



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC P&A NO. 461 OF 2017

FORMERLY MACHAKOS P&A NO. 375 OF 2008

IN THE MATTER OF THE LATE NDAMBUKI SOMBA (DECEASED)

SUSAN KATINDA LEWA.....1ST PETITIONER

ANDREW NZIOKA.....2ND PETITIONER

VERSUS

ROSE KATINDA.....PROTESTER

AND

PETER MAKAU MULWA.....INTERESTED PARTY

RULING

1. The matter for hearing are two protests by Rose Katinda Muoki and Peter Makau Mulwa vide affidavit filed by them sworn and filed on 31/03/2017 and another on 20/11/2017 and filed 21/11/2017 respectively. Rose Katinda also has Supplementary Affidavit sworn on 20/11/2017.
2. The two affidavits are protests against summons dated 16/03/2015 and filed on 19/03/2015 for confirmation of grant made on 26/09/2008. Same is supported by affidavit and a Supplementary Affidavit on distribution sworn on 22/07/2015 and filed on 15/09/2015.
3. There is also further affidavit sworn by Susan Katinda Lewa on 02/10/2017 and filed on 03/10/2017. The protesters were represented by Kisongoa Advocate and administrators by Ombwayo Advocates.
4. The both sides agreed to canvass protests via written submissions which they filed and exchanged.

PROTESTERS SUBMISSIONS

5. The entire estate of Ndambuki was subdivided and/or shared to his two houses as per attached clan minutes. The objectors' did not offend any law and all agricultural land must be subjected to the law as provided in Section 32, 33 and 35 and the Constitution.
6. The court should also consider Nzioka a beneficiary who sold all his share of the estate to **PETER MAKAU MULWA** and **BERNARD MUTUKU**. All these who bought almost the entire estate investment persons have permanent improvements in the respective pieces of land they bought from the beneficiaries.
7. When the surveyor will go to the site to distribute the estate he will meet people on the site with the permanent and fixed development who are not beneficiaries but bought from the beneficiaries.
8. There is also **PUBLIC SCHOOL** which is aided by Makueni Government. After Nzioka of the second wife sold his share after the clan shared the land among the two wives he even sold other parcels of land situate in different locations and which were left out of succession.
9. The sales may have offended Section 45 of the Succession Cause but that has been the practice for ages in Ukambani particularly when

one is in great need in need of finance and has no other means to get finance.

10. In these premises the objector being the surviving wife of the only son of the second wife of Ndambuki worries that the Administrator has been biased against her claiming that the clan should not have shared her that piece of land. The entire clan of Aombe responded to the family of Ndambuki request to share the land.

11. The custom complies with the policy of the Constitution of Kenya over access to land. The court is an institution of the Government and is bound by the Lands Act 2012 in handling land issues.

12. As regards the second Objector/Interested party his claim is over a portion of land he bought from Katinda Muoki. He invested over Kshs.10,000,000/= in the land.

13. He consulted the clan before he bought it and even the government of Makueni County the school is now sponsored by the National Government. He bought the compound where the school is situated.

14. He relies in his affidavit since he has lost his thinking and speech due to brain damage. Doctor's report is attached hereto.

15. The prayer of Rose Katinda Muoki is that the distribution should follow the Division of the clan which is in Agreement with Section 32, 33 and 35 (b) of the Section Act 160. Katinda is also a creditor.

ADMINISTRATOR'S SUBMISSIONS

16. The administrators and the beneficiaries of the Estate of the Deceased herein, save the 1st protestor, who is the daughter in law of the deceased, her husband having passed on after his father, the deceased herein, agreed to share the assets comprising the Estate first into two equal parts between the two households of the deceased, and thereafter the beneficiaries under each house to share equally.

17. The rationale was that the deceased had during his lifetime, divided his property between his two wives who took up possession of their respective portions of property together with their respective children, wives or husbands as the case was.

18. Consequently, reviewing that distribution would be tantamount to having old members of the family relocate from one location to another, and therefore the distribution in its way shall retain the *status quo* in terms of settlement of the beneficiaries of the deceased's estate. The distribution is for the entire estate of the deceased.

19. It is submitted that, the 1st protestor is a daughter in law to the deceased, having married the son of the deceased who is also now deceased.

20. Her interest has been taken care of in the distribution of the Estate as she has received equal shares according to the formulae used in distribution, of the entire assets comprising the estate of the deceased. Her protest however, is five-fold and it lacks merit.

21. First, that the distribution offends Section 32 and 33 of the Law of Succession Act Cap 160, which refer to the mode of distribution of what is termed as **excluded property**, and which is applicable on identified districts, which does not comprise Makueni, and so this ground of protest fails at the outset.

22. Second, that the mode of distribution offends Section 40 of the Law of Succession Act Cap 160 which provides that in a polygamous setting, each child together with the wives shall benefit from the deceased patriarch's estate equally.

23. This is negated by submissions above that the deceased had already settled his family on identified portions, which this protestor also acknowledges at paragraph 7 of her affidavit of protest filed on 31st March 2017 and at paragraph 2 of her Supplementary Affidavit filed on 21st November 2017; her protest on this ground is thus made in ill faith and should be dismissed.

24. Third, the 1st protestor has based her protest on the ground that the distribution be done as per clan proceedings which essentially ratified the distribution of the estate, first equally between the two households, and thereafter equally amongst beneficiaries under each household, which is similar to the formulae proposed in the mode of distribution.

25. This protest is thus not a protest but a support of the mode of distribution and ought therefore to fail.

26. Fourth, she has also protested on the ground that all the land comprising the estate of the deceased be considered and distributed amongst beneficiaries, which is also what the administrators have done.

