



No. 147/2013

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 950 OF 2012**

**IN THE MATTER OF THE ESTATE OF WILLIAM**

**NDWIWA MUANGE ALIAS WILLIAM MUANGE**

**1. JOHN MBONDO )**

**2. PRISCILLA KAVINI NDWIWA)..... PETITIONERS**

**3.KENNEDY MAWIOO )**

**RULING**

1. **William Ndwiwa Muange** (the deceased) died on an unknown date in the year 1998. Subsequently his death was registered on the 28<sup>th</sup> February, 2011. The deceased died intestate. He was polygamous. A grant of letters of administration was issued to **John Mbondo Ndwiwa**, **Priscilla Kavini Ndwiwa** and **Kennedy Mawioo Ndwiwa** who represented each of his three houses. On the 12<sup>th</sup> October, 2012 according to the affidavit in support of the petition for letters of administration, the only asset the deceased had was Land Parcel No. Makueni/Kikumini/61.
2. On the 22<sup>nd</sup> April, 2013, an application for confirmation of the grant was filed. In an affidavit in support of the application purportedly sworn by the three petitioners but signed by only one person it was proposed that the asset comprising of 39 acres of land be subdivided as follows:-
  - i. 2 acres be registered in the joint names of **Priscilla Kavini Ndwiwa** and **Kennedy Mawioo Ndwiwa**.
  - ii. 37 acres be registered in the names of **Priscilla Kavini Ndwiwa**, **Kennedy Mawioo** and **John Mbondo Ndwiwa**.
3. The 1<sup>st</sup> Petitioner (**John Mbondo**) filed an affidavit of protest. He averred that the deceased had 3 wives and concubines; He had two (2) assets, Makueni/Kikumini/61 measuring 30 acres and Makindu/Kalii/597 measuring 25 Hectares; prior to 1968 the deceased with his three (3) wives and their children lived on parcel of land Makueni/Kikumini/61; in 1968 he settled his second family, (the 3<sup>rd</sup> Petitioner and her children) on Makindu/Kalii/597; in the year 1998, the 2<sup>nd</sup> Petitioner was registered as the owner of Makindu/Kalii/597. He thereafter stated that the 3<sup>rd</sup> Petitioner and her children should not inherit Makueni/Kikumini/61.
4. Further, he stated that in the year 1995 the deceased subdivided Makueni/Kikumini/61 between him (1<sup>st</sup> Petitioner), his mother and the 3<sup>rd</sup> wife; and according to Kamba Customary Law children born to the 3<sup>rd</sup> wife and her concubines could only inherit property from the 3<sup>rd</sup> wife's 16 acres

- but not the deceased. The two (2) families living in Makueni/Kikumini/61 are settled in their respective portions of land.
5. In answer to the protest the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners stated that the deceased owned only one asset namely Makueni/Kikumini/61. Parcel No. Makindu/Kalii/597 did not belong to the deceased as it belonged to the 3<sup>rd</sup> Petitioner.
  6. Further, they stated that prior to his demise the deceased subdivided Parcel No. Makueni/Kikumini/61 equally amongst his three (3) wives in the presence of his wives, children and the Akitondo clan members. Sisal plants were planted to mark boundaries but the 1<sup>st</sup> Petitioner uprooted them. They called upon the court to confirm the grant of letters of administration intestate in accordance with the proposed mode of distribution set out in the affidavit in support of the application.
  7. At the hearing, in his testimony the 1<sup>st</sup> Petitioner stated that the deceased having been a businessman owned property, parcel of land No. Makindu/Kalii/597 inclusive. Thereafter, in the year 1968 the deceased settled the 2<sup>nd</sup> Petitioner on the said land. He denied an allegation that parcel No. Makueni/Kikumini/61 was subdivided into three. Thereafter the deceased became sick. He met his medical expenses. On being discharged from hospital, he gave him a portion of his land in reciprocation. The remaining parcel was given to his mother and Sabina where she settled with her two (2) concubines and their children who are represented by the 3<sup>rd</sup> Petitioner. He now occupies his portion that he was given by the deceased and the portion that belonged to his mother, now deceased.
  8. On being cross-examined he stated that his father made a decision to leave title deeds for all parcels of land in custody of the 3<sup>rd</sup> Petitioner. He stated that the deceased only subdivided Makueni/Kikumini/61 but not Makindu/Kalii/597 as he had already given it to the 2<sup>nd</sup> Petitioner.
  9. The Protester called **PW3, Muia Kyuli** a witness who was only aware of the Makueni/Kikumini/61 as the deceased's property. It was his evidence that he was present when the said parcel of land was subdivided and the Protester/1<sup>st</sup> Petitioner given 6 acres of land.
  10. Testifying on behalf of the Respondents, the 3<sup>rd</sup> Petitioner **Kennedy Mawioo Ndwiwa** stated that he was present when the deceased summoned all his family members and subdivided the land into three (3) portions which he gave to the three wives. Sisal plants were planted on boundaries set but the 1<sup>st</sup> Petitioner/Protester uprooted them. He also damaged a house constructed on the 2<sup>nd</sup> Petitioner's portion of land. He said that the deceased entrusted him with title deeds and instructed him to divide the land amongst his three (3) wives. After the death of the deceased, he called all family members. The chief presided over the meeting. The chief investigated and found Makueni/Kikumini/61 to be the only asset the deceased left behind.
  11. **Joseph Musyoki**, a son to the 1<sup>st</sup> Respondent/2<sup>nd</sup> Petitioner said that after the deceased divided the Makueni land amongst his three (3) wives, the 1<sup>st</sup> Petitioner uprooted the boundaries set and demolished the house that had been constructed on the 2<sup>nd</sup> Petitioner's portion. His brother who was to stay in the house ran away.
  12. **Katheke Ndwiwa** and **DW4 Musau Ndwiwa** from the 2<sup>nd</sup> house of the deceased and the 2<sup>nd</sup> Petitioner confirmed in material particulars what the Respondent and his other witness stated.

