



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC P&A NO. 5 OF 2017

FORMERLY MACHAKOS HC P&A NO. 697 OF 2009

IN THE MATTER OF THE ESTATE OF SIMON MULINZAU (DECEASED)

ANDREW NDAMBUKI MULI.....PETITIONER

VERSUS

PAUL KYALO MULI.....OBJECTOR

RULING

1. This matter is having Chamber Summons dated 17/02/2011 for Confirmation of Grant which faces protest over the distribution of estate.
2. The parties have filed Affidavits in support of their position on the element of distribution of the estate subject herein.
3. On 11/05/2015, the parties agreed and court determined beneficiaries as herein under:-

1ST HOUSE

1. Grace Mbithe Muli-Wife (deceased).
2. Esther Munyiva Makau – Daughter (Married).

2ND HOUSE

1. Martha Nzula Muli – Wife (Deceased).
2. Andrew Ndambuki Muli – Son.
3. Tabitha Kanini Mwangangi – Daughter (Married).
4. Theresia Mbulwa Muli – Daughter (Married).

3RD HOUSE

1. Anna Mbetete Muli – Wife.
2. Paul Kyalo Muli – Son.
3. Francis Kivindu Muli – Son.
4. Onesmus Kioko Muli – Son.
5. James Kisoi Muli – Son.
6. Elizabeth Muli – Daughter.

7. Boniface Wambua Muli – Son.

8. Stella Kalondu Muli – Daughter.

4. Both sides have put their different proposals on distribution of the estate.

5. The parties also testified briefly reiterating the content of their affidavits.

6. The objector via his affidavit sworn on 03/01/2017 proposed that the distribution be according to a document purportedly made by deceased on 20/10/1986 where he seem to share his properties to the 6 children. He claims to have distributed to the 6 children and himself.

7. The objector says that the chief resolved the dispute and urged parties to respect the wishes of the deceased.

8. It was agreed submissions be filed and exchanged but only petitioners have filed their submissions.

THE PETITIONERS SUBMISSIONS

9. The petitioners submit that, the issues for determination before this court are distribution of the assets of the estate of the late Simon Muli Nzau. The issue on who are the right beneficiaries of the estate was determined on 11/05/2015 where the beneficiaries are as here under:-

a) Annah Veta Muli.

b) Andrew Ndambuki Muli.

c) Tabitha Kanini Muli.

d) Kimanthi Muli.

e) Esther Munyiva.

f) Kisoi Muli.

g) Kioko Muli.

10. The assets of the late Simon Muli Nzau are as hereunder as per petitioner's evidence which was not contradicted and/or disapproved by the objector:-

a) Plot No. 1078.

b) Plot No. 1482.

c) Plot No. 248.

d) Vyaa B un numbered.

e) Plot No. 228.

f) Yumbani un numbered.

g) Plot No. 104.

h) Plot No. 122.

i) Plot No. 268.

j) Ukenyea Shares a.

11. The objector produced a document as exhibit No. 1 which he claimed to be deceased's will on distribution. The petitioner termed the document as a forgery. It was clear from the objector's evidence that the document was not authored by the deceased.

12. The document produced as exhibit No. 1 does not meet the requirements of a valid written will.

13. For a written will to be valid it is submitted that, it must be:-under section (II) of chapter 160, law of succession, Kenya.

i) Must be in writing.

ii) Must be signed.

iii) Must be witnessed. The testator's signature must be made in the presence of two witnesses who need not be present at the same time.

iv) Must be attested; each witness must sign the will in the presence of the testator.

v) The testator must be in capacity to make the will.

14. The document produced as exhibit No. 1 by the objector does not meet the above requirements thus it's not a will to base the distribution herein on.

