



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 142 of 1998 1654 of 1999

IN THE MATTER OF CHARLES MUHORO KIONGO (DECEASED)

MARIA WAIRIMU MUHORO.....PETITIONER

VERSUS

FRANCISCA MATOLO KAMANTHE.....OBJECTOR

RULING

This matter first came up before me on 03.04.06 whereat the petitioner was represented by learned counsel, Mr P. M. Wamae while learned counsel, Mr G.M. Muhoho appeared for the objector representing Master Kevin Kiongo, a minor. Counsel for the parties informed the court that the parties were negotiating apportionment of the deceased's estate. At the parties' request, the case was fixed for mention on 24.05.06 with a view to the parties recording consent on mode of distribution of the estate.

On 24.05.06 the parties' counsel appeared before Rawal, J and informed her that the quantum of liability and details of deceased's assets were agreed; that valuation reports were with the parties and that the reports were agreeable; and that the distribution of the assets is the only issue to be determined; and that it would be determined by submissions only. The parties were directed to take a hearing date at the Registry.

Eventually the case came up for hearing before me on 12.07.06 whereat the parties were represented by the same lawyers. Mr Wamae for petitioner informed the court that all evidence relied on by the parties was on record; that valuation of deceased's properties had been done as ordered by the court; and that the parties wished to file written submissions as follows:-

- a) Objector to file written submissions by 14.07.06;
- b) Petitioner to file replying submissions within 7 days of service.

Petitioner's counsel asked for mention on 26.07.06 to confirm compliance with the above proposals and for the court to give a date for Ruling. Mr Muhoro for objector concurred in the above proposed arrangement.

At the mention on 26.07.06 Mr P.M. Wamae continued to represent the petitioner while Mr D. Njogu held brief for Mr G.M. Muhoro for the objector. Mr Wamae informed the court that the objector filed her submissions on 14.07.06 while the petitioner filed hers on 21.07.06. The court noted that while the objector's submissions were available in the file, those of the petitioner were not and the petitioner's counsel asked that the latter submissions be traced at the Registry and put on file or if not traced he would furnish a copy thereof from his office.

On the same date, i.e. 26.07.06, petitioner's counsel also informed the court that he had just been served with written response by objector's counsel to the petitioner's submissions of 21.07.06. According to petitioner's counsel, the objector's written response filed on 26.07.06 was unprocedural and not in accordance with the order of the court given on 12.07.06 with consent of the parties and that the said response should be expunged from the court record. Alternatively, petitioner's counsel asked that if the court decided that the objector's response filed on 26.07.06 be made part of the proceedings in this case, he should be given time to study it and take instructions with a view to filing further submissions thereon. Mr Njogu holding brief for objector's counsel replied that his instructions were limited to taking a date for Ruling. At this juncture the court directed that the petitioner's written submissions of 21.07.06 which were not in the file be traced at the Registry and put on file or if not traced, petitioner's counsel to furnish a copy thereof. The case was fixed for mention on 27.09.06. On this latter date the petitioner's submissions were still not on file and petitioner's counsel promised to furnish a copy. Ruling was fixed for 18.10.06 but the next time the case came up was on 26.10.06 when the court drew attention to another missing document, i.e. a valuation report by Mr P.E.N. Ngugi of Messrs Pinnacle Valuers Limited on the deceased's estate.

On 07.11.06 objector's counsel informed the court that he had handed in the valuation report in 5 volumes on 02.11.06 to the Registry. Petitioner's counsel asked for time to verify whether the report handed in by objector's counsel to the Registry was the one referred to in the petitioner's submissions. On 15.11.06 petitioner's counsel confirmed to the court that he had verified the report availed to the Registry by objector's counsel and that it was in order. Ruling was fixed for 29.11.06 but the file seems to have been erroneously returned to the Registry and got misplaced there until April, 2007.

I have now had a chance to study the relevant documents.

The first thing I wish to note is that on 26.07.06 I recorded that I would allow the objector's 'Response to Petitioner's Submissions' to remain on file for consideration and gave the petitioner 7 days to file and serve further submissions in answer thereto. Secondly, that at the mention on 27.09.06 petitioner's counsel said he had not found it necessary to file and serve further submissions in answer to the objector's response to the petitioner's submissions of 21.07.06. Thirdly, that the objector's 'Response to Petitioner's Submissions' said to have been served on petitioner's counsel on 26.07.06 is not in the court file. All there is in the file is petitioner's comments on it filed on 26.07.06. It would, however, appear from petitioner's said comments that the objector had in her 'Response to Petitioner's Submissions' raised issues relating to properties Nairobi/Block 72/175 and Nairobi/Block 60/231 denying they were owned by the petitioner and deceased as tenants in common in equal shares and insisting that they belonged to the deceased solely.

