



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.437 OF 2015

(FORMERLY SUCCESSION NO. 1629 OF 1997 - NAIROBI)

IN THE MATTER OF THE ESTATE OF NZOMO NZIOKI ISUIA (DECEASED)

GERALD KIOKO NZOMO.....1ST ADMINISTRATOR/PROTESTOR

MARTIN MUSEMBI NZOMO.....2ND ADMINSTRATOR

FIDELIS MUASA NZOMO.....3RD ADMINSTRATOR

RULING

1. The three administrators herein were granted letters of grant of administration to the estate of the late **Nzomo Nzioki Isiu**. Later the 2nd and 3rd Administrators filed summons for confirmation of grant dated 26/07/2012 in which they proposed to have the assets be shared equally among the beneficiaries and that each of properties were to be divided into four equal portions among the four beneficiaries.
2. The 1st Administrator **Gerald Kioko Nzomo** disagreed with the proposed scheme of distribution of the estate and he filed an affidavit of protest dated 14/1/2013 in which he vehemently opposed the proposal by his co-administrators and he thus presented his rival proposed mode of distribution.
3. Parties agreed to cavass the protest by way of viva voce evidence.
4. **Gerald Kioko Nzomo** testified and stated that he was the last born in the family and resides at the compound of his late parents while his co-administrator reside elsewhere. He further stated that the deceased had four parcels of and namely **Mbiuni/Makiliva/397, Mbiuni/Makiliva/380, Mbiuni/Makiliva/302, Mbiuni/ Makiliva/ 566**. He proposed that parcel No. 380 should be given to him since the same had been bequeathed to him by his late father and that he has made a lot of improvements thereon. He further proposed that parcel No. 397 be shared between himself (6 acres), Martin Musembi Nzomo (7.5 acres) and Paul Musyoki Nzomo (7.5 acres) while parcel No. 566 should go to Fidelis Muasa Nzomo who had earlier been given parcel No. 398. Finally he proposed that parcel No.302 should go to one Paul Mutinda Muindi who had purchased it from the deceased. On cross – examination, he maintained that the other two administrators are out to deprive him of his rightful share yet his late father had bequeathed him the portions of land he is staking a claim onto. He also confirmed on re-examination that the deceased did not make any agreement while bequeathing the lands to his sons.
5. The third **Petitioner Fidelis Muasa Nzomo** testified on his behalf and on behalf of the 2nd Petitioner. He stated that all the properties should be shared equally among the children of the deceased. He denied that the deceased had bequeathed any properties to any of the family members. He maintained that parcel **No. Mbiuni/Makiliva/398** belongs to him having purchased it a long time ago and was registered in his favour in 1976 and should be excluded from the assets to be shared. He went on to add that all the beneficiaries developed parcels no. 380 and maintained having planted fruit trees on the land and which should be shared equally. He further stated that the said plot is commercially viable and likely to attract a market and hence each beneficiary should get a piece thereof. Finally he stated that parcel No. 302 should be given to one Paul Mutinda Muindi who had purchased it from the deceased. On cross-examination he denied that the deceased had given him Plot Number 398 since he had purchased it himself with his own money from one Thyaka and maintained that the other properties should be shared equally.
6. Learned Counsel filed written submission. It was submitted by Mr. Ngolya for the Protestor that fairness will only be achieved by distributing the estate in the manner suggested by the Protestor namely that Parcel No.380 should be left with the Protestor while the 3rd Administrator takes up 398 and 566 and that parcel 397 be shared between the protestor, 2nd Administrator and one beneficiary.
7. Miss Kavita for the 2nd and 3rd Administrators submitted that the distribution proposed by their clients is in line with the provisions of Section 38 of the Law of Succession Act in that all the three properties should be shared equally among the beneficiaries. It was also submitted that Parcel Number Mbiuni/Makiliva/398 is not part of the estate since the same had been purchased by the 3rd Administrator and

who has a title thereto.

8. I have considered the evidence of the 1st Administrator/Protector and the 2nd Administrator. I have also considered the submissions of both learned counsels. It is not in dispute that all the three administrators herein were duly issued with a grant of letters of administration and that they were about to have the said grant confirmed when the 1st Administrator filed this protest. It is also not in dispute that the deceased herein had four sons and six daughters. It is not in dispute that the six daughters have neither appeared in court to tender evidence nor signed a consent to the confirmation and distribution. It seems to me that it is only the male children who have petitioned for letters of grant of administration. There is no evidence tendered to the effect that the said female children had renounced their rights under the estate. The deceased had died intestate and therefore the guiding provisions should be Section 38 of the Law of Succession Act which provides as follows:-

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

9. The protector in his proposed scheme of distribution wants to have for himself Parcel No. Mbiuni/Makiliva/380 and further to have a share in Mbiuni/Makiliva/397 and he was of the opinion that parcel Number Mbiuni/Makiliva/398 which is registered in the names of the 3rd Administrator should be treated as family property which should go to the 3rd Administrator as part of the distribution. However the 3rd Administrator appears to have convinced this court that the said Parcel No. 398 had been registered in his name way back in 1976 as per the copy of the search certificate. The 3rd Administrator maintained that he bought the same with his money quite early while the Protector was still a toddler. Since a title has already been issued in favour of the 3rd Administrator, I find that the said asset should not form part of the estate for distribution. The Protector in his evidence claimed that Parcel No.380 had been bequeathed to him by the deceased but the same was not corroborated. Indeed the Protector admitted on cross-examination that he had witnesses to prove how the deceased had shared out the properties to his children. However the Protector did not call the said witnesses to testify on the issue and further none of the alleged witnesses recorded statements regarding the matter. It transpired from the evidence that parcel numbers Mbiuni/Makiliva/380 and 397 were very critical to the family on the grounds that one was likely to be of a commercial value while the other was the parents ancestral land where the parents had been buried. Hence these two parcels appear to be quite dear to the children of the deceased thereby suggesting that each of the beneficiaries should have a piece thereof. It would follow therefore that the proposed scheme of distribution fronted by the 3rd and 2nd Administrators is reasonable and equitable and resonates quite well with the provisions of Section 38 of the Law of Succession Act as compared with that by the protector. One of the parcels namely Mbiuni/Makiliva/302 has been agreed by the parties herein that it should be given to one Paul Mutinda who had purchased it from the deceased.

As the female children of the deceased have not filed any views towards the confirmation of the grant, I find it would be appropriate to direct the Administrators to file an amended summons for confirmation of grant supported by a consent by the requisite beneficiaries as well as a schedule on distribution. If the female children of the deceased do not wish to be considered in the distribution, then they are at liberty to file affidavits renouncing claims to the estate.

10. In view of the foregoing observations, it is the finding of this court that the Protectors' protest lacks merit. The same is dismissed. The Administrators are now directed to file an amended summons for confirmation of grant within the next thirty (30) days and set it down for hearing. As parties are members of one family, there will be no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 7th day of May, 2019.

D. K. KEMEI

JUDGE