



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 59 of 2004

IN THE MATTER OF THE ESTATE OF JAVAN KITOGHO MWAKIWO (DECEASED)

JANE WAWUDA KITOGHO N

ESTHER SARU KITOGHOADMINISTRATORS

VERSUS

DOROTHY MKAWANA MSAGHA

MARTIN MSAFARI MSAGHA.....INTERESTED PARTIES

RULING

1. Martin Msafari Msagha, (Martin) has filed the Summons revocation of grant of letters of administration in respect of the estate of Javan Kitogho Mwakiwo (the deceased) who died on 11.6.03. Initially, a grant was on 3.5.05 issued to Clemence Mwae Kitogho (Clemence) and Bardsley Zephania Msagha (Bardsley), the widow and son of the deceased respectively. The grant was confirmed on 29.9.06 and the widow was get 95% of the estate while Bardsley was to get 5% thereof. Thereafter, Clemence suffered a stroke rendering her incapable of carrying out her duties as administrator, while Bardsley on 29.11.10. Pursuant to their application dated 31.5.13, a fresh grant (the Grant) was on 6.9.13 issued to Jane Wawuda Kitogho and Esther Saru Kitogho (the Administrators) both daughters of the deceased. The Grant was confirmed on 26.6.13 confirmed.

2. The following are the assets of the estate:

Plot No. Kilifi/Roka/500

Plot No. 965 Lake Jipe Settlement Scheme

House No. Plot No. 2096/VI/MN (Portreitz)

Shares with National Bank A/C No. xxxxx

Shares with KCB Certificate No. xxxx

Plot No. Kilifi/Tezo Rka/116

Plot No. Bura.Mwatate/1185

Plot No. Chawia/Wusi-Kaya/188

Plot No. C/Kidaya/Ngerenyi/858

Plot No. 1488/VI/MN

Plot No. Chawia/Wusi Kaya/2116

Plot No. LR 2840/i/mn

Shares with Standard Chartered Bank Certificate xxx

Plot No. 113/I/MN Shanzu Wayani

Plot No. 2161 Shanzu Settlement Scheme

3. The certificate of confirmation of the grant indicated that Bardsley was to get 5% of the estate while 95% of the estate was to be shared to the following in equal shares:

Clemence Mwae Kitogho

Bardsley Zephania Msagha

Joyce Wanjala Mwalandi

Dina Wakesho Njau

Jane Wawuda Kitogo

Esther Saru Kitogho

4. In the Summons, Martin, a grandson of the deceased and son of Bardsley sought that administration be handed over to the Public Trustee. He also prayed that the estate be redistributed so that he is given 75% of the estate being the only son.

5. Following negotiations between the parties, a consent order was recorded and adopted in which all properties were distributed save for Plot Nos. 2840/I/MN (Plot 2840) and 2161 Shanzu Settlement Scheme (Plot 2161). The distribution agreed upon is as follows:

Asset Beneficiary

Plot No. Chawia/Wusi-Kaya/2116 Estate of Bardsley Zephaniah Msagha

Plot No. C/Kidaya/Ngerenyi/858 Dina Wakesho Njau

Plot No. Kilifi/Roka/500 Esther Saru Kitogho

Plot No. Kilifi/Tezo/Roka/116 Estate of Thomas Mwakio Kitogho and Estate of Samuel Mwakio Kitogho in equal shares.

Plot No. 1488/IV/MN Estate of Bardsley Zephaniah Msagha

Plot No. 2096/IV/MN Mombasa Estate of Samuel Mwakiwo Kotogho Chumani House Joyce Wanjala Mwalandi, Diana Wakesho Njau, Jane Wawuda kitogo and Esther Saru Kitogho in equal shares.

Plot No. 965 Lake Jipe Settlemnt Scheme to be sold and proceeds thereof to take care of liabilities and the balance, if any, to be shared equally among the children of the deceased.

Plot No. Chawia/Wusi-Kaya/188 Diana Wakesho Njau and the Estate of Thomas Mwakio Kitogho

Plot No. Bura/Mwatate/1185 Estate of Bardsley Zephaniah Msagha Estate of Samuel Mwakio Kitogho Joyce Wanjala Mwalandi, Jane Wawuda Kitogho in equal shares.

Shares with Nation Bank Limited

Kenya Commercial Bank,

Standard Chartered Bank Limited to be sold and proceeds thereof to cater for liabilities and the balance, if any to be distributed equally among the children of the deceased.