15. Thus it is submitted that the assets should be shared as hereunder as proposed by the petitioner:-

a) Plot No. 1078 to be shared equally between Esther Munyiva, Andrew Ndabuki and Ann Veta.

b) Plot No. 1482 to be given to Ann Veta alone.

c) Plot No. 248 to be given to Andrew Ndambuki alone.

d) Vyaa B un numbered to Esther Munyiva.

e) Plot No. 228 to be shared equally between Esther Munyiva, Andrew Ndambuki and Ann Veta.

f) Yumbani un numbered to Ann Veta alone.

g) Plot No. 104 to Andrew Ndambuki alone.

h) Plot No. 122 to be given to Esther Munyiva and Ann Veta.

i) Plot No. 268 to be shared equally to Esther Munyiva, Andrew Ndambuki and Ann Veta.

j) Ukenyea shares to be shared equally to Esther Munyiva, Andrew Ndambuki and Ann Veta.

16. That on 12/10/2016 the court directed that the petitioner to take measurements to get the size of the plots which are un numbered but the objector declined and instead he threatened the petitioner.

17. The truth is the objector's witnesses had no facts at hand over the estate of the deceased but assumption that by claiming having some close relationship with the deceased would make the court believe their word. Close look at their evidence indicates objector crafted evidence to defeat justice. No documentary evidence to support the objector's claim was tendered.

18. That the objector together with his family sold some parcels of land without the other beneficiaries consent, to an extent that they fraudulently made a transfer to one parcel of land they had sold.

19. That indeed if the application is granted, the petitioner and the other beneficiaries shall suffer loss and injustice due to time and court fees and other costs in filing the succession cause.

20. No valid ground to warrant the revocation and/or annulment of the letters of administration of grant ought to issue.

21. That let the petitioner remain the administrator and the assets be distributed fairly majorly according to the succession law of Kenya taking into account what has been illegally sold.

22. After going through the affidavits and the evidence on record, I find the issues are;

1. How the deceased's property will be distributed?

2. What is the order as to costs?

23. The beneficiaries list vide order of 11/05/2015 was agreed.

The proposal by the objector on distribution is based on purported will by deceased of 20/10/1986. The same was not signed and witnessed as required by the law. Section 11 on Written wills states;

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.

That being so and taking to account that the deceased was polygamous with 3 houses, the provision of Section 40 Laws of Succession comes into play. Section 40 states that **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.

24. The estate that constitute the deceased's properties in his name will be distributed equally to all his beneficiaries listed vide order and agreement of 11/05/2015. i.e.;

1ST HOUSE

?Esther Munyiva.

2ND HOUSE

?Andrew Ndambuki.

?Tabitha Kanini.

?Theresia Mbulwa Muli.

3RD HOUSE

?Anna Mbeti Muli.

?Paul Kyalo.

?Francis Kivindu.

?Onesmus Kioko.

?James Kisoi.

?Elizabeth Muli.

?Boniface Wambua.

?Stella Kalondu.

25. The certificate of grant will issue each of the beneficiaries getting $\frac{1}{12}$ of the share. Beneficiaries can agree on how each will get the same on the ground as per their occupation and development provided none gets more than $\frac{1}{12}$ (12%) of the estate.

26. The court is also amenable to record a settlement/consent if beneficiaries can agree.

27. The court has disregarded the purported deceased proposal on distribution as it was not a will and that it does not conform to the provisions of Section 40 Laws of Succession Act.

28. So is the Chief's alleged verdict on distribution save where with consent of the beneficiaries the provisions of the Section 40 Laws of Succession Act prevails.

29. The other aspect which can overrule the provisions of aforesaid provisions is a valid will of the deceased.

30. The court thus makes the following orders;

i) The deceased estate shall be shared equally between his following surviving beneficiaries;

1ST HOUSE

?Esther Munyiva.

2ND HOUSE

?Andrew Ndambuki.

?Tabitha Kanini.

?Theresia Mbulwa Muli.

3RD HOUSE

?Anna Mbete Muli.

?Paul Kyalo.

?Francis Kivindu.

?Onesmus Kioko.

?James Kiso.

?Elizabeth Muli.

?Boniface Wambua.

?Stella Kalondu.

ii) Each getting 12% ($\frac{1}{12}$) of the share.

iii) The grants are confirmed.

iv) No orders as to costs.

THIS RULING SIGNED, DELIVERED THIS 21ST DAY JUNE, OF 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE