



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

Probate & Admin. 6 of 1995

IN THE MATTER OF THE ESTATE OF KITHIMBA KYAMBO

(DECEASED)

1. ANNA MUNYIVA KITHIMBA

2. ESTHER NZAVWA KITHIMBA RESPONDENTS

RULING ON DISTRIBUTION

1. The late Kithimba Kyambo died on 16/5/1987 at Nairobi and he left behind two widows, Anna Munyiva Kithimba and Esther Nzakwa Kithimba and their children are;

i. House of Anna Munyiva:-

- a. Elijah Mbatha Kusimba
- b. James Maingi Kusimba
- c. Ndila Kithimba

Anna Munyiva has six deceased children.

ii. House of Esther Nzakwa:-

- a. James Maingi Kithimba
- b. Daniel Guy Kithimba
- c. Boniface Kilonzo Kusimba since deceased
- d. Kyambo Kithimba
- e. Wanza Kithimba
- f. Muthiya Kithimba
- g. Mutisya Kithimba

h. Kiluu Kithimba

i. Mwanja Kithimba

2. The deceased from evidence before me also left the following properties registered in his name;

i. L.R. No. Kangundo/Kyevaluki/1175 measuring 0.20 hectares.

ii. L.R. No. Kangundo/Mbusyani/719 measuring 0.50 hectares.

iii. L.R. No. Kangundo/Mbusyani/583 measuring 0.19 hectares.

iv. L.R. No. Kangundo/Mbusyani/438 measuring 3.8 hectares.

3. I have noted that the persons who petitioned for letters of administration to the estate of Kithimba Kyambo on 12/1/1995 were his widows. On 10/3/2008 however Esther Nzakwa denied knowledge of the petition but after the intervention of this court, the family went back to discuss the matter but they failed to reach any agreement and so I ordered each house to file affidavits on how they propose to distribute the estate and later I took evidence from them before retiring to consider the matter.

4. From the evidence, both oral and in affidavit form, I gather that the position taken by Esther Nzakwa Kithimba is that all the assets of the deceased **“be distributed equally among all the children, sons and daughters alike as well as the widows”** – see paragraph 16 of her Affidavit sworn on 18/7/2008. Her son, Daniel Guy Kithimba took the same position although he was more amenable to distribution amongst the deceased’s sons equally as his father allegedly intended.

5. Anna Munyiva Kithimba however took a different position. Firstly, in her affidavit sworn on 24/7/2008, she deponed that title No. Kangundo/Mbusyani/719 does not belong to her husband but I will quickly dismiss that assertion by pointing out that a Certificate of Official Search dated 25/3/2008 clearly indicates that title thereto was issued and registration made in the name of Kithimba Kyambo on 7/7/1979 and that is prima facie evidence that the land is available for distribution as part of the deceased’s estate.

6. Secondly, that titles Nos. Kangundo/Kyevaluki/1175 and Kangundo/Mbusyani/583 though registered in her “husband’s name do not belong to (him) and are not available for distribution.” The reasons for this forceful assertion are to be found at paragraph 6 of her Affidavit aforesaid and also in oral evidence where she states that;

6. “THAT titles No. Kangundo/Kyevaluki/1175, measuring 2 ha and title No. Kangundo/Mbusyani/583 in Maanzoni and measuring 0.194 ha, though registered in my husband’s name, do not belong to my husband and are not available for distribution for the following reasons:-

a. Kangundo/Kyevaluki/1175, was part of a larger portion gifted (after sub-division, became Kyevaluki/1173, 1174 and 1175) to me by my mother in law, Kiluu Kyambo (deceased), and who in turn had been gifted the said land by her father Muloki (deceased). It is further to be noted that the other beneficiaries of the same land gifts from my mother in law are the following:-

i. Mutile Ngalama (deceased) wife to my husband’s elder brother, Ngalama Kyambo deceased. The current occupant of the land (part) (Kangundo Kyevaluki/1173) is my nephew, Kaunge Ngalama, (Son to Ngalama Kyambo) (deceased). The other part is owned by the wife of Kaunge Ngalama’s elder brother (deceased), Ndindi Muithya.

ii. Portion No.1174 was gifted to Kalekye Nzioka wife to my mother in-law last son, Nzioka Kyambo (deceased). The same was sold to Daniel Guy Kithimba, my co-wife’s elder son.

b. Kangundo/Mbusyani/583 was also part of a larger portion gifted to me by my mother in law and which land belonged to her husband, Kyambo Ngai (deceased), and which larger portion was divided into

three (currently Kangundo/Mbusyani/583, 554, & 585) and other original beneficiaries being the same as in Kangundo/Kyevaluki/1175. Currently, all portions have since been sold off to other persons, not being family members.”

