



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 158 OF 2017**

**(FORMERLY MACHAKOS HIGH COURT SUCCESSION CAUSE NO. 582 OF 2011)**

**IN THE MATTER OF THE ESTATE OF MBONDO KATA (DECEASED)**

**SERAH MUNYIVA KAVINDU.....PETITIONER**

**-VERSUS-**

**GRACE MUNANIE MBONDO.....OBJECTOR**

**RULING**

1. On 12/10/2017 this Court ordered the parties to file an application for confirmation of grant and distribution of the estate subject herein within 21 days. It was further ordered that any dissatisfied beneficiary was at liberty to file a proposal for distribution.
2. The petitioner filed a proposal for distribution on 15/11/2011. She states that she was married to Mary Mwendu Mbondo (*herein after 'Mary'*) under Kamba Customary Law. She further states that Mary and Grace Munanie Mbondo (*herein after 'Grace'*) were the two wives of the deceased.
3. According to the petitioner, there are two assets available for distribution i.e. Makueni/Mubau/467 (*herein after 'No. 467'*) and Makueni/Mubau/558 (*herein after No. 558*).
4. It is therefore her proposal that she should get the former and the latter should go to the objector.
5. An affidavit was filed on 15/11/2017 by Daniel Musau Bondo. He depones that the objector was his biological mother and the petitioner his sister-in-law by virtue of being married to his brother one, Joseph Kivindu Mbondo.
6. He further depones that the only asset available for distribution is Makueni/Mubau/467. Land parcel No. Makueni/Mubau 558 is registered in the name of Katiku Mbondo as illustrated by the search certificate marked as 'DMM-2'. He proposes that the available asset be wholly registered in the name of the objector.
7. The matter came up for hearing on 16/11/2017 and both parties were unrepresented.
8. **PW1** was the petitioner. It was her testimony that she was a daughter-in-law to the deceased. The deceased had two wives i.e Mary and Grace and that Mary had married her (*petitioner*) under the Kamba customary law. She said that Mary had five daughters who are all deceased. They were married and their children are with their fathers.
9. She further testified that Grace had 6 sons and 2 married daughters. According to her, land parcel No. Makueni/Mubau/467 (*25 acres*) is registered in the name of the deceased and is occupied by all the houses. The other parcel of land i.e Makueni/Mubau 558 (*30 acres*) is in the name of Katiku Mbondo who she doesn't know. The deceased told her that it belonged to him (Katiku Mbondo). She said that no succession cause has ever been filed in respect of Katiku Mbondo's estate.
10. She testified that there was no agreement on how sharing would be done but maintained that it should be as per her proposal which she had filed in Court.
11. On cross examination, she said that she was not aware as to whether the deceased had a 3<sup>rd</sup> wife. She agreed that she had sired 11 children with Joseph Kivindu Mbondo, a son of the deceased. She also agreed that she was a daughter-in-law of the deceased.
12. **PW2** was Jackson Mbande Kivindu, a son of the petitioner and Joseph Kivindu. He said that the deceased had 2 wives, Mary and Grace.

Grace lives on No. 558 with all her children and his (PW2) family lives on No. 467 together with 4 of Grace's children i.e. Daniel, Wilson, David and Mbatha. His proposal was that the two parcels of land be shared between the two families. He went on to say that No. 558 should be shared on its own because it was in the name of someone else.

13. He further testified that Mary had 5 daughters who are all deceased. According to him, his mother (*petitioner*) should get Mary's share.

14. On cross examination, he maintained that the petitioner was Mary's wife and that distribution should be done according to two houses.

15. **DW1** was Daniel Musau Mbondo, a son of the deceased. According to him, the deceased had 3 wives i.e. Mary, Kasukwa Mbondo and Grace. Mary had 5 children, Kasukwa had 1 child (*Katuku Mbondo*) and Grace had 8 children.

16. He testified that the petitioner was the wife of their elder brother Kivindu and they had 11 children. It was his further testimony that since Joseph Kivindu is alive, the petitioner cannot share the deceased's estate. She should get her share *via* Kivindu.

17. On cross examination, he said that he had witnessed the petitioner getting married to his brother Kivindu and maintained that the petitioner should get her share *via* Kivindu. He said that the petitioner has developed her part of occupation just like Kavata, the 2<sup>nd</sup> wife of Kivindu.

18. **DW2** was David Musyoka Mbondo, a son of the deceased and Grace. He said that the petitioner was his sister in law by virtue of being married by his brother, Kivindu Mbondo. It was his evidence that Kivindu Mbondo has two wives i.e. the petitioner and another one known as Kavata.

19. He went on to say that the deceased had 3 wives and only Grace is alive with her 8 children. According to him, the sharing should be done among the 6 sons of Grace as the 2 daughters are married. He said that the petitioner was not Mary's wife.

