



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**SUCCESSION CAUSE NO. 82 OF 2011**

**ESTATE OF THE LATE WENSLAUS WATIBINI - (DECEASED)**

**PROTUS MASIBO WATIBINI.....1ST APPLICANT**

**PATRICK WAFULA WATIBINI.....2ND APPLICANT**

**VERSES**

**CONCEPTER WANJALA WATIBINI**

**VERONICA WATIBINI.....RESPONDENTS /OBJECTORS**

**RULING**

1. The deceased herein died on 6<sup>th</sup> September, 2010 leaving behind his Will dated 11th June, 2008. There have been various applications to challenge the Will by the beneficiaries to the estate but this court vide a ruling on record held that the same was valid for all intent and purposes.

2. This court then ordered that the grant issued on the 23<sup>rd</sup> June, 2011 be confirmed without much delay. The Applicant **Protus Masibo Watibini**, one of the Administrators filed the application dated 3<sup>rd</sup> November, 2017 for confirmation of the said grant. In the supporting affidavit he has relied solely on the will as the main document for distribution of the estate.

3. The objectors vide the affidavit of protest by **Concepter Watibini** sworn on the 19<sup>th</sup> of April, 2017 stated that they have not agreed on a working formula on how they should utilise the estate before dividing among themselves after expiry of 50 years as stated in the will by their late father.

4. They further argued that there were other properties not listed in the will and that the same ought to be determined before the grant is confirmed. There was equally the contentious issue of the purchasers in which it was suggested that the same should be taken into account prior to confirmation of the grant.

5. On his part the Applicant contented that the will should be strictly construed and interpreted and if there are any other properties outside the will then they ought to be dealt with independently.

**ANALYSIS AND DETERMINATION**

6. This court has read the submissions on record by the two opposing factions though from the same family. The issue in dispute is the construction of the will and specifically how should the properties be dealt with before the expiry of the 50 years.

7. Counsel for the Objectors has proposed that the same should be agreed upon and he has given a specific formula which according to his opinion it shall serve the purpose of ensuring that there is fairness and now equality. He stated that if the will is taken as it is then some of the parties shall be disadvantage especially the girls.

8. What I understand the objectors to be saying is that let us utilise the estate equitably pending the final distribution after expiry of the 50 years.

9. The Applicant on the other hand disagrees with the same. He states that most of the beneficiaries have sold part of the land in total disregard of the express provisions in the Will and more importantly Section 82 of the Succession Act. He states that the estate should be distributed as per the will as that was the intention of his father.

10. The contentious Clause 4 of the will states as follows;

***“I devise and bequeath all my real and personal estate including cash money whether in any bank or found deposited with any person firm or company and all other properties immovable or moveable and over which I can dispose of by will WHATSOEVER AND HOWSOEVER situate into my said trustees and executor UPON THE FOLLOWING TRUSTS:***

***A. UPON TRUST I devise and bequeath all my real and personal estate including cash money whether in any bank or found deposited with any person firm or company and all other properties immovable and over which I have a claim and which I can dispose of by the will WHATSOEVER AND WHOSEVER situate to be utilised jointly by my whole immediate family for their own benefit upon my death on condition that my said immediate family shall utilise my said property solely for their purposes and they shall not jointly and severally dispose off any of my property or be registered as proprietors until after 50 years from the date of my death and upon expiry of such period my estate shall be shared as follows;”***

11. First of all it is abundantly clear that the deceased did not desire the land or the estate to be sold before the 50<sup>th</sup> anniversary of his death. Plainly therefore those who have purchased the land from some of the beneficiaries have done so contrary to the will and the wishes of the deceased.

12. Secondly they have intermeddled with the estate of the deceased which is contrary to Section 82 of the Succession Act. In a nutshell whichever way one sees, this occupation whether temporary or permanent is illegal and the only logical thing to do is to vacate and ask for the refund of their purchase or leasing consideration from whomsoever they gave. That is the law and the position.

13. On the question of interpretation of clause 4 of the will, the same cannot be read in isolation. The subsequent clauses then goes ahead to share out the property. My understanding is that barring all the factors that is where each of the beneficiaries ought to occupy.

14. Did the deceased anticipate a situation where the beneficiaries would utilise the property jointly till the 50<sup>th</sup> year of his death anniversary? In some sense yes but the situation on the ground seemed far from it. It has emerged as it can be deduced from the pleadings that some of the beneficiaries have already disposed part of the estate whereas others have not. Those who have done so as stated above must suffer the consequences of intermeddling with the estate. At least none of them did so with the approval of this court.

15. If one was to follow that the beneficiaries should utilise the estate jointly then in my considered view, shall create serious disharmony and chaos in the family. It is assumed that by the time the deceased died each of the beneficiaries who are all apparently adults of middle age were settled somewhere and that all that they are doing are generally supplementing whatever they have with what was left behind by their father.

16. As found by the court in an earlier ruling the will was and is valid for all intent and purposes and contrary to the objectors averments the same cannot be said to be oppressive. It cannot be said that the 50 years imposed by the deceased are practically impossible for them to enjoy the estate since in any case it was not indicated anywhere that that helped in the acquisition of the property. The law permitted the deceased to will his estate as he desired.

17. Back to the issue of how the will ought to be construed, I hold that the same should be construed purposively and liberally. In other words what was the intention of the testator? His desire eventually was for each of them to get a share of his property and he deliberately specified the same. Taking into account the above observation I find that it would be important for each of the beneficiaries to have their designated portion of the estate as per the Will.

18. The will is clear on what each person should be given. The only rider should be that none should be able to dispose off till the expiry of 50 years but they are free to utilise the same. In a nutshell the title documents would have to remain in the name of the deceased till after the expiry of 50 years.

19. The above observation is also anchored on the fact that once each of the beneficiaries have been shown their respective portion then they shall be able to develop the same, say construct a permanent building or structure or plant permanent trees or carry out any other development without any fear of being disturbed after the expiry of the 50 years. In short there would be certainty in the estate.

20. Following that and in agreeing with the Objector’s observation that the 50 years is too long, it shall thus be easier for the families to settle their loved once in the respective portions in line with the wishes of their father or for that matter their grandfather as the case maybe. The proposal given by the objectors in my view will cause uncertainties as parties may not be bothered to develop and settled their respective families for the fear of being moved after 50 years.

21. Further and in any case there seemed not clear on how the beneficiaries were settled when the deceased died and attempting to impose a settlement formula for the next 50 years is a recipe for chaos, uncertainty and disaster.

## **CONCLUSION.**

**a. The purchasers or the leases or any third party in occupation of the deceased land or estate is doing so illegally and in total contravention of the will and the Succession Act.**

**b. The grant be confirmed as per the will. The county survey office shall thereafter move to the ground to establish the position of each individual beneficiary.**

**c. This court directs that the necessary application be made in regard to the other deceased’s assets which are not contained**

in the Will if any.

d. This being a family matter each party shall meet their own costs.

Dated signed and delivered in open court at Kitale this 11<sup>th</sup> day of June, 2019.

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H.K CHEMITEI

JUDGE

11/6/19

In the presence of:

Mr Kiarie for the 1<sup>st</sup> Administrator

Mr Teti for the 2<sup>nd</sup> and 3<sup>rd</sup> Administrator

Court Assistant – Kirong

Ruling read in open court.