



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

**Prob & Admin Cause 23 of 1993**

**IN THE MATTER OF THE ESTATE OF RUTH ELIJAH KITUKU - DECEASED**

**VERSUS**

**RODAH MUTIO NDAMBUKI ..... APPLICANT**

**RULING**

This cause was filed on 2/2/1993, in respect of the Estate of the late Elijah Ndambuki, who died on 17/8/1979, at Kenyatta National Hospital. The petitioners were:

1. Moses Muasya Ndambuki
2. Charles Kieti Ndambuki
3. Judah Ndambuki

Grant was issued to the three but an objection was raised and an application for revocation was filed on 23/8/1995 by Mutua Ndambuki. Mr Muhoro, Advocate came on record for the petitioners whereas Mr Makau Advocate was appointed to act for the objectors. On 17/7/96, by consent of the parties, it was agreed that the following do administer the deceased's estate:

1. Moses Muasya Ndambuki
2. Amos Mutua Ndambuki
3. Mathew Matu Ndambuki

The grant issued to the three is dated 28/2/01. This matter continued to remain dormant until on 23/4/01 when Judah Ndambuki, a son of the deceased applied that Moses Muasya Ndambuki be removed from administering the estate and be replaced by Judah Ndambuki. On 17/1/02, this court allowed that application allowing Judah Ndambuki to take over as one of the administrators in place of Moses Ndambuki. The court granted the application as it was unopposed as the estate had not been administered for five years and was likely to be wasted. Earlier on 10/5/00, the parties had agreed to have the matter go for arbitration but two awards had been filed and parties did not agree and the court then ordered that the matter do proceed for hearing by way of viva voce evidence on distribution.

On 19/2/02, by consent, the parties agreed to proceed with the application dated 13/1/1999 by way of viva voce evidence on distribution and ascertain of who the administrators were. The matter was adjourned severally and on 15/12/02, the court ordered that if the petitioners did not pay costs for 26/9/02, they

would not be heard. The petitioners did not comply with that order and the court ordered the objectors to present their case and petitioners were not allowed to tender evidence. The matter was partially heard and on 20/3/03, Mr Mulwa, appeared for the petitioners, said the costs had been paid and wanted the ex parte proceedings set aside and he was asked to put in a formal application to set aside the proceedings.

The application to set aside the ex parte proceedings was filed by Mr T.M. Muli, but on 5/6/03, the application dated 28/3/03 was struck off for being incompetent as it had been filed by counsel who had no practicing certificate. This matter came up for hearing severally and the petitioners were given a last adjournment and the case was to be heard on 19/11/03. The then trial Judge was no longer at Machakos High Court and despite that delay in the matter being set down for hearing, the petitioners did not file any other application to have the ex parte proceedings set aside, nor did they pay the outstanding costs as ordered by the court. When this matter came up for mention, it was ordered that the matter do proceed for further hearing ex parte. This was of course after several mentions.

As per Form P & A 5, there were a total of 13 heirs inclusive of the 3 administrators who form part of the estate of Elijah Ndambuki.

Properties forming the deceased's estate were:

Mitaboni Parcel No.1414

Plots 12, 13 Tala Market

Mitaboni Parcel Nos. 1401, 3166. In the application for confirmation dated 13/1/99, Moses Muasya Ndambuki, swore an affidavit in which he proposed how the deceased's estate was to be distributed. At paragraph 5 of the affidavit it was proposed that Plot No.1414 Mitaboni adjudication Section be shared equally amongst the 13 heirs; that plots No. 12 and 13 be registered in the names of Judah Ndambuki as trustee for all the 13 heirs. There was no mention of Mitaboni 1401 and 3166 and how it was to be distributed. The heirs did not agree on this mode of distribution and that is why a consent was entered into for the parties to go to arbitration. Again that did not work as the parties came up with two different awards.

On 8/3/02, G.M. Muhoro filed an application for confirmation amongst other prayers. In the affidavit of Amos Mutua Ndambuki, it was proposed that Tala market Plot No. 12 be registered in equal shares in the names of Amos Mutua, Moses Muasya and Mathew Matu Ndambuki. Plot 13 was to be distributed likewise; that plot Mitaboni/Kathiani/1414 which was about 67 acres was to be shared as follows:

- |            |                                |          |
|------------|--------------------------------|----------|
| 1.         | Mathew                         | Matu     |
|            | Ngove                          | Ndambuki |
|            | Michael                        | Maithya  |
| (25 acres) |                                |          |
| 2.         | Amos Mutua Ndambuki – 12 acres |          |
| 3.         | Moses Muasya                   |          |
|            | Priscilla Mathei Mbithi        |          |
|            | Charles Kieti                  |          |
|            | Judah Ndambuki                 |          |
|            | Titus Wambua                   |          |
|            | John Kituku                    |          |

**(30 acres)**

4. Land Parcel Mitaboni/Kathaana/1401

Jacob Kioko Ndambuki

Musyoka Kioko

Pius Ndeti Mutua

**(14 acres)**

According to the deponent that is what the family had agreed on.

