



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

SUCCESSION CAUSE NO. 62 OF 2017

FORMERLY MACHAKOS SUCCESSION CAUSE NO. 930 OF 2012

IN THE MATTER OF THE ESTATE OF NASON KIMINA MBINDA (DECEASED)

SUSAN NZISA MUTUKU 1ST PETITIONER/ ADMINISTRATOR

GIDEON MUIA KIMINA 2ND PETITIONER/ADMINISTRATOR

-VERSUS-

RACHAEL MUMBUA NGANGA 1ST PROTESTER

SAMSON KATHUKYA KIMINA 2ND PROTESTER

RULING

1. This is a succession matter relating to the estate of Nason Kimina Mbandi, who died intestate on 1st May 2007. He was aged 75 years old at the time of his demise. He was survived by eleven children i.e. five (5) sons, five (5) daughters and one (1) daughter in law. Later two daughters Ruth Nyivu and Jacinta Mwangeli also passed on. He left behind the following properties.

- a) Share in Konza Ranching & Farming Co-operative Society Ltd No. 164.***
- b) Commercial Plot No. 910 (Kwa Mautio) in Konza Ranching & Farming Co-operative Society Ltd.***
- c) Agricultural Pot No. 312.***
- d) Commercial Plot No. 633 Kwa Mautio New Plots.***
- e) Share Holder No. 2 with Kilungu Timber & Furniture Co-operative Ltd.***

2. A petition for letters of administration was filed on 17th September 2012 by Susan Nzisa Mutuku (*daughter in law*) and Gideon Muia

Mula Kimina (*son*). A grant of letters of administration intestate (form P&A 41) was issued to the two petitioners on 4th of April 2014 as no objection had been raised. The cause Machakos cause No. 930/2012 had been gazetted on 6th December, 2013.

3. On 22nd May 2014, Rachael Mumbua Nganga and Ruth Nyivu Mwangangi filed an application dated 21st May 2014 seeking a preservative order to maintain the deceased's estate the way it was at the time of his death. This prayer was granted by consent of the parties on 6th June 2014. The parties then went into negotiations over the rest of the prayers. There is no report on record in respect to the said negotiations. The two Applicants in the said application are children of the deceased.

4. On 4th June 2018, the two Administrators filed summons for confirmation of grant. The mode of distribution is listed at paragraph 5 of the affidavit of Gideon Muia Kimina in support of the application. It provides as follows:

- a) Share in Konza Ranching and Farming Co-operative Society Ltd No. 164 to go to the sons of the late Nason Kimina Mbandi and to be registered in the name of Gideon Muia Kimina to hold in trust for his own benefit and for the benefit of the other sons.***

b) Commercial Plot No. 910 (Kwa Mautio) in Konza Ranching and Farming Co-operative Society Ltd to be shared equally among the children of the late Nason Kimina Mbandi and to be registered in the name of Gideon Muia Kimina to hold in trust for his own benefit and for the benefit of the other children.

c) Commercial Pot No. 633 (Kwa Mautio – new plots) in Konza Ranching and Farming Co-operative Society Ltd to be sold and shared equally among the children of late Nason Kimina Mbandi and to be registered in the name of Gideon Muia Kimina to hold in trust for his own benefit and for the benefit of the other children.

d) Agricultural Plot No. 312 in Konza Ranching and Farming Co-operative Society Ltd to be shared equally among the sons of the late Nason Kimina Mbandi and to be registered in the name of Gideon Muia Kimina to hold in trust for his own benefit and for the benefit of the other sons.

e) Share No. 20 in Kilungu Timber and Furniture Co. Ltd and the sales to be shared equally among the children of Nason Kimina Mbandi.

5. Annexed to the application is a consent to the confirmation of grant. It is signed by seven (7) out of the eleven (11) beneficiaries. Susan Nzisa also filed her authority allowing Gideon Muia to file an affidavit in support of the summons for confirmation.

6. Following the filing of the summons for confirmation of grant the following affidavits of protest were filed.

- Racheal Mumbua Nganga dated 2nd July 2018 and filed on the same day.

- Samson Kathukya Kimina dated 24th January 2019 and filed on 25th January, 2019

7. Directions were taken to the effect that the protests would be heard by way of viva voce evidence. Parties were to file witness statements and finally their preferred modes of distribution of the estate. All these were complied with.

8. During the hearing, Pw1 **Rachael Mumbua Nganga** testified that she would wish to be added as a 3rd administrator because the current administrators have sold the properties without their participation. She admitted having attended a meeting at the chief's place together with other family members. She says the brothers had done a letter, written their names on a separate paper and signed it. A copy was annexed to the replying affidavit.

9. She admitted receiving Kshs.100,000/= in respect to Plot No. 663. Her late sister Ruth's children were given nothing. She says her prayer is for all the property to be returned to the estate for distribution.

10. In cross examination, she denied signing any documents before an advocate or receiving Kshs.115,000/=. She admitted receiving Kshs.5,000/= from the timber company.

