



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
IN NAIROBI

SUCCESSION CAUSE NO. 591 OF 2002

In the matter of the Estate of Andrew Muya Ngui (Deceased)

RULING

1. Andrew Muya Nguli hereinafter referred to as the deceased died on the 3rd of September 1980 intestate. He was survived by Nduku Muya-daughter, Richard Mutuku Muya-son, Jonathan Muthama Muya-son, Boniface Ngau Muya- son, Muthike Muya-son and Stephen Nguli Muya-son. His wife Esther Mbeke Muya and one son Stephen Onesmus Ndunda are deceased.

2. On the 1st of December 2004 this court confirmed the grant that had been issued to Richard Mutuku Muya and Jonathan Muthama Muya on the 22nd August 2002. The estate was determined as follows:

| NAME | SCHEDULE | SHARE OF HEIRS |
|----------------------------|--|-----------------------|
| Richard Mutuku Muya | Donyo Sabuk/Koma Rock Block 1/406 | Absolutely |
| | Matungulu/Isinga/98 | |
| | Donyo Sabuk/Koma Rock Block 1/417 | |
| | Matungulu/Isinga/1035 | |
| Steven Ngulili Muya | Donyo Sabuk/Koma Rock Block 1/421 | |
| Boniface Ngao Muya | | |
| Steve Ndunda Muya | Matungulu/Isinga/1489 Donyo Sabuk/Koma Rock Block 1/420 | |

| | | |
|------------------------------|--|--|
| Jonathan Muthama Muya | Matungulu/Isinga/322 | |
| | Donyo Sabuk/Koma Rock Block 1/419 | |
| | Donyo Sabuk/Koma Rock Block 1/418 | |
| | Plot No. 8 Ndunduni Market | |

3. On the 13th of July 2006 Beth Mutindi Muya filed a Summons for Revocation of the grant confirmed on the 1/12/2004. She sought to have the grant issued to Richard Mutuku Muya and Jonathan Muthama Muya revoked. Beth claims that she was a wife to the deceased prior to the marriage between the deceased and the petitioners' mother and that Aron Kilonzo Muya is the deceased's son. She seeks to have the grant revoked or she will be disinherited of their lawful rights and that a fresh grant be issued to the petitioners and both of them to facilitate equal distribution of the deceased's estate. That the deceased had two houses at the time of his death one represented by the petitioners as their mother is deceased and herself. In response to her affidavit Richard Mutuku Muya filed a replying affidavit dated the 5/2/2007. He depones that at the time of filing the cause they did not include the respondents Beth and Aron because they had been advised that that they had been given properties by the deceased and that they learnt of the correct position after they had a meeting with the chief. That they have re-allocated the properties and given Beth and Aron the following properties

i. Donyo Sabuk/ Komoaroc-20 acres

- a. **6 acres from No.417**
- b. **6 acres from No. 418**
- c. **4 acres from No. 419**
- d. **4 acres from No. 420**

ii. Mutunguku – 8 acres

iii. Plot in Kamulu ranch

iv. Plot in Matuu Wendano No. 77

v. Plot in Kayatta Planation

That the respondents took possession of the said plots and they have always been ready to amend the grant and transfer them into her name and that of her children. That what is in issue is the distribution and not the grant and that cancelling it will take them 15 years back.

4. On the 13th June 2007 Aron Kilonzo Muya filed a protest dated the 15th May 2007. His protest is against the manner in which the estate of the deceased was distributed and gave his suggestion on the manner of distribution of the deceased estate. In his protest he states that the estate should be distributed as follows;

i. Donyo Sabuk/ Komorock Block 1/197 be shared equally among the two wives of the

deceased (it consists of 100 acres)

ii. **The land parcel No. Donyo Sabuk/ Komorock block 1/177 measuring two acres be shared equally among the two wives of the deceased.**

iii. **That the land parcel No. Mutungulu/Isinga/1035 be shared out equally among the two wives of the deceased**

iv. **The land parcel No. Mutungulu/Isinga/322 be shared out equally among the two wives of the deceased.**

