



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

P&A CAUSE NO. 755 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE MUTISYA MUTISO MYATU – DECEASED

KIVILU MUTISYA MUTISO)
DAVID MULI MUTISO *alias* **NDAMBUKI MUTISYA**).....**OBJECTORS/**
MUTUKU MUTISYA MUTISO) **APPLICANTS**

VERSUS

AMOS MULEE MUTISYA**PETITIONER/RESPONDENT**

R U L I N G

1. The deceased herein **Mutisya Mutiso Myatu** died intestate on 23/01/1999. He had two wives both of whom have died. The Petitioner herein comes from the first house while the Protestors are from the second house. A grant of letters of administration intestate was made to the Petitioner herein on 5/03/2008. The Petitioner later filed summons for confirmation of grant on 23/10/2008 and annexed a schedule of distribution of the assets.

2. The Objectors filed an affidavit of protest dated 2/10/2009 and accused the Petitioner for leaving out and failing to consult them while instituting the Cause and that the Petitioner failed to disclose all the assets of the deceased. The Protestors proposed that the assets be shared equally between the two houses from where the children could share equally amongst themselves. The Protestors came up with a list of 18 parcels registered in the names of the deceased and further averred that the Petitioner had sub-divided some parcels of land and registered them in his names and other strangers. The Protestors finally stated that the deceased had prior to his death allocated seven parcels to each of his sons – **Josephat Mutisya, Mutuku Mutiso, David Mutiso, Fredrick Mutisya, Kivilu Mutiso** and **Amos Mulee Mutisya** and left out a disabled son **Mutiso Mutisya Mutiso**. The Protestors proposed that the disabled son of the deceased be allocated **LR. Mumbuni/Kasinga/2180**.

3. The Petitioner filed a replying affidavit dated 16/11/2009 in which he averred *inter alia*: that the distribution should be made to the sons of the deceased; that some of the parcels at Kaewa Adjudication Section are not registered in names of the deceased and cannot form part of the estate; that there are no shares in Donyo Sabuk and Masaku Industries since the said companies were deregistered a long time ago; that some of the parcels have disputes, which are yet to be resolved; that the interest of the disabled son ought to be taken care of by the Protestors household.

4. Parties agreed to canvass the protest by way of viva voce evidence.

5. **Kivilu Mutisya Mutiso** was the first Protestor. His case is that the Petitioner left them out in the petition and in the distribution and further left out other assets. The Protestor accused the Petitioner of sub-dividing the parcels of land without involving them and also secretly registered them in his names. It was further his case that the deceased's parcels of land namely 1991, 2138 and 2813 were secretly subdivided by the Petitioner without their knowledge and that they should revert back to the deceased and which should be shared equally between the two houses. He further claims that the deceased had shares in Donyo Sabuk and Masaku Industries and same should be traced and shared. On cross-examination, he admitted that parcel No. 1991 was ancestral land which was sub-divided so as to cater for the deceased and his brothers. He denied that objections were lodged against parcel No. 2138 wherein the deceased lost the case. He also confirmed that the deceased was sued over parcel No. 2813 but he won the case. He also admitted that he has no evidence to the effect that the Petitioner dished out family land to outsiders. He also admitted that Masaku industries changed to Imuka Self Help after his father died and cannot tell if the shares were transferred to the new outfit.

6. **David Muli Mutiso** is the second protestor. He adopted the contents of his witness statement filed on 21/04/2016 and maintained that the assets of the deceased should be shared equally. On cross-examination, he maintained that the parcels Nos. 1991, 2813 and 2138 had not been included in the schedule of distribution. On further prodding he admitted that objections had been lodged against parcel No. 1991 which succeeded and that objections on parcel 2813 led to the said parcel being given to other people. He also admitted that there are no

shares belonging to the deceased in Masaku Industries after it was de-registered.

