



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 249 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE GEORGE TEVULO MUINDI - (DECEASED)

MARTHA TEVULO MUINDI.....1ST PETITIONER/OBJECTOR

VERSES

PRISCILLA WANJA MUINDI.....2ND PETITIONER/APPLICANT

JUDGEMENT

1. The deceased herein **GEORGE TEVULO MUINDI** died on the **13th day of March, 2012** intestate leaving behind the following survivors;

(A) MARTHA TEVULO MUINDI..... WIDOW

(B) PRISCILLA WANJA MUINDI..... WIDOW

(C) JOSEPH G.T. MUINDI.....SON

(D)KILONZI MUINDI..... SON

(E) NATHANIEL G. MUINDI.....SON

(F) PETER MUTISO MUINDI.....SON

(G) ELIZABETH SONNY MUINDI..... DAUGHTER

(H) LESA JANE MUINDI (DECEASED)DAUGHTER, (represented by TOM HECTOR MUINDI (GRANDSON)

(I) JANE NDILA GITHINJI.....DAUGHTER

(J) NATHANEAL MUINDI GEORGE.....SON

(K) KENNEDY TEVULO MUINDI.....SON

(L) ZICK MUINDI.....SON

(M) FLORENCE KANINI TEVULO.....DAUGHTER

(N) JANET MUTINDI TEVULO.....DAUGHTER

(O) JOHN MUTUA TEVULO.....SON

(P) BONIFACE MUKITI MUINDI.....SON

(Q) JACKLINE KILUU MUINDI.....DAUGHTER

(R) ELIZABETH KAVINDU TEVULO.....DAUGHTER

2. The deceased left behind several properties spread between Kitale, Nairobi, Machakos and Kitengela which are enumerated in the application for the confirmation of grant dated **18th April 2015**. That application was made jointly between the two applicants who are the deceased widows respectively.
3. The application was premised on a family agreement reached by the parties on **4th July, 2012** and thereafter went before a lawyer called **Alice Kamau** who proceeded to prepare the necessary affidavits which they signed before her as well as the necessary consents for the confirmation of grant.
4. The Applicant **Martha Tevulo Muindi**, the 1st widow, objected to the mode of distribution and prayed that the grant issued jointly to her and her co- widow on the **23rd day of July, 2014** should not be confirmed. She said in her affidavit of protest that she signed without knowing the contents since she was old. She said that the distribution favours her co -widow and that the distribution should be made directly to the beneficiaries who include the deceased grandchildren.
5. The respondent opposed the above assertion vide her replying affidavit dated **18th November, 2015** saying that the mode of distribution was as per the wishes of their deceased husband who had settled them separately in Machakos and Kitale. She said that she had never settled in Machakos from the date of her marriage to the deceased and she knew Kitale to be her matrimonial home.
6. When this matter came up, it was ordered that the same be determined by way of oral evidence which indeed began. However, the court found that since the only issue of contention was on distribution, it was necessary to value the vast estate so as to determine the net value of each property before distribution. The parties were thereafter ordered to submit on the mode of distribution.
7. The parties have complied with the orders and filed separate valuation reports which the court has perused. They have as well filed their respective rival submissions which this court has perused as well.
8. The objector has submitted that the estate should be distributed under the provisions of Section 40 of the Succession Act, that is, equally among the beneficiaries. The other reason was that the consent reached was not signed by other beneficiaries including NATHANEIL MUINDI, ELIZABETH MUINDI, FLORENCE TEVULO and BONIFACE MUINDI.
9. She further submitted that she had more children than her Co- widow and the more reason why the estate should be shared equally. She said that in regard to plot number LR 2116/23/11 within Kitale town, the same was registered between her and the deceased and thus she should be allowed to take it directly.
- 10 . The Respondent on her part maintains that the consent was entered willingly and those who had not signed had excuses why they were absent. That the estate should be shared in line with the wishes of the deceased. She said that the land number LR NO 5552/3 (Maji Farm) was purchased by her and the deceased as per the documents which had accompanied her replying affidavit. The same contained documents like the consent of the land control board as well as the documents or receipts by Agricultural Finance Corporation (AFC).
- 11 . She further said that she had been fully involved in the development of the estate and that the deceased sold part of Maji farm land measuring 50 acres to develop the Machakos properties. That what is remaining is a portion which some of it is not arable.
- 12 . She submitted that the family after the meeting have coexisted peacefully as per the agreement and that they have each continued to receive rent from their respective rental units. She thus prayed for the grant to be confirmed as prayed.