11. Pw2 **Samson Kathukya Kiminia** prayed that Pw1 (**Rachael Mumbua Nganga**) be made an administrator. He said he was given only Kshs.27,000/= for the properties sold. He mentioned a land in Konza measuring ten (10) acres which was sold. He denied going to any advocate's office to sign any documents. He also said the children of their late sister have not been given anything.

12. In cross examination he said he was aware of the sale but never gave any consent. He said they have filed their preferred mode of distribution and the title deeds.

13. Pw3 **Esther Waiu Kimina** gave similar evidence to that of the first two witnesses. She admitted receiving Kshs.100,000/= in respect of Plot No. 633 only. In cross examination, she admitted having consented to the sale of Plot No. 633. They had however been forced to sign the documents, she said.

14. Pw4 **Eunice Kimina** also gave similar evidence. She admitted receiving Kshs.100,000/= for Plot No. 633 and Kshs.20,000/= for Plot No. 910. She denied signing any documents at the chief's place, and knowledge of the sale of properties. Pw1, Pw3 and Pw4 all said they are ready to return all the money they had received. Their case was closed at this point.

15. Rw1 **Susan Nzisa Mutuku** is the 1st administrator and eldest daughter in-law of the deceased. She said the appointment of administrators and distribution of the estate was done by consent of the family members. She stated that Plot No. 633 was sold and the proceeds shared out equally. Plot No. 910 was also sold and the proceeds were to be used to pay fees for Jacinta Mwangeli (*now deceased*). The proceeds were again shared. They had agreed on all this before the chief. A copy of the chief's letter is annexed to the 2nd administrator's replying affidavit.

16. In cross examination, she agreed that Plots No. 633, 910 and 312 had been sold, with the consent of all parties. She received Kshs.100,000/= for Plot No. 633 and Kshs.20,000/= for Plot No. 910. She also confirmed that the late Ruth Nyivu's children were not given their share in both plots. She expressed fears in Pw1 being made an administrator since she is already one where she is married.

17. Rw2 **Gideon Muia Kimina** is the 2nd administrator. He adopted his witness statement. In it he says the sale of properties was agreed on at the chief's office. After the sale of Plot No. 633 and 910, they again sat and shared the proceeds equally and also paid the costs of the case at Machakos. The case was never withdrawn by Pw1.

18. In cross examination he said the deceased gifted each of them during their weddings, and the record was at home. It is his evidence that

Plot No. 312 was a wedding gift to him by the deceased. It measures 10.5 acres. He sold it and transferred it on 7th July, 2017.

19. He said the land was given to him by Konza in 2017, through his father's shares. Referring to the agreement at the chief's office he said he was withdrawing his prayer to share Plot No. 312, and wants it in his name. He used the agreement at the chief's office to sell it. He sold it at Kshs.9 million which he did not share with anyone else.

20. He agreed that the late Ruth's children were not given anything from the sales of Plots No. 633 and 910. His take is that they can't return what they sold and were paid. That Pw1 can't be an administrator since she is married. He opposed the protestor's mode of distribution.

21. Counsel for both parties filed written submissions. After doing a summary of the evidence of the parties, Mrs. Nzao for the protestors submits that from the evidence on record the estate ought to be administered by three people and be distributed to all beneficiaries by adopting the protestors' schedule of distribution filed on 24th September, 2019.

22. She also submits that the evidence shows that the petitioners have intermeddled with the estate by selling some properties without the consent of all the beneficiaries and pocketed all the proceeds. There was therefore the need of having a 3rd administrator, and all assets to revert back to the estate for distribution.

23. Mr. Kimeu for the Petitioners/Administrators in his submissions states that the protestors main issue is that they did not share the proceeds of sale of part of the deceased's estate allegedly disposed of by the petitioners. He submits that the Petitioners/Administrators produced documentary proof in support of their case.

24. They also produced a sale agreement and minutes/proceedings of what was agreed on by all the deceased's heirs. That the protestors merely denied that they appended their signatures. It is therefore his contention that the matter is the word of the protestors against that of the petitioners.

25. He further refers to section 45 of the Law of Succession Act (Cap 160 Laws of Kenya) on intermeddling of a deceased's estate. His submission is that both the protestors and petitioners jointly and severally actively participated in disposing of part of the deceased's estate before confirmation of grant as provided for under section 71 of the said Act.

26. He urges the court to uphold the mode of distribution of the deceased's estate as proposed by the petitioners. He in the alternative urges the court to peruse the record and evidence tendered and proceed to distribute the deceased's estate as it deems fit as by the Law provided.

Analysis and determination

27. Having considered the evidence on record and the Law, I find the issues falling for determination to be as follows:

i. Which of the two modes of distribution filed should be adopted?

ii. Whether the estate needs a 3rd administrator.

Issue no. (i) Which of the two modes of distribution filed should be adopted?

28. The protestors propose that all properties (*sold or not sold*) belonging to the deceased's estate be reverted to the said estate for distribution in equal shares. On the other hand, the petitioners propose that distribution be made as per the agreement of the family members at the chief's office whereby some properties are shared out equally among all the children while others are left for the sons only to share.