### **Issues for determination**

- i. Whether Makindu/Kalii/597 forms part of the deceased's property
  - ii. Whether the 2<sup>nd</sup> Petitioner and her household are entitled to parcel of land No. Makueni/Kikumini/61.
13. All parties are in agreement that the deceased had three (3) wives. Two (2) of whom he sired with biological children and one who got concubines that sired him children though from other men following Kamba Customary Law. Although in the affidavit in support of Petition for letters of administration, names of other children were omitted. Evidence adduced in court established that the first wife of the deceased **Sabeth Munyiva Ndwiwa** had only one son the 1<sup>st</sup> Petitioner herein. The 2<sup>nd</sup> wife, **Priscilla Kavini Ndwiwa** had three (3) children while the 3<sup>rd</sup> wife, **Sabina**

- Kongu Ndwiwa** had two (2) concubines who sired some 12 children. I have noted that only two (2) names were included in the affidavit in support of petition for letters of administration intestate.
14. Looking at the same affidavit which was sworn by the Protestor/1<sup>st</sup> Petitioner, the 2<sup>nd</sup> Petitioner and 3<sup>rd</sup> Petitioner respectively, the only asset indicated is Land Parcel no. Makueni/Kikumini/61. Per the evidence adduced, it is only the 1<sup>st</sup> Petitioner who stated that Makindu/Kalii/597 belonged to the deceased. PW3, an elder who was purportedly present when the deceased subdivided the Makueni property said he was not aware of the Makindu property.
  15. Per the Official Search Certificate produced in respect of Parcel No. Makindu/Kalii/597, the property that measures 11.25 Hectares belongs to **Priscilla Kavini Ndwiwa**. The date of registration was 9<sup>th</sup> September, 1998. Per the evidence of the 1<sup>st</sup> Petitioner, the deceased died on 10<sup>th</sup> November, 1998. The death certificate issued indicate the year of death. It does not show the date or month of the deceased's demise. There is uncertainty as to when exactly the deceased died.
  16. However, the evidence adduced by 2<sup>nd</sup> Petitioner that she acquired the land through her own means was not controverted. If from the outset the 1<sup>st</sup> Petitioner believed Property Makindu/Kalii/597 belonged to the deceased it could have been included in the list of assets. Without proof that the aforesaid property belonged to the deceased it cannot be eligible to distribution. In the premises the only asset of the deceased's Estate that is available for subdivision is Makueni/Kikumini/61.
  17. Makueni/Kikumini/61 is said to be 39 acres. Out of the said acres the 1<sup>st</sup> Petitioner claims 6 of the acres belong to him as he was given by the deceased. This was in consideration of his good gesture of having taken care of his medical expenses. It was stated that three (3) elders were present, two (2) have since died. The only surviving one is PW3.
  18. In this matter the deceased died intestate. There was neither an oral nor a written will left by him. However the 1<sup>st</sup> Petitioner produced some written documents purportedly written in year 1995. Per the translation the document states that the deceased bequeathed his land to the 1<sup>st</sup> and 3<sup>rd</sup> wife and also gave part of it to the 1<sup>st</sup> Petitioner as a gift. This particular document the 1<sup>st</sup> Petitioner/Protester sought to rely on is not specific on what properties it refers to. The document has a signature allegedly appended by the deceased but it was not attested by any witnesses. The document could only pass to be a wish or intention of the deceased if it had been attested by other people. It therefore lacks characteristics of a will. **(See Section 11(c) of the Law of Succession Act).**
  19. The 2<sup>nd</sup> document adduced bequeaths the 1<sup>st</sup> Petitioner 6 acres of land. It was witnessed and attested by a village elder, clan elder and the family members including a **John Willy** and the 3<sup>rd</sup> wife **Sabina Kongu**. The document bequeaths the 1<sup>st</sup> Petitioner 625 feet in length and width of 670 feet at the back and width of 300 feet at the front. These are dimensions deemed to have been uttered by the deceased. However, it is not clear to which land it refers to. The two (2) documents produced are vague and cannot be relied on by this court.
  20. The deceased was survived by three (3) wives and their children. Section 40 of the Law of Succession Act provides:

***“(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”.***

Following the provisions of the law it is just that the property be divided equally amongst the three (3) houses. I wish to point out that the 3<sup>rd</sup> Petitioner seemingly wants to lock out other beneficiaries of the 3<sup>rd</sup> household. Their interests must be taken into consideration.

21. Parties are directed to file a list of all beneficiaries. This being a family dispute, there shall be no orders as to costs.

**DATED, SIGNED and DELIVERED at MACHAKOS this 10<sup>TH</sup> day of DECEMBER, 2013.**

**L.N. MUTENDE**

**JUDGE**