On 10.07.07 I had this matter mentioned before me after mention notice was duly sent to both parties' advocates. The petitioner was represented at the mention by learned counsel, Mr. C.W. Wamae while the objector was represented by learned counsel, Mr G.M. Muhoro. I drew the parties' advocates' attention to the fact that the objector's response alluded to in the petitioner's communication dated 25.07.06 headed 'Response to Petitioner's Submissions' is not in the court file. Petitioner's counsel pointed out that the objector's response alluded to in the subject communication was filed without the court's leave and submitted that even if the said response was in the file, it should be expunged therefrom. Objector's counsel conceded that he indeed filed the response to petitioner's submissions without leave but nevertheless urged that if the response and supporting documents were in the file, they should be considered as 'they form part of the assets.' I note, firstly, that the objector's response to the petitioner's submissions was filed without the leave of the court and that the petitioner objects to the said response being taken into account by the court in determining the matters in controversy herein. Secondly, the said response is not in the court file – it was, as it were, sneaked in. I ignore the said response, which in any event does not exist in the file.

I now consider the written submissions on record.

Objector's submissions

The objector, Francisca Matolo Kamanthe is the mother of Master Kevin Kiongo Muhoro, a minor gotten through an association between the objector and the deceased herein not amounting to marriage. The High Court (Koome, J) earlier on found and declared Master Kevin Kiongo Muhoro to be one of the heirs to the estate of the deceased, Charles Muhoro Kiongo. Valuation had been done to show the extent of the deceased's known assets with a view to determining the share of each beneficiary. According to the objector, the deceased's assets amount to Kshs.40,273,100/=. She put the figure of heirs to the deceased's estate at 6 and divided the value of the assets by 6 to arrive at a figure of approximately Kshs.6,713,000/= per heir. Objector's counsel submitted that Master Kevin Kiongo Muhoro is entitled to Kshs.6,713,000/=, being 1/6th of the accumulated figure of Kshs.40,273,100/= arrived at as follows:-

1. Admitted value :Kshs.20,273,100/=
 2. Rents for two plots housing school: Kshs.2,000,000/=
 3. Directors income : Kshs.5,000,000/=
 4. Tea sales : Kshs.3,000,000/=
 5. Undeclared incomes from
schools & security firm :Kshs.10,100,000/=
- TOTAL :Kshs.40,273,100/=.

According to the objector, the value of the deceased's shares in Eveready Security Guards (Company Limited) amount to Kshs.10,400/= and that Master Kevin Kiongo Muhoro is entitled to 1/6th thereof amounting to Kshs.1,733/=. The objector worked out the deceased's shares in Lang'ata Junior (Academy) at 50, 1/6th of which amounts to 8 shares, which should go to Master Kevin Kiongo Muhoro. Objector's calculations are that Master Kevin Kiongo Muhoro's entitlement from deceased's shares in Eveready Security Guards Company Limited is Kshs.1,733/= plus 8 shares in Lang'ata Junior Academy.

It is the objector's contention that the petitioner currently holds the titles to parcels of land Nairobi Block 60/231 and Nairobi/Block 72/175 in absolute proprietorship. These two properties have been valued at Kshs.4,200,000/= and Kshs.10,000,000/=:, respectively, totaling Kshs.14,200,000/=. The objector contends that the petitioner must have spent all the income from the estate on herself and her children while Master Kevin Kiongo Muhoro has been advanced only Kshs.130,000/= since the deceased's demise over 11 years ago. The objector contends that Master Kevin Kiongo Muhoro should alone inherit:-

- Magutu/Ragati/278 valued at Kshs.1,750,000/=
- Magutu/Ragati/250 valued at Kshs.1,050,000/=
- Kshs.2,800,000/=

- All shares in Eveready Security Co.
- 8 shares in Lang'ata Schools.

The objector adds that since the shares were said to be of no value, Master Kevin Kiongo should get further contributions of Kshs.3,913,000/= from the others (being the difference between his entitlement of Kshs.6,713,000/= and the combined value of Magutu/Ragati/278 and Magutu/Ragati/250 of Kshs.2,800,000/=) to adjust his share to Kshs.6,713,000/=.

