



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 10 of 1995

PATRICK KILONZO MATHEKA.....APPELLANT

VERSUS

MARY MUTILE MATHEKA.....RESPONDENT

*(Being an appeal from the original Ruling and Order in Kitui Senior Resident Magistrate's Court Succession Cause No. 8/1994 by Hon. N.A.K Njeru, SRM on 13/12/1994)*

**JUDGMENT**

The Petition for grant of letters of administration in respect of the estate of **Matheka Kasoka** was made by **Mary Mutile Matheka** who described herself as his wife. An objection to the application was filed by **Patrick Kilonzo Matheka** her stepson. The lower court does not seem to have notified the Objector to file an answer to the application and a cross petition as required by section 68 of the Law of Succession Act, Cap 160(k)

Nonetheless the court proceeded to hear the application and ruled accordingly.

Being aggrieved by the decision of the court, the appellant appealed on the following grounds that:-

***“1. That the learned Senior Resident Magistrate erred in law in hearing probate proceedings without jurisdiction in contravention to section 49 of the Law of Succession Act Cap, 160 Laws of Kenya.***

***2. The learned Senior Resident Magistrate erred in both law and fact and grossly misdirected himself when he failed to distribute the estate of the deceased equally between the two wives and/or houses of the deceased, which said distribution was in contravention of the Probate and Administration rules.***

***3. The learned Senior Resident Magistrate erred both in law and fact in declaring a trust in favour of one Kasoka Matheka in respect of parcels numbers 197, 173 and 198 which the said Senior Resident Magistrate had found in fact to solely belong to the appellant and further when the said Kasoka Matheka had made no claim against the said parcels.***

***4. The learned Senior Resident Magistrate grossly misdirected himself in the manner he took, analysed and evaluated the evidence before him”.***

This is an old case that was filed in 1995. On the 29<sup>th</sup> May, 2008 parties were granted an opportunity of exploring a possible settlement. On the 31<sup>st</sup> May, 2012 the respondent made an application seeking to

have the appeal dismissed for want of prosecution under Order 42 rule 35 of the Civil Procedure Rules. The action must have prompted counsel for the appellant to fix a hearing date.

When the matter came up for hearing on 31<sup>st</sup> October, 2012, parties agreed to dispose of the appeal by way of written submissions.

I will adopt issues for determination as outlined in the appellant's submissions.

### **1. Issue of Jurisdiction**

Territorial jurisdiction granted to magistrates to handle succession matters is derived from section 49 of the Law of Succession Act, Cap 160(k) which provides as follows;-

***“The resident magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by section 48”***

The affidavit in support of the petition for letters of administration dated 14/2/1994 gave an inventory of assets as;-

§ Land parcel No Changwithya/Mbusyani/172 & 178.

§ Land parcel No. Changwithya/Tungutu/518

Their total estimate value was given as Kshs. 100,000/=. Evidence to the contrary was not adduced. The magistrate who heard the case was hence seized of the requisite jurisdiction to entertain the case.

### **2. Distribution of intestate estate**

The deceased died intestate and was polygamous. Distribution of his estate is hence according to section 40 of the Law of Succession Act, Cap 160. It provides as follows:-

***“(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 estate 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.***

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

Case law shows that the section is not concerned with distribution of the estate among children of the deceased but emphasizes equity in making provisions for the dependants. This position was explained in the judgment of **Omolo J.A.** in **Mary Rono vs Jane Rono & Another- Civil Appeal No. 66 of 2002** where he held that :-

***“... and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Succession Act, Cap 160 of the Law of Kenya, lays down as a requirement that the heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principles of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act...My understanding of that section is that while the net intestate estate to be distributed according to the houses, each house being treated as a unit... the Judge doing the distribution still has discretion to take into account or consider the number of children in each house.”***

In his ruling the learned magistrate distributed portions of land that were not a subject matter of the estate of the deceased namely parcels Nos 197, 173 and 178. This was erroneous. Declaration of trust in favour

of **Kasoka Matheka** was similarly misdirection.

In evaluating the evidence the trial magistrate stated as follows;-

***“The evidence of both the applicant and the objector did not have much weight for this court to rely on”.***

His failure to rely on evidence adduced resulted into disregarding evidence that he should have analysed and instead relied on extraneous matter.

In the premises, the appeal succeeds. The ruling and order of the lower court is set aside. The matter will be heard by another court of competent jurisdiction at Kitui.

This being a succession cause, each party shall bear their own costs. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 20<sup>TH</sup> day of MAY, 2013.**

**L.N. MUTENDE**  
**JUDGE**