



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 6 OF 1995

IN THE MATTER OF THE ESTATE OF KITHIMBA KYAMBO (DECEASED)

ELIJAH MBATHA KITHIMBA.....APPLICANT

AND

1. ANNA MUNYIVA KITHIMBA

2. ESTHER NZAKWA.....PETITIONERS/RESPONDENTS

RULING

1. **Kithimba Kyambo** died having been domiciled in **Kenya** on the 16th May, 1987. On the 3rd November, 1995 Letters of Administration Intestate were issued to **Anna Munyiva Kithimba** (Now deceased) and **Esther Nzakwa** in their capacity as the widows of the deceased.

2. **Lenaola, J** who presided over the matter directed parties to file affidavits as to the mode of proposed distribution of the estate of the deceased. The matter was heard by way of *viva voce* evidence. **Esther Nzakwa** proposed equal distribution of the properties but **Anna Munyiva** disagreed on the grounds that assets, Kangundo /Mbusyani/719; Kangundo/ Kyevaluki /1175 and Kangundo/Mbusyani /583 did not belong to the deceased and could not be included as part of his estate. Evidence adduced was considered and a conclusion that the properties having been registered in the name of the deceased, per evidence of certificate of searches adduced, they were to be considered as part of the estate of the deceased. **Section 40** of the **Law of Succession Act** was invoked, an agreement reached by the family members that the sons should inherit the land to the exclusion of married daughters was also considered. Consequently, the following orders were made:-

i. Title No. Kangundo/Mbusyani/438(measuring 3.8 hectares) should be shared equally between all the sons of the deceased in equal shares so that seven (7) of them each gets 0.5 hectares or thereabouts.

ii. Title No. Kangundo/Mbusyani/719(measuring 0.50 hectares) should be inherited by **Anna Munyiva Kithimba**.

iii. Titles No. Kangundo / Kyevaluki/1175 (measuring 0.20 hectares) and Kangundo/ Mbusyani / 583 (measuring in total 0.39 hectares) to be inherited by **Esther Nzakwa Kithimba** by fact of having more sons, her house would have inherited a large portion of Title No. Kangundo/Mbusyani/438 and her house holding reduced by 0.10 hectares.

3. The court further pointed out that **Elijah Kithimba** and his mother **Anna Munyiva** may have sold part of title Number 583 and 1175 to **Noah Kivuvo** and **Muinde Mbingu**. The actions were illegal under **Section 45** of the **Law of Succession Act** and they were directed to refund monies received within the next 60 days. The grant was then confirmed.

4. On the 10th December, 2008, **Elijah Kithimba** a beneficiary of the Estate and son to **Anna Kithimba** being aggrieved with the ruling filed an application pursuant to the provisions of **Rule 49** of the **Probate and Administration Rules** seeking review of the ruling and to be allowed to present witnesses to prove that **Anna Kithimba** who was deceased had a claim on Kangundo/Kyevaluki/1175 and L.R. No. Kangundo /Mbusyani / 583 to the exclusion of all others.

5. The application is premised on grounds that: Kangundo /Mbusyani/719 granted to **Anna Kithimba** does not exist as the same was sold during her lifetime; In the interest of justice, the court does allow the applicant to call witnesses to testify to the claim that **Anna Munyiva's** claim on L.R. No. Kangundo/Kyevaluki/1175 and Kangundo/ Mbusyani /583 to the exclusion of others was merited.

6. The application is supported by an affidavit deposed by the applicant, **Elijah Kithimba** whereby he states that the family held a meeting on the 15th November, 2008, and discovered that one of **Esther's** sons had been erroneously left out of the defendants list as the deceased had 8 sons and not 7 as indicated in the ruling. Kangundo/Mbusyani/719 was sold to **Jonathan Nzyoka Kyambo** by the deceased and that the court rejected the assertion by **Anna** that Kangundo/Kyevaluki /1175 and Kangundo/Mbusyani / 583 were gifts to her since she lacked evidence but there are witnesses to prove the claim.

7. Subject to approval by other beneficiaries he proposed review and distribution as follows:-

- i. Kangundo/Kyevaluki/1175, Kangundo/Mbusyani/583 and part of Kangundo/Mbusyani/438(0.11Ha) be granted to Anna Munyiva (now deceased)
- ii. Esther Nzakwa's 0.39 hectares be excised from Kangundo/Mbusyani/438 which measures 3.8 hectares, since her homestead is situated thereon.
- ii. The remaining portion forming 3.3Ha of Kangundo/Mbusyani/438 be divided equally among the 8 sons.

8. In response, **Daniel Guy Kithimba** one of the beneficiaries of the Estate of the deceased stated that he was in agreement with the ruling of the court regarding the mode of distribution, **Esther Nzakwa** was agreeable to getting a smaller share of land and whatever remains be sold and proceeds shared by all family members. **Elijah** having acted fraudulently by selling off a deceased person's land should produce documentary evidence of refund of all the monies.

