



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Succession Cause 231 of 2008

IN THE MATTER OF THE ESTATE OF BENJAMIN WAMBUA KALOVOTO (DECEASED)

AND

AMBROSE MUSYOKA WAMBUA

CATHERINE MUTINDI WAMBUA

CAROLINE NDUNGE WAMBUA

TABITHA WAMBUA.....ADMINISTRATORS

VERSUS

WILSON MORRIS WAMBUA.....OBJECTOR

RULING

On 5th May, 2008, **Ambrose Musyoka Wambua, Catherine Mutindi Wambua, Caroline Ndunge Wambua** and **Tabitha Kamene** respectively petitioned this court for a grant of letters of Administration Intestate with regard to the estate of **Benjamin Wambua Kalovoto** who passed on way back on 8th October, 1994. They presented the Petition in their capacities as sons, daughters and widow of the deceased respectively.

Apparently, the deceased left behind a vast estate consisting of movable and immovable assets. The movable assets included shares in Kenya Breweries, Kenya Co-operation, Kenya Commercial Bank and a Tractor KMF 517, Trailer 984. As for the immovable assets, they consisted several parcels of land to wit; Machakos/Kiandani/50, 28, 80, 537, 2722, 3016-3022, 3027 -3051, Kaseve Township, Plot No. 13 and 70 Kithaayoni, Plot No. 1 Kavilila, Plot No. 559 Kinaye, Plot No. 2962 Lukenya and Machakos/ Block 11/561.

The deceased too had a large family consisting of the following;

SONS.

1. Ambrose Musyoka Wambua
2. Selvester Musila Wambua
3. Richard Seke Wambua
4. Wilson Morris Wambua
5. Abed Kalovoto Wambua
6. Jones Mutiso Wambua

DAUGHTERS

1. Catherine Mutindi Wambua
2. Caroline Ndunge Wambua
3. Annastacia Mbatha

DAUGHTERS IN LAW

1. Beatrice Kamene Mbondo
2. Esther Munase Giltoms Musembi
3. Catherine Nzula Munyao

The deceased too left behind a widow, **Tabitha Kamene Wambua** and a granddaughter, **Jackline Koki**.

In due course, a temporary grant was issued to the Petitioners. That was on 1st July, 2008. Soon after the temporary grant was issued, a dispute as expected in such big families arose. **Wilson Morris Wambua** filed an application seeking that the petitioners be restrained from intermeddling and or interfering with the estate and more particularly disposing of, by sale any assets forming part of the estate of the deceased and that the 3rd Petitioner be removed from her a position as an administrator of the estate and substituted him. Apparently the petitioners had commenced the succession cause without consulting him though he was one of the “*senior*” sons of the deceased. Upon obtaining the temporary grant, the petitioners had started intermeddling with the estate thereof by approaching various people asking them to buy some of the assets of the deceased. There was therefore need to preserve the estate, hence his application.

On 14th December, 2009, *Lenaola, J* granted the application in the interim pending *inter-partes* hearing. Subsequently however, on 21st June, 2010, the said application was withdrawn; paving way for the filing of the application for confirmation of grant dated 12th January, 2010. In their schedule of distribution, they indicated that Plot No. Machakos/Kiandani 459 had been subdivided by the deceased in his lifetime into 36 parcels for 3 purposes;

- Agriculture 4 parcels,
- Commercial 4 parcels and,
- Residential 28 parcels.

Of the 36 parcels however, the deceased had sold and transferred 3 of them parcels to the 3rd Petitioner.

Therefore the remaining 33 parcels were the only ones available for distribution as well as the other remaining parcels of land and movable assets. They then came up with an agreed schedule or scheme of distribution. Apparently, all the beneficiaries save for **Wilson Morris Wambua**, agreed with the proposed distribution.