20. I have perused the record and looked at the evidence of the parties. I find that the following are the issues for determination;

- a. Was the deceased polygamous?
- b. Was there a woman to woman marriage between Mary and the petitioner?
- c. What is available for distribution?
- d. How should the available asset(s) be distributed?

### **ON POLYGAMY**

21. There was consensus among the parties that the deceased had more than one wife. The point of departure was whether they were 2 or 3. It was alleged that there was a wife known as Kasukwa who had sired a son known as Katiku Mbondo with the deceased. It was also stated that both Kasukwa and her son are deceased.

22. I note that No. 558 is registered in the name of Katiku Mbondo. There was no abstract of title to show the history of this parcel of land but if it indeed belonged to the deceased (*Mbondo Kata*) at some point, then it is probable that Katiku Mbondo was a progeny of the deceased and Kasukwa.

23. Be that as it may, whether or not Kasukwa was the deceased's wife does not negate the fact that the deceased was polygamous.

### **WOMAN TO WOMAN MARRIAGE**

24. The petitioner claims to have been married to Mary Mwendu Mbondo under the Kamba Customary law. Apart from stating it verbally and in her filed proposal there is absolutely no evidence upon which the Court can find that there existed a valid woman to woman marriage between the petitioner and Mary.

25. There are numerous authorities both from the High Court and the Court of Appeal to the effect that in customary marriages, there are essential steps and ceremonies (*of the particular community in question*) that must be performed in order for a marriage to be deemed as valid.

26. In **KIMANI VS GIKANGA**, (1965) EA 735, at page 739, Duffus JA expressed himself as follows on proof of customary law:

**“To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”**

27. It is clear that the petitioner did not discharge the burden of proving that she was married to Mary under the Kamba customary law.

**WHAT IS AVAILABLE FOR DISTRIBUTION?**

28. The only asset registered in the name of the deceased is land parcel No. Makueni/Mubau/467. The other one *to wit* Makueni/Mubau/558 is registered in the name of Katiku Mbondo as evidenced by the certificate of search marked DMM2 and annexed to the affidavit of DW1.

**HOW SHOULD THE AVAILABLE ASSET(S) BE DISTRIBUTED?**

17. The deceased died on 26<sup>th</sup> August 1975. The **Law of Succession Act, Cap 160 Laws of Kenya** (*the Act*) came into operation on 1<sup>st</sup> July 1981. **Section 2 (1)** of the Act provides as follows,

**“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 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.”**

18. The estate of the deceased herein is therefore not governed by the Act and as much as he was polygamous, **Section 40** of the Act does not apply. So, what does the Akamba Customary Law say with regard to distribution?

19. The evidence of the parties was scanty with regard to how an intestate estate should be distributed under Kamba Customary law.

20. According to DW2, the estate should be distributed among the 6 sons of Grace because the 2 daughters are married. This seems to suggest that married daughters are not supposed to claim a share from a deceased’s parent estate.

21. In **Machakos P&A No. 303 of 1998, Andrew Manyuzu Musyoka (Deceased) 2005 eKLR**, Wendoh J expresses herself as follows;

**“Kamba customary law which the applicants intend to apply in distribution of deceased’s estate would discriminate against PW1 if she is a married lady for she is presumed to be entitled to her husband’s estate.”**

22. In **P&A Cause No. 203 of 1998; Estate of Mutio Ikonyo V Peter Mutua Ngui** Justice Mwera held that the objector was not entitled to the deceased’s estate because she was a married woman.

23. The customary practice/traditions is that married women are not entitled to inherit from their fathers’ estates under Kamba customary law. However at this moment and time, the same custom is not applicable, as this is certainly in contradiction to **Article 27 (1) of the Constitution**, which provides for equal protection and benefit of the law.

24. However the 2 daughters of Grace did not bother to file their proposals on distribution despite being aware of the proceedings herein. They seem disinterested in their deceased fathers’ estate.

25. As for the house of the 1<sup>st</sup> wife Mary, the only evidence on record is that she had a son (*who died when he was a minor*) and five daughters who were all married but have passed on as well. According to PW1, the children of the deceased daughters are with their fathers.

**CONCLUSION**

26. In the circumstances, I am of the view that the available asset should be shared equally among the sons of Grace and of course a portion be reserved to their mother who is still alive and needs a place of abode and any of her daughters who may return home in event of divorce or separation.

27. Thus the court makes the following orders;

- i. The wife Grace to get one acre life interest which will also take care of any of her daughters who may return home in event of divorce or separation.**
- ii. The remaining 24 acres to be shared equally between the 6 sons of Grace.**
- iii. No orders as to costs.**

**SIGNED, DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF MAY, 2018 IN OPEN COURT.**

**C. KARIUKI**

**JUDGE**

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