Plot No. L. R. 2840/I/MN Shanzu and

Plot No. 2161 Shanzu Settlement Scheme to be distributed after further discussion between the parties.

6. Parties were to hold further discussions with a view to agreeing on the distribution of Plot No. L. R. 2840/I/MN Shanzu (Plot 2840) and Plot No. 2161 Shanzu Settlement Scheme (Plot 2161). However, no agreement was forthcoming. The daughters of the deceased who include

the Administrators, Joyce Wanjala Mwalandi and Dina Wakesho Njau wish to be granted Plot 2840 in their affidavit sworn on 29.11.18. Their argument is that their late brothers Bardsley, Samuel and Thomas were given houses on prime plots while the daughters got the Chumani house which is an empty shell and belongs to every member of the family.

7. Their desire is that they be given the house on Plot 2840. They are opposed to Plots 2840 and 2161 being sold and the proceeds distributed amongst all the children of the deceased as proposed. They argue that they would only agree to sale of any property if all the properties of the estate are sold and the proceeds divided equally. The daughters of the deceased note that Dorothy Mkawana Msagha, the 1st Interested Party had erroneously included Plot 2161 as part of the state of Bardsley in Succession Cause No. 50 of 2011 and had taken possession of the same. The daughters have no objection to the estate of Bardsley keeping the same.

8. On her part, the 1st Interested Party in her affidavit sworn on 29.11.18 averred that her husband Bardsley had told her that 5% of the estate which he was to get constituted properties he had personally developed at the time and a plot in Shanzu which he planned to develop. In 2010 he began construction of the house in Shanzu the drawings of which were done by one Julius Kagia who was also the contractor. In 2010, Bardsley was away in Nairobi where he worked while the 1st Interested Party was taking care of her mother in law who was very sick at home. Bardsley therefore would draw cheques in favour of the 2nd Administrator so that she would make payments to the contractor on his behalf. The amount paid to the contractor through the 2nd Administrator between January and May 2010 was Kshs. 2,820,000/=. Cheque counterfoils and statements were exhibited. Construction stopped in November 2010 when Bardsley died. She averred that initially because the plan had not identified the plot number, she thought the house was constructed on Plot 2161 but she now knows that the house is actually on Plot 2840. To her, it would be unjust to have Plot 2840 given to the daughters of the deceased as it forms part of the estate of Bardsley as he used his own funds to develop the house they consented to the same. She has no objection to Plot 2161 being given to any other **same. The daughters of the deceased were aware of the state of the house in Chumani w person.**

9. Martin in his affidavit sworn on 14.12.18 averred that the house on Plot 2840 was constructed by his father Bardsley. He associated himself fully with the depositions and submissions of the 1st Interested Party.

10. In their submissions, the Administrators listed 2 issues for determination:

- i) Whether as daughters of the deceased they are entitled to equal share of their late father's estate.
- ii) Whether contribution to partial development of Plot 2840 entitles Bardsley to the same.

Whether as daughters of the deceased they are entitled to equal share of their late father's estate.

11. From the submissions of the Administrators, it is evident that the view of the daughters of the deceased that they have been unfairly treated in the distribution of the estate of their late father. The Court notes that the family of the deceased like many African families are yet to be delivered from retrogressive cultural belief that discriminates against daughters of a deceased person when it comes to inheritance of his estate. This is apparent from the petition filed by the widow of the deceased and Bardsley. They stated on oath that the deceased was survived by themselves as widow and the son respectively. There was no mention of the 4 daughters of the deceased. The Court in blissful ignorance went on to distribute the estate between the widow and Bardsley. It was only after the widow suffered a stroke and the demise of that it emerged that the deceased was in fact survived by 4 daughters when the administrators applied for the Grant. The retrogressive cultural belief is also demonstrated by Martin's prayer in his application that the **estate be redistributed so that he is given 75% of the estate being the only son.**

12. Article 27 of the Constitution of Kenya 2010 embodies the principle of equality and non-discrimination in all matters. This would include a matter concerning the distribution of the estate of a deceased person. It provides as follows:

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

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

13. The Law of Succession Act makes elaborate provisions as to how the estate of a deceased person is to be administered and in particular distributed amongst the persons entitled thereto. Prior to promulgation of the Constitution, the Law of Succession Act had as far back as 1981 progressively made provisions that made no distinction between male and female children, married and unmarried. Section 3(2) of the Act defines child as follows:

References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

14. The evidence on record indicates that the deceased was a monogamous man who died intestate. He left behind a widow who has since died as well as sons now deceased, and daughters. Section 38 of the Act stipulates how the property of an intestate is to be distributed where there are children but no spouse as in the present case:

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.