Petitioner's Submissions

In the petitioner's calculations, the deceased's assets amount to Kshs.18,025,000/= while the liabilities amount to Kshs.15,734,344/85 and that, therefore, the net value of the deceased's estate is Kshs.2,290,655/15. The petitioner's counter-proposals are summed up in the last paragraph of her counsel's written submissions, to wit:

'In conclusion the only proper manner for ascertaining one-sixth (1/6) of the value of the intestate's estate, which as stated above is Kshs.2,290,655/15, (is) by dividing the said sum by six (6). The result is Kshs.381,755.90. In our humble submissions, suitable adjustments should be made onto this sum to cater for inflation, potential appreciation of the real estates, and all other benefits that could accrue to those beneficiaries whose shares will not be converted into money. Taking all these positive probabilities into account we submit that a sum of Kshs,1,00,000/= would be reasonable, fair and adequate apportionment to Kevin's of his share out of the intestate's estate. This in effect means appreciating the total value of the estate to a sum of Kshs.6,000,000/= which said sum very much approximates to that sum that would be arrived at by adding back a sum of Kshs.3,913,000/= that the objector's advocate submits should be included as part of the estate vide the last paragraph of his submissions at page 6 thereof. We urge this Honourable Court to make a finding that the value of Kevin Kiongo Muhoro's share in the intestate's estate is Kshs.1,000,000/= being one sixth (1/6) share thereof at the enhanced net value of the estate to Kshs.6,000,000/= after taking into account in Kevin's favour all the positive probabilities as aforesaid. We pray that payment of the said sum be stayed for six (6) months provided that some initial payment may be ordered to cater for the immediate needs of Kevin and the balance thereof be invested in such manner as this Honourable Court may deem fit as Kevin, being a minor, is a ward of court.'

I have given due consideration to the rival submissions of the parties.

In the petitioner's counsel's written submissions dated 21.07.06, he identified the issue for my determination as being whether certificate of confirmation given to the petitioner on 22.11.99 should be issued. There is no specific rejoinder from the objector on the issue. I answer the issue in the affirmative, with the PROVISIO that the mode of distribution of the deceased's estate should include Master Kevin Kiongo Muhoro as one of the beneficiaries and to get one-sixth (1/6) share of the deceased's estate.

The petitioner maintains that the deceased's estate has assets worth Kshs.18,025,000/= and liabilities amounting to Kshs.15,734,344/85, which leaves the net value of the estate as Kshs,290,655/15. On the other hand, the objector maintains that the value of the estate is in the region of over Kshs.40 million including undisclosed incomes from security and security firm. With regard to the security firm, I note that although shares in Eveready Security Guards Company Limited were indicated by the petitioner as being of no value, balance sheets availed to the court show that for the year ended 31.07.02 the company incurred loss of Kshs.79,003/= but made a profit of Kshs.115,544/= for the year ended 31.07.03. It does not, therefore, seem to be a totally valueless company.

The petitioner seems to be the one who was living in physical union with the deceased prior to his death while the objector apparently waited in the wings. The petitioner had the advantage of having, or being in a position to have, ready access to title documents relating to properties deemed to constitute the deceased's estate. Master Kevin Kiongo Muhoro, a minor, is an innocent off-spring of the objector's loose association with the deceased while the deceased lived. The records of properties availed to court and ascribed to the deceased may not be comprehensive but they are useful as a rough guide of what Master Kevin Kiongo Muhoro should expect from the deceased's estate. I take cognisance of the fact that Kevin is a minor and needs tender care and reasonable provisions to facilitate his wholesome upbringing, with a future to look forward to. The deceased seems to have doubled up as a landlord and businessman. It is the principal concern of business to make profit but it sometimes also incurs loss. The disclosed landed properties the deceased owned or at least had an interest in are:-

- a) Magutu/Ragati/250 in Nyeri District valued at Kshs.1,050,000/=.
- b) Magutu/Ragati/278 in Nyeri District valued at Kshs.1,750,000/=.

- c) Magutu/Gathehu in Nyeri District valued at Kshs.1,025,000/=.
- d) Nairobi/Block 60/231 in Nairobi valued at Kshs.4,200,000/=
- e) Nairobi/Block 72/175 in Nairobi valued at Kshs.10,000,000/=.

These landed properties have a total value of Kshs.18,025,000/=. If you divide this figure among the 6 beneficiaries, Kevin's one-sixth(1/6) share comes to around Kshs.3,000,000/=. Land generally appreciates in value.

Doing the best I can with the incomprehensive data availed to court, I make the following orders, based principally on the landed assets:-

The objector is awarded:-

1. Land parcel Magutu/Ragati/250 measuring approximately 1.17 Hectares (2.89 Acres) together with all structures and tea bushes thereon valued at Kshs.1,050,000/=, free of encumbrances.
2. Land parcel Magutu/Ragati/278 measuring approximately 1.94 Hectares (4.79 Acres) together with all structures, wattle trees/bushes and tea bushes valued at kshs.1,750,000, free of encumbrances.
3. Kshs.500,000/= from the deceased's estate for start-up maintenance expenses for Master Kevin Kiongo Muhoro.
4. Expenses for freeing the landed properties at 1 and 2 above from encumbrances shall be met from the deceased's estate.
5. The objector shall hold the properties awarded to her hereinabove in trust for the minor Kevin Kiongo Muhoro.
6. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 25th day of July, 2007.

B.P. KUBO

JUDGE