v. **That plot. No. 8, Ndunduni Matunguli Isinga/1483 be registered in his names absolutely.**

vi. **That plot No. Matungulu/Isinga/1489 be shared equally**

5. On the 26th Of May 2008 a grant was issued to **Richard Mutuku Muya** and **Beth Mutindi Muya**. On the 24th of June 2008 an application to confirm the grant was filed by **Richard Mutuku Muya** and **Beth Mutindi Muya** seeking to confirm the grant that was issued on the 26th May 2008. The said application is supported by the affidavit of Richard Mutuku Muya. In his affidavit he names the deceased's dependants and avers that the said estate had been ascertained and determined by all the parties through the village elders and the local tribunal and he annexed a copy of the said document. On the 21st day of June 2012 Justice Kariuki (as he then was) upon revoking the grant issued on the 1/12/2004 ordered that the estate of the deceased be distributed fairly among the surviving widow and the deceased's children.

6. On the 15/11/2010 the petitioners filed written submissions. They submit that the deceased had 2 wives but was survived by Beth Mutindi Muya who has one child Aron Kilonzo Muya and that the 1st wife's house consists of Steve Ndunda Muya (deceased), Boniface Ngao Muya, Nduku Muya, Muthike Muya, and Steve Nguli Muya. That the issue of contention is the distribution of the estate which was agreed upon between the family members as was presided by the village elders and the local land tribunal. That it was agreed that title No. **Kangundo/Komarock/177/197** be subdivided each of the five sons to be given **20 acres** each. That all beneficiaries appended their signatures and ID cards to the agreement. That at the time of identifying the five portions for each son a mistake was done consequent upon which Aron Kilonzo Muya was left out. That the mother of Aron discovered this and lodged a dispute with Matungulu Divisonal Disputes Tribunal and after being heard the Tribunal ruled that

a. That the parcel of land be subdivided into five (5) portions measuring 20 acres for each son.

b. Land Registrar Machakos to appoint surveyor and subdivide the same land into five portions of 20 acres each one being for Aron Kilonzo Muya the son of the claimant- Beth Mutindi Muya

That the objectors didn't appeal against the said decision of the tribunal nor does Aron and his mother deny that they signed the family agreement. That what the objectors are raising now is being done in bad faith and is meant to enrich one house to the disadvantage of the other. That the objectors' contention of equal sharing by virtue of Kamba customs is not in tandem with the time and modern justice.

7. The objectors filed submission on the 1/12/2010. It is submitted there has been a wrangle over the manner of distribution of the deceased's estate being land No. Kangundo/Komarock/177/197 and that a meeting convened by all family members presided by the village elders and the local land tribunal it was agreed that the said parcel of land be divided equally amongst the five surviving sons of the deceased and each son was to get 20 acres. That they are not satisfied with this arrangement since the distribution of the estate was based on the sons only forgetting the 2nd wife who was also considered as a unit when distribution is carried out. For this argument they relied on the provisions of section 40 of the Law of Succession Act. That going by the said provision a wife forms part of a unit which comprises of children and she too is entitled to an equal share of the deceased's property in line with the children. That the first house has four units comprising of four sons since the first wife and one son died and the 2nd house has

two units comprising of the 2nd wife and one son. That the deceased's estate should be divided equally among all the dependants who are six in total in the ratio of 4:6 to the first house and 2:6 to the 2nd house and not in the ratios 4:5 and 1:5. That Beth Mutindi has been excluded from the list should thus be considered. They urged the court to note that the elders who sat to deliberate the matter were out of order as they had no jurisdiction and that customary law is inapplicable in the matter.

8. Aaron Kilonzo Muya the objector in his affidavit dated the 27/1/2015 depones that the parties herein have an agreement to the mode of distribution of the estate save for Komorock Housing Co-operative Society parcel No. 197 measuring 100 acres and parcel No. 4001 measuring 2 acres, that at the family meeting it was agreed that each house would be entitled to one half of the property thus 51 acres.

