



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 325 OF 2009**

**IN THE MATTER OF THE ESTATE OF NGUKU NTHIWA MBAI (DECEASED)**

**1. WILLY MAKAU NGUKU**

**2. BEATRICE MBITHE NGUKU.....PETITIONERS**

**VERSUS**

**1. WAMBUA SANZI**

**2. KASYIMA SANZI**

**3. MUOKI SANZI**

**4. WAYUA SANZI.....OBJECTORS**

**RULING**

**Introduction**

The Petitioners herein are a son and daughter of the deceased Nguku Nthiwa Mbai (hereinafter referred to as “the Deceased”), and they were issued with a grant of letters of administration with respect to the estate of the Deceased on 23<sup>rd</sup> September 2009. The Objectors then filed a summons for revocation of grant and various objections to the making of grant. The Court (Muriithi J.) on 4<sup>th</sup> February 2016 directed the Petitioner to file their summons for confirmation of grant, and the Objectors to thereupon file their affidavits on distribution.

The Petitioners filed summons for confirmation of grant dated 3<sup>rd</sup> June, 2016 seeking confirmation of the grant together with their schedule of distribution. The 1<sup>st</sup> Objector filed an affidavit with his proposals on distribution sworn on 18<sup>th</sup> April 2016, and adopted an affidavit on equal distribution sworn on 24<sup>th</sup> August 2016 and filed in Court on 2<sup>nd</sup> September 2016 as their affidavit of protest.

This Court on 14<sup>th</sup> December 2016 directed that the summons for confirmation of grant and affidavit of protest proceed to hearing by way of *viva voce* evidence. During the hearing the Objectors and Petitioners each called two witnesses to testify on their behalf and their respective cases are as follows.

**The Objectors’ Case**

The 1<sup>st</sup> Objector, Wambua Sanzi (OW1) and the 2<sup>nd</sup> Objector, Kasyima Sanzi (OW2) gave evidence in

support of their case. The 1<sup>st</sup> Objector adopted as his evidence the affidavits on distribution and affidavit of protest that he had sworn on 18<sup>th</sup> April 2016 and 24<sup>th</sup> August 2016, as well as a witness statement he filed in Court on 19<sup>th</sup> January 2017. The 2<sup>nd</sup> Objector relied on a witness statement he signed and filed in Court on 19<sup>th</sup> January 2017 as his evidence

The 1<sup>st</sup> and 2<sup>nd</sup> Objectors testified that they are grandsons of the Deceased, being sons of the late Sanzi Nguku, who was a son of the Deceased. According to the 1<sup>st</sup> Objector, the deceased was survived by 16 beneficiaries:

1. Katiti Nguku – widow
2. Mutavi Nguku – son (deceased)
3. James Kiten’ge Nguku– son
4. Kavuti Nguku - son (deceased)
5. Willy M. Nguku – son
6. Peter Mutuku Nguku – son
7. Ruth Mune Nguku – daughter
8. Beatrice Mbithe Nguku – daughter
9. Nzioka Nguku – son (deceased)
10. Dorcas Nthangu Muthui – daughter
11. Sanzi Nguku – son (deceased)
12. Kivuva Nguku -son
13. Mukonyo Ndeti – daughter
14. Recheal M. Nguku – daughter
15. Lucy Ndunge Mulinge – daughter
16. Rebecca Nthamba Nguku- daughter

Further, that the deceased properties were as follows:

1. Kalama/Muumandu /376
2. Kalama/Muumandu/307
3. Kalama / Muumandu/341
4. Kalama/Muumandu /382
5. Plot No. 371 -Kalembwani & Ngaamba Farmers Ltd
6. Plot No. 471- Kalembwani & Ngaama Farmers Ltd

According to the 1st Objector, the schedule of distribution in the summons for confirmation of grant proposed by the Petitioners has errors, as the estate is not shared equally among the beneficiaries, and not all beneficiaries consented to it. The examples they gave were that some beneficiaries like Katiti Nguku, Kioko Nzioka, Muteti Nzioka and Esther Nthenya Nzioka have been given double allocation in Plot No. 307, and others allocated larger portions than the rest. Further, that other beneficiaries risk eviction without their consent from where they have been living and invested for over 25 years.

The 1st Objector also testified that the soil fertility and the value of each land parcel is different, and that the Administrators allocated themselves the prime areas being land parcels in Muumandu which are very fertile and have natural water available throughout the year, and whose proximity is close to Konza City and Machakos Town. The 1st Objector stated that it is unfair that the Objectors have been allocated Plot No. 371 Kalembwani/Ngaamba which is a semi- arid region, and that between the year 1993 and 1994 with the consent from the Deceased, he constructed a permanent building of Kshs 2 million at Muumandu in the portion where the deceased had given his late father Sanzi Nguku.

