



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 391 OF 2011

IN THE MATTER OF THE ESTATE OF KIMULI MWANIA NZELU (DECEASED)

PAUL MUISYO KIMULIPETITIONER

VERSUS

RUTH WAMBUA MWANIA.....RESPONDENT/PROTESTOR

RULING

1. **Paul Muisyo Kimuli**, Petitioned for Letters of Administration in respect of the Estate of **Kimuli Mwanja Nzelu** (deceased). It was stated that the deceased was survived by the petitioner, **Paul Muisyo Kimuli**, **Charles Mutoka Kimuli** and **Mwelu Kimuli**. The assets the deceased left were indicated as **Machakos/Konza North/Block 1/1365** and shares with **Konza Ranching & Farming Co. Ltd** No. 1443.

2. A Grant of Letters of Administration Intestate were issued to the Petitioner on the **21st day of October, 2011**.

3. By way of summons for confirmation dated **6th August, 2012** the Petitioner sought to have the grant of Letters of Administration Intestate confirmed. In the affidavit in support of the application, the applicant/ petitioner sought to have the assets belonging to the estate of the deceased registered in his name to hold them in trust for himself and the beneficiaries. His two (2) siblings signed a consent to the confirmation sought.

4. An affidavit of protest against confirmation of the grant was filed by **Ruth Wambua Mwanja** whereby she deposed that she is a wife to **Wambua Mwanja (Deceased)** a son to the late **Nduku Mwanja**, mother to **Kimuli Mwanja** and **Kimongo Mwanja**; their late mother acquired a share with **Konza Co-operative and Ranching Society – No. 1443** the share was allocated **Parcel No. Machakos Konza North Block 1/1365**; After the demise of their mother, **Kimuli Mwanja Nzelu** illegally caused to be transferred to his name the property without consulting other members of the family. She raised the complaint with the society, the chief and the matter was adjudicated upon by the clan and it was ruled that the land be shared equally among the three (3) sons.

5. Further, she stated that the deceased refused to comply with the decision of the clan. Consequently, she filed a case before the **Makueni Land Disputes Tribunal, Kilome Division Case No. 77 of 2006**. The award thereof that was in her favour was adopted as the judgment of the court. The deceased however passed on prior to the decree of the court being executed.

6. She also stated that she was compelled to file Citation **Cause No. 85** of **2011** whereby the sons of the deceased, the petitioners herein were ordered to apply for letters of administration in default the protestor would be at liberty to do so. When the petitioner filed the Succession Cause he failed to disclose her interest in the subject matter and/or notify her of the case. She therefore called upon the court to have her interest and that of **Kimongo Mwanja** the other beneficiary taken care of.

7. In a response thereto the petitioner stated that the deceased was the sole legal owner of the share. He denied an allegation that **Kimuli Mwanja Nzelu** fraudulently transferred the share member number. He averred that the protestor had not provided evidence that **Nduku Mwanja** had died and the transfer of the membership card was in **1982** during **Nduku Mwanja's** life time.

8. He stated that the Land Disputes Tribunal had no jurisdiction to entertain a claim over title to land and a first registration; He denied having been served with the citation and order as alleged by the protestor.

9. Further, he stated that the protestor having been a wife to the brother to the deceased was not a beneficiary of his estate.

10. The matter was canvassed by way of *viva voce* evidence. In her evidence the protestor stated that she is the one taking care of **Kimongo Mwanja** a brother to the deceased who is mentally challenged. She resides at her matrimonial home. She lived with her parents-in-law prior to their demise. She stated that after her mother-in-law purchased the shares in issue, her late husband is the one who used to collect dividends from the society on their behalf. Her mother-in-law (*deceased*) called all her children and told them that shares would be shared amongst them.

11. When she learnt of the fraudulent acquisition of the shares by the deceased she reported the matter to the clan and authority. A decision was made. The deceased passed on prior to execution of the decree issued by the court in her favour.

12. The petitioner stated that his father was a member of Konza Society. After his demise he went to Konza Ranching Society and according to the membership records his share was number **1443**. He had a title deed for Plot **No. 1365**.

13. He disputed the Protester's averment that she is entitled to the asset.

14. The issue to be determined is whether the Protester is entitled to the assets indicated as forming the estate of the deceased. Evidence was adduced of;-

i. A membership card issued by Konza Ranching & Farming Co-operative Society Limited dated the 27th February, 1982 in the name of **Kimuli Mwanja**, membership No. 1443.

ii. Title deed for Land Parcel No. Machakos/Konza North/Block 1/1365 registered on 28th May, 1991 and issued on the 1st April 1992 to **Kimuli Mwanja Nzelu**. This is *prima facie* evidence that the land and the shares indeed belonged to the deceased.

15. It is however, argued by the Protester that share No. 1443 was acquired by **Nduku Mwanja**. It ought to have been shared amongst **Nduku's** three (3) sons, her husband being one of them but the deceased caused it to be registered in his name. She argues that it was done fraudulently.

16. It is evident that the protestor complained to the clan in the year 2002 about fraudulent acquisition of shares at Konza. The clan reached a decision that the same ought to have been shared among three (3) siblings. There is further evidence of the case having been heard by the Land Disputes Tribunal and the court having adopted the award. A decree thereto was drawn. Per the decree issued on **17th May, 2010** by **Kilungu, Senior Resident Magistrate's Court** the plot of **Nduku** was to be subdivided among the three sons equally. i.e **Wambua, Kimuli** and **Kimango**. Costs were awarded to the

Protester. The decree is however, silent on the number of the plot. This would call on the protester to execute in that particular case against the legal representative of the estate of the defendant.

17. It is argued that the plot at Konza belonged to the family. To establish that fact evidence of the committee should have been called; and the proper forum to adjudicate on the issue would have been the Co-operative Tribunal.

18. Otherwise, the evidence before this court establishes the fact that the assets alluded to belong to the deceased herein. The beneficiaries of the estate would be as provided by **Section 38** of the **Law of Succession Act** which states;-

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

19. The estate of the deceased would therefore devolve upon all beneficiaries who survived him.

20. A Citation Cause instituted by the Protestor was filed on **2nd of February, 2011**. The instant Succession Cause was filed on **13/5/2011**. The order granted by **Dulu, J** directing **Muthoka Kimuli** and **Muisyo Kimuli** to apply for Letters of Administration within 60 days and in default the same to be done by the **Protestor** is dated **7th November, 2012**. This order was overtaken by events since a Succession Case in respect of the estate of the deceased had already been filed.

21. That notwithstanding it is established by the information in **P&A 1175 of 2012** that the deceased may have been survived by more than the beneficiaries stated by the applicants. Further it is also established that at the time of his demise he had liabilities following the order of the court.

22. In the result, I direct that that the Grant be confirmed on condition that all beneficiaries of the estate be identified. All liabilities of the estate be taken into consideration. A date shall be taken at the registry on priority basis. This being a succession matter each party shall bear their own costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 22ND day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE