



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT NAIROBI

#### SUCCESSION CAUSE NO.13 OF 1996

#### IN THE MATTER OF THE ESTATE OF JOSEPH MWEU NZAU (DECEASED)

#### RULING

1. The deceased Joseph Mweu Nzau died on 3rd May 1992. Benjamin Musyoka and Thomas Muisyo petitioned for grant of letters of administration and were issued with the same on 12th March 1996. The deceased was survived by 10 children to whom it is alleged he had prior, to his death, distributed the property he owned. After several years the petitioners sought to have the said grant of letters of administration confirmed. Later on the 30<sup>th</sup> of December 2010, letters of administration were issued to Thomas Musiyo Mweu, Isaac Mwanthi Mweu, Teresia Musyoka Mweu and Veronica Mwikali Mweu

2. However, Beatrice Muloko Kilonzo a widow to the late Dishon Kilonzo Mweu who died on 22nd October 1995 who was a son of the late Joseph Mweu Nzau raised an objection to the said confirmation of grant claiming that she and the family were not adequately provided for as all they got from the deceased's estate was only 5 acres. Adding that when her husband died she was pressured by her brother in laws to sign an agreement on how the remaining property was to be distributed. She avers that she and her children stay at Katheka sub-location where the deceased had given her late husband. While the shamba at Kingoti was about  $\frac{1}{4}$  an acre belonging to Samuel Kinyoe which they had been gifted by the brother to the deceased. Further that the shamba at Makuyuni was measuring 3 acres and not 37 acres as alleged. She avers that it is only fair that her family is included in the share of the remainder of the deceased's estate and urges the court to equitably re-distribute the remainder of the deceased's estate.

3. Thomas Muisyo Mweu a son to the deceased in opposition to the said protest filed his affidavit dated 13th February 2013. He avers that 10 children including Dishon Kibuzo Mweu survived the deceased at the time of his demise. The deceased went ahead to distribute his property amongst his children with Dishon being settled at ***Kitheka in Matugulu/Katheka/594*** measuring 37 acres and also Kingoti Land Number 1899 in Matugulu Division. Samson Kivuva Mweu, Raphael Muange Mweu were settled at Yatta while Isaac Mwanthi Mweu also settled at Matugulu. Kingoti and Benjamin Mweu at Kamulu and Komarock. Late Mulwa was settled on Land no. 126 Komarock, Thomas Muisyo Mweu land no 126 Komarock and Veronica Mwikali No. 126 Komarock. After the death of the deceased he together with Isaac Mwanthi Mweu, Theresia Musyoka Mweu and Veronica Mwikali Mweu were nominated to be administrators although the applicant did not raise any objection to the settlement and has always been content with the status quo. That her statement that she was forced to sign the document is untrue.

4. Isaac Mwanthi Mweu in his replying affidavit dated 22<sup>nd</sup> December 2013 is opposed to Beatrice Muloko Kilonzo getting a share of ***Donyo Sabuk/Komarock Plot no.62 or no. 157*** adding that their late father had already provided for Beatrice Muloko Kilonzo's late husband with Plot 594 at Katheka location measuring 37 acres and plot no1899 at Kingoti sub location in Matungulu Division. Adding that Dishon did not sell any part of the aforesaid property but after his demise his widow sold the aforesaid inheritance in the year 2000 and 2008 and it was after doing so that she developed an interest in ***Donyo Sabuk/Komarock Plot no.62 or no. 157***. That the applicant was a party to the meetings held and which

minutes she signed and cannot allege coercion. Further that James Mulwa Mweu who had no children died having entered into an agreement to sell his share of 26.5 acres and it is only fair that the outstanding purchase price be distributed among his siblings with the exclusion of Beatrice Muloko Kilonzo. That the beneficiaries had already been adequately provided for on 18th October 1996 as the deceased had distributed **Donyo Sabuk/Komarock Plot no.62 or no. 157**. With each of them namely Isaac Mwanthi Mweu , Estate of James Mulwa Mweu, Estate of Benjamin Musyoka Mweu and Thomas Muisyo Mweu all getting 26.5 acres.

