



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 345 OF 2003

**IN THE MATTER OF THE ESTATE OF THE LATE GEDION KITIVO NDAMBUKI-
(DECEASED)**

MAURICE NDAMBUKI KITIVO 1ST ADMINISTRATOR/APPLICANT

BONIFACE MUTUA KITIVO 2ND ADMINISTRATOR/APPLICANT

MICHAEL MUSAU KITIVO 3RD ADMINISTRATOR/PROTESTER

J U D G M E N T

1. The late **Gideon Kitivo Ndambuki** (deceased) died intestate on the 19th December 2000. The Certificate of death reflects his age at the time of death as 100 years. One of his sons, **Michael Musau Kitivo** petitioned the court on 13/10/2003 for a grant of Letters of Administration. According to the said petition, the deceased was survived by three wives and twenty four (24) children.
2. On 15/7/04, the firm of **O.N. Makau & Associates** entered appearance on behalf of fifteen (15) beneficiaries. The said beneficiaries subsequently filed a summons for the revocation/annulment of the grant issued to Michael.
3. The application for revocation/annulment of grant was thereafter allowed by the consent of the parties. Two more administrators were brought on board. A fresh grant issued on 21/4/2005 reflected the Administrators as follows:-
 1. **Maurice Ndambuki Kitivo**
 2. **Boniface Mutua Kitivo**
 3. **Michael Musau Kitivo**
4. On 6/9/2005 a summons for the confirmation of the grant was filed. The said summons was subsequently amended to reflect the 1st and 2nd Administrators as the Applicants. In the affidavit sworn on 26/7/2006 in support of the amended summons for confirmation of the grant, the beneficiaries were reflected as 27 children of the deceased who were outlined as follows:-
 - a. **Rev. Boniface P.M. Kitivo** (Son)
 - b. **Patrick K. Kitivo** (Son)
 - c. **Aron M. Kitivo** (Son)
 - d. **Dominic K. Kitivo** (Son)
 - e. **Solomon K. Kitivo** (Son)
 - f. **Leonard M. Kitivo** (Son)
 - g. **Maurice N. Kitivo** (Son)
 - h. **Isaack K. Kitivo** (Son)
 - i. **Bernard K. Kyalo** (Son)

- j. **Michael M. Kitivo (Son)**
- k. **Peter M. Kitivo (Son)**
- l. **Nicholas M. Kitivo (Son)**
- m. **Joseph M. Kitivo (Son)**
- n. **Kanini Nzove (Son)**
- o. **Christie Ndeter David Kivulu (daughter married)**
- p. **Mary Mbelele Wambua (daughter married)**
- q. **Nzilani Ndunda (daughter married - deceased)**
- r. **Grace Mwethya Kiio (daughter married)**
- s. **Roda Ndunge Sammy (daughter married)**
- t. **Pauline Mueni Makau (daughter married)**
- u. **Agnes Kamene Mutuku (daughter married)**
- v. **Lucia Martha Kitavi (daughter married - deceased)**
- w. **Eliabeth Nzisa Nzioki (daughter married)**
- x. **Monicah Musembi (daughter married)**
- y. **Mbesa Mutuku (daughter married - deceased)**
- z. **Margaret Ngina Mwangi (daughter married)**
- a. **Maria Shem (daughter married)**

5. The three wives who survived the deceased are listed as follows:-

- a. **Beatrice Ndila Kitovi (wife)**
- b. **Esther Nzakwa Kitivo (wife – deceased)**
- c. **Esther Mutono Kitivo (Wife – deceased)**

6. The proposed mode of distribution which is said to be in line with the distribution made by the deceased prior to his death is as follows:-

- 1. **Kalama/Katanga/15193.81 Hectare – Aron Muange Kitivo**
- 2. **Kalama/Katanga/15203.07 Hectare**

1.775 Hectare Patrick Kimondiu Kitivo

1.295 Hectare Beatrice Ndila Kitivo

- 3. **Kalama/Katanga/1521 2.76 Hectare – Bernard Kyalo Kitivo**
- 4. **Kalama/Katanga/1522 2.80 Hectare – Maurice Ndambuki Kitivo**
- 5. **Kalama/Katanga/1523 2.44 Hectare – Solomon Kiseli Kitivo**
- 6. **Kalama/Katanga/1524 2.76 Hectare – Michael Musau Kitivo**
- 7. **Kalama/Katanga/1525..... 1.19 Hectare – Peter Mutuku Kitivo**
- 8. **Kalama/Katanga/1531 0.343 Hectare – Peter Mutuku Kitivo**
- 9. **Kalama/Katanga/1532 0.17 Hectare – Michael Musau Kitivo, Joseph Mbwika Kitivo, and Peter Mutuku Kitivo (share equally)**
- 10. **Kalama/Katanga/1533 1.85 Hectare – Isaac Kilonzo Kitivo**
- 11. **Kalama/Katanga/1534 2.49 Hectare – Leonard Munyao Kitivo**
- 12. **Kalama/Katanga/1535 – 0.35 Hectare – Boniface Philip Mutua Kitivo**
- 13. **Kalama/Katanga/1536 – 0.10 Hectare – Boniface Philip Mutua Kitivo**
- 14. **Kalama/Katanga/1537 – 1.86 Hectare – Nicholas Muthama Kitivo**
- 15. **Kalama/Katanga/1538 – 0.14 Hectare – Isaac Kilonzo Kitivo and Nicholas Muthama Kitivo to share equally.**
- 16. **Machakos/Konza North B1/13064.84 Hectare – Dominic Kyengo Kitivo**
- 17. **Kalama/Katanga/10471.7 Hectare – Boniface Philip Mutua Kitivo**
- 18. **Machakos/Konza North B1/1305 ...4.51 Hectare**

Makueni/KanzokeaJoseph Mbwika Kitivo

19. **Rent Kola Market Plot No. 45Beatrice Ndila Kitivo**

20. **Dividends from Konza Ranching Society No. 40Beatrice Ndila Kitivo**
21. **Konza Ranching Co-operative SocietyCommercial Plot No. 213 All beneficiaries to share equally.**
22. **Standard Chartered Bank Account No. [particulars withheld] Kshs.35,191.15/=Beatrice Ndila Kitivo”**

7. On 25/9/2006, the 3rd Administrator **Michael Musau Kitivo** filed a “**replying affidavit**” through which he protested to the proposed mode of distribution. It is averred in the said affidavit that the proposed mode of distribution does not give a full and accurate account of the estate of the deceased and that all the assets and liabilities of the estate have not been disclosed. On the issue of the beneficiaries, it is averred that one **Serah Nzilani Ndunda** and one **Lucia Martha Kitavi** died before the deceased and the 1st and 3rd wives died after the death of the deceased. That land parcel No. **Machakos/Konza North B1/1305** and a parcel of land in **Makueni/Kanzokea** area are not part of the estate of the deceased but belonged to a son of the deceased by the name **Joseph Kitivo Ndambuki**.
8. It is further contended that the purported distribution of the estate of the deceased by the deceased in his lifetime was obtained through fraud and misrepresentation in that the deceased was elderly and in a poor state of health at the time. That sales agreements; the obtaining of **Land Control Board** consents; and the registration of titles thereof was carried out irregularly and therefore the said properties belong to the estate of the deceased. That the contribution of the 1st wife **Esther Nzakwa Kitivo** and the Applicant in the form of livestock and money towards the purchase of some of the parcels of land, other than the ancestral land, have not been taken into account in the proposed schedule of distribution. According to the Protester, after taking all the above into consideration, the net intestate estate should then be shared out equally amongst the three wives of the deceased then again shared equally among the number of children in each house, taking the surviving wives as additional units.
9. The hearing of the protest proceeded by way of *viva voce* evidence. Each of the two sides was represented by counsel.
10. The Applicants called a total of four witnesses; namely **Morris Ndambuki**, a son who is an Accountant (PW1), **Rev. Boniface Kitivo**, a son who is a Preacher (PW2), Beatrice Ndila Kitivo (PW3) the 2nd wife and **David Muthiani Kithi**, a cousin to the deceased.
11. **Boniface Ndambuki Kitivo** (PW1) and **Rev. Boniface Kitivo** (PW2) are two of the joint Administrators of the estate of the deceased. They are from the 2nd and 3rd houses of the deceased, and the two Applicants who filed the summons for the confirmation of the grant.
12. The four witnesses from the Applicants side all testified with one accord; that the wishes of the deceased be respected and the distribution of the estate as carried out by the deceased in his lifetime be honoured. It emerges from their evidence that the distribution took about 20 years to accomplish and the deceased called in a surveyor who assisted in the exercise. That the clan elders supervised the distribution and the boundaries were marked with sisal plants and eventually some of the sons of the deceased moved to their portions. That the deceased signed the transfer forms and obtained the consents of the Land Control Board. That indeed some of the family members have processed the title documents for their land. That the three wives of the deceased were to live with their last born sons. That what remained undistributed was a plot at **Kola market, Konza shares** and some money in the bank, about 40,000/=. There was no mention of the estate’s liabilities, if any.

