



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1040 OF 1991

IN THE MATTER OF THE ESTATE OF CHARLES KAKURU KATUNGI – DECEASED

TAU KATUNGI.....APPLICANT

VERSUS

MARGRETHE THORNING KATUNGI.....1ST RESPONDENT

PETER DAVID BELFORD WALKER.....2ND RESPONDENT

RULING

1. Tau Katungi is one of the surviving children of the deceased. He has come to court by way of a summons dated 10th December 2013. He seeks one principal prayer, that the value of his share in LR No. 7588/17 Mwituu estate, Karen, Nairobi be ascertained by way of valuation and that the value be paid out to him in full in monetary terms.
2. The background is that the applicant's father, the deceased herein, died on 4th August 1991. Representation to his estate was sought in September 1991 by his widow, Margrethe Thorning Katungi and P.D.B. Walker, Advocate. He was described as having been survived by the widow and two children – Camilla Ann Katungi and Nina Caroline Katungi. The principal asset was listed as LR No. 7583/17 Mwituu estate Karen (6.2 acres). The petition was gazetted on 11th October 1992.
3. An objection was filed to the petition on 6th November 1991 by the applicant herein, Tau Katungi, through his mother Edith Byanyima. Also filed in court was an answer to the petition and a cross-petition. The affidavit in support was sworn by Edith Byanyima who stated in effect that the petition on record had not stated all the survivors of deceased and all his assets. Her case was that in addition to the survivors stated in the petition, the deceased had also been survived by his son, Tau Katungi, then 1½ years the deceased's mother and sister. She also stated that he died possessed of other assets in Nairobi other than what was disclosed in the petition, and in Belgium, the United States of America and Uganda.
4. The parties resolved the objection out of consent. The terms of the compromise were set out in the Chamber Summons dated 4th June 1997. The application was allowed by Kuloba J on 23rd June 1997.
5. The terms compromised were:-

- a. That Tau Katungi was declared to be a son of the deceased, with Edith Byanyima, by virtue of **Section 3(2)** of the Law of Succession Act;
- b. That the said Tau Katungi was entitled to a share in the deceased's movable property in Kenya in accordance with the Law of Succession of the Republic of Uganda where the deceased was domiciled at the date of his death;
- c. That the said Tau Katungi was entitled to a share of the deceased's immovable property in Kenya, that was to say an equal one third share of the said property jointly with the other children of the deceased, that is to say Camilla Ann Katungi and Nina Caroline Katungi as tenants in common in equal shares subject to statutory trusts and subject to the life interest of the widow, Margrethe Thorning Katungi.
- d. That 2nd administrators of the estate were to be the petitioners – Margrethe Thorning Katungi and PDB Walker, but in the event PDB Walker was unable to act as administrator, he was to be replaced by R.Q.M. Watson or other advocate chosen by Margrethe Thorning Katungi;
- e. That Margrethe Thorning Katungi and/or her children were given the option exercisable at any time to purchase Tau's share of the movable property in Kenya at market value to be agreed or established by an arbitration;
- f. That the extent of the deceased's estate in Uganda was to be established and the same was to devolve upon Tau Katungi; and
- g. That the objection was to be withdrawn and a grant of letters of administration made to the petitioners with respect to the deceased's estate in Kenya.

6. Following grant on 23rd June 1997 of the orders sought in the application of 4th June 1997 a grant of letters of administration intestate was made on 23rd June 1997 to Margrethe Thorning Katungi and PDB Walker.

7. The said administrators moved the court on 17th February 2001 by a summons dated 14th February 2001 for the confirmation of the grant. The application sought confirmation of grant on the terms that the movable property of the deceased in Kenya (which was expressed as not known to the administrators) pass by the Law of Succession of the Republic of Uganda and that the value of property in Kenya (being LR No. 7581/17) Mwituu Estate – Karen) pass to the widow, Margrethe Thorning Katungi with the remainder on her death or remarriage to the three children of the deceased – Camilla Ann Katungi, Nina Caroline Katungi and Tau Katungi – as attain majority and if more than one in equal shares.

8. The confirmation application was heard on 16th November 2011 by Maraga J. It was allowed. The grant was confirmed. It was directed that the widow shall have life interest and thereafter the three heirs to have equal interest in the same. A certificate of confirmation of the grant dated 16th November 2011 was issued signed by the judge. It states that the widow was entitled to a life interest, or until her remarriage on LR No. 7583/17 Mwituu Estate Karen and that the children Ann Katunga, Nina Camilla, Caroline Katungi and Tau Katungi were to take whole residue of the intestate estate as tenants in common in equal shares absolutely, subject to the life interest of the widow as aforesaid determinable on her remarriage.