The 1<sup>st</sup> Objector also averred that Plot No. 371 Kalembwani/Ngaamba has a Title Deed, yet the Administrators have deliberately and intentionally failed to obtain an official search but instead used a letter from the Manager of the Co operative Society which cannot be trusted as it is not conclusive evidence of ownership.

The 1<sup>st</sup> Objector on cross-examination denied that the Deceased had allocated land to all his children by the time he died, and denied that their father had allocated land by the Deceased in Plot 371 at Kalembweni to live here with his two wives. He confirmed that he did not have any valuation report of the value of the deceased's properties, and that he had not taken the sizes of the different plots into account. The 1<sup>st</sup> Objector also confirmed that at the time his father died he was living on the deceased's land at Kalembweni, which is where he was buried, and that some of his brothers also live at Kalembweni.

The 2<sup>nd</sup> Objector (OW2) reiterated the statements made by the 1<sup>st</sup> Objector in his evidence, and upon cross-examination stated that he was not aware how the deceased allocated his land to his children.

Both the 1<sup>st</sup> and 2<sup>nd</sup> Objector testified that they want each of the Deceased's properties to be divided equally among his sixteen beneficiaries. The Objectors' counsel did not file any submissions after having been directed by the Court to do so.

### **The Petitioners' Case**

The 1<sup>st</sup> Petitioner, Willy Nguku, and Angelina Wayua Sanzi, the 4<sup>th</sup> Objector herein, gave evidence on behalf of the Petitioners as PW1 and PW2 respectively. PW1 relied on the affidavit in support of the summons for confirmation of grant he swore on 3<sup>rd</sup> June 2016, and a supplementary affidavit he swore on 22<sup>nd</sup> January 2015 as his evidence. PW2 on the other hand relied on an affidavit she swore on 22<sup>nd</sup> January 2015 which was annexed to PW1's supplementary affidavit of the same date as her evidence.

The 1<sup>st</sup> Petitioner's list of the deceased beneficiaries and properties tallied with that given by the 1st Objector, and he in addition provided copies of search certificates for the properties known as Kalama/Muumandu/376 with an area of 0.51 hectares; Kalama Muumandu/307 with an area of 2.28ha; Kalama Muumandu/341 with an area of 0.27 hectares; and Kalama Muumandu/382 with an area of 0.07 hectares and which all showed the Deceased to be the registered proprietor. He also annexed a letter from Kalembweni and Ngaamba Farmers Ltd confirming that the Deceased was their member and had two plots No 371 measuring 5 acres, and plot 471 measuring 1 acre.

The Petitioners' proposal on distribution of the Deceased's estate is as follows:

Kalama/Muumandu/376

1. James Kitenge Nguku - 0.15Ha
2. Willy Makau Nguku - 0.15Ha
3. Dorcas N. Muthui Ngonyi - 0.20Ha

Kalama/Muumandu/307

1. Katiti Nguku - 0.15Ha
2. Rose Mutile Mutavi  
Mary Kitela -0.11 Ha
3. James Kitenge Nguku - 0.10Ha
4. Rechael Nduku Muia -0.045 Ha
5. Willy Makau Nguku - 0.11ha
6. Peter Mutuku Nguku - 0.80 Ha
7. Ruth Mune Mutisya -0.16 Ha
8. Beatrice Mbithe Nguku -0.21 Ha

9. Kioko Nzioka

Muteti Nzioka

Esther Nthenya Nzioka -0.21 Ha

10. Dorcas N. Muthui Ngonyi -0.33Ha
11. Rechael Nduku Muia -0.13 Ha
12. Katiti Nguku -0.13Ha

13. Kioko Nzioka

Muteti Nzioka

Esther Nthenya Nzioka -0.04 Ha

Kalama /Muumandu/341

1. James Kitenge Nguku - 0.071Ha
2. Peter N. Nguku - 0.065Ha
3. Ruth M. Mutisya - 0.120a

Kalama/Muumandu/382

1. Kioko Nzioka

Muteti Nzioka

Esther Nthenya Nzioka -0.023 Ha

2. Peter N. Nguku - 0.03 Ha

Plot No. 371- Kalemwani & Ngaamba Farmers Ltd

1. Agelina Wayua Sanzi - 2 Acres

2. Wambua Sanzi, Peter Sanzi,

Muoki Sanzi Kasyima Sanzi,

Katee Sanzi Sera Sanzi

& Munyiva Sanzi - 2 Acres

3. Lucy Ndunge Mulinge - 2 Acres

Plot No. 471 -Kalemwani & Ngaama Farmers Ltd

Rebecca N. Nguku - Whole (1 Acre)

Upon cross-examination, the 1<sup>st</sup> Petitioner stated that what was allocated to the Objectors is the land the Deceased had allocated to their father, and that it was not possible to sub-divide some of the land into sixteen portions for all the beneficiaries. He also stated that he took into account the size of the land and the Deceased's wishes in the proposed distribution.

