



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

SUCCESSION CAUSE NO. 438 OF 2011

IN THE MATTER OF THE ESTATE OF KAHINDI GONA KONDE (DECEASED)

RULING

1. Before this Court is a Summons dated 25.5.16 seeking Confirmation of Grant in respect of the estate of Kahindi Gona Konde (“the Deceased”). The record shows that the Deceased died on 5.10.92 at Msajeni, Kaloleni. Initially, a grant of letters of administration of the estate of the Deceased was issued to Mariam Kahindi, a daughter of the Deceased. A rectified grant was issued to the Administrator on 16.4.15 with her name as giving her name as Mariam Mwambire Ndundi. Pursuant to an application dated 6.8.15, the grant was revoked on 11.2.16 for *inter alia* non-disclosure and involvement of all beneficiaries of the estate. A grant was issued to Mbogo Kahindi Gona, Khamisi Kahindi Gona and Khadija Kahindi Gona as joint administrators.

2. Although the new administrators were directed to file a summons for confirmation of within 30 days, this was not to be due to disagreements within the family. Khadija Kahindi Gona (“the Applicant”) filed the Application herein with a view to having the Court determine the distribution of the estate. She averred in her supporting affidavit sworn on 25.5.16 that the Deceased was survived by 4 wives and several children. The 1st wife (now deceased) had 6 children. The 2nd wife also has 6 children. The 3rd wife has 1 child, the Applicant, while the 4th wife has 9 children.

3. The estate is comprised of a property known as Title No. Kilifi/Mtwapa/564 (“the Property”). According to the Applicant, the 1st and 2nd houses occupy about 1 acre each while the 3rd and 4th houses occupy about ½ acre each. These portions are well defined by a natural fence and each of the houses has peacefully occupies their respective portions for a period of over 10 years. The Applicant’s prayer is that the Court distributes the Property in accordance with the portion each house occupies.

4. In her Affidavit of Protest sworn on 28.5.18, Nzingo Kahindi Gona (the Protestor) avers that the distribution proposed by the Applicant is inequitable. She and her children will have the least portion of the property. Her house has more members than other houses. She prayed that the Court distributes the Property in accordance with the law taking into account the number of units in each house.

5. According to Mbogo, the Protestor left home shortly after the demise of the Deceased and remarried. She lived in Kisauni until 2010/2011 when she returned. Mbogo further avers that upon her return she put up a house in part of the portion assigned to her and has lived there without complaint. She has also sold the remainder to one Hassan who has constructed a house thereon. Other family members have also sold portions of their shares to third parties who have constructed thereon. The Protestor’s demand for redistribution of the Property is driven by malice as it would prejudice the other beneficiaries and 3rd parties who have invested in the property. He prays that the Property be distributed in the exhibited survey map.

6. The matter was heard by way of *viva voce* evidence. In her testimony, the Applicant reiterated the contents of her affidavit. The Deceased had 4 wives Sidi (deceased), Fatuma who has 6 children, the Protestor who has 4 children and Dama (deceased) who had 1 child, the Applicant. No one opposed the distribution of the property done by the Chief. Some of the Deceased’s children sold the portions given to them by the Chief to 3rd parties. Any change therefore will cause trouble with the third parties who have built on the portions purchased. The Protestor has only left a small portion. The Applicant has also sold her portion.

7. On her part, the Protestor stated that she was not involved with the distribution by the Chief. She is not aware of any conflict regarding mango and coconut trees or that the Chief was called to resolve the same. She denied knowledge of the Chief and village elders. At the time of distribution she was in Kisauni. When she was shown her portion, she built her house on that portion. She did not oppose the distribution. All her co-wives were on their respective portions and they all lived in harmony. According to her at the time of the demise of the Deceased, each of the wives had built their home on the Property. She stated that she had 4 children with Deceased. The 3rd parties bought portions of the Property according to the portions given to the beneficiaries. In her view, if the distribution is changed, there will be no conflict. Each beneficiary should get their entitlement.

8. Khamis Kahindi Gona a son of Sidi, the first wife and the eldest son of the Deceased testified. He is one of the Administrators. He stated that following a dispute over he requested the Chief to distribute the Property. The Chief set the boundaries according to the houses and each house was shown its portion. No one opposed the boundaries. Some of the family members have sold their portions. They have all lived in harmony. He has not sold his portion. In his view, the land should be distributed according to how it is on the ground.