ANALYSIS AND DETERMINATION

13 . This court easily finds that the issue at hand is to do with whether the estate ought to be distributed in line with Section 40 or 42 of the Succession Act.

Section 40 provides as follows;

“40(1) 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 estate 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.”

Section 42 on the other hand provides that;

Previous benefits to be brought into account 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, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

14 . There is no doubt from the evidence on record that the deceased settle his first wife in Machakos, Kakuyuni, and the 2nd wife in Kitale. The estate is vast spreading to both counties as well as Nairobi and Kajiado.

15 . There is no evidence that the deceased discriminated against either of his wives or the children. It is also apparent that there was general flow of travel to either homes by the children. There are more children (10) from the first house and six from the 2nd house.

16 . The valuation of properties commissioned by this court in which they all complied and the same are on record are almost at par save the Maji farm property which it was valued by the first house through **Mwamba valuers**) at KShs.490 million and the 2nd house through **Pavida property consultant** at KShs.154 million. The discrepancy as submitted by the 2nd house was based on different acreages so that it increased in Mwambas report who used 71.1 acres instead of 63.7 acres.

17 . Having stated so what should be the rationale in sharing out the estate. Should it be shared equally or equitably? From the onset it appears that the deceased had settled her family prior to his demise. This should as much as possible be respected. There is no evidence that the 1st house ever stayed in Kitale and neither is there evidence that the 2nd house settled in Machakos.

18 . The affidavit of reply dated 18th November, 2015 clearly shows the input by the 2nd widow in the purchase and working in the Kitale Maji Farm.

19 . As regards the family meeting that took place on the 4th of July 2012 none of the parties has disputed the said minutes or the occurrence of the meeting. In the meeting the family agreed on raft of issues including the management of the two developed properties within Kitale town namely **NILE BUILDING** and **KITALE GUEST HOUSE**, which belonged to the two widows respectfully. The Kitengela building was to be managed by Kilonzi and Lucky.

20 It was further agreed that the rent from the Kitengela property will be shared out equally between the two widows. It further appeared that the rent of the two Kitale buildings once paid the balance of the amount shall be shared equally between the two widows.

21 . The spirit of the meeting above clearly indicated that the properties were shared out amicably without any valuation being carried out. It was a mutual understating for example that motor vehicle **Toyota Rav 4** which value was estimated at kshs. 500,000 was taken by the 2nd widow and **Toyota Hilux pick up** which was estimated at kshs. 700,000 was given to the first widow. There was no professional valuation exhibited in regard to the two motor vehicles.

22 . Further and during the pendency of this cause the parties did record a consent in which they devolved the shares and the money in several banks to both widows to share equally and there was no objection at all.

23 . The court has perused the supporting affidavit to the application for the confirmation of the grant as well as the affidavit of protest by the objector dated 7th May, 2015.

24 This court respectfully does not agree with the contents therein. It is inconceivable that she signed without knowing the contents which in a way mirrors those of the meeting of 4th July, 2012. She has not denied that she was by consent of the rest of the family members proposed to be the co administrator of her husband's estate. She did not deny the fact that pursuant to the said meeting they agreed to manage the Kitale town developed premises and collect rent separately, an issue captured well in the affidavit in support of the confirmation of grant.

25 . More significantly, her own children, at least some of them have signed the affidavit in support and there is nothing to show that it was fraudulently obtained. There was no evidence of coercion by any of the parties. Alice N Kamau, the counsel who witnessed the said affidavits has not been called by any of the parties to deny or accept that she saw the parties sign the same.

26 . This court is persuaded by the conduct of the deceased that he divided his family between Machakos where his first family stayed and Kitale where the 2nd family stayed. He acquired several properties as per the list exhibited in court. He developed the said properties equally. Save for the Maji farm, which the 2nd widow seemed to have participated in its development, there is no other evidence of any assistance by any of his children.

27 . The implied intention as at the time of his death was for the families to stay where they have been. None of the children even those objecting to the proposed mode of distribution participated in the acquisition or development of any of the properties. They all came after the fact.