9. The application was allowed. Viva voce evidence was tendered.

10. PW1, **Elijah Mbatha Kithimba** testified that prior to the demise of the deceased he sold Kangundo/Mbusyani/719 to his brother **Jonathan Nzioka**, who is also deceased but his family resides on that land. Plot No. 1. Mbusyani was disposed off following an agreement by the two (2) wives and their family to educate **Mary Kiluu Kithimba** after the demise of the deceased, Kangundo/Kyevaluki/1175 and Kangundo/Mbusyani/583 were given as a gift to his mother, **Anna** by his grandmother but during adjudication of land, it was registered in the deceased's name.

11. Further, he stated that in 1994 the clan gave his mother the two (2) parcels of land (Kangundo/Kyevaluki /1175 and Kangundo /Mbusyani/ 583) which she decided to sell to raise money for medical expenses but **Esther** objected and they agreed to split the land into two (2) for the two(2) houses. In 2004, a meeting was held and minutes were taken. His mother sold Kangundo/Kyevaluki/1175 and Kangundo/Mbusyani/583 to **Ndambuki** and **Muinde** respectively to meet medical expenses.

12. PW2, Willy **Kaunge Ngalama** a cousin to the applicant stated that **Anna** was given the property by the deceased's mother although he could not recall the year as he was not yet born. At a meeting held in 1999 it was decided that the land should be occupied by all sons of the deceased.

13. PW3, **Florence Ndila Kithimba** stated that their mother was given land by their grandmother as a gift. **Anna** then gave part of it to her co-wife **Esther** to cultivate and when she could no longer cultivate it, she sought to sell it. On cross-examination she said she was not present when the land was sold but her mother told her that she was given both portions of land because she took care of their grandmother.

14. PW4, **Lazaro Ngatia Nzioki** stated that he was called to subdivide the deceased's land. The family confirmed that indeed the two (2) parcels of land belonged to **Anna**. **Anna** offered to sell some portion to **Esther** which was approved by the clan but **Esther** declined.

15. PW5, **Alex Ndambuki Nzioki** testified that **Anna** sold to him land in 2007 at Kshs. 170,000/=. The money was received by **Elijah Mbatha**, the applicant. He continues to utilize the land.

16. PW6, **Samuel Mundi Paul** testified that **Anna** sold him Kangundo/Mbusyani/583 in 2002 at Kshs. 100,000/= and he paid the sum leaving a balance of of Kshs. 11,000/=. He took possession of land.

17. DW1, **James Maingi Kithimba** a twin brother to the applicant testified that prior to his demise the deceased told them that his land should be divided equally amongst his sons. After his death, the applicant sold the land secretly to **Norah Kizito** at Kshs. 250,000/=. He declined to share with him the money as directed by their mother **Anna**. Stating that the land belonged to the deceased, he supported the proposal that the purchasers be refunded their money.

18. DW1, **Daniel Mwithya Kithimba** stated that a search carried out at the Land Registry prior to the succession cause being filed revealed that all the land was registered in the name of the deceased. During the lifetime of the deceased both wives used Kangundo/Kyeveluki/1175 jointly. On cross-examination he stated that they sold off a shop to educate his sister.

19. DW3, **Nzau Kithimba Fredrick** testified that land was divided between the two (2) wives. They agreed to dispose of land at Kshs. 25,000/= to pay fees for **Mary Kiluu**. Elders subdivided the Kangundo/Mbusyani/438 amongst the two (2) wives.

20. Rival submissions were filed by both parties that I have taken into consideration.

21. Parties herein had agreed on issues to be determined before **Lenaola, J.** namely;-

i. Whether title No. Kangundo/Mbusyani/719 was sold by the deceased during his lifetime;

ii. Whether parcel No. Kangundo/Kyavaluki/1175 and Kangundo/Mbusyani/583 were given as a gift to **Anna Kithimba** by her mother-in-law and therefore did not belong to the deceased.

iii. Whether Plot No. 1 Mbusyani, a commercial plot was sold to **Gideon Musa Nzioki** by the family after the deceased's death to educate his daughter **Mary Kiluu Kithimba**.

22. It is claimed that Kangundo/Mbusyani/719 was sold to the deceased's brother **Jonathan Nzioka** (now deceased) during the deceased's lifetime. Other than the allegation, no evidence was tendered to prove that fact. It was alleged that the family of **Jonathan Nzioka** resides on the property. No member of the alleged family was called as a witness to confirm the allegation. The parcel of land Kangundo/Mbusyani/719 is registered in the name of the deceased. According to the certificate of official searches dated the 7th July, 1979 and 23rd March, 2008 respectively. None of the witnesses who

testified was present when **Anna's** mother-in-law allegedly gave her the land as a gift, therefore, they cannot vouch for that fact. Similarly, there is no proof that the land was sold during the lifetime of the deceased.

