



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 233 OF 2010**

**IN THE MATTER OF THE ESTATE OF JOSEPH MASILA MUTISO (Deceased)**

**BETWEEN**

**WANZA MASILA.....PETITIONER**

**AND**

**AMOS MULEE MUTISYA.....OBJECTOR**

**RULING OF THE COURT**

1. The Petitioner was issued with grant of letters of administration on 21<sup>st</sup> November, 2011. She filed summons dated 8<sup>th</sup> October, 2012 seeking confirmation of the said grant. In her affidavit in support of the summons, the petitioner listed the objector, Wambua Masila, Kamula Masila, Kaluu Masila and Wanzuu Masila as the children of the deceased. She then stated that the identification and shares of all persons beneficiary entitled to the said estate have been ascertained and determined as follows:

***a) Mumbuni/Kasinga/970 to be transferred and registered in the names of Jonathan Musyoka Muli.***

***b) Mumbuni/ Kasinga/2177 to be registered in the names of Wanza Masila to hold in trust for herself and that of other beneficiaries.***

2. The Objector filed an affidavit protesting the petitioner's application for confirmation of the grant. He particularly opposed the proposed mode of distribution. The reasons advanced were that; the petitioner was once married to the deceased who is his uncle but divorced and later got married to another man. That the deceased had one daughter also deceased with the deceased. That the other children are from her second marriage and none of them is the deceased' biological children. That the petitioner without letters of administration purported to sell the deceased' parcel of land Mumbuni/ Kasinga/970 to Jonathan Musyoka Muli yet she has no legal right to dispose of the property. He further stated that being a relative of the deceased, he is entitled to a share of the deceased' estate.

3. It emerged from the Objector's witnesses evidence that the Petitioner divorced the deceased and only returned home after 40 years. That the parcel of land is ancestral land and ought to be maintained within the family and not sold to Joseph Musyoka Muli who is not a family member.

4. From the Petitioner's side, David Muia admitted that the property is ancestral land but that he does not know what the petitioner did with the money upon selling the plot. The petitioner in her evidence admitted to having sold the property before confirmation of the grant.

5. The submissions were a reiteration of the facts on record save that the objector cited Section 45 stating that the petitioner had no authority to meddle with the property and the case of **Joseph Gitau Githongo Vs. Victoria Mwhaki Munya [2014] e KLR**.

6. In my view the issues that fall for determination here are:

*(a) whether or not the petitioner divorced her husband;*

*(b) if the said is answered in the affirmative whether or not the petitioner is entitled to her husband's property; and*

*(c) whether or not the children are entitled to the property in the event it is found that they were not the deceased's legitimate children.*

*(d) whether the Protestor is entitled to a share of the estate.*

7. There is no evidence on record as to what kind of marriage the petitioner and the deceased entered into. However, it is an undisputed fact that she was married to the deceased presumably through traditional marriage. Having parted ways with the deceased for 40 years, a fact the petitioner did not contend, it amounts to a divorce.

8. On the second issue, I find that the Petitioner has a right over the husband's property. I am guided by the Court of Appeal's decision in **P N N v. ZWN [2017] e KLR** where it held that:

*“The opportune moment for change came during negotiations on the new Constitution which was promulgated in August 2010, three years after the Echaria case. The people of Kenya in a referendum decided to expressly pronounce themselves on the institution of family in Article 45 as “the natural and fundamental unit of society and the necessary basis of social order” which must enjoy the “recognition and protection of the state”.*

As relates to marriage, Article 45 (3) of the Constitution provides as follows:

*“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”*

*4. One of the earliest opportunities to interpret the provisions of Article 45 (3) came one year after the promulgation in the case of Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011), where this Court stated as follows:-*

*“Article 45 (3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.”*

*5. Parliament indeed rose to the occasion two years after that decision and enacted The Matrimonial Property Act, 2013 which received assent on 24<sup>th</sup> December, 2013, and commenced on 16th January, 2014. Section 7 provides:*

**“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”**

**Contribution is defined by Section 2 to mean monetary and non-monetary contribution. Non-monetary contribution includes:**

- a. Domestic work and management of the matrimonial home;**
- b. Child care;**
- c. Companionship;**
- d. Management of family business or property; and**
- e. Farm work**

**“Family business” means any business which -**

- a. is run for the benefit of the family by both spouses or either spouse; and**
- b. generates income or other resources wholly or part of which are for the benefit of the family;”**

**6. A combination of the above provisions of the Constitution 2010 and the Matrimonial Property Act 2013, has settled the law on matrimonial property and charted a clear vision for the future. The only debatable consequence is whether those provisions have confined previous decisions to the archives. One school of thought espoused by this Court is that at least they render the Echaria case obsolete. That was the view taken by this court in the case of V W N v. F N [2014] eKLR decided in October 2014 when it rejected an application for leave to appeal to the Supreme Court for determination of the following issues, amongst others:**

**“Whether Article 45 (3) of the Constitution applies in matters filed before the promulgation of the Constitution and not yet determined; the extent to which Article 45 (3) of the Constitution applies vis-à-vis the principles enunciated in the case of Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR regarding matters filed after promulgation of the Constitution..”**