7. **Mutuku Mutisya Mutiso** is the 3rd Protestor. He adopted his statement filed on 21/04/2016. He accused the Petitioner of leaving out other assets of the deceased namely parcel numbers 1991, 2138 and 2813. He also claimed that the Petitioner left out a disabled son of the deceased from the distribution. He proposed that the assets be shared equally. On cross-examination he admitted that none of the beneficiaries have been left out except the one who is disabled. He admitted that his mother had allocated land which has coffee trees to the disabled beneficiary. On re-examination, he confirmed that objections had been lodged against parcel No.1991 by cousins of the deceased and that the same was sub-divided. He maintained that the confirmation should not be allowed unless all the properties have been included.

8. **Amos Mulee Mutisya** is the Petitioner. He sought to rely on the affidavit in support of summons for confirmation of grant as well as his affidavit in reply to the protest. He stated that the deceased had two wives. Starting with parcel No.1991 he stated that the same initially belonged to his grandfather and that it was shared between deceased and his cousins – **Kioko Nthuku** and **Mutua Maula** which led to subdivision of five portions whereby he got 3156 while Kioko Nthuku got 3154 while Mutua Maula got 3155 and that the deceased remained with the original 1991. He stated that the parcel No.1991 was again subjected to another subdivision after a brother of deceased Joseph Musyoki lodged an objection and which gave rise to parcels Nos. 3935 and 3936 but still with the original parcel No.1991 still remaining in the name of deceased which can be shared equally among the beneficiaries. He stated that he is in possession of a portion of parcel 2138 while the remaining part is to be shared equally. He added that several objections were lodged against parcel No.2813 by villagers but there is no portion thereof remaining which can be shared. He also stated that there is another parcel **Mumbuni/Kasinga/1888** due to the deceased. Finally he stated that he paid for the deceased's shares in Donyo Sabuk which will result in two acres of land and he proposes that the same be allocated to him since he paid a sum of Kshs.10,415/= therefor. On cross – examination he confirmed that the deceased had not sub-divided the properties before he died. He admitted that he resides on parcel No.2138 which he claimed that the deceased had given him. He also confirmed that the deceased had shares at Donyo Sabuk and that he paid for it with his own money and should be allowed to take those shares as he not only saved it but also defended the suits with the deceased during the myriad objections lodged by villagers.

9. **Joseph Musyoki** is an uncle to both Petitioner and Objectors. He stated that he had lodged objection against parcel No. 1991 as it was ancestral land and he got a piece thereof while the deceased retained the remainder. He added that he sold his portion to the sons of the Petitioner. On cross- examination he stated that the deceased had not sub-divided his parcel no. 1991.

10. It was submitted by counsel for the Objectors that the proposed distribution by the Petitioner is not proper as it deliberately fails to disclose all the properties forming part of the estate of the deceased. It was also submitted that the Petitioner failed to involve the Objectors in the preparation of the schedule of distribution. Learned counsel urged this court to consider the mountain of documents filed by the Objectors which clearly shows that the assets belonged to the deceased and which the Petitioner is out to hide in the distribution of the estate. It was also submitted that the Petitioner's conduct in secretly sub-dividing the lands and selling them to third parties behind the Protestors backs merits the revocation of the grant.

11. It was submitted by counsel for the Petitioner that the deceased having died intestate and with no surviving widows, then the estate should be distributed among the children under Section 38 of the Law of Succession Act and that the assets be shared equally among the beneficiaries as proposed by the Petitioner.

12. I have considered the summons for confirmation of grant and the affidavits in support as well as the affidavits of protests. I have also considered the annexed documents. I have considered the evidence of the Petitioner and the protestors as well as the submissions by both learned counsels. It is not in dispute that the deceased died intestate. It is also not in dispute that the deceased had prior to his death sub-divided some of the parcels of land to his sons and left behind a huge chunk which is now a bone of contention between the Petitioner and the Objectors. It is also not in dispute that the two wives of the deceased have since died leaving behind only the children. The only question for determination is "**which mode of distribution of the estate is suitable?**"

