



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO.219 OF 2011

IN THE ESTATE OF THE LATE NAUMI MULWA NZEKI (DECEASED)

NTHIKE MULWA *alias* MUTHIKE MULWA NZEKI.....PROTESTOR

VERSUS

1. JOHN MUTETI MULWA

2. ESTHER NDUKU MULWA.....PETITIONERS/RESPONDENTS

R U L I N G

1. The Petitioners herein filed summons for confirmation of grant dated 20/05/2016 in which they sought to have the deceased's properties namely **IVETI/IVETI/566** and **IVETI/IVETI/559** distributed to the Petitioners to hold in trust for themselves and their siblings. Upon being served with the said summons the Protestor filed an affidavit in protest dated 20/05/2016 wherein she averred that she is a co-wife to the deceased herein as they were both wives of the late Mulwa Nzeki who was the initial proprietor of the two (2) parcels of land. The Protestor further averred that the two parcels are currently registered in the joint names of herself and the deceased as tenants in common and as such they have equal shares and should be sub-divided equally between the protestor and deceased and that the Petitioners can hold their half share for themselves and siblings while the Protestor takes her portion.

2. Parties agreed to canvass the protest and summons for confirmation by way of oral evidence. They also agreed to file and exchange witness statements and documents before tendering their respective testimonies.

3. **Muthike Mulwa** the Protestor testified and averred that she is a wife to the late Mulwa Nzeki and that the two properties belonging to her late husband namely **Iveti/Iveti/566** and **Iveti/Iveti/559** should be shared equally between herself and the children of the deceased herein who was her co-wife. She added that the two titles are jointly registered in her name and that of her co-wife and that she has been in possession of the said title deeds. She relied on her affidavit as well as her statement and documents. On cross-examination she stated that after the demise of her husband she was harassed out of the home but was later assisted back by the clan who restored her back into her land. She further stated that the properties belonged to her late husband and that as a wife she is entitled to half the portions of the parcels of land. She also denied having been chased away by her late husband. She finally stated that the Adjudication Tribunal had directed that the two parcels of land be registered in her name and the deceased herein to hold them in common.

4. **Winston Ndambuki Nthenge** stated that he knows the parties herein since his father is a step brother to the Petitioners herein. He stated that the husband of the Protestor and deceased herein owned two parcels of land. He added that upon the death of the Protestor's husband she was chased away by a brother in law and she went to stay with her parents and during her absence the deceased herein who was her co-wife registered the two parcels of land in her names and this forced the Protestor to lodge an objection with the Land Adjudication Tribunal which ruled that both lands be registered in the names of the two co-wives. On cross – examination he confirmed that the two parcels of land have not been sub-divided. He also admitted that he did not witness the marriage of the Protestor to the late Mulwa Nzeki.

5. **Charles Kyalo Loki** is the chief Iveti location. He stated that he knew both the Petitioners and the Protestor as they are his subjects. He stated that the Protestor had earlier approached him for assistance after the deceased herein had registered the whole land in her names during the adjudication exercise but however the protestor's co-wife declined to turn up for the meeting in his office. He stated that the Protestor lodged an objection to Iveti Land Adjudication Section which ordered that both parcels be registered in the names of the Protestor and her co-wife Naomi Mulwa (deceased herein). As far as he is concerned it is wrong for the Petitioners to lock out the Protestor and that the Lands should be shared equally between the Protestor and the Petitioners. On cross – examination, he denied authoring the introductory letter during the lodging of this succession. He also admitted that it is not possible for a co-wife to be a beneficiary of the other deceased wife.

6. The Petitioners case was presented by the second Petitioner **Esther Nduku Mulwa** who stated that she is the last born daughter of the deceased herein. She confirmed that the Protestor is her step mother. She stated that parcel **Iveti/Iveti/559** belongs to her mother while

parcel **Iveti/Iveti/566** is to be shared equally between her mother and the protestor. She added that **parcel 559** had been bequeathed to her mother by her mother in law who is grandmother to the Petitioners for having helped her and which cannot be shared with the Protestor. She further averred that the Protestor had deserted her matrimonial home in 1968 and went to live with her parents. On cross – examination, she reiterated that **parcel 559** did not belong to her father but her grandmother who bequeathed it to her mother. She further stated that the protestor left her matrimonial home as soon as her husband died and that the only property available is half portion of parcel 566.

7. Parties filed written submissions. Vide submissions dated 8/08/2019 together with supplementary submissions dated 10/12/2019 the protestor submitted that since the two properties initially belonged to her late husband Mulwa Nzeki then the same should be shared equally between her and the Petitioners who are children of her co-wife. It was further submitted that pursuant to the objection numbers 49 and 50 of 1988 lodged by protestor to the Iveti Land Adjudication Section in which the tribunal ruled that the names of the protestor be included in the two plots so as for the properties to be owned in common with the deceased the same should now be shared equally. It was also submitted that as the properties are registered in the names of the Protestor and the deceased as tenants in common, then the appropriate way is to direct that the grant be confirmed and that the estate be distributed as proposed by the protestor and the petitioners do each get a share of 1.88 Ha from **Iveti/Iveti/566** and then 0.215 Ha from **Iveti/Iveti/559** to hold in trust for themselves and their family members respectively.