27. Fifth, the 1st protestor's protest was also that the estate owes her Kshs.200,000/= which should be settled before distribution, which lacks merit because she has failed to prove her claim.

28. Based therefore on the circumstances of this case, the 1st protestor's protest lacks merit and ought to be dismissed with costs.

29. It is further submitted that, the 2nd protestor's case is that between the 20th September 2006 and 16th September 2007, he purchased from Mr. Andrew Nzioka Ndambuki, a son to the deceased herein, piecemeal, a total of 4 acres of land which he later on learnt to be a portion of

property known as **MBITINI/ITETA/347** that he also learnt later comprised the estate of the deceased.

30. He contends that at the time he purchased the property, he never knew that it was registered property, to the deceased herein, though a Certificate of Search annexed as **SKN 1** to the further affidavit of administrator Susan Katinda Lewa sworn filed on 3rd October 2017 shows that the property had been registered to the deceased herein on 26th October 1976 which due diligence could have revealed.

31. This contention is both self serving and meant only to shore up the 2nd protestor's case, for separately, the 2nd protestor claims to have involved the clan in his alleged transaction.

32. He has also claimed that he only knew that the property belonged to the deceased herein much later, and the succession cause too, which is okay because at the time of the alleged purchase, which has been denied, the succession proceedings, which were commenced on the 24th June 2008 with the lodging of the petition of letters of administration intestate, had not been lodged.

33. Any transaction that the 2nd protestor entered into before the succession proceedings with Mr. Andrew Nzioka Ndambuki, which is denied, can only be termed as personal as the afore mentioned Mr. Andrew Nzioka Ndambuki, though a beneficiary and later a joint administrator to the estate of the deceased herein, could not have represented the deceased's interest in the alleged transaction, and the only remedy that may be available to the 2nd protestor, upon proof, would be a refund by the afore mentioned Mr. Andrew Nzioka Ndambuki, and not an interest in the deceased's estate.

34. In addition, since the 2nd protestor contends that the said Mr. Andrew Nzioka Ndambuki never disclosed to him that the property comprised the estate of the deceased, there is no issue of representation by the afore mentioned beneficiary (Mr. Andrew Nzioka) that he was acting as administrator of the estate of the deceased, and so the alleged purchase falls outside the purview of the Law of Succession.

35. The 2nd protestor has also made two inconsistent claim at paragraphs 14 and 15 of his affidavit of protest there he wants a refund of Kshs.2 million comprising land purchase price and development costs from the administrators and that he be accorded his share in the estate respectively; his claim is thus vague at the outset. More importantly though, the following legal point also render the 2nd protestor's protest untenable.

36. First, the alleged purchaser interest is unenforceable as they have violated Section 6(1) Land Controls Act Cap 302 as no consent to subdivide or transfer of a registered agricultural property belonging to a deceased person, and none has been given for the last several years, going by the allegation of purchase by the 2nd protestor; his claim is thus null and void *ab initio*.

37. Second, the deceased herein died on 10th January 1992, succession proceedings were commenced on 24th January 2008, letters of grant were issued on 26th September 2008 whilst the 2nd protestor claims purchaser interest for alleged purchases of land allegedly made in the years 2006 and 2007.

38. The purchaser's claim against the administrators untenable as the deceased's property vests upon the administrators only upon appointment by a letter of grant and bot before, and they cannot therefore be held liable as administrators for transactions allegedly entered into before their appointment, and see provisions of Section 79 of the Law of Succession Act on this; in addition, such a purchase or subdivision of the deceased's land before confirmation of grant, as is the case herein, is barred by Section 55 (1) of Succession Act, and the 2nd protestor's alleged action is that of an intermeddler under Section 45 thereat.

39. After going through the evidence in affidavits and the submissions, the court finds issues arising are as follows:-

- ***Whether the protests have merit?***
- ***What will be the mode of distribution?***
- ***What are the orders as to costs?***

40. The deceased died intestate subsequently some or all of the beneficiaries did some transactions purporting to sell some or part of the deceased's estate.

41. The sale was done prior to confirmation of grant thus offending Section 45 and 79 Laws of Succession Act.

42. Section 45 stipulates that;

No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

43. Section 79 states that;

Property of deceased to vest in personal representative The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

44. Thus same which in any case were not blessed with letter of consent from Land Controls Board lack legal validity. The vendor who lacked capacity to transact will be at liberty to refund money or give their shares once confirmation and distribution is effected.

45. The court is bound in situations like the instant one where the deceased was polygamous to go by the dictates of Section 40 of Law of Succession Act which 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.

46. The houses of the deceased are to share equally according to the units in each house. The clan had no mandate to distribute the estate without the referral of the matter by the court to the same clan or if allowed by all the beneficiaries.

47. In absence of the all beneficiaries consent filed herein the clans purported distribution is of no legal validity and thus not binding the court.

48. The court will thus order:-

- Mbitini/Iteta/347,
- Makindu/Kalii/849,
- Makindu/Kalii/960,
- Mbitini/Iteta/1229 be shared to all deceased children/daughter in-law where her husband (deceased son is dead) and surviving spouse equally taking to account the beneficiaries occupation on the ground.

49. The purchasers are at liberty to lodge case at ELC to claim their interest or refund of the purchase price from whoever they entered into transaction with.

50. There was no debt disclosed in the petition or schedule against the estate of the deceased. Thus no debt will be levied from the deceased estate.

51. Thus court orders;

- i. The above properties be shared equally to all deceased person's beneficiaries as stated above paragraph 45 & 48.**
- ii. Grants are hereby confirmed.**
- iii. The purchasers are at liberty to lodge case at ELC to claim their interest or refund of the purchase price from whoever sold same to them.**
- iv. No orders as to costs.**

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

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C. KARIUKI

JUDGE