5. Beatrice Muloko Kilonzo in her further affidavit dated 1st December 2015 stated that the only parcel they got from the deceased was only **Matungulu/Katheka /594** measuring 5 acres only.

6. Beatrice Muloko Kilonzo in her testimony dated 13<sup>th</sup> September 2016 stated that she was married to Dishon Kilonzo a son to the late Joseph Mweu who had died on 22nd October 1995. That the late Joseph Mweu had divided his land to his 7 children prior to his death. Raphael Mwange and Samson Kivuva were to stay in Ya33tta and each was given 50 acres with the other 5 children Dishon Kilonzo, Isaac Mwanthi, Benjamin Musyoka, James Mulwe and Thomas Muisyo were given 100 acres in Komarock which they were to subdivide amongst themselves. She stated that she stays in a 5 acre piece of land left to her by the deceased Joseph Mweu Nzau and Joseph Mweu's brother Samuel Kinyoe gave her a shamba in Kingoti in Matungulu.

7. On cross examination she stated that she and her husband were supported by her father in law and he had given them a 5 acre piece of land where they lived. She however denied that her father in law gave them the land at Katheka. She stated that the deceased distributed the shamba but her in-laws removed her husband's name which pushed her to come to court. She denied selling any parcel of land.

8. Isaac Mwanthi Mweu in his affidavit acknowledged knowing Beatrice as the wife to his late elder brother Dishon Kilonzo. He denied that his late father Joseph looked after her adding that the said parcel of land was owned by Mweu's family and not Samuel Kinyoe as claimed by the applicant. Adding that Dishon was given a shamba at Kingoti and Katheka by their father when he gave each one of them their portion of land. He added that the Komarock land was given to him and James Mulwe, Musyoka Mweu and Thomas Mweu adding that the others got 50 acres at Yatta. He stated that the deceased died having divided everything and at the time and his children including Dishon could have complained if not satisfied with what they got.

9. On cross-examination he stated that sometime in 1994 the deceased called them slaughtered a bull and divided the land. Adding that the land given to Dishon was in his name and has been sold. That they had made an agreement on what each of them was to get and even the applicant had signed the same. At the time she signed his brother Benjamin who had taken the papers to her said everything was ok. She has sold the Katheka land.

10. Parties filed written submissions. The applicant submitted that the application is within the law as they are living off the land given to them by the deceased herein and as such are dependants within the law. That the applicant's husband who is deceased was not adequately provided for as he was only given 5 acres with other sons of the deceased getting larger parcels of land and it is thus only fair that provision be made for the applicant from the residue estate of the deceased. Adding the applicant's husband's brother one Isaac Mwanthi Mweu had in his evidence stated that Dishon did not have any survivors.

11. Isaac Mwanthi Mweu submitted that the application was brought under section 26 of the Law of Succession Act. It was submitted that section 29 of the Law of succession Act defines a dependant as that who is maintained or entitled to be maintained by the deceased. That Paragraph (a) where a deceased man, then his wives and children are categorized as dependants. That the deceased was not the applicant's husband and on cross-examination she could not say what maintenance she was receiving from the father in law when she had a husband adding that she had in cross examination stated that it was indeed her husband who was supporting her. That paragraph (b) on the other hand brought in relatives maintained by the deceased. She could not succeed on this as she had not demonstrated that she was being maintained by the father in law. It was his submission that the applicant has not proved that she was a dependant within

