



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Probate & Admin. 263 of 1994

IN THE MATTER OF THE ESTATE OF PETER KIMILU MULIMBI (DECEASED)

GRACE MUMO KIMILU 1ST PETITIONER/ APPLICANT

CHARLES KIMILU 2ND PETITIONER/APPLICANT

VERSUS

PAUL KIMILU RESPONDENT/OBJECTOR

RULING

1. The deceased person herein, Peter Kimilu Mulimbi died on 4/8/1994 and in the Petition filed on 4/11/1994, Grace Mumo Kimilu and Charles Munguti Kimilu stated in Form P & A 5 that the deceased was survived by 2 sons, Charles aforesaid and one Stephen Kioko Kimilu and 4 daughters, Joyce, Elizabeth, Rachael and Margaret as well as Grace his widow aforesaid. A number of properties were also listed but I will return to that issue later.
2. In any event, letters of grant of administration were issued to Grace and Charles on 10/1/1995 (jointly) and on 1/11/1995, the grant was confirmed and Grace Mumo was to inherit three plots viz Nos 80, 82 and 86 comprised in the estate. The confirmed grant was however not issued and on 14/8/1996 one Alice Mua Kimilu sought to have the grant annulled for reasons that the Petitioners failed to disclose that she was also a spouse of the deceased and had six children with him viz Nahashon, Paul, Mary, Katete, Ndulu and Tabitha. She stated in her Supporting Affidavit that Grace and Charles deliberately refused to disclose their existence with the intention of disinheriting them and rendering them landless.
3. On 14/10/1996, Mwera J referred the dispute to elders of Aini Location upon parties so consenting. The elders heard the same and determined that;
 - i. Alice Maua was the deceased's first wife.
 - ii. Grace Mumo was the deceased's second wife.
 - iii. Grace Mumo lied when she filed the Petition and claimed to be the deceased's only spouse.
 - iv. The deceased had prior to his death confirmed to clan and family members that he had two wives.

v. The deceased's properties should be shared equally between the two houses in accordance with Kamba customary law.

4. A joint grant was thereafter issued to both Paul Kimilu and Grace on 14/6/2002 and the earlier one revoked and the only issue left was that of distribution. There are now 2 proposals before court. The first is contained in the Affidavit of Paul Kimilu sworn on 21/8/2008 on behalf of Alice's house (Alice is now deceased). He states as follows:-

"5. THAT since my deceased father had two houses, his Estate must be divided into two equal shares as follows:-

1. GRACE MUMO KIMILU

- i. Land parcel No. 80 Utithini Adj. Section.**
- ii. Land parcel No. 48 Nzaini.**
- iii. One Posho Mill.**
- iv. One weighing machine.**
- v. 4 beehives.**

2. PAUL KIMILU

- buried.**
- i. Land Parcel No. 86 Maanzoni where my mother is**
 - ii. Plot No. 57 fully developed.**
 - iii. Land parcel No. 82 Nzaini.**
 - iv. One weighing machine.**
 - v. 4 beehives.**

6. THAT the allegations that my Mother's House was allocated a Land at KAMBU is not true for that was a Government Land and my Deceased father was only a squatter in a Government Land and the same was taken over (reposed) by the Government.

7. THAT the Plot No. 57 which comprises a shop is a property of my Deceased father, having bought from one WAMBUA KALELI contrary to the allegations that it is owned by my step brother one Charles M Kimilu. (Annexed is a copy of the sale agreement marked PK1)."

5. Grace states as follows in her Affidavit sworn on 19/9/2008;

"8. THAT, before the deceased passed on he had called elders and he did give me the lands in UTHINI and herself and sons were given the lands in Kambu.

9. THAT, the land at Kambu was about 10 Acres and they did go there, but left the land and the same was invaded and taken away by other persons.

10. THAT, I am the one who bought the Posho Mill (attached is a sale agreement marked GKM1).

11. THAT, I am the one who personally purchased Plot No. 57 in Upete Market in the year 1979.

12. THAT, while in marriage I did purchase Plot Nos. 80 in the year 1962, Plot No. 82 in the year 1963, Plot No.86 in the year 1964 and there was no input from the other house.

13. THAT, hence the objectors should not benefit from his estate at all.

14. THAT, the beehives are not there owing to passage of time.”

6. Firstly, Grace’s proposal above is partly unrealistic and partly unreasonable. I say so, with respect, because the elders’ award was that the deceased had two wives and that they were all entitled to inherit the estate. From the record, that award was never set aside and I will use it as a guide to distribution. Secondly, I would in any event, with or without the elders’ award have reached the same conclusion because there is no evidence before me that Alice was ever divorced by the deceased. In fact in her Affidavit sworn on 19/9/2008, Grace at paragraph 6 thereof depones that the deceased married Alice in 1956 but “**separated**” with her in 1960. That admission does not state that Alice was ever divorced and is otherwise not entitled to the estate.

7. Having so said, I note that the posho mill was purchased in Grace’s name and is her private property but since the posho mill was in any event allocated to her, the issue is moot. As for plot No. 57 in Upete Market, Grace states that she personally purchased it but the Sale Agreement regarding the plot shows that although she is the one who paid the purchase money, it was agreed that W Kaleli Musau would sell it to the deceased Peter Kimilu Mulimbi and not Grace and so the plot is available for distribution. It would however be unfair that having participated in its purchase and Alice having nothing to do with the building on it or the business in it, Grace should be denied that asset.

8. There is also no evidence that Grace personally purchased plots Nos. 80, 82 and 86 and in fact in the Petition filed herein she admitted that those assets are available for distribution and so again, her contention that they all belong to her is less than honest. Further, there is no evidence that there is any land belonging to the deceased at Kambu and the fact that other persons now occupy it is indeed evidence that such land does not form part of the deceased’s estate.

9. For all these reasons and following the uncontested decision of the elders and also invoking section 40 of the Law of Succession Act, the estate herein shall be divided as follows:-

i. House of Alice Mumo –

- a. Land parcel No. 86 Maanzoni
- b. Land Parcel No. 82 Nzaini
- c. Land Parcel No. 48 Nzaini
- d. One weighing machine
- e. 4 beehives.

ii. House of Grace Mumo –

- a. Plot No. 57 Upete
- b. Land Parcel No. 80 Utithini Adjudication Section
- c. One weighing machine

and whoever presently has the ox plough will retain it.

10. The above distribution module will mean that each member of each house has an equal share to their

house's share and internal distribution will be left to each individual house and each individual in the house is a unit within the meaning of Section 40 aforesaid.

11. The Application for confirmation of grant dated 15/7/2002 is allowed in those terms.

12. Each party to bear its own costs.

13. Orders accordingly.

Dated and delivered at Machakos this 13th day of May 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Mung'atta for Petitioners

ISAAC LENAOLA

JUDGE