29. The deceased's properties as set out by the petitioners and which have been confirmed by the protestors are five (5) and are as outlined at paragraph 4 of this ruling. On perusal of the file I have noted a search certificate dated 16th May 2014 in respect to Machakos/Konza North Block/1221 measuring 4.5 HA in the names of N.K. Mbandi. Infact it's the ONLY search that was ever filed by the petitioners. There is otherwise no title or search filed in respect of the other properties.

30. Documents have been filed to show that the beneficiaries appeared before the chief and agreed that certain things be done. The protestors have disowned this and want this court to find that they were never involved. That they never agreed to the sale of any property of the deceased.

31. I would have agreed with them if they had not gladly received money from the proceeds of the sale of Plots No. 633 and 910. The documents produced bear their signatures as attendees at the family meeting of 22nd September, 2014. They also signed for receipt of the money. Their names and I.D numbers are clearly indicated.

32. It is also a fact that Pw1 and the late Ruth Nyivu cited the 2nd petitioners and two brothers in Machakos High Court Succession Cause No. 930/2012. It was after such citation that the petitioners filed this succession cause. The agreement GMK '2' shows clearly how the money from the two sales was spent. I therefore find that the protestors on the issue of the sale of these two plots are blowing both hot and cold. They participated in the agreement for the sale. And they received money.

33. It has however been admitted by the petitioners that the children of Ruth Nyivu a daughter of the deceased did not benefit from the two sales. This was a serious omission on the part of the petitioners and it must be made up for.

34. The properties left for distribution are therefore:

- Land Parcel No. Konza North Block 1/1221- 4.5HA.
- Surveyed 5 acres at Matangu.
- Agricultural Plot No.312.
- Shares in Konza ranching and farming Co-operative Society Ltd.
- Share in Kilungu Timber & Co. Ltd.

35. In his evidence, Rw2 Gideon Muia Kimina told the court that property – Agricultural Plot No. 312 exclusively belongs to him having been given to him by the deceased as a gift on his wedding. This having been a controversial matter, Rw2 ought to have adduced evidence to support his claim e.g. when the plot was given to him and when it was transferred to him.

36. He said he used the chief's agreement to transfer it to a 3rd party. The chief's agreement (GMK2) shows that the land among others was to go to the deceased's sons and not him alone.

37. Secondly, in his affidavit in support of the summons for confirmation at paragraph 5(4) he states this:

“Agricultural Plot No. 312 in Konza Ranching & Farming Co-operative Society Ltd to be shared equally among the sons of the late Nason Kimina Mbandi and to be registered in the name of Gideon Muia Kimina to hold in trust for his own benefit for the benefit of the other sons”.

This affidavit was sworn on 21st May 2018.

38. He claims to have sold the land in 2017 yet in 2014 and 2018 the position was that the land had to be shared among the sons of the deceased.

39. I find the dealing of Rw2 in this specific parcel of land to have been crafty and corrupt. He intermeddled with the deceased's estate by selling land that did not belong to him. He has not even explained why titles to the properties were not annexed to the petition for grant. This property MUST revert to the estate. Any sale of the same is null and void and the transfer and title deed issued is cancelled. The Land Registrar to re-issue a title in the deceased's names.

40. Section 38 of the Laws of Succession Act provides:

Where an intestate has left a surviving child or children but no spouse:

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

41. Since the deceased died intestate all the properties save for Plots No. 633 and 910 shall be the subject of a fresh distribution among all the deceased's children in equal shares. The shares of the deceased Ruth and Jacinta will go to their children if any is surviving them. The administrators must cater for the share of Ruth's children in plots No. 633 and 910.

Issue no. (ii) Whether the estate needs a 3rd administrator.

42. Following the above exposition, I find that it is only fair and just that a 3rd administrator be added to the present two administrators. Racheal Mumbua Nganga has been so identified and so shall it be. The initial grant in the name of the two administrators is hereby revoked. The same to be returned to the court. A fresh grant to be issued in the joint names of:

- i. Susan Nzisa Mutuku**
- ii. Gideon Muia Kimina**
- iii. Racheal Mumbua Nganga**

43. The upshot is that the protests partially succeed with the following orders being made:

1) The sales of Plots No. 633 and 910 are valid and are confirmed.

2) The sale of Agricultural Plot No. 312 is revoked. The land reverts to the estate of the deceased. The title deed issued to Hasa Isa is hereby revoked. Let him seek for a refund of his money from Gideon Muia Kimina. The Land Registrar Makeni County to re-issue

a title deed in the deceased's name.

- 3) The initial grant be and is hereby revoked. A fresh grant to issue in the names of Susan Nzisa Mutuku, Gideon Muia Kimina and Racheal Mumbua Nganga. The initial grant to be returned to court.
- 4) The properties cited at paragraph 34 of this judgment to be distributed equally among all the deceased's children.
- 5) The administrators to agree on how the children of Ruth Nyivu will receive their share of the sales of Plots No. 633 and 910.
- 6) No order as to costs since this is a family matter.

Orders accordingly.

Delivered, signed & dated this 12th day of May 2020, in open court at Makueni.

H. I. Ong'udi

Judge