According to these four witnesses, **Michael** the 3rd Administrator from the 1st house is the only one who complained about the distribution of the wealth of the deceased and even protested to the deceased and to the elders but the decision remained unchanged.

13. According to the Applicant’s witnesses, the distribution was fair and just. It was however conceded that the 2nd and 3rd houses got a bigger share than the 1st house. Their common stand was that their late step mother, **Esther Nzakwa** should be buried at her last born’s homestead

where her husband had moved her in his lifetime and provided money to build for her there. That the late **Esther Nzakwa** had lived for over ten years with her last born son until her time of death.

The 2nd wife (**Beatrice Ndila**) who testified as PW3 stated that she is also ready to be buried by her last born son in his land although she lived with one of her sons in Land Parcel **Kalama/Katanga/522** where her late husband is buried and the original family homestead where all the three wives had lived before the distribution of the land by the deceased.

14. Three witnesses testified on the side of the 3rd Administrator/Protester. These were **Michael Musau** from the 1st house (DW1), **Peter Mutuku Kitivo** from the 1st house and **William Mwilu Kiyanga** (DW3) a cousin to the deceased. The position taken by these three witnesses is that the deceased had three wives. That the 1st wife, Esther Nzakwa had four sons and 3 sisters. The 2nd wife **Beatrice Ndila** had five sons and four daughters. The 3rd wife, **Esther Mutono Kitivo** had five sons and four daughters. That the deceased during his lifetime distributed his property but the 1st house objected to the distribution. According to their evidence, the 1st house objected because a son, **Joseph Ndambuki** from the first house had been left out of the distribution and their mother's (the 1st wife) homestead had been given to **Maurice Ndambuki** from the 2nd house (**Kalama/Katanga/1522**). That when the mother (1st wife) died on 31/8/2004, the children wanted to bury her in plot No. **Kalama/Katanga/1522** next to her late husband in accordance with her wishes of the mother and in accordance with the Kamba **traditions** but their step brother **Maurice Ndambuki Kitivo** objected and obtained orders of injunction from the court. An appeal to the High Court and to the Court of Appeal to lift the orders of injunction failed. The 1st wife's body remained in the mortuary as her children opted to await the distribution of their father's estate by the court.
15. The counsels for each of the Protagonist sides filed written submissions at the close of the case. The Protester, **Michael Musau** however filed a Notice to Act in Person on 16/11/12 and filed another set of submissions. I have duly considered the submissions filed and the evidence on record. I took over this cause at the stage of judgment writing. This protracted litigation had gone through the hands of a total of seven judges previously.
16. It is not in dispute that the deceased:-

v. **Died intestate**

- v. **Had a polygamous family consisting of three wives and well out twenty adult offsprings.**
- v. **Had during his lifetime distributed almost all his entire estate to his sons and three wives.**
- v. **The 3rd Administrator protested against the said distribution.**
- vi. **That the clan elders intervened and upheld the distribution carried out by the deceased.**
- v. **That the deceased showed each of his sons his land and the boundaries were marked with sisal plants.**
- v. **That the deceased subsequently had the land surveyed and subdivided and obtained the Land Control Board consents to transfer and did transfer the resultant parcels of land.**
- v. **That some of the sons obtained their title deeds while others had paid the transfer fees before the 3rd Administrator/Protester lodged cautions with the Registrar of Lands.**
- v. **The deceased sued his son the 3rd Administrator/ Protester for the removal of the cautions. The case was later withdrawn.**
- v. **The undistributed property of the deceased include a plot at Kola market, shares at Konza Ranching Co-operative Society and money in a bank account.**
- v. **That the case that sought orders of injunction against the burial of the 1st wife in plot No. 1522 was allowed and the decision upheld by the High Court and Court of Appeal.**