7. I will similarly and very quickly dismiss that assertion because the Certificate of Official Search dated 1/4/2008 shows that title number 1175 was registered on 9/1/1985 in the names of Kithimba Kyambo and title Number 583 was registered on 7/7/1979 in the same names. She explained this fact by saying that she never claimed the land during the demarcation process because women are fearful in front of their husbands. That may well be so but Section 34 of the Law of Succession Act provides as follows:-

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

8. This court while appreciating the difficulties that women face in acquisition of property generally nonetheless cannot accept the proposition that free property of a deceased person, properly registered in his name should be inherited by only one of his widows because of an unsubstantiated assertion that the deceased’s mother bequeathed the property to her but her husband had it registered in his name. Without proper evidence being led on the issue and probably the deceased’s title cancelled, I hold that the two properties as is No.1175 are all part of the deceased’s estate and are available for distribution as such.

9. In evidence, Anna Munyiva Kithimba made a rather startling closing statement; that if the properties above are taken away from her, she will invoke the dreaded Kamba “**kithitu**” oath to the detriment of the beneficiaries thereof. I can only say that the oath, curse or whatever else it may be, has no influence when the law is properly invoked as I have done above and I leave it to those affected to deal with the world of mythology and tradition at their own instance. I digressed but all the assertions by Anna Munyiva, her sons Elijah Mbatha and James Maingi are untenable in law, attractive as it seems it may be to them.

10. Having held as I have that all the properties of the deceased as outlined above are available for distribution, then Section 40 of the Law of Succession Act automatically comes into operation. That section provides as follows:-

“40. (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.”

11. From the evidence before me, although properly entitled to the estate, the deceased’s daughters have expressed no interest in the deceased’s estate but having heard Daniel Guy Kusyimba and Elijah Mbatha Kusimba, I think that the family is in agreement that the sons should inherit the land to the exclusion of married daughters who in any event can inherit their mothers’ portions of the land. In applying Section 40 above, I am reminded of the words of Omolo J.A in **Rono vs Rono 2004 e KLR** that Section 40 is not cast in stone and the court should apply it depending on the circumstances obtaining in each case. I agree because some of the parcels of land in this estate are too small to be viably shared out amongst the many beneficiaries and for that reason I shall order distribution as follows:-

i. Title No. Kangundo/Mbusyani/438 should be shared equally between all the sons of the deceased in equal shares so that the 7 of them each get 0.5 hectares or thereabouts.

ii. Title No. Kangundo/Mbusyani/719 measuring 0.50 hectares should be inherited by Anna Munyiva Kithimba.

iii. Titles Nos. Kangundo/Kyevaluki/1175 and Kangundo/Mbusyani/583 measuring in

total 0.39 hectares to be inherited by Esther Nzakwa Kithimba because by fact of having more sons, her house would have inherited a large portion of title No.438 and her house holding is reduced by 0.10 hectares.

12. The above distribution module is the fairest, equitable and lawful way to put an end to the acrimony obtaining in the Kithimba family. I am well aware that Elijah Kithimba and his mother Anna Kithimba may have “**sold**” part of title number 583 and 453 to Noah Kivuvo and Muinde Mbingu. Those actions were illegal under Section 45 of the Law of Succession Act and can attract both a fine and a prison sentence to the two of them. They should forthwith refund monies received and in any event within the next 60 days failure to which legal sanction will be imposed.

13. In the event, the grant herein as prayed in the Application dated 10/8/2006 is confirmed in terms above.

14. Costs shall be in the cause.

15. Orders accordingly.

Dated and delivered at Machakos this 15th day of October 2008.

ISAAC LENAOLA

JUDGE

In presence of: All beneficiaries

ISAAC LENAOLA

JUDGE