9. On the 2/3/2015 Richard **Mutuku Muya** pursuant to the orders of Justice Kariuki of 21/6/2012 filed an affidavit dated the 26/2/2015 stating how the estate should be distributed. He deponed that the estate should be distributed as per the family agreement. He attached the family agreement dated the 27/6/05, the Land District Tribunal decision of 8/9/2005, certificate of search for Kangundo/Isinga parcels of land numbers 322,1035,98 and 1489. A letter of confirmation for plot No.8 Ndunduni market and a confirmation dated the 18/7/2013 for land parcel No.197 and parcel No.4001.

10. Aron Kilonzo Muya filed his supporting affidavit dated the 27/1/2015 on the 30/1/2015 stating how the estate should be distributed. He depones that the parties herein are in agreement to the mode of distribution of the estate save for Komorock Housing Co-operative Society Parcel No. 197 measuring 100 acres and Parcel No. 4001 measuring 2 acres and that a family meeting held previously it was agreed that each house would be entitled to one half of the property thus 51 acres.

11. Winnie Kamene Wavinya a caveator filed a caveat on the 21st of September 2015 stating that nothing should be done in the estate of the deceased without notice to her.

12. Winnie Kamene Wavinya a caveator in her affidavit dated the 19th of October 2015 states that she claims a purchaser's interest in plot no. 420 Donyo Sabuk/ Komorock measuring 2 acres. That she had entered into sale agreement dated the 9th of April 2003 with Ngao Muya a son of the deceased, she paid the full purchase price and was given vacant possession by the vendor as stipulated in the agreement. That she has buried her mother in the said plot and she has since then developed a permanent 4 bedroom house on it. That her efforts to get the title from the vendor for the last 12 years have proved fruitless and that he has always advised that she waits until the succession cause is over. She requested the court to take her interest at the time of distributing the estate. In her further affidavit dated the 19/2/2016 she deposes that there is a typographical error in respect of the receipt issued to him by Malonza & Company and that the error does not in any way disapprove of the agreement for sale. That she became aware of the ruling of Justice GBM Kariuki after instructing her lawyers to peruse the court file in August 2015. That she does not know Aaron Muya and that Ngao Muya can confirm that she buried her mother in the said land and that she has had uninterrupted possession of the land for the last 12 years and has even developed it. That she is only claiming the 2 acres she bought from Ngao Muya and not the estate of the deceased. That there is no illegality in the sale agreement entered between herself and Ngao as the agreement recognised that there is an estate of Andrew Muya Nguki and what was sold to her was a beneficial interest, she has come to court with clean hands.

13. The caveator filed submissions dated the 2/2/2016. She reiterates what's deposed in her affidavits. It's her plea that the court exercises the wide discretion it has under section 47 of the Law of Succession Act. The objector filed submissions dated the 8/2/2016. In a further affidavit sworn by Richard Mutuku Mjuya he depones that the objectors have concealed facts that the family had agreed that each son gets 20 acres and that the objectors sold their portions to Consolata S. Kitku (2.0 acres), Festus Kioko Kitonyi (5.6 acres) and Samwel Njuguna Kimani (4.0 acres) and that the said persons developed permanent houses on the said portions where they currently reside. That the objectors are dishonest when they state they don't know the caveator. That he is aware that after the five sons shared the 100 acres equally at 20 acres each, they each including Aron Muya sold part of the portions to 3rd parties through subdivisions based on the initial agreement between family members and as was ratified by village elders. The

objectors did not respond to this affidavit

14. The objectors filed submissions on the 11/2/2016. They aver that there is a discrepancy on the dates the agreement was made between the caveator and Ngao Muya that either it was made in 2003 or 2014, that a copy of the subdivision map marked WKW4 shows that it was drawn on the 2nd of April 2015 and approvals granted within the said month. That the court had put on hold all dealings of the property of the deceased. They elide on Section 45 (1) and Section 82 (b) (ii) of law of Succession Act to challenge the sale of land to the caveator . they cited the case of “In the matter of the estate of M’ mugambi M’ guoko alia Mugambi Gwoko alia Mugambi Guoko- deceased. That the transactions the subdivision and the subsequent approvals were done in complete violation of the court orders. That the sections quoted don’t exempt transactions amongst the beneficiaries. They also relied on the case of “ in the estate of Veronica Njoki Wakangoto- deceased Succession Cause 1974 of 2008 and Mecklina Kirigo M’ murithiu vs. Mary Gantuku Simukiri and 2 others 2016 eKLR.

