



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 984 OF 2012

IN THE MATTER OF THE ESTATE OF JOHN NTHIWA NTHENGE (DECEASED)

BONIFACE MWANGANGI NTHENGE.....1ST ADMINISTRATOR/PROTESTOR

V E R S U S

JOSEPH MUTHOKA NTHENGE.....2ND ADMINSTRATOR/APPLICANT

RULING

1. The protestor and the applicant filed Succession Cause No. 984 of 2012 seeking for letters of administration intestate in the estate of John Nthiwa Nthenge in their capacity as sons. They were issued with letters of administration on 24/1/2013 and on 12th June, 2013 they proceeded to file an application for confirmation where they proposed that land parcels **Mbee/Kathiani/415, 1057,1072,1094,1119,966,340 and 748** be registered in their names to hold in trust for the other beneficiaries. The protestor then filed a protest dated 29.11.2013 against confirmation of grant which is now the subject for determination herein.

2. The protestor deposed that land parcel **Mbee/Kathiani/748** ought to go to their brother Peter Syuki Nthiwa who had refunded the purchase price to Edward Muinde Makosi after their father had sold it. He further deposed that land parcel **Mbee/Kathiani/340** was shared out in clan proceedings and one Mutuku was to be included as one of the beneficiaries. He deposed that the mentioned properties are not available for distribution.

3. The parties filed witness statements and the protest was heard vide oral evidence. The Protestor testified and called one witness. The 2nd Administrator testified and called 2 witnesses.
4. The Protestor testified that the deceased had directed that his property be distributed equally amongst all the children and that land parcel **Mbee/Kathiani/748** ought to go to their brother Peter Syuki Nthiwa who refunded the purchase price to Edward Muinde Makosi after their father had sold it. He further testified that land parcel Mbee/Kathiani/340 was shared out in clan proceedings and one Mutuku was to be included as one of the beneficiaries. On cross-examination, he confirmed that the land parcel **Mbee/Kathiani/748** is still registered in the names of the deceased and land parcel **Mbee/Kathiani/340** belongs to Nthiwa and Muli Kituu.
5. Peter Syuki Nthiwa was Pw2 and he testified that the minutes of the family deliberations on 31.8.06 and 5.9.06 show that he refunded Peter Muinde Kshs 50,000/-. He further testified that he agreed with the proposal by the 1st administrator on the mode of distribution of the estate of the deceased. On cross-examination, he testified that land parcel **Mbee/Kathiani/748** belongs to him since he refunded Muinde Kshs 50,000/- however he agreed that he has not called Muinde to court, neither has he called the author of the minutes to court. He further testified that he resides on land parcel Mbee/Kathiani/748 and no one has opposed his occupation over the same.
6. Joseph Muthoka, the 2nd Administrator testified that land parcel Mbee/Kathiani/748 and 340 are in controversy; they initially belonged to the deceased and another person. He maintained that the deceased did not sell any land and he did not witness any sale agreement between the deceased and Edward Muinde Makosi. On cross-examination, he testified that land parcel Mbee/Kathiani/340 is owned by his father and Sophia Muli and the same is not being used by any of the family members. He testified that Edward Muinde Makosi was refunded his Kshs 50,000/- and thus he seeks that the property be distributed in accordance with clan customs and not written laws.
7. Pw2 for the petitioner was Willy Kiilu Sengwe who testified that land parcel Mbee/Kathiani/748 belonged to his family members and an objection was lodged before the adjudication officer and after he got his portion he sold it to the deceased at Kshs 50,000/=. It was his testimony that the property of the deceased should be shared equally between the houses. On cross-examination he testified that the 50,000/- to purchase land parcel Mbee/Kathiani/748 was loaned to the deceased by Edward Muinde Makosi and he does not know whether the same was refunded.
8. Edward Muinde Makosi was Pw3 for the petitioner. He testified that he did not buy property from the deceased but gave him friendly loan that was refunded to him by the deceased and not by Peter Syuki. On cross-examination, he testified that he does not know Robert Ngei.
9. The parties filed written submissions.

10. The protester in his submissions on the issue of the status of land parcels 748 and 340 argued that land parcel Mbee/Kathiani/748 had been given out to Peter Syuki after he refunded the Kshs 50,000/- that belonged to Edward Muinde Makosi and prayed that court holds so. Counsel further submitted that land parcel Mbee/Kathiani/340 solely belonged to the deceased and to date no one has come to claim the land and thus he submitted that the same be held as part of the estate of the deceased and be distributed. On the issue of the mode of distribution to be adopted, counsel submitted that it should be done equitably and cited the case of **Mary Rono v Jane Rono & Another (2005) eKLR**. Counsel submitted further that Section 40(1) of the Law of Succession Act guide the court for the deceased had more than one wife.