In opposition to the above mode of distribution, Judah Ndambuki swore an affidavit dated 29/1/02 on behalf of the 2nd house of Ruth Nzula which he claimed to represent except one Moses Muasya who did not accept that he represents them. He identified the same assets as identified earlier save that he added that he is owed 503,888/= by the deceased's estate which he incurred in repairing and renovating plots 12 and 13 at Tala market. He also deponed that the 3rd house had illegally sold plot 13 B without the court's leave and that him and the 2nd house proposed that distribution be as follows:

1. Mitaboni/Mitaboni 1414 – each individual to continue to occupy the portion of land which he occupies and cultivates.
2. Mitaboni/Mitaboni/1401- to be inherited by Jacob Kioko.
3. Plot 3166 to go to Philip Mbithi Ndambuki.
4. That plot No. 12 Tala be sold to pay off debt to Judah Ndambuki and if any balance is left, then heirs do share equally.
5. Plot No. 13 A and 13 B be sold and proceeds be shared equally.

The objectors went ahead to give viva voce evidence and a total of 4 witnesses were called.

PW1, Judah Ndambuki Kituku, recalled that his father Elijah Kituku had three wives:

1. Rodah Mutio Ndambuki - deceased.
2. Ruth Nzula Ndambuki - deceased.
3. Naomi Mutio Ndambuki – 3rd wife who is still alive.

The deceased had 12 sons and 5 daughters all married. The deponent belongs to the 2nd house. Each of the three administrators were drawn from each house. He identified the deceased's estate. He recalled that even before the death of their father they were all living on plot No. 1414 where each had a portion to cultivate and that they shared that plot on 9/11/98 and recorded in a family book. He produced a copy of an extract from the said book as he said Moses Muasya has the original. The agreement is dated 9/11/98 and signed by the 11 sons of the deceased. He said that each person was also given a portion of the area where the dam is situate and he produced a map of the land as Exhibit No. 1 (b) which details the sub divisions of the plot and the swampy area near Kathaana River. He further said that plot 1401 was subdivided and became plots 1401 and 3166 which went to Jacob Kioko and Philip Mbithi respectively. According to PW1 there is no dispute over plot 1414.

As regards plot No. 13, PW1 testified that it had been unserviceable and they agreed on 15/2/88 that he reconstructs it which he started on 12/3/1988 till 1/4/1989 and he spent a total of Kshs.235,620/=. He

produced a book which PW1 says they all signed. It was produced as Exhibit No. 2 a and b. I have seen the agreement with 11 signatures of the deceased's sons. He put up six rooms at the back of plot 12. He produced as Exhibit No. 3 a and b cost of repairs. They did all accounts on 15/1/96 and the total was 243,380.00.

He produced a copy of the agreement where they agreed that PW1 does repairs and they would refund. It is dated 2/2/95 and signed by 12 heirs. On 15/3/98, he said that they did the accounts of what he had spent on repairs and it totaled Kshs.503,888.00. He produced the said accounts signed by Mwenga, Titus, Mathew and PW1. He said that he was supposed to be paid from the rents from the plots but Amos collects rent while the tenant in the butchery claims to have bought it from Mutua Ndambuki. He requests that plot 12 do remain with him till the money is recovered. PW2, Titus Mutua one of the heirs reiterated PW1's evidence and confirmed that the heirs agreed on 15/2/1988 that PW1 would renovate the plots at Tala and that Kisingu witnessed that agreement. PW3 Stephen Kisingu identified his signature on Exh. 5 (a) in which it was confirmed PW1 had spent Kshs.243,289/= on repairs of plot 12 and that it would be refunded. The other signatories were Daniel, Jacob Kioko and Judah (PW1). PW3 had no idea whether PW1 had been paid or not.

PW2 denied that PW1 has been paid the costs he incurred and suggested that PW1 be paid from rent received from the said plot.

PW4 Henry Ndunga, the District Surveyor, Machakos was requested by counsel for the objector to visit the deceased's estate and ascertain the sizes of the plots forming the estate. He found as follows:

Plot 1401 – 0.95 acres

Plot 1414 – 47.93 acres

Plot 3166 – 1.2. acres.

The surveyor's report was produced as Exhibit No. 10. I have carefully considered all the record and given a brief history of this matter. Though it proceeded to hearing ex parte, I have considered the pleadings filed by petitioners and the objectors.

Plot No. 1414, said to be 47.93 acres forms the biggest asset of the deceased's estate. In the first application for confirmation dated 13/1/99, the administrators wanted it shared equally amongst the heirs. In a later application dated 8/3/02, Amos Mutua Ndambuki, suggested on how that plot was to be shared. I have already alluded to it above but there is no harm in repeating it here. He suggests that:

Mathew Matu Ndambuki

Ngove Ndambuki

Michael Maithya

**(25 acres)**

to share 25 acres:

i. Amos Mutua to get 12 acres

ii. Moses Muasya

Priscilla Mathei Mbithi

Charles Kieti

Judah Ndambuki

Titus Wambua

John Kituku

*(to share 30 acres)*

He further suggested that Jacob Kioko, Musyoka Kioko and Pius Ndeti Mutua share plot 1401 which he indicated was 14 acres but from the measurements of the District Surveyor in his report Exhibit No. 10, Plot 1401 is only 0.95 acres and could not possibly be shared as suggested by Amos Ndambuki. Amos Ndambuki did not give the basis or reasons for this mode of distribution. What is notable is however that he was supposed to get the biggest chunk of 12 acres from that plot unlike all others.

On the other hand, PW1 deponed that plot 1414 had long been distributed during the lifetime of the deceased and each heir was given a place to cultivate. A follow up was made on 9/11/98 when a proper distribution was done and that distribution was recorded in a book produced as Exhibit No. 1 (a) written in Kikamba with the translation into English Exhibit 1 (b) and it was signed by all heirs. He wants that plot to be distributed in the same terms. This court has not received any evidence to the contrary. The distribution by Amos is baseless and unreasonable as it seems it favour only him most and I will agree with PW1 and 2 that plot 1414 be distributed as per the agreement of the family members and each heir to remain in his plot plus part of the dam allocated to each.

In the initial application for confirmation dated 13/1/99 it was suggested that plots No. 12 and 13 be registered in the names of Judah Ndambuki, as trustee for all the heirs.

However, in a later affidavit by Amos Ndambuki, he suggests that plots No. 12 and 13 be registered in equal shares in the names of the three administrators, Amos Mutua, Moses Muasya and Mathew Ndambuki. On the other hand, PW1 has testified that he has spent about 503,888/= in renovating the said plots with the consent of the other heirs. He has not recovered the said monies and that is why he suggests that it be sold so that he is paid the 503,888/=. As for plot 13 B he claims that the 1st and 3rd house purported to have sold it to a 3rd party but that sale if any is null and void because these houses lacked the capacity to deal with the deceased's estate. The administrators could have sold the plot with the consent/leave of the court. That was not the case. The plot therefore still forms part of the deceased's estate. PW2 corroborated PW1's evidence that indeed PW1 incurred expenses which have been tabulated and the other heirs are aware of that fact.

PW1 produced Exhibit 4 (a and b) 5 (a & b) and 7 as evidence that he renovated the plots and the amounts spent. That evidence is not controverted as there has been no evidence to the contrary. PW1 (objector) has a special interest in the plot 12 and 13 as a creditor and that has to be paid during distribution. By the very fact that this case has dragged for so long because the heirs cannot agree, it is unlikely that they will be able to repay PW1 for the money spent on renovations on plots 12 and 13. The court will still give the heirs an option to pay PW1 forthwith or sell plot 12 to offset the objector's debt of about 500,000/=. Payment should be within 3 months of this ruling failure which the plot should be sold and the proceeds be applied to the debt owed to PW1, Judah Ndambuki.

As regards plots 13 A and 13 B, I do agree with PW1's suggestion that the same be sold and proceeds be distributed because the heirs are unlikely to agree. It seems some are taking advantage of each other and without consensus it will be difficult to manage that plot if it is owned jointly.

The application dated 13/1/99 never took into account plots 1401 and 3166. Similarly the application by Amos Ndambuki did not take into account plot 3166 and totally misled the court on the size of the plot 1401. PW1 and 2 testified that that plot had been given to Jacob Kioko and Philip Mbithi. I believe the two were given these plots when plot 1414 was shared out and they must have been given those plots with the distribution of plot 1414 in mind. The sizes are very small and there is no suggestion that they be interfered with. The two plots 1401 and 3166 should remain with Jacob Kioko and Philip Mbithi.

All in all, I find no evidence to controvert that of PW1 of PW1, 2, 3 and 4. PW1's suggested mode of distribution is supported by PW2 is reasonable and workable. All circumstances of the case considered, I do hereby order that the deceased's estate be distributed as above and the grant issued to Judah Ndambuki, Amos Mutua and Mathew Matu Ndambuki, is hereby confirmed in those terms. Each party to bear their own costs.

**R.V. WENDOH**

**JUDGE**

**Dated at Machakos this 22nd day of September 2005**

**R.V. WENDOH**

**JUDGE**