It is instructive that the distribution aforesaid followed a family meeting presided over by the national clan officials of **Atangwa** clan that the deceased, the petitioners and all the beneficiaries of the estate belonged to. Prior to his death, the deceased was a staunch clan leader and adviser to the **Atangwa Clan**. From the minutes of the meeting attached to the affidavit in support of the application for confirmation of grant by the petitioners, the chairman of the clan was **W.N. Waki** and was accompanied by **D.N. Mule**, General Secretary, **David Nzioki Waita**, Committee member and **Albert Ndiso Muinde**, Division chairman at the meeting.

As expected, **Wilson Morris Wambua**, hereinafter "*the protester*" filed an affidavit of protest against the confirmation of the grant on the grounds that the petitioners had intermeddled with estate of the deceased and had failed to account for the proceeds emanating from the sale of some of the properties, there was no evidence that the 3 parcels of land had been sold and transferred to the 3rd petitioner by the deceased in his life time, nor had the deceased prior to his death subdivided Machakos/Kiandani/459 into 36 parcels as claimed. According to him it appeared the same was subdivided post humously in 1996 before the petitioners commenced these succession proceedings. He also deponed that, the petitioners had left out some assets of the deceased in the schedule to wit; Machakos/Kiandani/3022-3024 and Machakos/Kiandani/2723. He objected to **Alex K. Mutua** benefitting from the estate as he was not a member of the family, he objected too, to the proposed sharing of the plots at Kathayoni as the distribution was not equitable. Machakos/Kiandani/3016 had been given to him by the deceased as a gift following his marriage and was therefore not available for distribution. The tractor and trailer had been sold to him on 7th June, 2009 by members of the family and was therefore not available for distribution as he had repaired it solely.

On 21st November, 2011 directions were given by this court that the application for confirmation of grant and protest be heard simultaneously by way of viva voce evidence.

On 27th February, 2012 the hearing of the cause commenced before me. The protester went first. He stated that the deceased was his father. The temporary grant had been issued to his siblings and stepmother. He did not agree with the proposed distribution. Though the deceased passed on in 1994, his land parcel, Machakos/Kiandani/459 was subdivided in 1996 and title closed. This was the basis of his objection to the proposed distribution. Otherwise, he reiterated in his oral evidence what he had deponed to in his affidavit of protest. In the end, he proposed that the entire estate of the deceased be shared equally among his children.

Under cross-examination by **Mr. Ashiruma**, learned counsel for the Petitioners, he conceded that the deceased had subdivided Iveti/Kiandani/455, the predecessor to the suit premises. The sale agreement between the 3rd petitioner and deceased over the 3 parcels of land was fictitious as far as he was concerned. But he had not taken up the matter with the police. Further any search certificates showing that the deceased subdivided Machakos/Kiandani/450 and 273 were equally fake. He maintained that though there was a clan meeting, no decision on distribution of the estate was arrived at. The deceased had no liabilities or arrears on account of land rents and rates. He conceded though that he had put up a nursery school in plot numbers Machakos/Kiandani/3030 & 3031, the same plots allocated to **Alex K. Mutua** whom he claims he does not know. He also conceded having rented Machakos/ Kiandani/28 to a church at a monthly rental of Kshs. 1000/= . He maintained that he bought the tractor and trailer from the deceased and his brother at Kshs. 80,000/= . The tractor had broken down and he had to repair it. Though now repaired, the same was still in the name of the deceased. It was normally hired and he is paid.

With that the protester closed his case.

For the petitioner, the 3rd petitioner testified on her own behalf and on behalf of all the other petitioners.

