



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION CAUSE NO. 63 OF 2007
IN THE MATTER OF THE ESTATE OF SAMSON NZIOKI KYUMA (DECEASED)
VINCENT MUSYOKA NZIOKI.....PETITIONER

VERSUS

1. STEPHEN KAWINZI NZIOKI

2. WAMBUA NZIOKI.....OBJECTORS

3. MUTUKU NZIOKI

JUDGMENT OF THE COURT

1. What is before me is a summons for confirmation dated 9th June, 2009. It is brought pursuant to the Provisions of Section 47 and 71 (1) and (2) of the Succession Act. It seeks for the following reliefs namely:-

a. That the grant of letters of administration (intestate) made to the Applicants Vincent Musyoka Nzioki and Stephen Kawinzi Nzioki in this cause be confirmed in terms of an annexed schedule of distribution of the estate of the late Samson Nzioki Kyuma.

b. That other assets which have become known to the Petitioners since the filing of this cause and which are reflected in the schedule of distribution be deemed as part of the estate of the deceased for purposes of confirmation of the grant herein.

c. That costs of the Application be paid out of the estate.

2. The Summons is supported by rival affidavits of both Petitioners herein, the first one sworn on 9/6/2009 by the 2nd Petitioner and the second sworn on 24/11/2011 by the 1st Petitioner. The rivalry in the Affidavits is based on divergent opinions on the proposed mode of the distribution of the estate of the deceased. As far as the first Petitioner Vincent Musyoka Nzioki is concerned, the only property of the estate namely **MAKUENI/UNOA/242** measuring 32 acres should be divided equally between the two houses (wives) of the deceased. On the other hand the 2nd Petitioner Stephen Kawinzi Nzioki is of the view that the said property be divided amongst the houses according to the number of children in each house so as to ensure that each beneficiary gets an equal share.

3. Due to the disagreement on the proposed mode of distribution of the estate the parties took directions to

the effect that the Application be canvassed by way of viva voce evidence and parties were directed to file and serve written statements of witnesses. It seems it is only the 2nd Petitioner who complied and filed statements of witnesses and further participated in the viva voce evidence while the 1st Petitioner gave the directions a wide berth and failed to do so and also did not adduce evidence. Incidentally the 1st Petitioner in his affidavit is opposed to the distribution of the estate equally among the beneficiaries and consequently was deemed to be the Objector and was thus expected to start off with the hearing of the objection to the equal distribution of the estate among the beneficiaries. However, following the failure by the 1st Petitioner to appear for the hearing, the 2nd Petitioner was allowed to proceed and present his preferred mode of distribution of the Estate.

4. The 2nd Petitioner's case is that the deceased herien had married two wives namely Naomi Nduku Nzioki and Ndululu Nduku Nzioki. It was the 2nd Petitioner's case that the first wife had three sons and one daughter while the second wife had one son and two daughters. It was the 2nd Petitioner's further evidence that the two wives have since passed on and that he is from the first house while the 1st Petitioner is from the second house. The 2nd Petitioner averred that the only property of the deceased namely **MAKUENI/UNOA/242** measuring about 32 acres should be shared equally amongst all the children of the deceased. The 2nd Petitioner further stated that in his affidavit that the purported clan deliberations conducted on 24/08/1991 was only to do with an access road for one of the beneficiaries Wambua Nzioki who has since passed on and that their deceased father had not subdivided the land during his lifetime. The 2nd Petitioner called one of his brothers Joseph Nzioki Mutuku who testified that he is opposed to the distribution of the estate equally between the two houses but that the property be shared equally among the sons of the deceased since all his sisters and step sisters are already married. The said witness further stated that the beneficiaries had not been shown their respective parcels by their late father Samson Nzioki Kyuma. He also denied that the clan had ever divided the family land as claimed by the 1st Petitioner/Objector.