23. A certificate of official search dated the 1st of April, 2008 demonstrates that the Kangundo/Kyevaluki/1175 was registered on the 9th January, 1985 in the name of the deceased at which time he was still alive. Kangundo/ Mbusyani /583 was also registered on the 7th July, 1979 in the name of the deceased during his lifetime.

24. Evidence adduced is that the deceased died in 1987. The **Law of Succession Act** came into effect in 1991. Subsequently, the law applicable in this particular case is the **Laws of Succession Act**.

25. **Section 45(1)(2) (a)** of the **Law of Succession Act** provides;-

“(1). Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession in or dispose of, or otherwise intermeddle with, any free property of a deceased.

(2) Any person who contravenes the provisions of this Section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment”

26. The estate of the deceased must remain intact until Letters of Administration are confirmed and the property distributed amongst the beneficiaries thereof, nobody irrespective of status is allowed to intermeddle with the estate of the deceased. Consequently, sales purported to have been transacted are invalid as the vendors lacked the capacity to transfer the property to the purchasers. All parties herein seem to be in agreement that Plot No. 1 Mbusyani, a commercial plot was sold to realize proceeds that were used to pay school fees for **Mary Kiluu Kithimba**. Though they were in agreement, they intermeddled with the estate of the deceased. Indeed it was a Criminal Act. Therefore the vendors having acted without the requisite capacity the sales were null and void. They should arrange to compensate the purchasers as rightly ordered by **Lenaola, J.** (See a persuasive case - in the matter of the estate of **Veronica Njoki Wakagoto(deceased) [2013] eKLR** where the court held that:-

“In this matter the respondent sold property belonging to a dead person without authority as Letters of Administrating had not yet been made to him. The fact of having petitioned for the letters did not clothe him with any authority. He and Felix Kinuthia intermeddled with the estate and they no doubt committed an offence under Section 45(2) (a) of the Act. It is unfortunate that the prosecutorial authorities do not focus on offences of this kind as prosecutions are hardly ever mounted over them. This explains why property of dead persons is routinely intermeddled with.” The sale to Felix Kinuthia of immovable property was done in contravention of the law. It amounted to criminal activity. Such transaction cannot be valid, and should not be upheld by the law”

27. One of the grounds upon which the application for review was premised was the applicant's intention to call witnesses who were to testify in support of the claim that L.R. No. Kangundo/Kyevaluki/1175 and L.R. No. Kangundo/ Mbusyani were gifts to **Anna Munyiva**. No such witnesses were called. All witnesses who alleged that the two (2) parcels of land were gifts to **Munyiva** could not tender direct evidence as to the fact. Their evidence was hearsay.

28. Elders or clan members had no capacity to bequeath the estate of the deceased to any of the beneficiaries. The applicable law being the **Law of Succession Act** it must be applied to the letter.

29. In paragraph 3 of the supporting affidavit, it is stated that one of **Esther Nzakwas's** sons **Nzau Kithimba** had been erroneously left out of the dependents' list. According to the evidence adduced the deceased was survived by two(2) widows;-

Annah Munyiva had three children;

1. Elijah Mbatha Kithimba (son)
2. James Maingi Kithimba (son)
3. Ndila Kithimba (daughter)

Esther Nzakwa had 9 children –

1. Daniel Guy Kithimba
2. Boniface Kilonzo Kithimba(Deceased)
3. Kyambo Kithimba
4. Wanza Kithimba
5. Mwithya Kithimba
6. Mutisya Kithimba
7. Kiluu Kithimba
8. Mwanja Kithimba
9. Nzau Kithimba

30. As correctly pointed out by **Lenaola, J.** in his ruling , **Section 40** of the **Law of Succession Act** is clear. The estate herein being of an intestate who was polygamous the estate ought to have been divided equally among the houses according to the number of children. However, in the instant case the deceased's daughters seem to have renounced their rights to inherit. Beneficiaries having so agreed then such peculiar circumstances must be taken into consideration. In the premises I will not deviate from the mode of distribution per the ruling of **Lenaola, J.** save that instead of 7 sons the number will be reviewed to read eight (8) sons. In the premises I do direct as follows-

i. Title No. Kangundo/Mbusyani/438 shall be shared equally between all the sons of the deceased. Each one of them will be entitled to 0.475 hectares or thereabout.

ii. Title No. Kangundo/Mbusyani/719 measuring 0.50 hectares shall be inherited by Anna Munyiva Kithimba

iii. Title Nos. Kangundo/Kyevaluki/1175 and Kangundo /Mbusyani 583 measuring 0.39 hectares shall be inherited by **Esther Nzakwa Kithimba** due to the fact of having more sons and her house holding is reduced to 0.10 hectares.

31. Consequently the grant of letters of administration intestate shall be confirmed in the terms aforesated.

32. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE