



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Prob & Admin Cause 164 of 1999

**IN THE MATTER OF THE ESTATE OF MWAILU MUISYO
DECEASED**

VERSUS

MARY MUTUNGWA MWAILU

MUNANY'E MWAILU

ARON MUISYO MWAILU PETITIONER

VERSUS

MBINYA KASIMU MWAILU OBJECTOR

RULING

The petitioners herein, Mary Mutungwa Mwailu, Munany'e Mwailu and Aaron Muisyo Mwailu, filed an application for grant of letters of Administration in respect of the estate of the Late Mwailu Muisyo, on 30/4/84. The deceased died intestate on 18/8/04 at the age of 75 years.

On 17/6/99, grant of letters of Administration Intestate were issued to the three petitioners; Mary Mutungwa Mwailu and Munany'e Mwailu are wives of the deceased whereas the 3rd petitioner is the son of the deceased.

On 8/11/99 Mbinya Kasimu Mwailu, a wife to late Kasilu Muisyo, who was the son of the deceased and therefore a daughter in law of the deceased Mwailu Muisyo, filed summons for revocation and annulment of grant under Section 76 of the Law Succession Act and Rule 44 of Probate & Administration Rules. The said revocation/annulment was sought on grounds that the grant of letters of administration was obtained fraudulently, that the grant was defective and true facts were concealed from the court. The application was filed by Makau J.A as counsel for objector and on 18/1/00 Mrs Nzei came on record for the petitioners. Later on 22/1/03 the petitioners filed notice of intention to act in person.

On 26/4/00, the petitioners filed an application for confirmation of grant. In that application, it was proposed that the deceased's Estate be registered in the names of the two widows of the deceased, Mutungwa and Munanie Mwailu. The 1st petitioner filed a further affidavit in court on 19/2/00, in which the whole of the deceased's family members had agreed that deceased's estate be registered in the names of the two wives of the deceased. On 28/2/05, Muindi Mwailu, one of the sons of the deceased filed a reply to the petitioners' application denying having been consulted when the petitioner filed this petition, or that he had been party to any agreement on distribution. He proposed that distribution of the deceased's estate be in accordance with the distribution done in 1972 when the deceased was alive and whereby he had given each son his portion of land and which they have been occupying since and some sons have

sold and moved away. He has personally sold his plot and moved elsewhere. The objector Mbinya Kasimu, also filed a replying affidavit on 27/2/02 in which she echoed similar sentiments as Muindi. On 8/3/02 Mutungi Mwailu also a son of the deceased denied having been notified of the the Estate of Mwailu Muisyo (Deceased) [2005] eKLR filing of the petition was not party to any agreement on distribution and was of same view with the objector and Muindi on how distribution should be done.

The 1st petitioner filed a reply to replying affidavits reiterating her position that the deceased's estate had never been distributed and it should be transferred to the two wives who will do the distribution.

On 18/5/00, by consent of the parties, the objector who had been left out of the list of beneficiaries was included. The application for annulment and revocation was therefore spent. The only issue that was left and which the parties are not agreed upon is distribution of the deceased's estate.

On 13/7/00 after the parties failed to agree on distribution, it was ordered that viva voce evidence be adduced. The objectors' case commenced on 19/2/02. The objector testified and called 3 witnesses while the petitioners gave evidence and called one witness. The objector's testimony was that she is the wife of the late Kasimu Mwailu who was the son of Mwailu Muisyo. Mwailu Muisyo was therefore her father in law. That the deceased was survived by his two wives, Mutungwa Mwailu and Munanye Mwailu the first two petitioners. Mary Mutungwa had two sons Mutungi Mwailu and Kivaya Mwailu whereas Munanye Mwailu had Kasimu Mwailu – now deceased and husband to the objector, Aaron Muisyo, Muindi Mwailu and Kilonzo Mwailu.