13. The Petitioner has presented his schedule of distribution in which he has listed 26 properties while an extra two are reported to be under dispute. As the two assets are still under dispute there is no clear evidence that the dispute will be determined in favour of the estate so as to rope them in for distribution. The determination of the dispute could go either way. Hence it is proper not to include the same in the distribution and that the administrator will be at liberty to distribute them to the beneficiaries if the dispute is ruled in their favour. The Petitioner seeks to have his schedule adopted while on the other hand the Objectors appear to propose that the assets be shared equally between the two houses. As the wives of the deceased are all dead, the estate should be distributed in accordance with Section 38 of the Law of Succession Act which provides as follows:-

Section 38 " where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42 devolved upon the surviving child, if there be only one or shall be equally divided among the surviving children".

The deceased was blessed with seven (7) sons one of whom is since deceased and five daughters. All the daughters are reported to have been married. Even though the daughters are said to have duly signed a consent to the distribution, I do not see any affidavits by them renouncing their rights to benefit from the estate of their late father. It seems the Petitioner and Objectors have considered themselves as the only ones to benefit from the estate yet their sisters have not made any express renunciations as they are too entitled as of right by virtue of being biological children of the deceased. As the mothers to both Petitioner and Objectors are deceased, I find the Objectors proposal to have the estate shared between the two houses is not tenable and is an affront to the clear provisions of Section 38 of the Act. Equally the Petitioner's proposal having been opposed by the Objectors cannot sail through. The Objectors have claimed that one of the beneficiaries who is said to be disabled has not been adequately provided for and have suggested that he be allocated parcel **No. Mumbuni/Kasinga/2180**. The Petitioner is also claiming to be considered for other extra parcels by virtue of having participated in defending suits involving certain parcels and also contributing some of his monies. His actions may have been noble in the interest of the family but then as long as the assets belonged to the deceased, the same ought to be shared equally between the beneficiaries unless there is an agreement by all of them to the contrary. In any case the Petitioner did not avail any evidence regarding his claims. In the present circumstances, the Objectors are not agreeable to the proposal by the Petitioner. Again the female members of the family have not filed affidavits of renunciations. This state of affairs necessitates an order compelling the parties herein to go back to the drawing board and begin afresh on a clean slate after involving all

the family members and ensuring that all the assets of the deceased have been gathered and listed for distribution. It transpired from the evidence and documents presented that some assets are still subject of disputes which are yet to be resolved. This opportunity will be used by the new administrators to present all the assets for distribution. If it is not possible to secure the said assets, the administrators are at liberty to seek for a partial confirmation of the grant as they await the outcome of the disputes. It is also noted that the Petitioner herein is from the first house while the Protestors are from the second house. It is fair and just that one of the Protestors be made an administrator so as to team up with the Petitioner and carry out the process of administration of the estate. Even though the administration is almost on the homestretch, I am unable to lose sight of the fact that this Cause was filed in 2007 and is yet to be concluded. I find an additional administrator might inject the much needed impetus to fast track the matter. I am of the considered view that the first Protestor herein **Kivilu Mutisya Mutiso** should be appointed as a co-administrator.

14. In the result it is my finding that the Protestors protest has merits. The same is allowed in the following terms:

(a) The summons for confirmation of grant dated 23/10/2008 are hereby dismissed.

(b) The grant dated 5/3/2008 is hereby revoked. A fresh grant is issued in the names of AMOS MULEE MUTISYA and KIVILU MUTISYA MUTISO.

(c) The administrators are hereby directed to file fresh summons for confirmation of the fresh grant within Thirty (30) days and ensure that all the assets of the deceased are gathered and listed and all the beneficiaries be involved.

(d) Any of the beneficiaries who do not wish to take up their entitlements in the estate shall be at liberty to file affidavits of renunciation once the fresh application for confirmation of grant is filed.

(e) As the parties are members of the one family, there shall be no order as to costs.

It is so ordered.

Dated and Delivered at Machakos this 20th day of January, 2020.

D. K. Kemei

Judge