8. It was submitted by Miss Watta for the Petitioners that the protestor did not take any action after the decision of the Iveti Adjudication Committee to seek to sub-divide the land thirty years later. She submitted that parcel **Iveti/Iveti/559** was the deceased's sole property and that the protestor neither works on the land nor is she in occupation and therefore she cannot ride on the registration of the two title deeds as being held in common to claim a share in parcel number **Iveti/Iveti/559** as the same as the were registered as such for security purposes and did not mean that they had equal shares of the parcels of land. Learned counsel also submitted that there was mischief in that the register of titles shows that the same was opened on 20/06/2013 four years after the demise of the deceased herein and even without a grant of letters of administration. It was finally submitted that parcels **Iveti/Iveti/566** be surveyed to ascertain the acreage whereupon the Petitioners will transfer a portion thereof to the protestor and retain the rest in trust for their siblings and that parcel **Iveti/Iveti/559** should be left intact and be distributed to the petitioners.

9. I have considered the rival affidavits as well as the oral testimonies presented. I have also considered the submissions of the parties. It is not in dispute that the protestor is a co-wife to the deceased herein as they were both wives of the late Mulwa Nzeki. It is also not in dispute that the protestor had lodged an objection with the Iveti land adjudication Section vide Objection numbers 49 and 50 of 1988 wherein the tribunal directed that the two parcels of land **Iveti/Iveti/566** and **599** be registered in joint names of the Protestor and the deceased herein as tenants in common. It is not in dispute that the said two properties are currently registered in joint names of the Protestor and the deceased. That being the position I find the following issues necessary for determination namely:

(i) *Whether the protestor has established her interest in the two parcels of land reference numbers **Iveti/Iveti/566** and **559**.*

(ii) *How should the estate of the deceased be distributed?*

10. As regards the first issue, it is noted that the petitioners are only agreeable to the Protestors claim to only a portion of parcel **Iveti/Iveti/566** while the whole of parcel **Iveti/Iveti/559** should solely belong to the deceased as the same had been bequeathed to her by her mother in law. On the other hand the protestor has presented evidence to the effect that she has an interest in both parcels of land by virtue of the fact that the assets belonged to her late husband Mulwa Nzeki and that the Iveti Land Adjudication committee had directed that the two assets be registered in the joint names of herself and the deceased and that as at present the two title deeds are in the said two names. The Protestor called **Winston Ndambuki Nthenge (Protestor – PW.2)** who is a nephew to the petitioners herein who confirmed that the two assets belonged to the protestor's husband Mulwa Nzeki and that the Iveti land Adjudication Committee had directed that the protestor and deceased be registered as tenants in common over the two properties. She also called the area chief **Charles Kyalo Loki (protestor – PW3)** who confirmed the above position. I have perused the proceedings of the arbitration committee for Iveti Adjudication Section at Pages 115–118 which reveals the response from the deceased herein upon being cross–examined by the arbitration committee and also reveals the committee findings as follows:-

“ Q – Now that you are the recorded owner of the plots in question would you like the plots to be divided or the other wife's name be included in the plots?

A- I would like the plots to be recorded in the names of the two wives instead of sub-dividing”.

The committee further stated as follows:-

“This court is satisfied that both plots belongs to the late Mulwa Nzeki now deceased and both wives have equal rights to own these plots. The court has considered the fact that to sub-divide the two plots may result in Objector selling her share and go back to her father. The court has decided that recording the names of both wives in both Plots No. 559 and 566 would be more appropriate for the security of the plots. Objection allowed. Name of Muthike Mulwa Nzeki to be added in Plot No. 559 and in plot No.566 be as to be owned in common”.

Upon the deliberations of the Iveti land Adjudication Committee the Protestor seems to have proceeded thereafter and had the two properties registered in her names jointly with the deceased as indicated in the copies of the title deeds annexed in her affidavit of protest as “*MMN2*” and “*MMN3*”. Indeed the copies of the certificate of official searches indicated that the properties were owned in common equal shares. That being the position I am not persuaded by the Petitioners assertion that the protestor's name was added by the Adjudication Committee for security purposes so that she does not sell off the land since the committee was quite categorical when it allowed the protestor's objection and ordered her name to be added in the two plots so as to be owned in common. Therefore I find the Petitioners to be rather economical with the truth. The adjudication committee having established that the two properties belonged to the late Mulwa Nzeki who was husband to both the protestor and deceased herein then the same clearly put paid the Petitioners' claim that one of the assets namely **Iveti/Iveti/559** had been bequeathed to the deceased by her mother in law. This alleged claim was not presented it to the adjudication committee and is thus a

new claim. It is instructive to note that no appeal was lodged against the decision of the land adjudication and settlement committee by the deceased or any of the members of her household and hence the petitioners claims against the protestor over the parcel **No. Iveti/Iveti/559** have not been established on balance of probabilities. The Protestor and her witnesses came out as truthful as they remained unshaken even on cross-examination and that their evidence supported the decision of the Iveti land Adjudication and Settlement committee dated 13/09/1989. Again I find in the absence of an appeal to the adjudication committee's decision then that decision still holds and must be obeyed. Already the protestor has actualized the said decision by having the two properties registered in the joint names of herself and the deceased and holding the same as tenants in common.

