



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC. P&A NO. 444 OF 2017

IN THE MATTER OF THE ESTATE OF NDAMBUKI KINGUTU MAITHA (DECEASED)

PHILES MWIKALI KIOKO.....1ST PETITIONER

ESTHER NDULU KIOKO.....2ND PETITIONER

AND

SAMUEL MUNGUTI NDAMBUKI

***alias* SAMMY NDAMBUKI.....3RD PETITIONER/1ST PROTESTOR**

TABITHA KATILE KAWINZI NDAMBUKI.....2ND PROTESTOR

RULING

1. The court is moved via chamber summons dated 19/07/2017 for confirmation of grant and distribution of the deceased estate as follows:-

- a) Alice Muthoki Ndambuki 4 acres
- b) Syokau Ndambuki 1 acres
- c) Matee Nzomo 5 acres
- d) Philes Mwikali Kioko 21 acres
- e) Esther Kdulu Kioko 4 acres

2. The protestors opposed proposal on distribution and have via affidavits of Samuel Munguti Ndambuki alias Sammy Ndambuki proposed distribution as follows:-

- a) 1st house 12.9 acres.
- b) 2nd house 12.9 acres.
- c) 3rd house - 4 acres.
- d) Balance 5.2 acres to be given to Tabitha Katile Kawinzi being the portion bought by her husband Ndambuki Kawinzi from the deceased.

3. The parties agreed to canvass application via viva voce evidence and submissions. Thereafter the submissions were filed and exchanged.

PROTESTOR'S SUBMISSIONS

4. The protestors submit that the estate herein relates to Ndambuki Kingutu Maitha (deceased) who died intestate on 22/07/1985.

5. Thereafter, his son Leonard Kioko Ndambuki (deceased) secretly petitioned for letters of administration and caused the sole property of

the deceased herein (Land Parcel Number MAKUENI/UNOA/143) to be registered in his name.

6. He contends that, Parties herein resolved the issue of administration and agreed by consent order dated 17/01/2017.

7. In the aforesaid consent, parties further agreed that the only sole property of the deceased person herein be sub-divided among the three-housed of the deceased as per the sub-division on the ground and the surveyor was to ascertain the sizes of the portions occupied by each house.

8. Although this consent order has never been set aside or reviewed, the 1st and the 2nd Administrators failed to co-operate with the rest to have the surveyor ascertain the sizes of the portions occupied.

9. Instead they filed an application for confirmation of grant dated 19/07/2017 in which they have made weird proposals on the sub-division of the estate which proposal is contrary to what parties had agreed.

10. The protestors have protested to the proposal made by the 1st and 2nd Petitioners and have in so doing filed detailed affidavit in protests sworn by both the protestors.

11. During hearing of both the application for confirmation of grant and protest, both the 1st and the 2nd Administrator s testified.

12. It was the evidence of the 1st Administrator (Philes Mwikali) that together with the second wife of the deceased (Rael Muendi – deceased) acquired the subject parcel of land but the land was registered in the name of the deceased and as such she should get the biggest share of the estate.

13. She however could not explain how she managed to acquire the subject land and she was married when she was a young girl and she was barely eighteen years when the estate was acquired.

14. This evidence by the 1st Administrator was not supported by any other witness or any documentation and as such, they humbly submit that the 1st Administrator was only trying to mislead the court on the acquisition of the subject parcel of land.

15. The 2nd Administrator on the other hand indicated to the court that she did not know how the subject land was acquired but she was only told by his co-wife (1st Administrator) and her mother-in-law that the same was acquired jointly by them.

16. On their part, the 1st protestor, who is the first son (child) of the deceased herein categorically, stated that the land in question was acquired by their deceased father and they have all lived on the land and each family has a portion it occupies.

17. He further proposed that the estate be sub-divided as per the sub-divisions on the ground since the other two houses of the deceased are in agreement, the only house with issues is the second house.

18. He further testified that the deceased had sold a portion of the subject land to his son Kawinzi Ndambuki on 21/08/1969 and produced a sale agreement to that effect. This evidence was supported by the wife of the said Kawinzi Ndambuki.

19. Although this was admitted by the 1st Administrator, she further testified that the portion sold to Kawinzi was later sold to Matee Nzomo by the deceased. However, the agreement annexed is shown to have been drawn by Kawinzi Ndambuki and not the deceased.

20. Further, none of the witnesses who are said to be present during the alleged sale were availed to testify.

21. Therefore, since it is not disputed that Kawinzi bought from the father, the protestor submits that this land should be excised before the final sub-division is done.

22. If the family of Matee Nzomo indeed bought any portion from Kawinzi, then they will follow it up in the estate of Kawinzi Ndambuki since it is evident they never purchased any portion of land from the deceased.

23. Therefore, they also submits that the estate of the deceased be sub-divided as per the sub-divisions on the ground and as per the proposal made by the protestors.

24. Further, the family of Kazinzi Ndambuki be given the portion they bought from the deceased noting that the consent order signed by the parties herein is still binding and should be adhered to.

1ST AND 2ND PETITIONERS' SUBMISSIONS

THE DISPUTE

25. The Petitioners submit that, they were the original Petitioners in this matter. On 17/01/2017, Philes Mwikali Kioko, Esther Ndulu Kioko and Sammy Munguti Ndambuki were appointed as joint Administrator s.

26. Parties were directed to agree on distribution which was not possible. The 1st and 2nd Administrator s/Petitioners filed summons for confirmation of grant 19/07/2017.

27. The 2nd Administrator and one Tabitha Katile Kawinzi Ndambuki filed a protest. Both the protest and the summons were heard viva voce.