PW2 on her part stated that she is the wife of the late Sanzi Nguku and a stepmother of the 1<sup>st</sup> Objector, and that she was opposed to the objection and did not consent to her name being included as an objector. Further, that she witnessed the sub-division of the land Kalemwani/Ngamba/371 between her house and that of her co-wife in the late 1990's together with her late husband, the 1<sup>st</sup> Objector, and the Deceased. Lastly, PW2 stated that her late husband had indicated that their inheritance was in Kalemwani, and she was happy with the proposed distribution. Upon cross-examination, PW2 confirmed that there was no written evidence of the allocation of the land in Kalemwani to her late husband by the Deceased, and that she did not sign any consent to the proposed distribution.

The Petitioners' advocate, Mulwa Isika & Mutia Advocates, filed submissions dated 13th March 2017, wherein it was urged that the beneficiaries of the estate of the Deceased, including the Objectors' brother and step mother, know very well that the Deceased had already distributed his estate during his life time and are satisfied with the shares allocated to them, except the 1st Objector who is the only person who disputes the above fact. It was further argued that the standard of proof in civil matters is on a balance of probability and in consideration of the above, it is more probable than not that the deceased had distributed his estate before his death.

The Petitioners relied on section 42 of the Law of Succession Act, and the decisions in **Joseph Wairuga Migwi v Mikielina Ngina Munga [2016] eKLR** and **Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi (2009) e KLR** that the wishes of the deceased as regards distribution of his property should be respected and upheld unless it has been demonstrated that the wishes are illegal, unfair, discriminatory and unjust to the beneficiaries or some of them.

It was further submitted that the estate of the deceased at Munaandu is 7.57 acres and is being distributed among eleven (11) beneficiaries and their families, while the estate of the deceased at Kalemwani is approximately 6 acres and has been given to a single beneficiary and his family thereof. That as such

there is no inequity in the proposed distribution, and if there is any, then it has been occasioned to the beneficiaries benefitting from the deceased's estate in Muumandu and not to the objectors.

Further, that that it was impossible to distribute the land in Kalama / Muumandu /376 in equal shares, and that this explains why some beneficiaries at Muumandu have had double allocations, as well as the allocation of a single portion to multiple beneficiaries.

It was further submitted that it is a general rule that grand children who were not dependants of the deceased during his lifetime are not entitled to inherit directly from the estate, but from their respective parents as children of the deceased. That while the 1st Objector claims to have developed a portion in Muumandu, he is only entitled to the share which devolves to his father from the deceased's estate and not any other share. To support the said argument, the Petitioner relied on the decision in **In Re Estate of John Musombayi Katumanga (deceased) (2014) eKLR** that grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and taking a share in the estate.

It was contended that the Deceased had allocated the Objector's father a share of his estate at Kilembwani and not the one at Muumandu which was allocated to the other beneficiaries, and allowing the Objectors to benefit from the same will mean that some of the survivors of the deceased will benefit more than others without a justifiable reason. It was also contended that the Objector developed the land at Muumandu with the sole intention of displacing the rightful beneficiaries as per the deceased's lifetime.

Lastly, it was submitted by the Petitioners that the lack of the beneficiaries consent in writing is not fatal, because the administrators said they reached the schedule of distribution upon consultations, and as the said beneficiaries will be required to attend court during confirmation to confirm their shares.

### **The Determination**

After the parties closed their respective cases, the Court noted that the Objectors had testified and alleged that two of the properties of the deceased being Kalembwani/Ngaamba/471 and Kalembwani/Ngaamba/371 had been registered and the Petitioners had failed to produce the title documents. The Court directed the Objectors to file and serve the Petitioners with a supplementary affidavit annexing the copies of the said title documents to support this allegation, and to guide the Court on the size of the said parcels of land.