15. There is no justification in this day and age to discriminate against women and in particular daughters of a deceased person whether married or not. In this regard, I follow Kimaru, J who stated Peter Karumbi Keingati & 4 others v Dr. Ann Nyokabi Nguithi & 3 others [2014] eKLR:

This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.

16. Further, in Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR, the Court of Appeal stated that :

Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.

17. The law is therefore clear that daughters of the deceased are entitled to equal share of the estate of the deceased. It must however be noted that the matter before this Court is not the entire estate but the 2 plots, the other properties having been agreed upon.

Whether contribution to partial development of Plot 2840 entitles Bardsley to the same.

18. The Administrators argue that they were misled by their previous advocate in signing the Consent without solving Plot 2840. They argue that this is the only plot that they depend on to pay workers at the deceased's homesteads in Taita and Chumani. They claim that Plot 2840 was given to the daughters of the deceased and if at all Bardsley chipped in to construct the house thereon, he did it for the family of the deceased and not for his family. This is why he involved his sister and not his wife the 1st Interested Party. During the negotiations leading to the consent, contributions by way of construction or improvement of any property was not a consideration at all. They have no objection to the 1st Interested Party getting Plot 2161 which she has already included as part of Bardsley's estate. They also submitted that their sister Dina Njau also substantially contributed to the partial development of the structure.

19. The 1st interested Party contends that she has shown proof of Bradasley's contribution of Kshs. 2,840,000/= towards the construction of the house of Plot 2840 as well as the drawings for the same. The construction ceased upon the demise of Bardsley. She urged the Court the Court to find that the house on Plot 2840 was constructed by Bardsley and therefore belongs to his estate.

20. The Administrators seek that Plot 2840 be given to them so that they too may have the benefit of a house and a prime property like their brothers. They claim that this plot was given to them. The Interested Parties on the other hand state that this property was developed by Bardsley. On record are bank statement and cheque counterfoils showing that Bardsley periodically sent money to Esther Saru. The Court however notes that no evidence was availed to show the alleged contribution by Dina Njau. There is also no evidence that Plot 2840n was given to the daughters of the deceased. The Administrators do not deny the fact that Bardsley contributed towards the construction of the house on Plot 2840. Their case however is that Bardsley's contribution towards the development of the plot does not take away the fact that the same remains the property of the deceased and does not entitle Bardsley to the same.

21. The Court has considered that following family negotiations, the Administrators were by consent, given the house in Chumani. They cannot now be heard to say that the house is a shell and blame their former advocate. The Court has also considered the undisputed contribution by Bardsley towards construction of the house on Plot 2840. The Court has further taken into account the fact that both Plots 2840 and 2161 have houses. The Court notes that the 1st Interested Party is willing to surrender Plot 2161 and the 2nd Interested Party associated himself fully with the 1st Interested Party's position. Then Court further notes that no other beneficiary has laid any claim to these 2 properties. Further, it is noted that upon distribution of all the properties, the Administrators will no longer have any obligation to maintain the homestead in Taita. The house in Chumani will be maintained by all 4 daughters of the deceased not as the deceased's estate or a property belonging to everybody as they say, but as their very own property. The Court has further considered that the family of the deceased has been divided by the dispute relating to the distribution of their late father's estate. The hostility between family members clearly played out during the hearing of oral testimony. This is a family Court that is under a duty to facilitate a distribution that will not further exacerbate the strained family relations. Giving Plot 2840 to the daughters of the deceased will in my view do just that.

22. In view of the foregoing, I make the following orders:

(i) The estate of Bardsley Zephania Msagha shall have Plot 2840/I/MN.

(ii) Jane Wawuda Kitogho, Esther Saru Kitogho Joyce Wanjala Mwalandi and Dina Wakesho Njau shall have Plot 2161 Shanzu Settlement Scheme **in equal shares.**

DATED, SIGNED and DELIVERED in MOMBASA this 3rd day of May, 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Administrators**

..... **for the 1st Interested Party**

..... **for the 2nd Interested Party**

.....**Court Assistant**