17. Whether the distribution of the estate by the deceased in his life time was fair, equitable and within the law is one of the most contentious issues herein. The deceased died on the 19th December 2000. The **Law of Succession Act Cap 160 Laws of Kenya** came into operation on 1st July 1981. Under **section 2 (1)** of the said **Act**, *“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the*

administration of estates of those persons.”

18. The **Law of Succession Act** therefore governs the estate of the deceased herein. This brings to a close the arguments whether the estate of the deceased ought to be distributed in accordance with the **Akamba Customary Law** or the **Law of Succession Act**.
19. The deceased was polygamous. **Section 40** of the **Law of Succession Act** deals with the issue of polygamous families and stipulates as follows:-

Section 40 (1):-

“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 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.”

Section 40 (2):-

“The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

20. Having established the law relating to the distribution of the estate of the deceased, I turn to the question of who the beneficiaries of the estate of the deceased are. The deceased had three houses. **Section 3** of the **Law of Succession Act**, defines the **“house”** as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. There is no discrimination of the children on grounds of their sex. All the three wives of the deceased and all their children are therefore entitled to a share of his net intestate estate as equally as provided for by **section 40** of the **Law of Succession Act**.
21. That brings us to the question of the extent of the estate of the deceased. From the evidence on record, this court is left with no doubt that the deceased in the 20 years prior to his death embarked in the process of distributing his land to his sons and wives. No doubt the deceased and the clan elders who assisted him followed the customs of the **Kamba people**. The daughters did not get any share. It appears from the evidence on record that the daughters were married.
22. The evidence adduced herein further establishes that the deceased inherited some of his properties and purchased others. My humble view is that any questions as to the right of the deceased to distribute his estate ought to have been raised at that stage and the processing of the same brought to a stop by the aggrieved parties. The deceased did not only distribute most of his land but also formally surveyed and subdivided the land and went ahead to obtain the **Land Control Board** consents to transfer and indeed signed the transfer forms for most of the parcels of land. **Kalama/Katanga/1521** and Land Parcel **Kalama/Katanga/1047** had title deeds issued in the names of their new owners **Bernard Kyalo** and **Boniface Mutua** respectively. Land Parcel **Kalama/Katanga/1522** apportioned to **Maurice Ndambuki Kitivo**, and all the other subdivision had the processing of the titles stopped by the lodging of a caution by the 3rd Administrator/Protector.
23. What is the law on the question of the deceased having obtained the **Land Control Board** consents and signed the transfer forms? The Court of Appeal in **The Registered Trustees Anglican Church of Kenya Mbeere Diocese –vs- The Rev. David Waweru Njoroge – Civil Appeal No. 108 of 2002** quoting **Shells Equity 29th Edition** observed as follows:-

“...where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Thus in Re-Rose Midland Bank Executor and Trustee Co. Ltd –vs- Rose (1949) Ch. 78 the donor executed a transfer of shares in a private company and handed it with share certificate to the donee who died before it had been registered. Although the donee’s legal title would not be perfected until the company had passed the transfer for

registration or at least until the donee had unconditional right to be registered, it was held that the gift was good because the donour had done all that was necessary on his part. Likewise a gift of Registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as proprietor.”