The deceased was her father whereas the protestor was her brother. In their scheme of distribution, they had taken care of his interest in the estate. The deceased had 2 wives. The protestor and herself were from the 1st house which had 12 children, 5 girls and 7 boys. 2 girls and 4 boys had since passed on. The 2nd house had 4 children, 2 boys and 2 girls respectively. They were all alive. However the 2 wives of the deceased had since passed on. They did not agree with the distribution proposed by the protestor because he had left out some properties such as, Machakos/Kiandani/3019-3036. Before the deceased passed on, he had subdivided Machakos/Kiandani/459 in 1993 resulting in 36 titles. Since Machakos Kiandani no longer exists, it cannot be the subject of distribution. She had bought 3 plots arising therefrom. Those plots could not be the subject of distribution therefor. Out of those plots; she had sold 3032 and 3033 to **Justine Mumbi**. She conceded also that she had sold plot numbers 3030 & 3031 to **Alex Mutua** as well to offset outstanding liabilities due to the estate. She confirmed that the clan had sat and arbitrated on the distribution. An agreement dated 12th October, 2009 was reached. However, the Protester did not attend the clan meeting. She conceded further that plot numbers 2962 Lukenya and 6 Kaseve had not been included as assets of the deceased due to a typographical error. The nursery school had been put up in one of the plots by the protestor without their consent. He did so after the said plots had been sold to **Alex Mutua**. Again the protestor rented out a plot to a church without their consent. In conclusion she stated that the protestor's schedule of distribution had not catered equally all the beneficiaries whereas theirs had achieved that purpose.

Cross-examined by **Mr. Mutia**, learned Counsel for the protestor, he responded that in their petition, they had not indicated any liabilities, consent to subdivide the land had been obtained by the deceased in 1993 and title closed on 16th May, 1996 when the deceased had already passed on. She had disclosed to the Land Registrar that the deceased had passed on when he was processing the transfer of the plots into her name. She was not aware of a court case that stopped the transfer of the plots into her name. She was equally not aware of a court case that had stopped the transfer of some plots to **Justine Mumbi**. She sold the plots to pay bills. The debts were hers.

That also marked close of Petitioner's case.

Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered the same alongside cited authorities.

It is common ground that both the petitioners and protestor have intermeddled with the estate of the deceased. For the petitioners:-

- The deceased left Machakos/Kiandani/459 intact when he passed on sometimes on 8th October, 1994. However, the same was post humously subdivided into 36 parcels and file closed on 16th May, 1996. According to the evidence of the 3rd petitioner, before the deceased passed on he had already subdivided Machakos/ Kiandani/459. However, on the basis of the certificate of official search dated 13th July, 2011 and tendered in evidence, that position cannot possibly be correct. Again from her own evidence she seems to suggest that by the time the deceased passed on, much as he had obtained consents to the subdivision, he had not affected the same. However, she took upon herself to complete the process after the deceased passed on. This was wrong. Once the deceased passed on, the entire parcel of land reverted to his estate in the original form, much as he may have expressed his intention to subdivide the same and taken certain steps to actualise the intention. As long as the intention had not been realised at the time of his death, it remained just an intention upon which the 3rd petitioner should not have taken upon herself to actualise. By so doing, and with the active support of the other petitioners, they intermeddled with the estate and therefore failed in their duties to administer the estate as required.
- The 3rd petitioner too, transferred 3 parcels out of the illegal subdivision into her name. She claims that the parcels of land had been sold and transferred to her by her late father. From the sale agreement dated 20th May, 1993 that she annexed to her reply to the affidavit of protest against confirmation of grant, the said plots were to be hived off from Machakos/Kiandani/459.

As we have already stated, by the time the deceased passed on, the subdivision had not been effected. However, I note that from exhibit 2 tendered in evidence by 3rd Petitioner and which concerns one of the plots –being Machakos/Kiandani/3024, that the title was issued to one **Paul Abuto Omanga**, one of the alleged purchasers on 3rd February, 1998. It does not show that the same was transferred from 3rd petitioner. This would mean that it was a direct transfer from Machakos/Kiandani/459 which was illegal as the proprietor had by then passed on. The same reasoning would apply to the purchase from the 3rd petitioner by one, **Justine Muumbi** in respect of Machakos/Kiandani/3032 & 3033. Indeed in respect of this purchaser, **Wendoh,J** in a ruling dated 4th May, 2005 held that, the alleged sale was doubtful on account of want of consent from the relevant Land Control Board. The suit arose out of a caution placed on the said parcels of land by the protesters. **Justine Muumbi** had sought to have the cautions removed. The application was declined.