the meaning of section 26. Further that the applicant has not shown what she has been deprived of. That assuming she qualifies as a dependant she still needed to prove that she was not adequately provided for. That in her own testimony the deceased is the one who distributed his property before he died and by then he had given her husband the land at Katheka and Kingoti reasons they were not included subject to these proceedings. While Komarock properties comprise of plot no. 62 and 157 which had not undergone demarcation and the deceased could not transfer the same at the time hence they were caught up by his death and became subject to the Law of Succession Act. That the said parcels had been shared out to Isaac Mwanthi, James Mulwa Mweu, Benjamin Musyoka Mweu and Thomas Muisyo Mweu. He added that the applicant is the beneficiary of her husband's benevolence which she still enjoys courtesy of marriage to the deceased's son. That the applicant's husband did not complain during his lifetime as a sign that he was content along with his brothers Samson Kivuva Mweu and Raphael Mweu who were settled in Yatta adding that the applicant is using the size of land to claim for more. Further the applicant claims a share in the Komarock property given to four brothers and the same is tantamount to reviewing her late father in laws sharing formula. He urged the court to confirm the application for distribution as it conforms to the wish of the deceased which sharing had been settled by the time of his death.

12. Thomas Muisyo Mweu in his submission raises two issues.

- i. Does the applicant have locus standi to bring this application
- ii. Is the application meritorious to be allowed

### **Does the applicant have locus standi to bring this application?**

On this it was submitted that it is trite law that for one to act for any deceased person they must take out letters of administration as seen in the case of *Christine Achieng Ogesa & Another vs British Managers Limited HC Succession Cause no 2511 of 2011* it was held that *without a grant of representation or special limited grant ad colligenda bona, the applicants have no legal capacity to sue the respondent as yet for payment to them of money the deceased's estate is entitled to.*"

Adding that acting without a grant of representation is contrary to section 45 of the law of Succession Act. That is clear from the evidence on record the applicant has not taken out letters of administration for Dishon Kilonzo Mweu. Adding that a daughter in law is not a dependent as provided under section 29(d) of the law of succession. In the case of *Re-estate Cecilia Wanjiru Kibiche (deceased) [2016] eKLR*, As a protestor has not filed an application for provision under section 26, there cannot be any basis for me to begin to consider whether or not she was a dependant of the deceased. The same case would apply to her daughters. I should also add that a daughter in law is not listed in section 29(b) of the Act as being among persons who may move the court under section 26 for reasonable provision and who the court may declare to be a dependant.

That section 29 (b) of the Law of Succession states; *"(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;"*

It was submitted that for a grandchild to be provided for one has to prove that when making the application for reasonable provision, they must show that prior to the deceased's grandparent's death they were dependant on the deceased.

### **In Re Estate of John Musambayi Katumanga – (Deceased) [2014]eKLR**

*"The available literature appears to place her under Mary Musambayi. I suspect that she is a daughter of the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependent of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased. There are two reasons for this. She is not an heir of the deceased, for grandchildren are not entitled to inherit from their grandparents so long as their own parents, the*

*children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependent on the grandparent immediately before his death.”*

13. The applicant is a daughter in law to the deceased. Her late husband was a son to the deceased and as such was a beneficiary to the deceased’s estate. From the evidence tendered before this court the applicant has not taken out representation against her late husband Dishon who is the rightful beneficiary to the deceased’s estate and who would be properly placed to claim as a dependant under the meaning section 29 which lists those who are entitled to claim as beneficiaries as follows; *(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;”*

14. From the above provision daughter’s in law are not considered to be dependants though the applicant’s children would have had a better standing no grant of representation has been taken out to allow either she or the family of Dishon to persue a claim from his late father’s estate. I find that the protestor has not proved she is a dependant as provided for under the section 29 of the Act. Further without any grant limited or otherwise granted to her to persue the administration of the late Dishon the protestor cannot therefore seek to be considered to assume or take the place of Dishon or claim in his name without assuming the title of the legal representative of his estate. The respondents can proceed with confirmation process. Cost in the cause. It is so ordered.

**Dated, signed and delivered this 23<sup>rd</sup> day of February ,2017.**

**R. E. OUGO**

**JUDGE**

In the presence of;

.....**For the Applicant**

.....**For the Respondents**

**MS. Charity            Court Clerk**