The supplementary affidavit was sworn on 14<sup>th</sup> August 2017 by the 1<sup>st</sup> Objector and filed in Court on the same date. He stated therein that land parcel number Kalembwani/Ngaamba/471 has no title documents, while Kalembwani/Ngaamba/371 is shown to be owned by the Government of Kenya, and he attached a copy of a certificate of official search to this effect. The 1<sup>st</sup> Objector also averred that the deceased's second wife, Katiti Nguku passed on and was buried on 2<sup>nd</sup> August 2017. This averment was not disputed by the Petitioners.

As the survivors and properties of the Deceased are not in dispute, there are two issues for determination arising from the evidence and arguments made by the Objectors and Petitioners. The first is whether the Deceased had indicated his wishes as to the distribution of his estate, and if so, the nature of the said wishes. Secondly, is how the property of the Deceased should be distributed among his beneficiaries.

On the first issue, the 1<sup>st</sup> Petitioner alleges that the mode of distribution proposed in the summons for confirmation of grant was according to the Deceased's wishes, and PW2 who is a stepmother of the 1<sup>st</sup> Objector also collaborated the averment that the land in Kalembwani had been allocated to her late husband.

The 1<sup>st</sup> Petitioner also relied on two affidavits filed in Court on 11<sup>th</sup> December 2009 as evidence of the deceased's wishes. The first affidavit was one sworn on 9<sup>th</sup> December 2009 by Peter Sanzi, who is a brother of the 1<sup>st</sup> Objector, wherein he averred that the Deceased had allocated the land in Kalembwani to

his deceased father, Sanzi Nguku. The second affidavit was also sworn on 9<sup>th</sup> December 2009 by Kivuva Nguku , a son of the Deceased who stated that he had been allocated land in Kibwezi namely Nzayo/Kibwezi/91 by the Deceased, and that his brother Sanzi Nguku was allocated land in Kalembweni. He also stated that he was satisfied with the land he was allocated by the Deceased.

Section 42 of the Law of Succession Act provides as follows in this regard:

" **Where—**

**(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**(b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."**

The evidence brought by the Petitioners of the Deceased's wishes and settlement is only with regard to the Deceased's properties in Kalembweni and Kibwezi, and even then only with respect to two of his children, being Sanzi Nguku and Kivuva Nguku. The alleged settlement of land to Sanzi Nguku is also disputed by the Objectors.

In addition, the Petitioners did not bring any collaborating evidence as to how or to whom the Deceased settled or gave his properties in Muumandi. Lastly, the Petitioners did not provide any written consent by the beneficiaries so settled or given land, confirming that indeed the distribution they propose is what was agreed with the Deceased as alleged.

It is thus my finding that there was insufficient evidence of the allegation that the proposed distribution by the Petitioners is in accordance with the Deceased's wishes, or of any distribution or settlement by the Deceased of all his properties.

Coming to the second issue of the distribution of the Deceased's properties, the 1<sup>st</sup> Objector in his supplementary affidavit filed in Court on 14<sup>th</sup> August 2017 informed the Court that the only surviving wife of the Deceased died during the pendency of this ruling. The distribution of the property of an intestate who has no surviving spouse but has surviving children is governed by section 38 of the Law of Succession Act which provides as follows:

**'Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children..'**

In effect this section requires equal distribution among all the children while taking into account any gifts or settlements that may have been made by the deceased during his lifetime. In the present cause, one of the Deceased's sons, namely Kivuva Nguku admitted to have been bequeathed property in Kibwezi being Nzayo/Kibwezi/91, which he stated he was satisfied with. He in my opinion is therefore entitled to a lesser share of the Deceased's estate. There are thus fourteen beneficiaries who will get equal shares, who are the Deceased's 10 surviving sons and daughters after excluding Kiviva Nguku , and the survivors of the Deceased's 4 deceased sons.

I note in this regard that the total areas shown in the certificates of official search for Kalama/Muumandu/376, Kalama Muumandu/307, Kalama Muumandu/341, and Kalama Muumandu/382 is 3.13 hectares which is approximately 7.73 acres, while the land in Kalembweni is a total of 6 acres. It is also notable in this regard that the proposal by the Petitioners as regards the distribution of Kalama Muumandu/307 was for more land than the area of the said parcel of land, while in the other parcels of land it was for a lesser areas of land.

I also note that two of the survivors of the Deceased being Mukonyo Ndeti, a daughter of the Deceased,

and the beneficiaries of the late Kavuti Nguku, a deceased son, were not provided for in the distribution proposed by the Petitioners, and no explanation was proffered for the omission.