9. It is against the above background that the applicant has now come to court by his application of 10th December 2013. In his affidavit sworn on 5th December 2013 he complains that the widow and her children have failed to exercise their option to purchase his share so that he can obtain provision for himself. He alleges that there was a fire on the property hence his desire to have it valued. He also complains that he does not know the status of the estate as the administrator on the ground is now of ill – health. He claims that he did not inherit any assets from his father's Uganda estate. He expressed a desire of all and for accounts to be furnished to him by the administrators.

10. The application was served on the administrator who is within jurisdiction, Mr. P.D.B. Walker, who swore a replying affidavit on 24th January 2014, which was filed in court on 27th January 2014. He denies being of ill-health to the extent of not being able to discharge his duties as administrator. He avers that the only asset in Kenya comprised of LR No. 7583/17 Karen which was distributed by consent as per the terms of the certificate of confirmation of grant dated 16th November 2011. He argues that the widow of the deceased enjoys life interest from the said property as she is still alive and has not remarried, and consequently the applicant's share and that of the other children has not crystallised. He states that the consent orders of 23rd June 1997 were overtaken by the confirmation of the grant on 16th November 2011. He states further that there is no obligation in the consent order nor the confirmed grant for reasonable provision or schooling. He avers that the property is insured and therefore secure, hence there is no need for a valuation.

11. In response to the administrator's affidavit of 24th January 2014, the applicant swore a further affidavit on 1st March 2014, filed in court on 10th March 2014. He argues that whereas it was true that the widow was to enjoy life interest, the same did not mean that the entire estate of the deceased was to be held by her during her life time and it would devolve upon the children upon either her death or remarriage. He further argues that his interest has crystallised given that the widow held the property interest of the children, during their minority and that the children have since attained majority. On accounts, he alleges that the property has been mismanaged as there are now encumbrances registered against the title in favour of the Commissioner of Income Tax. He also claims maintenance on the grounds that the property is generating income which does not benefit him, but benefit the children of the widow.

12. In reply to that further affidavit of 1st March 2014, the administrator swore a further affidavit on 8th May 2014, filed in court on 9th May 2014. He reiterates that the net intestate estate devolved upon the widow during life interest and to the children thereafter in equal shares. He states that the life interest is yet to terminate and therefore the interests of the children are yet to crystallise. He further argues that the applicant's option to purchase was just that, an option, it was not obligatory. He contests the mismanagement of the estate, and states that the property is in fact undergoing repairs and is fully insured. He argues that the property properly passed to the widow during life interest and therefore there is no basis for rendering an account as the children are not entitled to the income from the property. On the tax matter, he explains that the same arose during the deceased's lifetime and was contested on the grounds of diplomatic immunity. He also states that the children of the widow do not receive income from the property.

13. On 11th March 2014 directions were taken to the effect that the application be canvassed by way of written submissions. The applicants filed his written submissions, dated 29th April 2014 on 30th April 2014. He also filed a list of authorities. The respondents did not file submissions nor a list of authorities.

14. In his submissions, the applicants argues three grounds. Firstly, he submits that the confirmed grant was obtained by concealment of material facts. His case is that the confirmation of the grant was at variance with the consent order of 24th June 1997. Secondly, he argues that the widow's life interest was limited to the use and benefit of the children. Thirdly, he argues that the entitlement to an account is a statutory obligation. He concludes that the estate has been in limbo for over twenty (20) years and the estate ought to be fully distributed.

15. The deceased person in this cause died intestate in 1991. His estate therefore fell for distribution in accordance with Part V of the Law of Succession Act, Cap 160, Laws of Kenya. He was survived by a spouse and children and therefore the relevant provision is **Section 35** of the Law of Succession Act. Section 35(1) provides as follows:-

“... where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

a. *The personal and household effects of the deceased absolutely and*

b. A life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

16. “Life interest” is not defined in the Law of Succession Act. Black’s Law Dictionary, ninth edition, West, 2009, defines it as “an interest in real or personal property measured by the duration of the holder’s or another person’s life.” In the context of *Section 35* it is an interest held by the surviving spouse during their life “in the whole of the residue of the net interest estate.” Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons. In the context of *Section 35*, the widow is entitled to enjoy rights over the residue of the net intestate estate, that is after taking away the chattels and settlement of liabilities, during her life time with the property passing to the children upon her demise or remarriage of she be a widow.

17. The effect of ***Section 35(1)*** is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.

18. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.

19. Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with as if it was their own. By virtue of ***Section 37*** of the Act, a surviving spouse cannot during life interest dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property the subject of life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.

