



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 417 OF 2012

IN THE MATTER OF THE ESTATE OF KATUNGE KILUU (DECEASED)

KILUBE KILUU.....PETITIONER

VERSUS

ROGERS MUSILA MUTISYA.....PROTESTOR/OBJECTOR

R U L I N G

1. **Katunge Kiluu** (deceased) died on the 11th march 1982. **Kilube Kiluu** petitioned for Letters of Administration Intestate. He presented the petition in his capacity as the son of the deceased. The grant of letters of administration was issued on the 22nd day of **August 2012**. On the 21st **February 2013**, **Kilube Kiluu** (Administrator of the estate) filed summons for confirmation of the grant.

2. An affidavit of protest to the confirmation of the grant was filed by **Rodgers Musila Mutisya** (Objector) in his capacity as the son to **Benjamin Mutisya Kiluu** (Deceased) who was a son to the deceased herein. It was his contention that he and his siblings are entitled to inherit from the estate of the deceased but were omitted from the list of beneficiaries. It was his argument that prior to passing on the deceased had divided her properties amongst her sons/children as follows:

- a) Kilube Kiluu – Iveti Mung’ala Nos.1349 and 361.
- b) Samson Nzeve Kiluu – Iveti Mung’ala Nos. 1726, 1727, 1728.
- c) Kasiva Kiluu and Mutisya Kiluu – To share Iveti Mung’ala No. 281.
- d) Muinde Kiluu – Iveti Mung’ala No. 610.
- e) Komu Kiluu and Kalondu Kiluu – (deceased).

3. He averred that **Kilube** and **Muinde** transferred their inherited portions into their respective names therefore had no claim over **Iveti/Mung’ala/281** a subject asset in this cause. The same was not transferred to **Kasiva Kiluu** and their late father because they trusted their uncles would not interfere with the premises.

4. The application was heard by way of viva voce evidence. In his evidence the Objector/Protestor stated the plot **No. 281** which measures approximately **one (1) acre** which has no title was allocated to his father and aunt, **Kasiva** by the deceased. He produced in evidence a book. The content therein was written by his father between **April 1993** and **August 1994**. A family friend **Ndolo Kivundo** was a witness. On cross examination he admitted that his father bought land at Charity but denied that he purchased it from the petitioner. The Protestor produced in evidence certificates of searches of various portions of land that belonged to the deceased that were allocated to her children.

5. **Kasiva Kiluu** stated that their mother had various properties. She gave **Kilube Nzeve** the Petitioner land at **Kisoeni**. **Komu** got **Mawinzoni** and when he died the Petitioner acquired it. **Mawinzoni** was given to **Muinde Kiluu** who passed on and left the portion to his children. The homestead was left to her and the Protestor's father.

Although the Petitioner ought to have moved out of the homestead he lives there todate. On cross examination she stated that when the parcels of land were subdivided everyone was alive.

6. **Ndolo Kivondo** aged 70 years old a relative to both the Petitioner and Protestor/Objector stated that he attended the meeting at the deceased's home. All her children were in attendance and what was agreed upon was reduced into writing. The Petitioner was to move to his portion of land. Upon their demise the Objector's parents were buried on the subject land as the deceased had allocated it to them.

7. In his testimony the Petitioner stated that he subdivided the land and gave the Objector's father. He argued that **Kasiva** being a woman was not entitled to any portion of land. He admitted that the Objector's parents were buried on the subject parcel of land. On cross examination he said that he occupies the subject land also **No.1349** which he owns jointly with his brother. He was given land **No.361**.

8. **Samson Nzeve** stated that he has a claim over the subject land because he planted coffee thereon. Admitting that the Objector lives on the subject land he said their father had land elsewhere.

9. Both the Objectors' counsel and the Petitioner filed rival submissions that I have considered.

10. In a further affidavit in support of the summons of confirmation of the grant, the Petitioner listed only **three(3)** beneficiaries to the estate of the deceased namely:

- a) Himself
- b) Kasiva Kiluu
- c) Samson Nzeve Kiluu

Per his proposal the only indicated property **Iveti/Mung'ala/281** was to be transferred to himself. He averred that the beneficiaries had consented to the alluded to distribution.

11. The 1st consent is signed by the Petitioner and his brother **Samson Nzeve**. Another consent is signed by **Patrick Nzoka Muinde**, Boniface **Muithya Muinde** and Isaac **Mutisya Kiluu**. It is not specified how the three (3) are related to the deceased.

12. Evidence adduced establish the fact that the deceased subdivided her property amongst her children prior to her demise. Certificates of official searches adduced in evidence indicate that:

- Kiluu.**
- i. Parcel No. **Iveti/Mung'ala/281** is registered in the names of **Katunge Kiluu.**
 - ii. Land parcel No. **Iveti/Mung'ala/361** is owned by **Katunge Kiluu.**
 - iii. **Iveti/Mung'ala/1349** is owned by **Kilube Kiluu.**
 - iv. **Iveti/Mung'ala/1726** is owned by **Samson Nzeve Kiluu.**
 - v. **Iveti/Mung'ala/1727** is owned by **Kioko Nzeve.**
 - vi. **Iveti/Mung'ala/1728** is owned by **Samson Nzeve Kiluu.**
 - vii. **Iveti/Mung'ala/610** is owned by **Muinde Kiluu.**

13. The remaining properties that should now form the estate of the deceased are **Iveti/Mung'ala/281** and **Iveti/Mung'ala/361.**

14. It is not in dispute that **Iveti/Mung'ala/361** was allocated to the Petitioner herein who utilizes it. Looking at the transaction per the content of the book where the decision reached was reduced into writing (Exhibit 16) parties were allocated portions according to where they lived.

It was stated:

“The land that is here at home belongs to mum (Katunge) and Kasiva. Mum should live on the upper side and Kasiva on the lower side.

*...That is when **Katunge** now declared that the portion of land at home belonged to **Naomi Mutisya.**”*

15. According to the Objector's witness No. 1 his aunt **Kasiva** who was present when the land was being subdivided stated that the homestead was to be shared between her and **Mutisya.** On cross examination of the Objector, the Petitioner claimed that he came to court to obtain authority to have parcel No. **281** subdivided amongst all of them. This is however contrary to the prayer sought whence he wanted the whole of **Iveti/Mung'ala/281** transferred to him.

16. It is also not in dispute that **Mutisya** and his wife, parents to the Objector were buried at the homestead on the subject portion. This would go to confirm that that is where they lived. It is not challenged that the Protestor's siblings live on that parcel of land.

17. On cross examination the Petitioner stated that **Kasiva** is only entitled to a portion of land where she ought to build a house to live on but not an expensive parcel of land. In the case of **In Re Estate of John Musambayi Katumanga – (Deceased) (2014) eKLR** where the court stated thus:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Section 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial states of the children.”

Kasiva just like her siblings is entitled to property left by her parents.

18. In the premises the intention of the deceased must be actualized by letting the Objector, his siblings and **Kasiva** inherit the portion of land known as **Iveti/Mung'ala/281**.

19. From the foregoing, the objection is meritorious. I therefore exercise my discretion to include **Iveti/Mung'ala/361** which is in the name of **Katunge Kiluu** as part of the estate of the deceased. The same will be transferred to the Petitioner.

20. Title **Iveti/Mung'ala/281** will be subdivided into **two (2)** portions – one portion shall go to **Kasiva Kiluu**. The remaining portion shall be subdivided equally between the Protestor/Objector and his sibling.

21. By this order I confirm the grant in the aforementioned terms.

22. Each party to bear their own costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 20TH day of NOVEMBER, 2014.

L.N. MUTENDE

JUDGE