispute that the deceased was survived by the widow and children listed in paragraph of the affidavit in support of the application of confirmation of grant:

1. Peter Wambua Joel      -son (1<sup>st</sup> Administrator)

2. Justus Kioko Joel      son (2<sup>nd</sup> Administrator)

3. *Annah Nduume Mulove – Widow*

4. *Philip Mbithi Joel – son*

5. *Isaiah Muinde Joel – son*

6. *David Mutua Joel – son*

7. *Erick Mweu Joel – son*

8. *Albanus Wambua Joel – son*

9. *Sabeth Mutio – daughter*

10. *Susan Kalwela – daughter*

11. *Doris Nduku – daughter*

12. *Rodah Mueni- daughter*

13. *Caroline Mueni Joel – daughter*

14. *Rebecca Joel – daughter*

15. *Rose Mwelu - daughter*

As the beneficiaries are established as the children of the two houses and the widow from the one house, the Estate shall be shared between the two houses in shares according to the number of children and taking into account the surviving widow.

#### ***Consent to proposed distribution***

The Court has noted the Consent dated 12<sup>th</sup> day of June, 2014 indicating concurrence of some of the beneficiaries with the 1<sup>st</sup> Administrator's proposed distribution scheme according to the two houses of the deceased, but there is no unanimity among the members of two houses, and therefore no full Consent for the proposed distribution formulas. For that reason, there cannot be any basis using the customary **house-based** scheme, which is not sanctioned by Law to the detriment of those beneficiaries who insist on their Lawful share, in accordance with section 40 of the Law of Succession Act.

#### **Orders**

The Court shall, therefore, make an Order that the Estate of the deceased herein be distributed in accordance with section 40 of the Law of Succession Act, as follows:

1. The Estate assets, land parcels known as L.R. **Mavoko Town Block 3/2717** and L.R. **Mavoko Town Block 3/3143** both in total measuring **60 acres** of land shall be distributed into units for all the twelve children of the deceased, male or female, married or unmarried, and additional unit share being made for the spouse of the deceased so that the said asset as one whole shall have been divided into **15 equal parts**, one each for all the children and the surviving spouse of the deceased.

2. Liberty to apply.

Each party shall bear his own costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF MAY, 2018**

**D. KEMEI**

**JUDGE**

**APPEARANCES:**

M/S R. M. Matata & Co. Advocates for the 1<sup>st</sup> Administrator.

M/S Advocates for the 2<sup>nd</sup> Administrator.

M/S Ngolya & Co. Advocates for the Interested Party.