Lastly, I also find that even though the Objectors did not bring any evidence of the value of parcels of land in Muumandu and Kalambweni, the different nature of the two locations was not denied by the Petitioners, and the principle of equal distribution not only involves the quantity but also quality of property being distributed, to ensure that the size, number, standard, and value of the estate being distributed is as much as possible the same among the beneficiaries.

In the circumstances, after equally dividing 3.13 hectares of the properties in Muumandu among the 15 beneficiaries entitled to inherit from the deceased, I find that each beneficiary is entitled to approximately 0.20 hectares of the said properties, while also making provision for the 6 metres access road provided for in Kalama/Muumandu/307. As this land is in a different location from the one allocated by the Deceased to Kivuva Nguku, he will also benefit from the residue.

Likewise, once the property of 6 acres in Kalembweni is equally distributed, each of the 14 beneficiaries will be entitled to approximately 0.4 acres of the said land. The remaining balances of the said lands shall cater for the survey and sub-division costs.

I accordingly order as follows:

1. The distribution of the following properties of the Deceased Nguku Nthiwa Mbai shall be as follows:

(a) Kalama/Muumandu/376 measuring 0.51 hectares

- |  |          |
|--|----------|
| i. Mukonyo Ndeti (daughter)                          | - 0.20Ha |
| ii. The beneficiaries of Kavuti Nguku (deceased son) | - 0.20Ha |
| iii. Kivuva Nguku (son)                              | -0.11 Ha |

(b) Kalama/Muumandu/307 measuring 2.28 hectares

- |  |          |
|--|----------|
| i. The beneficiaries of Sanzi Nguku (deceased son)   | - 0.20Ha |
| ii. The beneficiaries of Mutavi Nguku (deceased son) | - 0.20Ha |
| iii. James Kitenge Nguku (son)                       | - 0.20Ha |
| iv. Willy M. Nguku (son)                             | - 0.20Ha |
| v. Peter Mutuku Nguku (son)                          | - 0.20Ha |
| vi. Ruth Mune Nguku (daughter)                       | - 0.20Ha |
| vii. Beatrice Mbithe Nguku (daughter)                | - 0.20Ha |
| viii. The beneficiaries of Nzioki Nguku (deceased)   | - 0.20Ha |
| ix. Dorcas Nthangu Muthui (daughter)                 | - 0.20Ha |
| x. Rechael Nduku Muia (daughter)                     | -0.20 Ha |
| xi. Lucy Ndunge Mulinge (daughter)                   | - 0.20Ha |
| xii. Access Road                                     | -0.08 Ha |

(c) Kalama /Muumandu/341 measuring 0.27 hectares

- i. Rebecca Nthamba Nguku(daughter) - 0.20Ha
- ii. Estate Survey and sub-division costs - 0.07 Ha

(d) Kalama/Muumandu/382 measuring 0.07 hectares

- i. Estate Survey and sub-division costs -0.07 Ha

(e) Plot No. 371- Kalembwani & Ngaamba Farmers Ltd measuring 5 acres

- i. Estate Survey and sub-division costs - 0.2 acres
- ii. The beneficiaries of Sanzi Nguku (deceased son) - 0.4 acres
- iii. The beneficiaries of Kavuti Nguku (deceased son) - 0.4 acres
- iv. Lucy Ndunge Mulinge (daughter) -0.4 acres
- v. The beneficiaries of Mutavi Nguku (deceased son) - 0.4 acres
- vi. James Kitenge Nguku (son) - 0.4 acres
- vii. Willy M. Nguku (son) - 0.4 acres
- viii. Peter Mutuku Nguku (son) - 0.4 acres
- ix. Ruth Mune Nguku (daughter) - 0.4 acres
- x. Beatrice Mbithe Nguku (daughter) - 0.4 acres
- xi. The beneficiaries of Nzioki Nguku (deceased) - 0.4 acres
- xii. Dorcas Nthangu Muthui (daughter) - 0.4 acres
- xiii. Rechael Nduku Muia(daughter) -0.4 acres

(f) Plot No. 471 -Kalembwani & Ngaama Farmers Ltd measuring 1 acre

- i. Estate Survey and sub-division costs - 0.2 acres
- ii. Rebecca N. Nguku (daughter) - 0.4 acres
- iii. Mukonyo Ndeti (daughter) -0.4 acres

2. Each of the survivors of the Deceased shall within 90 days of the date of this judgment file in Court and serve affidavits indicating the names of all the beneficiaries of each survivor for final orders of confirmation.

3. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21<sup>st</sup> September 2017.

**P. NYAMWEYA**

**JUDGE**