9. I have given due consideration to the matter herein, the evidence as well as the written submissions. The Deceased was a polygamous man and was survived by his wives and children. 2 of his wives have however since died. It would appear from the evidence that following the demise of the Deceased a conflict arose between 2 sons of the Deceased over mango and coconut trees. The area Chief resolved the disputed by distributing the Property amongst the 4 houses and each house took possession of its portion. Some of the beneficiaries have sold their portions to 3rd parties who have taken possession and have built thereon. The Applicant and Khamisi pray that the Property be distributed in accordance with the status on the ground. The Protestor however opposes this proposal and prays that distribution among the houses according to the number of children in each house.

10. The law relating to the distribution of the intestate estate of a polygamous man is found in Section 40 of the Law of Succession Act which provides:

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.

11. In the case of Mary Rono v Jane Rono & another [2005] eKLR, Omollo, JA had this to say about Section 40 of the Law of Succession Act:

My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

12. The learned Judge restated the legal position that distribution of the intestate estate of a polygamous man shall be according to houses and must take into account the number of children in each house. Parliament did not intend that there be equality between houses. The intention of the framers of Section 40 of the Act can be deduced from the Report of the Commission on the Law of Succession 1968 as cited by Lenaola, J (as he then was) in Re Estate of John Muia Kalii- (Deceased) [2008] eKLR:

In customary law, on the other hand, the matter is complicated by the rules of division amongst the "house" by which there is an equal division amongst the "houses" irrespective of the number of children in each "house". We believe this rule to be highly unfair and discriminatory... We think that is necessary, for the purpose of determining beneficial interests, to make a division of the net estate between the "houses". This accords with customary law and will work out well in practice since the property of each "house" is normally treated as independent and separate from the other. As to the mode of division, we have already stressed that the present system of equal division irrespective of the number of children in each "house" is inequitable. We believe that the fairest division would be one based on the number of children in each "house" but also adding to the number of children, the wife as an additional dependants especially to cater for the wife who has no children.

13. From the foregoing, it is clear that the estate of a polygamist shall be distributed according to houses taking into account the number of children in each house with any surviving widow being counted as an additional unit to the number of children. This is the indeed the fairest mode of distribution.

14. In the present case, the Deceased had 4 wives. The 1st wife Sidi is deceased and had 6 children. The 2nd wife Fatuma has 6 children, the 3rd wife Dama (deceased) had 1 child and the 4th wife, the Protestor has 5 children. In accordance with Section 40 of the Act the beneficiaries in total are 19 made up as follows:

1 st house	6 children
2 nd house	1 wife and 6 children
3 rd house	1 child
4 th house	1 wife and 4 children

15. It is not disputed that the 1st and 2nd wives were given 1 acre each while the 3rd and 4th wives were given ½ acre each. This distribution is both unfair and inequitable. It is just such a situation that the Commission on the Law of Succession 1968 was seeking

to avoid when it proposed Section 40 of the Act. The equitable distribution is that between houses taking into account the number of children.

16. The Court was urged to maintain the distribution of the Property as was done by the Chief. To begin with, the Chief has no authority or jurisdiction to distribute the estate of a deceased person. This is done by the duly appointed administrators of an estate with the authority of the Court. The distribution of any capital assets before confirmation of a grant of representation is expressly proscribed by Section 55 of the Act which provides:

(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.

17. It is said that some of the beneficiaries have sold their portions. The law of Succession Act is explicit in prohibiting the sale of any immoveable property before confirmation of a grant of representation. Not even personal representatives are allowed to make such sale. Section 82(b) of the Act sets out the powers of personal representatives to sell the property of a deceased person. The proviso thereto provides:

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

i. ...

ii. no immovable property shall be sold before confirmation of the grant;

18. The parties herein sold portions of the Property in total violation of the law. They intermeddled with the estate of the Deceased contrary to section 45 of the Act which provides:

45. 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.

19. Having intermeddled with the estate of the Deceased, the parties have now come to ask the Court to sanction the illegalities by maintaining the status quo on the ground. This the Court cannot and will not do. Further they have invited the Court to endorse the distribution done by the Chief to avoid rocking the boat of the illegalities committed. The said distribution is contrary to the provisions of Section 40 of the Act and the Court declines the invitation.

20. I have carefully considered this matter and having applied the law to the facts herein, I do direct that the Property forming the estate of the deceased be distributed in accordance with Section 40 of the Act. The Property shall be divided among the houses according to the number of children in each house. This being a family matter, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 26th day of October 2018

M. THANDE

JUDGE

In the presence of: -

..... for the Administrator

..... for the Administrator

..... for the Protestor

..... Court Assistant