The Protestor being a joint proprietor of the two properties definitely has a stake in the said properties. It is noted that since the registration of the protestor and deceased as joint proprietors holding the same in common and in equal shares the petitioners or any members from the household of the deceased have not challenged the said registration either before this court or the Land and Environment Court. Hence the said registration still stands. A tenancy in common has been described by the Black's law Dictionary, Tenth Edition as a tenancy by two or more persons in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right to survivorship and that the central characteristic of a tenancy in common is simply that each tenant is deemed to own by himself with most of the attributes of independent ownership a physically undivided part of the entire parcel. Further tenants in common hold their respective interests in undivided shares and each tenant in common has a distinct share in the property which has yet to be divided among the co-tenants. Under the Land Act 2012 a tenancy in common is a form of concurrent ownership of land in which two or more persons possess the land simultaneously where each person holds an individual and undivided interest in the property and each has the right to alienate or transfer their interest but they do not have a right to survivorship so that upon their demise their interest passes according to the terms of their will or intestacy if any. As a tenant in common I find that the protestor has an interest in the two properties. I also find that she has established the said interest in the land parcels **Iveti/Iveti/566** and **Iveti/Iveti/559**.

11. As regards the second issue, I note that the Petitioners vide paragraph 7 of the affidavit in support of summons for confirmation of grant have proposed that the two parcel be registered in their names to hold in trust for themselves and/or their families. They have clearly left out the protestor despite claiming that a sub-division was done in 1989 wherein the protestor was given a portion of the land pursuant to rulings by the Iveti Land Adjudication Committee. This averment appears to be in contrast with the decision of the said committee since it ruled that the two properties were to be registered in the joint names of the protestor and the deceased as tenants in common. Having been registered as a tenant in common there is no way that the protestor would be thrown under the bus since her interest is clearly protected in law. The copy of the certificate official search clearly indicates that the protestor holds an equal share in the two properties with the deceased as tenants in common. The protestor's interest in the said properties is protected in law. The petitioners can only get the share of the deceased while the protestor should get her share as well in equal shares. Hence there will be great injustice occasioned to the protestor if the grant is confirmed as proposed by the petitioners as the protestor is likely to be left with nothing yet she is a co-wife to the deceased and that the properties belonged to their late husband and further that she is now registered as a tenant in common with the deceased over the two properties. The petitioners can only administer and/or distribute half share of the said properties while the other half should be reserved for the protestor. This should be the ideal way to resolve the matter and hence the proposal by the protestor on the distribution of the properties appears to be appropriate in the circumstances. Even though the protestor is not a family member of the deceased I find the circumstances herein are rather unique. For instance the protestor and the deceased are co-wives of the late Mulwa Nzeki who was the owner of the two parcels of land **Iveti/Iveti/566** and **559**. Again the deceased and the Protestor are jointly registered as proprietors in common. I find therefore that confirming the grant in terms proposed by the protestor is quite appropriate and will help to dispose of this matter. In any event under rule 73 of the Probate and Administration Rules this court has inherent powers to make such orders for the ends of justice and to prevent abuse of the courts process. Consequently, I am satisfied that the protestor has made out her case against the petitioners to warrant an order that the two properties be shared equally between the petitioners and the protestor to hold in trust for themselves and their family members. It is noted that parcel **No. Iveti/Iveti/566** measures 3.76 Ha or thereabouts while **Iveti/Iveti/559** measures 0.43 Ha or thereabouts. Both the parcels ought to be shared equally between protestors and petitioners.

12. In view of the foregoing observations I find merit in the protest. Consequently I proceed to make the following orders.

(a) The grant of letters of administration intestate made to JOHN MUTETI MULWA and ESTHER NDUKU MULWA on the 20/12/2011 is hereby confirmed.

(b) The estate comprising of land parcels number Iveti/Iveti/566 and Iveti/Iveti/559 shall be distributed as follows:-

(i) IVETI/IVETI/566

- 1.88 Ha be registered in the name of Muthike Mulwa Nzeki.

- 1.88 Ha be registered in the names of JOHN MUTETI MULWA and ESTHER NDUKU MULWA to hold in trust for themselves and other children of the deceased.

(ii) IVETI/IVETI/559

- 0.215 Ha be registered in the name of MUTHIKE MULWA NZEKI.

- 0.215 Ha be registered in the names of JOHN MUTETI MULWA and ESTHER NDUKU MULWA to hold in trust for themselves and other children of the deceased.

(c) As parties are family members there will be no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **21st** day of **April, 2020**.

D. K. Kemei

Judge