



**REPUBLIC OF KENYA**

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

**Coram: Hon. D. K. Kemei -J**

**SUCCESSION CAUSE NO. 160 OF 2015**

**IN THE MATTER OF THE ESTATE OF MWANZIA NDONYI (DECEASED)**

**DAVID MWANZIA**

**MUTUA MWANZIA.....PETITIONERS**

**VERSUS**

**KITHEKA MWONGELA.....PROTESTOR**

**RULING**

1. This matter relates to the estate of **Mwanzia Ndongi** the deceased who died intestate on 12.8.2011. This court directed on 24<sup>th</sup> May, 2018 that letters of administration intestate for the estate of the deceased be issued in the names of David Mwanzia, Mutua Mwanzia and Kitheka Mwongela. The administrators were directed to file an application for confirmation of grant.

2. On 18<sup>th</sup> July, 2018, an application was made by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners for confirmation of grant. In the application for confirmation of grant the proposed mode of distribution was as follows:

<b>PROPERTIES</b>	<b>BENEFICIARY</b>	<b>SHARES</b>
Plot xxx Kaluva Adjudication Section	Mutua Mwanzia and David Mwanzia	Joint owners
Nzambani/Ithimula/xxx	David Mwanzia	Absolutely

3. A search attached to the affidavit indicated that Nzambani/Ithimula/xxx is registered in the names of Mutua Mwanzia Ndongi. There is also a letter dated 22<sup>nd</sup> May, 2014 from the District Adjudication and Settlement officer of Kitui that is indicative that Plot xxx Kaluva Adjudication Section is registered in the names of Mwanzia Ndongi.

4. In response to the summons for confirmation, the 3<sup>rd</sup> petitioner proposed a mode of distribution vide application filed on 21<sup>st</sup> September, 2020 as follows

<b>PROPERTIES</b>	<b>BENEFICIARY</b>	<b>SHARES</b>
Plot xxx Kaluva	Everyone who occupies	As occupied

Adjudication Section	the land	
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5. The confirmation proceeded via oral evidence and the petitioner's Pw1 was David Mwanzia. He testified that the deceased was his father who had 3 wives who were allocated their respective portions of land. He testified that Plot xxx Kaluva Adjudication Section was allocated to his mother's house and therefore the 3<sup>rd</sup> petitioner's father was required to move out of the same and relocate to parcel xxxx and xxxx. He revealed that the 3<sup>rd</sup> petitioner's father and first wife died and they were buried on the parcel xxx. On cross examination, he admitted being allocated plot 1126 and confirmed that Plot xxx Kaluva Adjudication Section was allocated to his mother but however there was no transfer of ownership but he moved onto the plot in 1977. He also revealed that he was allocated plot 1126 and a title issued in 2013. He revealed that his mother is buried on plot xxx. He disclosed that the 3<sup>rd</sup> administrator's mother resides on plot xxxx together with his 2<sup>nd</sup> wife and that the deceased ordered the 3<sup>rd</sup> administrator to move out of the plot xxx to go and reside on the land that was allocated to him but however he refused. He reiterated that plot xxx belonged to the family of the second wife. On re-examination he testified that the parcel xxx was still under the adjudication section.

6. **Philemon Mwendwa Kimanthi** testified as the petitioners third witness (Pw3). He sought to rely on his witness statement where he stated that he chaired a meeting pertaining to the sharing of the deceased's parcel xxx. He told the court that the deceased wanted his son, the 3<sup>rd</sup> administrator to move to another parcel of land number xxxx. On cross examination, he told the court that the 3<sup>rd</sup> administrator's mother was allocated plot xxxx and that his child and eldest wife were buried on plot xxx. He reminded the court that the 3<sup>rd</sup> administrator was ordered to move out of plot xxx. The petitioners closed their case and the protestor/3<sup>rd</sup> petitioner was put on the stand.

7. **Kitheka Mwangela** testified that the deceased was his grandfather and that his father's house was the first house out of the 3 houses of the deceased. He told the court that his deceased grandfather shared out his land to his family but however he currently resides on plot xxx. On cross examination, he testified that his grandfather had 3 wives Kalunde, Kathivo and Kasyoka and his father Mwangela Mwanzia was the only son to the first wife Kalunde. He testified that the 2<sup>nd</sup> wife had children Mutua Muinde and David (the 1<sup>st</sup> petitioner) whereas the 3<sup>rd</sup> wife had David Mwanzia, Richard Mwanzia, Muema Mwanzia and Maingi Mwanzia. He told the court that Kathivo lived on parcel xxxx while Kalunde lived on parcel xxxx and Kasyoka lived on parcel 60. It was his testimony that his father was given parcel xxx as well as part of parcel xxxx and part of parcel xxxx. He told the court that his mother lived on parcel xxx after being moved from parcel xxxx but however she first moved to parcel xxxx upon getting married before moving to parcel xxxx. He reiterated that Kaleve currently resided on parcel xxxx; that nobody resided on parcel xxxx that had been allocated to his father. He told the court that he, Muinde, David and Mutua resided on parcel xxx and he could not move from parcel xxx as it was allocated to his father who gave it to him. He was not agreeable to the proposal that his father go to parcel xxxx and xxxx. On re-examination, he lamented that Mutua Mwanzia was given more land than his father. He told the court that he built his house on plot xxx; that his grandfather died in 2012 and his mother died in 2011. He told the court that his father was buried on plot xxxx which parcel is currently occupied by his step mother. He reiterated that he was occupying the share due to his father.

8. Parties filed written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners submitted that the deceased shared out his properties and that the 3<sup>rd</sup> administrator's father was allocated Nzambani/Ithimula/xxxx and xxxx. It was pointed out that the only plot in dispute was plot xxx because Mwangela Mwanzia, now deceased was the only son of the subject deceased's first wife and he married 2 wives. It was revealed that Nzule Mwangela (Mwangela Mwanzia's first wife), Mwangela Mwanzia and his mother settled on plot Nzambani/Ithumula/ xxxx but however when there was friction between Nzule Mwangela and her co-wife, then the said Nzule was moved onto parcel Nzambani/Ithumula/xxxx and that notwithstanding, Mwangela Mwanzia moved Nzule by force onto plot xxx. It was revealed that Mwangela Mwanzia was ordered to move Nzule back to plot xxxx or xxxx and he refused and hence the dispute was taken to the clan elders where it was resolved that Nzule be returned to plot xxxx Ithumula. Counsel reiterated that the 3<sup>rd</sup> petitioner should go back to plot xxxx that belonged to his father or plot xxxx that is vacant.

9. The 3<sup>rd</sup> petitioner submitted that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners have the lion's share of the deceased's land and therefore the 3<sup>rd</sup> petitioner claims ¼ of plot xxx that he uses and where he built his home as well since it was his father's share.

10. I have considered all the evidence adduced as well as the submissions. There are two issues which arise for determination:

- i) Who are the beneficiaries entitled to the estate of the deceased?
- ii) Is the grandchild of the deceased entitled to a share in the deceased's estate?
- iii) How should the estate be distributed?

11. **Who are the beneficiaries?**

The application for grant dated 19<sup>th</sup> March, 2015 indicated that the deceased was survived by the following persons

- Mwangeli Mwanzia- Son (now deceased),
- David Mwanzia- son,
- Mutua Mwanzia- son,
- Muinde Mwanzia- Son,

- David Mwendwa Mwanzia- Son
- Makau Mwanzia- Son
- Muema Mwanzia- Son
- Kalunde Mwanzia-wife and
- Kasyoka Mwanzia-wife

His 2<sup>nd</sup> wife, Kathivo Mwanzia is deceased

**Section 29** of the **Law of Succession Act** provides:

*“For the purposes of this Part, “dependant” means –*

- (a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
- (b) Such of the deceased’s parents, step-parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;*

Thus, the children of the deceased and his wives are dependants of the deceased whether or not they were maintained by the deceased prior to his death and they are entitled to the estate of the deceased. The grandchildren of the deceased are dependants if they were maintained by the deceased prior to his death.

**12. The second consideration is whether the grandchild of the deceased is entitled to inherit the deceased’s estate.**

From the definition given under **Section 29 (supra)** the grandchildren of the deceased can inherit if they were being maintained by the deceased prior to his death. In the present cause, the Kitheka Mwongela is claiming interests as a son of his deceased father who was a son to the deceased and he is in effect claiming his share out of the estate of the deceased as a grandson of the deceased. In a persuasive decision by Musyoka J. in the case of **In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR** it was stated:

*“..... she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependent on the grandparent immediately before his death.”*

**13. Section 26 governs Provisions for dependants not adequately provided for by will or on intestacy. It states that**

*“ Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”*

14. The cited case refers to grandchildren, and this would mean that there being no demonstration to court of an application under section 26, the 3<sup>rd</sup> petitioner would not be entitled to benefit from the estate of the deceased.

15. This brings me to the 3<sup>rd</sup> issue which is the **distribution of the Estate**. I have looked at the modes of distribution proposed by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and that of the 3<sup>rd</sup> petitioner. The proposal by the 3<sup>rd</sup> petitioner seemed to include him yet he is not a person entitled as a dependant save if he demonstrated under section 26 that he was entitled to benefit from the estate of the deceased. The law relating to distribution dictates that the parcel xxx devolve as provided under **Section 40** of the **Law of Succession Act** that provides that the estate of a polygamous deceased person be divided amongst the houses according to the number of children and any wife surviving the deceased shall be added as an additional unit to the number of children.

**16. Section 40 (1) of the Law of Succession Act provides:**

*“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 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.”*

17. Having established the law relating to the distribution of the estate of the deceased, and having established who the beneficiaries of the estate of the deceased are, because the deceased had 3 houses, **Section 3** of the **Law of Succession Act**, defines the **“house”** as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. All the deceased’s wives and

children are therefore entitled to a share of his net intestate estate equally as provided for by **section 40** of the **Law of Succession Act**. The 3<sup>rd</sup> petitioner came from a house that the wife and all the children had died. Because provision has been made for him out of the estate of the deceased vide allocation of plot xxxx and xxxx that were given to his deceased father and in this regard he can still pursue letters of administration in respect of his deceased's father's estate.

18. After hearing all the parties herein regarding the two rival proposed schedules of distribution vide the 1<sup>st</sup> and 2<sup>nd</sup> and the 3<sup>rd</sup> petitioners dated 2/7/2018 and 21/9/2020 respectively as well as the submissions, I find that the proposed mode of distribution by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners is reasonable and resonates well with the arrangements made by the deceased during his lifetime. The wishes of the deceased as confirmed by majority of the family members must be respected.

19. The two summons for confirmation of grant having been determined, I proceed to order that the free estate of the deceased be distributed as follows.

<b>PROPERTIES</b>	<b>BENEFICIARY</b>	<b>SHARES</b>
<b>Plot xxx Kaluva Adjudication Section</b>	<b>Mutua Mwanzia and David Mwanzia</b>	<b>Joint owners</b>
<b>Nzamba/Ithimula/xxx</b>	<b>David Mwanzia</b>	<b>Absolutely</b>

This being a dispute involving family members, each party will bear its own costs.

It is so ordered.

Dated and delivered at **Machakos** this **13<sup>th</sup>** day of **July, 2021**.

**D. K. Kemei**

**Judge**