1ST AND 2ND ADMINISTRATOR 'S CASE

28. PW1 Philes Mwikali Kioko told the court she is the 1st wife of Leonard Munguti Ndambuki. She informed the court that she acquired the land in dispute with Rael Muendi Ndambuki in the year 1948.

29. The deceased was at the time working on the farms in Njoro and only came back in 1950 and found her already settled.

30. However because they did not have identity cards as women then, the land was registered in the name of the deceased. The other people including the protestors joined them later in 1951 and found them already settled.

31. She testified that Alice Muthoki Ndambuki who is the 2nd wife of Leonard Kioko Ndambuki got her land in Mavindini. But the land was later taken by Sammy Munguti Ndambuki. She informed the court all family members know this position and they are only denying what they know is the truth.

32. On cross examination, she reiterated her evidence in chief. She produced search for the land as exhibit 1 which shows the land is registered in the names of the 1st and 2nd Administrator.

33. She also produced agreement dated 09/08/1973 which shows the portion of 5 acres was sold to Matee Nzomo and not Kawinzi Ndambuki as contented by the protestors.

34. PW2 Esther Ndulu Kioko told the court she is also a wife of Leonard Munguti Ndambuki. She adopted her affidavits. She repeated what the 1st Administrator stated.

35. In cross examination she confirmed that she was informed by the 1st Administrator how the land was acquired.

PROTESTORS' CASE

36. DW1 Samuel Munguti Ndambuki told the court that he is a son of the deceased in this matter. He adopted his affidavit and insisted that the land in issue was acquired by the deceased.

37. He denied that the 1st Administrator and Rael Muendi Ndambuki in 1948 as she stated. He prayed that the land be distributed as he has proposed.

38. He told the court in cross examination that the 1st Administrator was married on behalf of one Leonard Kioko Ndambuki while she was a little girl. It was his evidence that the 1st Administrator was not able to get the land then.

39. DW2 Tabitha Katile Kawinzi Ndambuki told the court she is wife of Kawinzi Ndambuki. She is therefore daughter in law of the deceased. She denied knowledge that the land was acquired by the 1st Administrator and Rael Muendi Ndambuki.

40. She told the court that there is a portion which his husband bought from the deceased and should be given to her. They should then go ahead and share the remaining land as per the law. The protestors denied that Matee Nzomo bought the portion.

41. She stated that it is Kawinzi Ndambuki who bought the land.

42. The 1st and 2nd Administrator s stated that the portion in issue was bought by Matee Nzomo and not Kawinzi Ndambuki but the protestors denied this.

43. They submit that the 1st and 2nd Administrator s have proved that it is the 1st Administrator who acquired the land in 1948 and thus belongs to her.

44. They pray the court do find she is the sole owner of the land and should be shared as she has proposed. The 1st protestor has another land in Mavindini where he is settled and does not live on the suit property.

DISTRIBUTION

45. The 1st Administrator s in the summons for confirmation of grant proposed the land be distributed as follows:-

a) Alice Muthoki Ndambuki - 4 acres.

b) Syokau Ndambuki - 1acre (because she has another land in Kangundo).

c) Matee Nzomo - 5acres (being the portion he bought from the deceased).

d) Esther Ndulu Ndambuki - 4 acres.

e) Philes Mwikali Kioko - 21 acres.

46. The 1st Administrator is getting 21 acres because she is the one who got the land and the rest have their own land and they are settled there.

ISSUES

47. The court has gone through the evidence on affidavit and given viva voce and has concluded that, the issues are;

i. Whether the estate has portions to be allocated to buyers at the point of distribution?

ii. If above in negative, how is the estate to be distributed?

iii. What is the orders as to costs?

48. The protesters side, it is claimed that the first Administrator should get 21 acres while the rest get;

- **Alice Muthoki Ndambuki 4 acres.**
- **Syokau Ndambuki - 1 acre (because she has another land in Kangundo).**
- **Matee Nzomo - 5acres (being the portion he bought from the deceased).**
- **Esther Ndulu Ndambuki - 4 acres.**

49. The justification given is that, she alleges that, she is the one who bought the land and the rest have their own land and they are settled there.

50. DW1 son of the deceased denied 1st bought the suit land but insisted that the land in issue was acquired by the deceased.

51. DW2 Tabitha Katile Kawinzi Ndambuki told the court she is wife of Kawinzi Ndambuki. She is therefore daughter in law of the deceased. She denied knowledge that the land was acquired by the 1st Administrator and Rael Muendi Ndambuki.

52. She told the court that there is a portion which his husband bought from the deceased and should be given to her.

53. The allegations of purchase by the 1st Administrator of the suit land in 1948 and registering same in deceased name is not supported by any evidence.

54. No documents have been produced to support it, nor seller to support the same. The reason why no claim was made during the live time of the deceased leaves a lot to be desired. The court finds that same allegation is credible.

55. In any event, if the same had evidence, same can only be canvassed in ELC court as it deals with title not distribution.

56. The same holding applies to the claim of DW2 wife of the late Kawinzi Ndambuki who was son of deceased. The holds that there is no evidence to support sale of land by the deceased to either Kawinzi or any other person.

57. In any event why was claim not made at the life time of the deceased?

58. The court thus holds that the deceased estate has no known liabilities or debt and since he died intestate, the land will be shared under section 40 of L O S A Cap 160 LOK as follows:-

i. The land shall be shared according to the 3 houses according to the numbers of the beneficiaries including surviving widows such that each of the them will get equal shares.

ii. The sharing on the ground shall take to account the occupation and development on the ground provided that no beneficiary gets bigger share than others.

iii. Parties to bear their costs.

SIGNED, DATED AND DELIVERED THIS 7TH DAY OF FEBRUARY 2019, IN OPEN COURT.

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HON. C KARIUKI

JUDGE