- 2 plots Machakos/Kiandani 3030 & 3031 were allegedly sold by the petitioner to one, **Alex K. Mutua** so as to settle debts of the estate. This was done while this petition was pending. Of the alleged debts the petitioners could only account for Kshs. 58,912/= out of Kshs. 500,000/= she received on account of the purchase price. She conceded though that she did not make any application to court.

How about the Protester? He has intermeddled as follows:-

- Constructing a nursery school on Machakos/Kiandani 3030 & 3031. The resultant income does not go to the estate.
- Lease to the church of Machakos/Kiandani/28. Again the income therefrom does not go to the estate of the deceased.
- Taking possession of the Tractor KMF 516 and Trailer Registration No. ZA 984. Although the protester claims to have bought it, he conceded that it is still registered in the name of the deceased and his brother. By his own admission, he leases out the tractor and receives income. To the extent that the tractor and trailer are registered in the names of the deceased and his brother, a portion of it, belongs to the estate of the deceased. The income for the tractor on account of the deceased's share must of necessity come to the estate.

Under section 45 of the Law of Succession Act an intermeddler cannot benefit from his mischief. This court cannot turn a blind eye to the violations of the law by the Petitioners and Protester. It must be corrected. That correction can only be by way of reinstating Land Parcel Machakos/Kiandani/459 to the position it was just before the death of the deceased. Consequently, I would declare the subsequent subdivision of Machakos/Kiandani/459 into 36 titles invalid. In the end I am not persuaded to go along with either the petitioners or the protester. I will nonetheless be guided by the law in the distribution of the estate of the deceased. This means therefore that the proposed distribution by the petitioners and protester both fail

I am of course not without sympathy to **Alex Mutua, Justine Muumbi and Paul Abuto Omanga. Justine Mumbi and Paul Abuto Omanga** would have had their remedy in section 93 of the Law of Succession Act. However, in view of the fact that the transaction were conducted before the 3rd petitioner had been clothed with authority of a person to whom representation had been granted, they will have to seek their remedy directly from her

As for **Alex Mutua**, again the same section does not assist him. Much as he has paid the purchase price or part of it, the plots he bought have yet to be transferred and registered in his name.

With regard to the two other immovable assets of the deceased, there is no much dispute. There are perhaps only 2 disputes. They relate to those that were not included in the petition and who should get what. The first issue is easy to deal with. The petitioners have conceded that plot numbers 2962 Lukenya and Kaseve No. 6 were not included in the list of assets in the Petition due to a typographical error. They

have no objection on the same being included in the list of assets. It is so ordered.

As regards who should get what, this court shall be guided by the provisions of section 38 of Law of Succession Act. It is in these terms-

“...where an instate has left a surviving child or children but no spouse, the net intestate estate 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...”

In this case, both spouses of the deceased have passed on. The deceased left behind several children. Accordingly, the net intestate estate shall be equally divided among the surviving children. The daughters-in-law and or grandchildren of the deceased will of course be given the share that would otherwise have gone to their father or mother if they were the children of the deceased. Where the asset is too small to be shared equally, I would propose that the same should be sold and the proceeds therefrom shared equally.

In short these are the orders I have made in this cause:-

1. The resultant subdivision of land parcel Machakos/Kiandani/459 upon the death of the deceased is deemed invalid. It will revert to its original position.
2. **Alex Mutua, Justine Mumbi and Paul Abuto Omanga** should seek redress from the Petitioners.
3. Plot numbers 2962 Lukenya and Kaseve Plot No. 6 shall forthwith be included in the assets of the deceased.
4. The net intestate estate of the deceased shall be equally divided among the surviving widows and grandchildren the share that would otherwise have gone to their respective husbands and or parents as long as they were children of the deceased.
5. Where an asset is not amenable to such subdivision, the same should be sold and the proceeds thereof shared equally among the beneficiaries.
6. As this is a family dispute, I make no orders as to costs.

RULING, DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of JUNE 2012.

ASIKE – MAKHANDIA
JUDGE