11. Learned Counsel for the 2nd Administrator submitted that the evidence on court record is that all the properties comprised in parcels **Mbee/Kathiani/415,1057,1072,1094,1119,966,340** and **748** are registered in the names of the deceased and therefore they are all available for distribution. Counsel further submitted that there is no sale agreement to prove that Parcel Number 748 was sold to Edward Muinde Makosi or evidence that parcel 340 has an ownership dispute. Counsel relied on the provisions of Section 107 and 108 of the Evidence Act and submitted that the protestor has failed to prove his case as required by the law. On the issue of the mode of distribution, counsel submitted that the court be guided by the provisions of Section 35 of the Law of Succession Act for there is a surviving spouse who is entitled to a life interest in the whole residue of the net intestate estate. Counsel relied on the case of **Tau Katungi v Margrethe Thorning Katungi & Another (2014) eKLR**.

12. From the evidence of the parties, I find that Land parcels **Mbee/ Kathiani/ 415, 1057, 1072, 1094, 1119** and **966** are not in dispute. I also find that land parcels Mbee/Kathiani/340 and 748 are registered in the names of the deceased. What appears to be in dispute is the realization of the interest in the said land parcels **Mbee/Kathiani/340 and 748**. The issues for determination are how the estate should be distributed and whether the court has jurisdiction to make allocations of land parcels Mbee/Kathiani/340 and 748.

13. With regard to the first issue, the 2nd Administrator testified that the estate should be distributed in accordance with customs. However **In the case of Rono v Rono (2005) IEA 363** the court of appeal held that:

“The application of customary law whether Marakwet, Keiyo or otherwise is expressly excluded unless the Act itself makes provision for it. The Act indeed does so in Sections 32 and 33 in respect to Agricultural land and crops thereon or livestock where the law or custom applicable to the deceased’s community or tribe apply. But the application of the law or custom is only limited to such areas as the minister may by notice in the gazette specify.....”

Similar position was held in the case of **Francis Njoroge Mungai and Others vs John Njoroge Mungai HCC Appeal No. 18/2001** where Judge Kamau held that the distribution of the estate in accordance with

customary law, of a person dying after the commencement of the Law of Succession Act, is inconsistent with Section 2(1) of the Act. The effect of Section 2(1) is to oust the application of African Customary Laws. In this regard, for distribution of the estate of the deceased, the relevant law is Section 40 and 35 of the Law of Succession Act and Article 27 of the Constitution.

Article 27 (1)

Every person is equal before the law and has the right to equal protection and equal benefit of the law.

Section 40(1)

“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net 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 unto to the number of children.”

Section 35

Where an intestate has left a surviving spouse and child or children the surviving spouse shall be entitled to (b) a life interest in the whole the net intestate estate

14. In view of the provisions of the law, the beneficiaries of the estate have been identified as well as the properties of the deceased and so there is nothing to preclude the court from making an order for confirmation.

15. With regard to the claims to land parcels Mbee/Kathiani/340 and 748, it is the protestor’s case that Peter Syuki Nthiwa has an interest in Plot 748 for he refunded the money that was used to purchase the said plot. The protestor’s case is that Plot 340 is to be shared with Mutuku. Both properties are registered in the names of the deceased and though Peter was a witness in the suit, he is not a party. Mutuku is neither a witness nor a party to the suit. There is no cogent evidence to prove the alleged refund, neither is there evidence to establish that the said Peter Syuki Nthiwa was given the land as a gift inter vivos. Be that as it may, if any one claims a purchaser’s interest in the property, this honourable court has no powers to determine the said interest; further, the prudent way would have been to be heard under **Order XXXVI (36) CPR**. In **Charles Murithi Kungu –Vs- Ann Njoki Njenga Nai Hccc 19 Of 2004** the court ordered that a dispute as to whether a particular asset formed part of the estate of deceased or belonged to the applicant be dealt with through an originating summons brought under **ORDER XXXVI RULE 1**.

16. I do point out that if the deceased had entered into some binding transactions, or where liability had attached against him or a right had accrued upon him, his death does not discharge him from the obligations or liability, or obliterate his right under those transactions. The personal representative comes

in to fulfil those obligation or liabilities, or to realize any right or benefit thereof for the estate of the deceased. That is why the law requires the personal representative to bring in all the estate property, to pay out all liabilities and discharge all obligations of the deceased. Nevertheless the evidence on record proves that the deceased has no liability.

17. At this juncture, it is my considered view that the protest is unsuccessful and is hereby dismissed.

18. The grant issued to the petitioner is hereby confirmed in the terms of the proposal by the administrators and the beneficiaries are directed to appear before court on the 2/5/2019 to consent to the mode of distribution.

19. Each party to meet their own costs.

It is hereby so ordered.

Dated and Delivered at Machakos this 2nd day of **April, 2019.**

D.K. KEMEI

JUDGE