20. At life interest there is a convergence of the interests of the surviving spouse and those of the children. The device seeks to secure the interests of both. Where the deceased therefore is survived by both a spouse and children, the net intestate estate will not pass absolutely to either of the two categories of survivors during the life time of either. The holder of the life interest in this case is still alive, and has not remarried, she is therefore still entitled to the property at this time and the same cannot be conveyed to the children. Conversely, all the children of the deceased are still alive, consequently the widow cannot have the property absolutely to herself, but she is entitled to whatever income that derives from it.

21. I have already stated that the life interest is terminable upon the death of the holder or through the remarriage of the widow. It is also terminable through exercise of the power of appointment provided for under the ***Section 35 (2) (3)*** of the provision Law of Succession Act. The states as follows-

“35(2). A surviving spouse shall during the continuation of life interest provided by subsection (1), or any part of the capital of the net intestate estate by way of a gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.”

22. The power of appointment provided for in *Section 35(2)* of the Act enables the holder of the life interest to distribute the property the subject of the life interest prior to the life interest determining in a manner envisaged in the proviso to *Section 35(1)*. He or she can distribute any or all the property the subject of life interest. *Section 35(3)* provides a remedy to any child who feels aggrieved with the manner of the exercise of the power of appointment or by what he or she considers to be an unreasonable withholding of the exercise of the said person.

23. In the case before me the surviving widow is yet to exercise the power given to her under ***Section 35 (2)*** of the Act. The applicant has not indicated whether he has requested the widow to exercise the said person in his favour by gifting her with a part of the net intestate estate, and that the widow has declined or unreasonably withheld the exercise of that power.

24. As matters stand the widow holds life interest over LR No. 7583/17 Mwituu Estate, Karen and she is entitled to whatever income that is generated from the said property. She enjoys interest over the whole property, and the three surviving children have no claim whatsoever over the said property for as long as she is alive, has not remarried and has not exercised the power of appointment. The children's right to the estate *“as tenants in common in equal shares absolutely”* has not crystallised. The life interest is for life, and the exercise of the power of appointment is at the discretion of the holder of the life interest. It is exercisable on her own motion or at the request of the children.

25. The applicant appears from his affidavit to give more premium to the orders of 23rd June 1997 than the confirmation orders made on 16th November 2011. The orders made on 23rd June 1997 resolved the objections of the applicant to the grant being made to the persons who had petitioned for it. It was agreed by consent that the applicant be recognized as a child of the deceased, that he was entitled to one third of the deceased's immovable property in Kenya and that the widow and her children had an option to purchase his share in the estate. These orders are recorded at the point of appointment of administrators, but not at confirmation of the grant.

26. The orders made at the confirmation of the grant on 16th November 2011 did not incorporate the clause in the consent order on the widow and her children's option to body the applicant's interest. The summons for confirmation, dated 14th February 2011, itself did not include that clause in prayer (d) which stated as follows:-

“that immovable property in Kenya that is to say land reference number 7581/17 Mwilu Estate Karen shall pass to Margrethe Thorning Katungi (also known as Gitte Katungi) with remainder over on her death or remarriage to the three children of the deceased that is to say of such Camilla Ann Katungi, Nina Caroline Katungi and Tau Katungi as attain majority and if more than one in equal shares.”

27. The order made on 16th November 2011 did not confirm with prayer (b) of the summons dated 4th February 2011. Maraga J. ordered as follows:-

“The grant is hereby confirmed. The widow to have a life interest and thereafter the three heirs to have an equal interest in the same.”

The certificate of confirmation dated 16th November 2011 is based on the said order and it does not therefore incorporate the consent orders of 23rd June 1997 nor the wording of prayer (b) in the summons for confirmation dated 14th February 2011.

28. In light of the above, there is no basis upon which I can require the widow and her children to purchase the applicant's one third share since the provision on the said option to purchase was not incorporated in the orders made by the court at the time the grant was confirmed. The consent orders of 23rd June 1997 were meant to resolve the objection proceedings, and at that stage there was no room for grant of orders whose effect was to distribute the estate since distribution only comes at the stage of confirmation. The fact that the confirmation orders did not conform with the said orders of 23rd June 1997 means that the orders of 16th November 2011 modified the orders of 23rd June 1997 on distribution to the extent that the said orders of 16th November 2011 were inconsistent with the orders of 23rd June 1997.

29. In the body of the affidavit in support of the application, the applicant raises issues of accountability. Significantly, the application dated 16th December 2013 does not pray for accounts. The matter of accounts is for that reason not before me.

30. In the result, the application dated 10th December 2013 is without merit. There is no basis for grant of the orders sought, and I therefore hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH DAY OF AUGUST 2014.

W. MUSYOKA

JUDGE

In the presence of advocate for the applicant.

In the presence of advocate for the respondents.