



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

P&A CAUSE NO. 639 OF 2012

IN THE ESTATE OF NATHAN MUTULI SILA (DECEASED)

JULIUS NTHIW'A MULINGE.....PETITIONER

VERSUS

FLORENCE MUTINDA MULINGE.....PROTESTOR

RULING

1. The Petitioner herein filed a summons for confirmation of grant dated 8/03/2017 and further amended on 19/07/2018 and 5/02/2019 seeking to have a grant issued to him on the 17/01/2013 confirmed. The estate is that of **Nathan Mutuli Sila** (deceased) who was father to both the Petitioner and Protestor. The Petitioner presented a schedule of distribution of four assets of the deceased as follows:-

(i) L.R. Kalama/Muumandu/944

Joseph Kasyoka Mulinge (whole)

(ii) L.R. Kalama/Muumandu/945

- 8.0 acres – Florence Mutinda
- 26.6 Acres – Julius Nthiwa Mulinge

(iii) Machakos/Konza North Block1/413

Job Mulonzi Mulinge (whole)

(iv) L.R. 2159 Muumandu Adjudication Section

- Julius Nthiwa Mulinge
- Joseph Kasyoka Mulinge
- Florence Mutinda Mulinge..... in equal shares

2. The Protestor filed an Affidavit of protest to the mode of distribution and raised several objections *inter alia*: that the deceased died intestate contrary to the Petitioner's claims that the deceased made an oral will; that an oral will cannot be in writing and that the purported writings attributed to the deceased cannot amount to a will; that the estate should be distributed as follows:-

(i) L.R. Kalama/Muumandu/944

Joseph Kasyoka Mulinge (whole)

(ii) L.R. Kalama/Muumandu/945

To be shared equally between Julius Nthiwa Mulinge and Florence Mutinda Mulinge

(iii) Machakos/Konza North Block1/413

Job Mulonzi Mulinge (whole)

(iv) L.R. 2159 Muumandu Adjudication Section

To be shared equally by:

- Julius Nthiwa Mulinge
- Josphe Kaysoka Mulinge
- Florence Mutinda Mulinge

The Protestor added that the above mode of distribution is fair to all beneficiaries and should be adopted.

3. The Petitioner filed a reply to the protest and averred that the deceased had distributed his property to his children in the presence of clan committee members as per a schedule according to his wishes.

4. Parties agreed to canvass the summons for confirmation of grant and the protest by way of written submissions.

5. Mr. Sila learned counsel for the Protestor raised two issues for determination namely *whether the deceased died testate or intestate and whether the deceased's properties should be shared equally between his children*. On the first issue, learned counsel submitted that there was no oral will made by the deceased as what the petitioner claims to be a will are purported written wishes of the deceased. It was the view of the counsel that the properties ought to be shared equally among the surviving children of the deceased pursuant to Section 38 of the Law of Succession Act since the deceased died intestate. On the second issue, counsel submitted that the only property in dispute namely **Kalama/Muumandu/945** should be shared equally between the Petitioner and the protestor as there is no justification why the Petitioner gets 26.6 acres while the protestor gets 8.0 acres yet they are both children of the deceased.

6. Mr. Mukula learned counsel for the Petitioner raised two main issues for determination namely: - whether the deceased distributed his assets during his lifetime and whether the grant should be confirmed as proposed by the Petitioner. On the first issue it was submitted that the deceased had shared his properties to his children as indicated by annexure **JMM4** and none raised any objection to the sub-division of the properties which were unequally distributed by the deceased himself. Counsel submitted that the Petitioner's proposed mode of distribution should be approved by dint of section 42 of the Law of Succession Act. Reliance was placed in the cases of **Paul Kiruhi Nyingi & Another –v- Francis Wanjohi Nyingi [2009] eKLR** and in the matter of the **Estate of Nduku Samson Mulwa (deceased) Machakos High Court Succession Cause No. 723 of 2013**.

7. I have considered the rival affidavits and the submissions of both learned counsels. It is not in dispute that both the Objector and Petitioner are siblings and that their late parents had a monogamous marriage and household. It is also not in dispute that the deceased had four properties which are now the subject of this dispute. It is also not in dispute that the only property in dispute is **L.R. Kalama/Muumandu/945** which has been slated for sharing between the Petitioner and the Protestor. That being the position, I find the following issues necessary for determination:

(i) Whether or not the deceased had prior to his demise distributed his properties amongst his children.

(ii) What orders may the court grant.