24. The deceased had done everything that required to be done in relation to the transfer of his land to some of his sons and wives. Indeed some of the parcels of land are now registered in the names of some of the sons under the **Registered Land Act Cap 300 Laws of Kenya**. The land given by the deceased to his sons and wives is a gift to the sons and wives during the lifetime of the deceased as provided for under section **28 (d)** of the **Act**. The land transferred by the deceased in his lifetime therefore no longer forms part of the estate of the deceased and is not free property that is now available for distribution.
25. How about if the distribution of the land by the deceased was unfair and not equitable? It is noteworthy that none of the deceased's wives protested to the deceased concerning the distribution of the land. It seems that they did abide by the husband's wishes and moved to the houses of their last born sons. Indeed the 2nd wife **Beatrice Ndila Kitivo** who testified herein (PW3) stated that after her death, she should be buried at the home of her last born son as per the wishes of her late husband.
26. The daughters of the deceased do not seem to have expressed any interest in the land. I say so because they do not seem to have taken any steps to protest the way **Michael Musau** did. There has been no active participation in the family meetings or in this case by the daughters even by way of swearing any affidavits or giving evidence to reflect their interest. As held by the Court of Appeal in **Buruou -vs- Margaret Waitimu Buruou Civil Appeal 319 of 2002**, married daughters who want to be considered in the distribution must like the sons, assert their right of inheritance. The daughters of the 2nd and 3rd houses have not been mentioned at all as having expressed by interest in the estate of the deceased. The fact that there is a protracted family dispute which even touches on the burial of the 1st wife of the deceased means the daughters must be aware of this case and would have moved this court for their share if they had any interest.
27. How about **Joseph Ndambuki Kitivo (Joseph)**, a son to the deceased who is said to have been left out of the distribution? The said **Joseph** has also not stood up and shown any interest. This to me supports the assertion by the Applicants that **Joseph** was indeed provided for and given land by the deceased. If Joseph purchased his own land, he should have testified to confirm that position.
28. What is the net intestate estate available for distribution? This is listed by the beneficiaries as the **Konza Ranch shares**, the plot at **Kola market** and some cash at the bank. No liabilities have been listed by the 1st and 2nd Administrator. However, the 3rd Administrator/Protester has deponed in his affidavit that there were liabilities to the estate of the deceased and that some monies from the estate of the deceased has not been accounted for.
29. The burial dispute concerning the 1st wife of the deceased cannot escape mention since it has featured very prominently in these proceedings. However, this is a succession matter under the **Law of Succession Act Cap 160 Laws of Kenya**. These proceedings are therefore not a burial dispute. I have held herein that customary law is not applicable in the distribution of the estate of the deceased. Suffice it to say that even if one was to presume that customary law was applicable, the Protester's side has given contradictory evidence on the issue. **Michael** (DW1) testified that his grandmother was not buried at this grandfather's matrimonial home. **Michael** (DW1) has also contradicted himself in that while he would like the estate of the deceased distributed equally amongst all the beneficiaries as opposed to equally between the three houses in accordance with the traditions of the **Kamba people**, he has in the same breath advocated for the burial of his mother as per the **Kamba customs**. **William Mwilu Kitanga** (DW3), a cousin to the deceased and one of the people who witnessed the distribution of the land by the deceased testified that under the **Kamba customs**, the first wife should be buried next to the husband but further testified that his own father is buried in **Ndauni** whereas his mother is buried in **Kyendani**. It is further observed that the clan elders who are experts in **Kamba customary law** were involved in the distribution of the estate during the life time of the deceased and endorsed the same.
30. The total sum of this evidence reflects that the customary law is not static. As observed by the

Court of Appeal in **Francis Muchiri Wairia –vs- Alice Wangari Wairia & Another 2011 e KLR** while referring to “**The Law of Succession**” by **Eugene Contran**, “....*customary law is always in a fluid state and changes occur due to various factors such as education, the influence of religion and social and economic advancement.*” I have therefore not been persuaded to distribute the estate of the deceased in a way that would accommodate the burial of the 3rd wife on Plot **Kalama/Katanga/1522** next to her late husband.

31. In the final analysis, this court agrees with the distribution of the estate as carried out by the deceased in his life time. The gifts *intervivos* to the beneficiaries must however be taken into account when distributing what remained free for distribution which includes **Konza Ranching Society shares, Kola market** plot and cash in bank and cash collected from the rental income.
32. The beneficiaries should therefore file further affidavits which reflect the value of the land given to each of the beneficiaries and the value of the net intestate estate. The net intestate estate will then be distributed to the beneficiaries while taking into account the land distributed by the deceased in his life time. Orders accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 28th day of March 2014.

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B. THURANIRA JADEN

JUDGE