15. Having read the affidavits and the submissions filed the issues for determination are;

- i. The distribution of 100 acres of land parcel No. Kangundo/Komarock/177/197 and
- ii. Whether the 2 acres from parcel No. 420 Donyo Sabuk/ Komarock bought by the caveator was legally done.

16. The provisions of section 40 (1) of the Law of Succession Act Cap.160 are that “ **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 accordingly to the number of the children in each house , but also adding the wife surviving him as an additional unit to the number of children**” . It’s not in dispute that the deceased left behind 5 sons and the first objector who is a wife surviving him. The objectors’ argument is that based on section 40 of Cap 160 she is a unit of the deceased’s estate and is therefore entitled to a portion of the 100 acres in plot 177/197. The 1st administrator argues that the family agreement should be followed. Indeed the law in section 40 is clear, should the court determine the distribution of the 100 acres as suggested by the objectors. The objectors do not dispute the family agreement they argue that the elders had no jurisdiction. I do note that the objectors subjected themselves to the family meeting willingly and raised no objection to the ruling made and the family agreement. In my view what the parties did was voluntarily none were coerced in making the agreement. They did it with the belief that it was what was best for the family. Should they now depart from it, in my view they should not. This particular land was to be shared between the sons, it’s not the complaint of Beth and Aron that they were not given other properties. They were recognised as the widow and son of the deceased they were given a portion of the deceased’s assets. The agreement was signed by the objectors and in my view they are bound by its contents. The share Aron gets as a son of the deceased is the 20 acres. I therefore decline to grant the objectors request for a further subdivision of the 100 acres.

17. On the portion of land bought by the caveator. She has explained that she bought the 2 acres from Ngao Muya a son of the deceased in 2003. She has explained that the error in the receipt issued from the lawyers office. This court has taken note of the provisions of section 40 and 82. It is apparent that the caveator bought the 2 acres before the grant was confirmed in court. The first grant which was later revoked was confirmed on the 1st December 2004. It was upon the administrators then to ensure that the estate was preserved. It’s the respondent’s argument that the objectors were aware of the sale that and it’s also averred that they were subdivisions done that have affected the parcel of land. One of the orders given by Justice Kariuki was that the petitioners were file official searches and or documents to establish the title and acreage and if possible indicate the developments on the parcels of land that make up the estate indicating where the parties reside. The caveator’s interest in the 2 acres of that of a purchaser. It was not in order that the land was sold to her before the grant was confirmed, however it is apparent that she didn’t expect any kind of trouble hence her building and burying her mother in the said parcel of land. Should this court grant her the request to be considered a purchaser, in light of the dealings the parties had and the family agreement and also recognising that the 2 acres she bought are from the portion belonging to Ngao Muya, in my view the 2 acres sold to her should be considered as belonging to her at

the time the grant shall be confirmed by the 2 administrators. The courts final orders are that the protest and objection fails. The 100 acres of plot no. 177/197 shall be divided amongst the five sons of the deceased. The caveator's interest as purchaser of the 2 acres in parcel no. 420 Donyo Sabuk/ Komarock shall be recognised at the time the grant is being confirmed. Parties to endeavour to confirm the grant in the short time possible for this is a fairly old matter. It is so ordered each party to bear its own costs.

Dated signed and delivered this **19th** day of **July 2016**

R. E. OUGO

JUDGE

In the presence of:

.....For the Objectors

.....For the Respondent

.....For the Caveator

Ms. Charity

Court Clerk