28 . The two sections namely 40 and 42 of the Succession Act would have to be applied selectively to the extent that none of the beneficiaries would be left out yet at the same time each **house** as far as possible would benefit from what the deceased left. The other saving grace is that there are assets which they have agreed to share out. In fact, as at the time of filing this cause they were already in agreement and this court shall not interfere with the same for instance the issue regarding shares and the money left in several banks.

29 . As stated earlier the valuations on record at least has given some directions on the value of each respective property. The variation is not wide and this court need not factor much on the same.

30 . What would be the net effect of interfering with the family mode of distribution and by extension the position left by the deceased? I think it shall cause great confusion among the family members. It is necessary as much as possible to leave the estate as the deceased intended. As stated earlier there is no evidence that the deceased intended the first house to live and stay in Kitale as much as the 2nd house to live in Machakos. The parties conscious of this decision gave directions in their family meeting stated above. That meeting equitably but not

equally divided the estate.

31 . It was not farfetched to presume that they were conscious of their sexes when they agreed as well as the numerical numbers per house. This court shall not therefore interfere with their discretion.

32 . Clearly the provisions of Section 42 of the Act is applicable herein for the reason that the steps taken by the deceased before he died is a pointer that he intended the two families to leave at least separately. If the deceased intended that the two wives and their children should stay together he should have demonstrated so, while he was alive.

33 . In the premises and taking all the above factors into consideration the agreed mode of distribution by the family before ALICE N KAMAU advocate as well as consents to the mode of distribution should thus be adopted. The already shared out shares and the amount in various bank accounts by the two widows is considered a done deal.

34 . Further each of the houses shall thereafter chart its own cause on how to share their respective inheritance left to them by their father/husband.

35 . It is noted that some of the registration details of the assets may not be available and it behoves the beneficiaries to pursue them as they may deem appropriate. Nothing stops the beneficiaries from entering into any voluntary understanding post this judgement for example carrying out any “*exchange* or” *trading* “if necessary.

36 . The estate shall be divided as hereunder;

(A) MARTHA TEVULO MUINDI

- (1) SUBIRA BAR KAKUYUNI.....100%
- (2) THREE IN ONE BUILDING KAKUYUNI (3 PLOTS)100%
- (3) MAMBOLEO BUILDING KAKUYUNI (2 PLOTS)100%
- (4) ELIJAH SHOP BUILDING KAKUYUNI (1PLOT)100%
- (5) GRANDFATHERS BUILDING KAKUYUNI.....100%
- (6) MZEES OFFICE BUILDING KAKUYUNI.....100%
- (7) NATHANIEL MEMORIAL BUILDING KAKUYUNI (1 PLOT)...100%
- (8) NEW BUILDING KAKUYUNI (2 PLOTS)100%
- (9) NAMELESS BUILDING KAKUYUNI (1 PLOT)100%
- (10) MBUSYANI KAKUYUNI (EMPTY PLOT 30*100) FTS.....100%
- (11) MBUSYANI BUILDING KAKUYUNI (1 PLOT)100%
- (12) KAKUYANI HOME COFFEE SHAMBA PLOT (2 BENCHES)..100%
- (13) KWA MWANZIA COFFEE SHAMBA (2 BENCHES)100%
- (14) KAKUYUNI MARKET (5 BENCHES) COFFEE.....100%
- (15) KWA MWAITU.....100%
- (16) KWA MUMBO (COFFEE) 6 BENCHES.....100%
- (17) KWA MUTALA (KAVILINGUNI, NEXT TO BOOSTER)100%
- (18) NILE BUILDING (PLOT) NO. 23 KITALE

(B) PRISCILLA WANJA MUINDI

- (1) MAJI FARM LR NO.5553/2/10.....100%
- (2) KITALE GUEST HOUSE BUILDING (PLOT) 15.....100%

(C) MARTHA TEVULO MUINDI & PRISCILLA WANJA MUINDI TO SHARE 50 % IN THE FOLLOWING PROPERTIES.

(1) KAU 537D PICK UP

(2) KAS 349X TOYOTA RAV 4

(3) KLE 464 TRACTOR

(4) MERINDA BUILDING KITENGELA

37 . In conclusion any liabilities due to the estate shall be settled equally by the two houses.

38 . This being a family matter each parties shall bear their respective costs.

Dated signed and delivered in open court this 8th day of April, 2020.

H. K. CHEMITEI

JUDGE

8/4/2020