



REPUBLIC OF KENYA



In re Estate of Joseph Ngundi Nthanga (Deceased) (Succession Cause 73 of 2017) [2023] KEHC 24153 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
SUCCESSION CAUSE 73 OF 2017
GMA DULU, J
OCTOBER 16, 2023**

IN THE MATTER OF ESTATE OF JOSEPH NGUNDI NTHANGA (DECEASED)

BETWEEN

NICHOLAS MUTHOKA NGUNDI PETITIONER

AND

SULPHICE NZONGA MUIA OBJECTOR

RULING

1. This succession matter commenced in Machakos as Machakos High Court Succession Cause No. 798 of 2013, and the Petitioner was Nicholas Muthoka Ngundi, who is still the petitioner herein.
2. There were objection applications filed in Machakos and on 20th November 2014 Thurairaja Jaden J. delivered a ruling dismissing an objection raised by Eliud Mwanzia Mbune and Sulphice Nzonga Muia in relation to Plot 147/Mbiini/Maatha and concluded as follows:-
 8. Under section 6 of the *Land Control Act*, cap. 302 Laws of Kenya the Land Control Board's consent is required in all transactions involving Agricultural Land.
 9. Prima facie, the applicants can be compensated in monetary terms.
 10. The applicants case has not met the threshold for grant of injunctive orders (see *Giella =Versus= Cassman Brown & Company Ltd* (1973) EA 358.
 11. Consequently the application fails. Costs in the cause.”
3. Thereafter, the file lay dormant until 21st February 2017 when it was transmitted to the High Court at Makueni by orders of Justice D. K. Kamei.



4. On 18th September 2017, the High Court at Makueni issued letters of administration in the matter to Nicholas Muthoka Ngundi of P. O. Box 37 Emali, but the file remained dormant again until 18th October 2018 when the cause was dismissed for want of prosecution.
5. On 13th February 2019, the petitioner herein Nicholas Muthoka Ngundi through counsel Paul Kisongoa & Company filed a summons for reinstatement and confirmation of grant.
6. To this above application, Sulpice Nzonga Muia filed an objection to making of grant in the following terms:-
 1. That the petitioner herein has concealed to this court that the deceased had a valid will in which he had willed the parcel of land Mbitini/Maatha/147 to Eliud Mwanja Mbune (deceased) and in the event of death of the said Eliud Mwanja Mbune the property would go to the objector.
 2. That the petitioner had applied for grant of probate intestate, totally ignoring the will and the contents thereof.
7. This objection was opposed through a reply in the form of an affidavit sworn on 24th September 2019 by Nicholas Muthoka Ngundi who deponed that the objection was misconceived, and contests the existence of a valid will and relied on the ruling of the High Court at Machakos delivered on 20th November 2014 in respect of the subject land.
8. The objection was heard through oral evidence, in which the objector called four (4) witnesses DW1 Sulphice Nzonga Muia, DW2 Susan Wanza Eliud, DW3 Daniel Mbuvi Ndetei and DW4 B. M. Mulwa an advocate.
9. On his part, the petitioner called two (2) witnesses – PW1 Nicholas Muthoka Ngundi, and PW2 Stephen Kathendu Ndeywa.
10. In my view, the objection has no merits and is for dismissal. The first reason is that the issue of the interest in the subject land between the petitioner and the objector was determined previously through the ruling of the High Court delivered at Machakos on 20th November 2014 which clearly dismissed the claim of the objector on the alleged purchase of land as there was no consent of the Land Control Board and the court opined that prima facie monetary compensation may apply as the possible relief to the aggrieved party.
11. Secondly, the will or purported will relied upon in the objection seems to have featured very late in the day and would be suspicious since, there was no will mentioned in the first objection by the same objector, who now appears to be a beneficiary of the will.
12. More importantly, there are variances in the names of the testator and beneficiaries, including the objector in the written will. Though these variances have been explained away as typographic errors, even by the advocate DW4 who is surprised that such errors could occur, they are such glaring variances that the document cannot be said to be one which can be relied upon as a valid and enforceable will.
13. In addition, it is apparent that the drafting lawyer and his clerk, who has now disappeared, were the purported witnesses to the will. In my view, that kind of practice by advocates should be avoided as it can put the advocate and his office into disrepute, because wills are often contested. In my view, the best practice is for the will to be signed by people other than the drafting lawyer, and his clerk.
14. I thus find that the purported will has not been proved to be a will validly and voluntarily made by the deceased herein.



15. I will as a result dismiss the objection and order that the cause herein will proceed on the basis of an intestate succession, and confirmation and distribution of the assets will go accordingly.
16. Consequently, I dismiss the objection herein and order that the petitioner serves the summons for confirmation of grant to all survivors of the deceased, including Theresia Mbandi Musyimi and Rosalia Mukeni Mwadime to attend court at Makueni to express their view on the proposed mode of distribution of assets for the purposes of confirmation of grant. The Deputy Registrar High Court Makueni will fix a mention date for directions.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF OCTOBER 2023.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mulewa for petitioner

Mr. Mutinida for objector