The deceased's estate comprised two parcels of land namely Masii/Embui/554 measuring 4.8 Hactares (12 acres) and Masii/Embui/558, 8.2 Hactares or 20.3 acres. In about 1972, the deceased subdivided his land amongst the six sons in the presence of family members who included the petitioners. Boundaries of the land were fixed by use of sisal plants. By then her husband was still alive. Each person was shown where to settle. The objector was settled in the portion given to her husband but the third petitioner Aaron Mule started to disturb her and she sold her portion and bought another in Mwasua. PW1 said that she is not the only person who has sold their portion but the 3rd petitioner Muindi Mwailu and Kilonzo have also sold. They were selling with the knowledge that they had no titles to the land.

She had a boundary dispute with 3rd petitioner Aaron and she referred it to the clan who deliberated on the issue and said they should go by the sisal plants planted by deceased. Aaron still threatened her with death and she reported to the national chairman of Aombe clan. He was not satisfied with the decision of the clan and came to court without informing her. It is her contention that the father in law already shared out the land and it should be registered in her names because she is apprehensive that if the land is registered in the wives' names, she is likely to be left out as a beneficiary just as she had been left out of the list of heirs. She further testified that Munany'e's sons have all sold their portions of land and moved elsewhere. Further that the deceased did not leave any land for the two widows but they were supposed to be cared for by the children. That indeed she lived with her mother in law Munany'e for long before she shifted to her other son's home.

PW2 Nzwii Kisilu, testified that the deceased was his uncle as deceased was step brother to his father. He confirmed that the deceased had two houses and that sometimes in 1972, the deceased had called him, the wives, and the sons and they divided the deceased's two pieces of land No. 554 and 558 amongst the sons but the wives did not get any land. They planted sisal plants as boundaries. He confirmed that Aaron, Muindi and Kilonzo sold their portions of land and have moved elsewhere. PW2 also confirmed to the court of there having been a boundary dispute between the objector and Aaron and the clan were called in to resolve it. Aaron continued to disturb the objector and the Aombe chairman was called and Aaron was asked to move out of the objectors' land.

The national chairman of Aombe clan, Muthoka Katani (PW3), confirmed that he had adjudicated over a boundary dispute between Mbinya (PW1) and Aaron Mule. He produced the agreement they wrote on 13/2/99 – Exhibit 2 (a) and (b) that the boundary fixed by the deceased was the recognized one. Matheka Kyula (PW4), was one of those called by the deceased to help distribute his land to the sons. They fixed boundaries. The sons of Munany'e Mule, Kilonzo Mwailu and Meli sold their portions of land and land

and shifted elsewhere. He reiterated the problem that has existed between the objector and Aaron Mule.

DW1 Mutungwa, told the court that she and her co-wife should administer the deceased's Estate. She admitted that the land had been shared between the two of them and each son was shown where to cultivate and each settled on that portion. She admitted that all the sons of Munany'e have sold their portions of land and have settled elsewhere. She wants the land on which the two sons are settled and she can then divide it between them.

Munany'e Mwilu (DW2), said that she was not aware when the objector sold land. She denied that the land was ever shared out but that they were settled in one compound. She denied giving her children permission to sell the land. She admitted that she hates the objector but that if she is allowed to administer the deceased's estate she will give the objector what she has been cultivating.

Aaron Mule (DW3) testified that the objector was been uncooperative and sent away the Divisional chairman but the national chairman said the sisal boundary should not be interfered with DW3. He suggests that the land should be shared equally amongst the houses but some 8 acres is to be hived off to take care of a case against the estate. He denies that the land has ever been shared out except that people were allocated land for cultivation and that none will be displaced but that if one has more it will be reduced. He denied having sold his land and that that person on his land, Peter Kavisa uses it with his permission. He also agreed that there are other people on the land with his brothers' permission.

DW4 Patrick Kibaya Mwilu, who said that the deceased father said that the land should be equally shared between the two wives who would then give to the children. He accepted that there are other people not family members in occupation of those two pieces of land 554 and 558. He wants his land to go to his mother. He later changed and said he had no objection to each person being given a number which he can then give to the buyers.