**7. The Court had this to say:**

**“The provisions of Sections 2, 6 and 7 of the Matrimonial Property Act, 2013 breathe life into the rights provided in Article 45 (3). The Matrimonial Property Act recognizes that both monetary and non monetary contribution should be taken into account in determining contribution. In light of Article 45 (3) and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non monetary contribution, Echaria [supra] is no longer good law.”**

**8. Another school of thought espoused in the case of PWK v JKG [2015] eKLR is that the Echaria case is not dead. The Court stated thus:**

**“We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in ECHARIA -VS- ECHARIA (Supra) “Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse**

*would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “Equality or equity” while heading the caution of Lord Pearson in GISSING –VS-GISSING [1970] 2 All ER 780] at page 788 paragraph c that:*

*„No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions otherwise than by way of advancement, by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one quarter, I do not think it is helpful or right for the court to feel obliged to award either one half-or nothing”.“*

*We are of the respectful view that the principles restated by ECHARIA VS. ECHARIA are good law and contribution as the basis for distribution of matrimonial property remains valid”.*

9. From the evidence on record, it has been established that petitioner only had one legitimate child with the deceased. The petitioner had the opportunity to prove otherwise but chose not to. In a case where a party has evidence which he or she chooses not to furnish in court, an adverse inference is always made. I therefore find that she only had one legitimate child with the deceased. The question that follows is whether the illegitimate children are entitled to the property. In my view they are considering that the deceased parented the children. They become his beneficiaries on the account of his parenthood. In fact all the surviving children of the deceased bear the name of the deceased as disclosed in the P &As Forms.

10. Following the foregoing, it is my conclusion that the Petitioner had the right to distribute the property to the children since they became legitimate by virtue of the deceased’ parenthood. The Objector claims that he too is entitled to a share of the property being a relative to the deceased. It must be noted that the Objector has not established that he was in any way a beneficiary of the deceased and was merely an administrator to ensure that the property is not wasted. He is not a beneficiary within the meaning under Section 39 Law of Succession Act since deceased left behind spouse and children.

11. The Protestor has also objected to the purported sale of one of the deceased’s properties to a third party namely **Mumbuni/Kasinga/970** on the ground that the same is ancestral land which should not be sold. Indeed the Petitioner admitted in her evidence and those of her children that she was forced to sell the said parcel to one Jonathan Musyoka Muli after her husband died while in Kericho as she need the money with which to organize for the ferrying of body and burial. However, at the time it is noted she had no capacity to purport to sell immovable property of the deceased before confirmation of grant. Section 82 of the Law of Succession Act bars any person from selling immovable property of a deceased person before confirmation of grant. Hence I am inclined to agree with the Protestor’s views that the land should not have been sold as he was not even consulted yet he was a co-administrator. The purported sale therefore was an intermeddling with the estate of the deceased and which is frowned upon by Section 45 of the Law of Succession Act.

12. The Protestor has raised the issue that the purported sale of parcel Mumbuni/Kasinga/970 was against the Community’s customs which forbade sale of such ancestral lands to persons who were not family members. The Protestor further stakes a claim to the land by virtue of being a brother of the deceased. It must be noted that a custom is a matter of fact and it is the duty of the party alleging a particular custom exists to prove that it actually exists. (See the case of JOSEPH GITAU GITHONGO vs VICTORIA MWIHAKI MUNYA [2014] eKLR). Even though the Protestor claimed that Kamba customs forbade sale of ancestral lands to outsiders, he only called his brothers. He did not call a distinguished clan elder to testify and to fortify the existence of such a custom. Again the copies of search certificate indicate that the lands in question had been duly registered in the name of the deceased herein Joseph Musila Mutiso. Indeed the Protestor’s brothers who testified confirmed that the deceased had been allocated those parcels. It seems to me that the Protestor and his brothers wanted to have a piece of the said parcels yet they had their separate portions. Since the parcels had been registered in the names of deceased for

himself and his immediate family, I find the Petitioner is the legitimate person to administer them by virtue of being his surviving spouse for the benefit of the children. In fact it emerged from the evidence that the deceased prior to his demise had handed over the title deeds to the Petitioner for safe keeping as he left for Kericho for it appeared he had a premonition of his impending death since he died soon afterwards. The intention of the deceased then was that his spouse was to take charge of his properties. Consequently, I find the Protestor has failed to prove the existence of any customs forbidding sale of land to non family members and further failed to prove that he is a beneficiary of the deceased's estate.

13. The upshot of the foregoing is that the 2<sup>nd</sup> Administrator/Protestor's protest as regards the 1<sup>st</sup> Petitioner's lack of capacity to sell parcel **Mumbuni/Kasinga/970** succeeds. The other grounds in the protest are found to have no merit and rejected. Consequently, the 1<sup>st</sup> Petitioner's Summons for confirmation of grant is rejected. A fresh summons for confirmation of grant be filed and in which all the interested beneficiaries are involved within sixty (60) days from the date hereof. As the Petitioner and protestor are sister in law and brother in law respectively, I direct that each party to bear their own costs.

Dated, signed and delivered at **MACHAKOS** this **29<sup>th</sup>** day of **September,2017**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Kamololo for Petitioner

Kyalo for Nthiwa for Protestor

C/A: Kituva