8. As regards the first issue, it is noted from the Petitioner's affidavit in support and submissions that the deceased had held a family meeting in the presence of clan committee members on the 8/11/2001 in which he distributed his properties among his children. The Petitioner appears to deem the said deliberations to be a will by the deceased. However, I must point out the fact that it has already been observed that the deceased died intestate and thus these are intestate proceedings. Had the contrary been the case, then the Petitioner would have filed the probate with annexed will. None was annexed to the Petition forms during the filing of this cause. Further had a will been made and disputed then it would have warranted a hearing for the purpose of probing the said will. I am satisfied that what transpired on 8/11/2001 were actually wishes of the deceased reduced into writing in circumstances that do not give rise to the making of a will. In any event by dint of the provisions section 9 of the Law of Succession Act the oral Will ought to be made before two or more witnesses and further the testator dies within a period of three (3) months from the date of making the will. The deceased vide certificate of death died on the 10/10/2004 while the purported will took place on the 8/11/2001. This means that the deceased died a clear three years after the alleged will which is outside the three months provided by the Act. There is therefore no doubt that the deceased died intestate. If that is the position then the estate will be distributed according to the provisions of Sections 38,41 and 42 of the Law of Succession Act which provides follows:-

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

41 *“where reference is made in this Act to the net intestate estate, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust in equal shares in the case of more than one child, for all or any of the children of*

the intestate who attain the age of eighteen years who, being female, marry under that age, and for all or any of the issue of any child of the intestate shall take through degrees, in equal share, the share which the parent would have taken had he not predeceased the intestate”

42 “where

(a) *An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

(b) *Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35 of this Act. That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”*

9. I have perused the deliberations made by the deceased herein on the 8/11/2001 in the presence of his children and the clan committee members and note that he gifted Konza land to Job Mulonzi while another parcel No.944 purchased from Mawa Muthembwa was to go to Joseph Kasyoka while parcel No.945 was given to Julius Nthiwa Mulinge with a small portion hived off for the benefit of Florence Mutinda who did not have a home. The Petitioner and Objector on their proposed mode of distribution have clearly revealed the true identity of the parcels belonging to the deceased. For instance parcel **No. Kalama/Muumandu/944** measuring 10 acres is earmarked for Joseph Kasyoka Mulinge while **Machakos/Konza North Block 1/413** measuring 10.7 acres is earmarked for Job Mulonzi Mulinge. Another parcel No. 2159 Muumandu Adjudication Section is to be shared equally between the Petitioner, Protestor and Joseph Kasyoka Mulinge. Finally parcel **No. Kalama/Muumandu/945** is to be shared between the Petitioner and protestor in the ratio of 26.6 acres and 8.0 acres respectively. I have noted that all the other beneficiaries such as **Job Mulonzi Mulinge** and **Joseph Kasyoka Mulinge** have not raised any objections to the proposed mode of distribution by the Petitioner and that they have not supported the protestor either. This clearly indicates that the proposed distribution by the Petitioner is in line with the wishes of the deceased prior to his death. The certificate of death shows that the deceased died on 10/10/2004 three years after he had made the distribution. There is no evidence that the protestor raised any objections to the deceased despite the fact that she lived with the deceased within the same parcel **Kalama/Muumandu/945** until his death on the 10/10/2004. My view is that all the beneficiaries were aware of the declarations made by their father during his lifetime. The said declarations were wishes of the deceased and it now behoves upon his children to adhere to the same. My understanding of Section 42 of the Law of Succession Act is that previous benefits made to beneficiaries must be brought into account during the confirmation of the grant. As the deceased had made an elaborate distribution of his assets to his children then it is only proper that they obey the same. A perusal of the certificate of death reveals that the deceased was a pastor by profession and had a monogamous marriage and that he had good intentions for his children and that is why he prepared them well in advance of his death. For three years prior to his death each of the beneficiaries was aware of the distribution. The deceased had the discretion to give any size of land to his children. The protestor herein did not raise any issues with the deceased over the distribution on grounds of discrimination. Why is she now raising her objection ten years after the death of the deceased? The only possible explanation is that she is out to harass the petitioner for no apparent reason knowing that the deceased would not be around to question her turn around yet she had not raised it with him before he died. Again the other beneficiaries Job Mulonzi Mulinge and Joseph Kasyoka Mulinge have not raised any objections despite their shares being significantly lesser than that of the Petitioner. The silence by these two beneficiaries leaves no doubt that indeed the properties had been distributed by the deceased prior to his death. Consequently I disagree with the protestor's claims and hereby proceed to find that the deceased had prior to his death distributed his properties to his children and which is in tandem with the mode proposed by the Petitioner.

10. As regards the second issue and in view of my finding above, the protestor's protest lacks merit. The same is dismissed. The summons for confirmation of grant dated 8/03/2017 and amended on 5/02/2019 is allowed and that the grant dated 17/01/2013 is hereby confirmed. The estate shall be distributed as proposed vide the schedule dated 5/2/2019 annexed to the Petitioner's affidavit in support of summons for confirmation of grant. A certificate of confirmation is to issue. As parties are family members, each party to bear their own costs.

It is so ordered.

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

D. K. Kemei

Judge