I have carefully considered the evidence adduced by both the objector and the petitioners and the submissions by both counsel.

There is no doubt that when the petitioners filed this petition they did not get the consent of all the heirs. The objector was totally omitted as an heir or beneficiary of the deceased's estate whereas Muindi Mwilu and Mutungi Mwilu were not informed of the filing of the petition. It is admitted by the petitioners. The name of the objector was included as an heir when she filed an application for annulment/revocation of grant and the parties agreed that she be included. The question is whether her being left out was an oversight as suggested by the petitioner or it was intentional. From hearing of both sides, it is apparent that there has been a long standing dispute between the 3rd petitioner and the objector over boundaries. Even DW2 Munanie, the objector's mother in law was candid enough to admit that she hates the objector. It is most likely that the petitioners intentionally left out the objector as an heir and yet she is acknowledged as the daughter in law to DW1 and 2.

Apart from the issues considered above the other issues that the court needs to determine are as follows:

2. Whether the deceased distributed his land before his death.
3. Whether there have been sales of the deceased's estate.
4. Are the sale transactions valid or what is the effect of any sale on the deceased's estate?
5. Can the court appoint the deceased's two widows as administrators of the estate and is there anything to administer.

There is overwhelming evidence on record that before the deceased died, he had distributed his pieces of land to his sons and made boundaries marked with sisal plants. PW1 to 4 have adduced such evidence. The deceased's sons, Mutungi Mwilu and Muindi Mwilu swore affidavits to the effects that their father had already distributed his land and given each son his share but they were supposed to take care of their

mothers who were not given any share. We have the independent evidence of PW2, 3 and PW4 who took part in the exercise of the distributions that indeed the deceased shared out his land in 1972 and planted sisal boundaries. DW1 as well admitted that the deceased shared out his land according to his two houses and showed each son where to cultivate and each has settled on their piece of land. I do find and hold that the deceased had indeed shared out his two pieces of land to the children for the two houses of the 1st and 2nd petitioner. He had expressed his wish as to how his property should be distributed and it had been done during his lifetime.

PW1 has sold her husband's share of the land which is part of deceased's estate and moved elsewhere and so have all the sons of Munany'e, DW2. DW3 denied having sold his land to Peter Kavisa but DW1, PW1 and PW2 all testified that DW3 has also his share of the land that the father gave him. DW1 said that infact all of DW2'S sons sold their entitlement and people have taken over the land. It is only Mutungi and Kibaya, sons of DW1 who have not sold their entitlement. PW1's reason for selling her entitlement was that the 3rd petitioner Aaron (DW3) kept harassing her and interfering with the boundaries and encroaching on her piece of land. PW2, 3 and 4 corroborated PW1's evidence that the matter had been reported to the clan and the clan had ruled in favour of PW1. The objector produced in evidence Exhibit 1 (a) and (b) dated 18/6/00 and 2 (a) and (b) dated 13/2/99 which were minutes of meetings of clan members over the deceased's estate and in Exhibit 2 (b), the clan resolved a boundary dispute between PW1 and DW3 and the clan recognized the boundary put up by the deceased. In Exhibit NO. 1 (b) the clan noted that it seemed all the sons of the deceased were content about the distribution by their deceased father except DW3 and the clan affirmed the wishes of the deceased in respect to distribution of his estate. Since the deceased's estate which he distributed during his lifetime has changed hands, the question is whether the deceased's sons had the capacity to sell and if they had, is there any land to distribute?