5. I have considered the evidence of the 2nd Petitioner and his witness as well as the rival affidavits as regards the proposed mode of distribution of the deceased's estate. It is not in dispute that the deceased left behind parcel number **MAKUENI/UNOA/242** measuring about 32 acres as the only asset for distribution. It is also not in dispute that the deceased had two wives namely Naomi Nduku Nzioki and Ndululu Nzioki both of whom are deceased. The first wife had three (3) sons and one (1) daughter while the second wife had one (1) son and two (2) daughters as described in the affidavits of the Petitioners herein. The issues necessary for determination are as follows:

a. Whether the deceased herein had subdivided parcel fo land MAKUENI/UNOA/242 in his lifetime.

b. The correct mode of distribution of the said parcel of land to the beneficiaries.

6. As regards the first issue it is necessary to decide whether the deceased had indeed sub-divided his land to all his family members or made certain gifts intervivos before he died. The wishes of a deceased person must always be respected. There are now two rival versions. According to the 1st Petitioner/Objector the deceased had divided the land equally between his two (2) wives and that the area clan elders subsequently endorsed the same during deliberations made on 24/08/1991. On the other hand the 2nd Petitioner maintains that no such thing ever took place and that according to him, his late father did not subdivide the land to them and further the clan deliberations which took place on 24/08/1991 only dealt with an issue of a road of access that had been requested by one of his brothers. The 2nd Petitioner seeks to have the land shared equally among all the children of the deceased whereas the 1st Petitioner/Objector is opposed to such an arrangement on the ground that he is likely to lose so much land yet he is to inherit the share from his mother's side by virtue of the fact he is the only son while his siblings are daughters who are married. The 2nd Petitioner feels that if the land is to be divided between the two houses equally, he and his siblings will get lesser shares as compared to the 1st Petitioner. As the 2nd Petitioner has denied that the deceased had already subdivided the land and further denied the

deliberations of the clan elders, it was incumbent upon the 1st Petitioner/Objector to establish the contrary. The burden of proof lies upon the 1st Petitioner to discharge. Indeed the 1st Petitioner opted not to tender evidence and to call any of the clan elders so as to establish the basis of his objection and back up his proposed mode of the distribution of the estate of the deceased. In the premises I am persuaded by the 2nd Petitioner herein that the deceased had not sub-divided the land parcel **MAKUENI/UNOA/242** during his life time.

7. As regards the second issue, it is noted that the deceased had two (2) wives. The first household had three (3) sons and one (1) daughter while the second household had one (1) son and two (2) daughters. According to the 1st Petitioner/Objector, the land should be shared equally between the two houses so that he remains alone to take care of the portion due to his mother's household. However the 2nd Petitioner is opposed to such mode and proposes that the land be divided equally among the seven (7) children of the deceased and that the share of his deceased brother Wambua Nzioki be taken up by the son Chad Mungata Wambua to hold in trust for his siblings. Indeed going by the proposed mode as per the 1st Petitioner/Objector, I find there is likely to be unequal distribution of the estate and which will be contrary to the provisions of Section 40(1) of the Law of Succession Act which provides thus:-

“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”.

The deceased's first house had four (4) children while the second house had three (3) children. There is therefore a total number of seven (7) children. All children of a deceased person have a right to inherit the estate of the deceased parent regardless of their gender and marital status. The 2nd Petitioner vide paragraph 9 of his affidavit in support of summons for confirmation of grant proposed that the seven (7) children of the deceased to each get an equal share of the 32 acres so that each will get approximately 4.57 acres. The 2nd Petitioner further proposed that the share of the deceased brother Wambua Nzioki be taken up by his son **Chad Mungata Wambua** to hold in trust for his siblings. I find the proposed mode of distribution of the estate by the 2nd Petitioner vide paragraph 9 of his affidavit to be proper and in accordance with the law of Succession Act.

8. In the result it is the finding of this court that the objection raised by the 1st Petitioner and his proposed mode of distribution cannot be sustained as it lacks merit. The same is rejected. Consequently the sole property of the deceased namely **MAKUENI/UNOA/242** measuring 32 acres shall be divided among the seven (7) children of the deceased in equal shares. The grant of letters of administration (intestate) made to the Applicants on 23/03/2009 is hereby confirmed and the estate to be distributed as proposed vide paragraph 9 of the 2nd Petitioner's affidavit in support dated 9/6/2009. The costs hereof be paid out of the estate.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **24TH** day of **JULY**, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Makundi for Mulei for Petitioner

C/A: Kituva