The deceased's land was distributed in 1972. By 2000 when the clan met to deliberate on this land issue, some of the deceased's sons had disposed of their portions of land even 10 years earlier. Under Section 45 of the Law of Succession Act, except where expressly authorized by the Act or written law, no person shall take possession, dispose of, or intermeddle with the estate of the deceased person. The deceased's children or wives would not have any capacity to deal with or dispose of the deceased's property until grant is confirmed. However, this case presents a slightly different scenario in that it is not really clear when the deceased's sons actually sold off their portions of land. Was it in the life time of the deceased or not? It is only PW1 who said that she disposed of her land in the year 1997 to 1998. The others sold their lands earlier. It seems that the deceased's sons dealt with their portions of land as they wished once given to them. It seems the petitioners never questioned the disposals but DW2 seems to have been incensed by PW1's sale of her land. She was candid in her evidence that she is unhappy with PW1 and even used such strong words like hate. To my mind, it is this personal hatred for PW1 by DW 2 and even DW3 whom they have disagreed with over boundaries, that this matter was brought to court to have the land registered in the names of DW1 and 2. Apart from DW1 , 2 and 3, it seems all the beneficiaries of the deceased's estate have no objection to the distribution done by the deceased. Infact DW4 Kivaya who had at first said that he wanted his land registered in DW1's names changed and had no objection to each beneficiary being registered as the owner of their portion of land as given by their father. From my analysis of the evidence before court and the conduct of the petitioners, if DW1 and DW2 were registered as the administrators of the deceased's estate, the objector will be prejudiced because of the bad blood existing between the objector on one hand and DW2 and 3 on the other. She might never get her share.

The deceased had 2 pieces of land: Masii/Embui/ measuring 554 4.8 Hactares or 12 acres and Masii/Embui/558 measuring 8.4 Hactares or 21 acres. Total acreage is about 33 acres. The deceased had shared it against his 6 sons from the two houses and left out the widows DW1 and DW2 to be cared for by the children. Whereas it seems the sons of DW1 have taken care of her those of DW2 have not and the sons of DW2 have all sold their portions.

Counsel for objector suggests that the two pieces be shared amongst the 6 sons and 2 widows equally so that each gets 4 acres each and the balance be left to cater for access roads. This would be in accordance with Section 40 of the Law of Succession Act which provides that distribution of a deceased's estate in a polygamous household will be equal shares of the estate to the children and surviving spouse. Counsel

therefore suggested as follows: Mbinya Kasimu, Mule Mwailu, Kivaya Mwailu get 4 acres each from plot 554 and Muindi Mwailu, Kilonzo Mwailu, Mutunga Mwailu, Mary Mutungwa, Munany'e Mwailu do get 4 acres each from plot No.558.

I do agree with counsel that under the circumstances provision has to be made for the 2 widows DW1 and DW2 as the children of DW2 seem not to be caring for her.

I also find that though under Section 45 of the Law of Succession Act, the beneficiaries or even administrators would not have the capacity to sell land belonging to a deceased's estate yet, as earlier observed, this presents a different scenario. The court has no idea when some of the sales were done. If it was in the lifetime of the deceased then it would mean he had no objection to the sale transactions. In the circumstances the court will take into account the buyers of the land and in the distribution it has to ensure that the purchases are not prejudiced by the distribution. For that reason court does find that each beneficiary do get 4 acres which must fall within the portion that was given to the particular beneficiary so that the purchases interests are also protected.

In distribution, they have to consider the issue of some of the land being stony and infertile as it transpired in evidence that PW1 may have got more land because that portion was stony and infertile; such cases may be considered for slightly bigger portions from the approximately one acre that will not be shared out.

The objector was included in the list of beneficiaries and that settled the issue of revocation or annulment of grant. For that reason, grant is hereby confirmed in terms of the six sons and 2 widows getting 4 acres of land each out of the deceased's estate and the sons' portions be allocated as closely as possible to where they were originally settled by the deceased.

The court orders that the petitioners do execute the transfer documents in the above terms to effect the transfer to each heir failing which the Deputy Registrar do execute the necessary documents to effect the transfers.

Each heir may then transfer their respective portions to the respective purchasers. The court therefore rejects the petitioners' proposal that the deceased's estate be registered in their names. Each party do bear their own costs.

R.V. WENDOH

JUDGE

Dated at Machakos this 14th day of December 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE