



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC P&A NO. 192 OF 2017

(FORMERLY MACHAKOS P&A NO. 563 OF 2014)

IN THE MATTER OF THE ESTATE OF MAUNDU KILUNGY'A (DECEASED)

GRACE MAUNDU KILUNGY'A.....1ST PETITIONER/ADMINISTRATOR

DANIEL NDUVA MAUNDU.....2ND PETITIONER/ ADMINISTRATOR

RULING

Introduction:

1. There are two applications for confirmation of grant before the Court. The first one was filed on 08/05/2018 by the 2nd petitioner and supported by an affidavit sworn by him on the same date. He prays that the deceased' estate *to wit* Nzaii/ Kikumini/158 be share equally between him and his co-petitioner.

2. The 2nd application was filed by the 1st petitioner on 21/05/2018 and supported by an affidavit sworn by her on the same date. She deposes that the deceased's estate comprises of ;

- a) Nzaii/Kikumini/158
- b) Plot No. 60A Emali
- c) Plot No. 60B Emali
- d) Plot No. 10 Kikumini
- e) Stock in Kikumini & Emali shops
- f) Simba leather kiosk
- g) Emali leather kiosk
- h) Katangini land
- i) Plot at Katangini market

3. She further deposes that the deceased had three houses and that the estate should be distributed as per the deceased's distribution of property schedule attached to her affidavit.

4. The applications were canvassed by way of *viva voce* evidence.

2nd Petitioner's Case:

5. **PW1** was **Daniel Nduva Maundu**. He adopted his statement dated 18/06/2018 as evidence and further testified that the 1st petitioner is his

step-mother. That his father (deceased) had three wives namely; Loise Mbeneka (alive), Mwikali Maundu(deceased) and Grace Maundu(alive). That when his father died, there was a family meeting and the clan sub-divided parcel No. Nzau/ Kikumini/158 between the house of Mwikali and Grace. That the land is 17 acres and each should get 17 acres.

6. That before his father died, he instructed the family to share the properties into 3 houses. Plot 60A Emali was given to Loise Mbeneka and plot 60B Emali was given to his mother, Mwikali Maundu. That his mother died in 1965 and left him and Ruth Katumbi (married). That minutes were written and the 1st petitioner was in the meeting and agreed to the sharing.

7. On cross examination, he said that the meeting was held on 27/02/1999 at James Kilungy'a's home and then they moved to the deceased's home. That the minutes were written by William Kilungy'a. That they knew that parcel 158 had been given to Grace by the deceased. That Loise got land at Katangini and Katangini market, plot 60A Emali which is fully developed, an undeveloped plot at Emali and a kibanda at Masimba market.

8. That before the deceased died, all the properties existed and he never claimed any of the properties given to Loise's house. That he was given 60B Emali-fully develop and a Kibanda at Emali market. That he was to get a shamba from the stock in the shops of deceased. That he is a squatter at Nguu where he lives with his two children because his wife is deceased. That the land at Nguu is 10 acres and he squatted till the land became his. They were sued over occupation at Makindu Court but the suit never succeeded. That his witnesses are Loise's children and clan members. That he is agreeable to re-distribution of the properties.

9. **PW2** was **William Musyoka Kilungy'a**. He adopted his statement dated 18/06/2018 as his statement. He said that Grace was his aunt and PW1 his cousin. That in 1986, the deceased was unwell and he called a family meeting to share his properties. That he was the one who wrote the minutes and the sharing was to be as follows;

- a) Loise given land at Katangini.
- b) Grace given land at Kikumini.
- c) The stock in hardware and other shop was to buy land to Daniel Nduva Maundu.
- d) Plot in Kikumini given to Grace.
- e) Plot in Katangini given to Loise.
- f) 60A Emali given to Loise and 60B Emali given to Grace.
- g) Kibanda at Emali given to Grace.
- h) Land at Kikumini and plot at Kikumini Market given to Grace.

10. That after the recording, the deceased healed and lived for 11 years thus everybody forgot the sharing. That after the deceased's death, they were called again for a meeting in 1999 but there was no stock in the commercial shops. That because there was no stock, it was agreed that parcel No. Nzau/ Kikumini/158 would be shared equally between Grace and Mwikali. He produced the 1986 minutes as exh 1 and the 1999 minutes as exh 2.

11. On cross-examination, he said that after 1986, the deceased acquired more lands in Emali but he had no evidence to show. He didn't know whether the deceased bought the land being occupied by PW1 in Nguu and he had no evidence to show that PW1 was a squatter. That the land is owned by a cooperative society and that the deceased had land in Nguu but it was lost to squatters.

12. That after the deceased's death, Loise's son continued to run the business for some time but there was no inventory taken. That there was no agreement of sharing land signed by Grace or anybody on her behalf. That the stock in hardware run by deceased was to buy land for PW1 but not Grace's shop. That PW1 has never occupied parcel No 158 but has sold a portion of the land. That by the time the deceased died, much of the business had been spent on medical expenses.

13. On re- examination, he said that the Nguu lands have no title deeds and that Grace did not get children with the deceased. That the properties cannot be re-shared as those given have developed the plots with a lot of investment.

14. **PW3** was **David Molo Maundu**. He adopted his statement dated 18/06/2018 and testified that his mother is Loise Mbeneka and he had 8 siblings. That Mwikali had 2 children and Grace did not get any child. That the deceased called a meeting in 1986 when he was sick and shared his property as follows;

- a) Loise got land at Katangini & Plot 60A
- b) Plot 60B was given to PW1.
- c) Grace Kikumini 34 acres and shop developed at Kikumini.
- d) Mwikali family-plot Emali 60B but no land.

15. That the deceased lived after 1986 and his brother Harrison Mulwa was called by Grace to run Emali business alongside the deceased. That the deceased died in 1997 and in 1999 the family and clan divided Kikumini land into 2 equal parts because the stock which was to buy PW1 land had been finished. That Grace attended the meeting and never opposed the proposal. That they have really developed their share and cannot agree to re-share. That they have two unmarried daughters who have shares in their land.

16. On cross examination, he said that the deceased did not buy land for PW1 at Nguu but he was given a Kibanda at Emali which was later taken over by the County Government. That PW1 has not sold Emali plot 60B. That PW1 was living in Nguu even during the life of the deceased. That the stock in the commercial shops had diminished and there was even a loan of kshs 300,000/= when the deceased died but they gathered cash and paid it. That they decided to give a portion of 158 to PW1 because the stock had been finished.

17. That the 1999 minutes were not signed and Grace never complained when the decision to share 158 was made. That Grace has over 10 lands in Emali which she has sold.

18. On re-examination, he said that plot 60B is still in Emali and is owned by PW1 but the vibandas were taken by the County government. That No. 158 is being partially used by PW1.

1st Petitioner's Case:

19. **DW1** was Grace Maundu. She said that she got married to the deceased in 1960 and he died in 1997. That the deceased had shared his properties to his three houses before his death. That she has no children but married a lady who procreated 10 children with deceased. That land No. 158 was given to her and her children.

20. On cross examination, she said that the lady she married was known as Alice Ndinda. That Ndinda got 6 children and the one before her known as Damaris Nthenya got 4. That she married both women customarily in her husband's lifetime and he consented to the same. That the deceased willed parcel No. 158 to her. That she has papers that the deceased owned 10 acres of land at Nguu. That Katangini land is 81 acres and No. 158 is 34 acres.

21. That there was stock to be sold in order to get land for Mwikali and it was done. That all her witnesses are dead and that all the assets in the schedule are in existence. That she is not aware of any sale and is agreeable to division of all the lands equally including the one given to her by deceased. That everyone lives as per the distribution done by deceased.

22. Having looked at the evidence on record and the rival submissions, it is my considered view that the following issues arise for determination.

a) What part of the deceased's estate is available for distribution?

b) How should the estate be distributed?

a) What part of the deceased's estate is available for distribution?

23. The 1st petitioner did not exhibit title documents for all the assets listed in the schedule for distribution of her supporting affidavit. The only title document on record is for land parcel Nzaui/Kikumini/158 (the asset). Accordingly, this is the only asset that the Court should concern itself with otherwise it will have courted the risk of issuing orders in vain.

Distribution:

24. Both petitioners agree that the deceased was polygamous and had three wives. The 1st wife was Loise Mbeneka and she had 8 children, the 2nd wife was Mwikali Maundu who had 2 children and the 3rd wife was Grace Maundu who did not get any children with the deceased but she married 2 women who bore her 10 children cumulatively. The 2nd petitioner (Daniel) contends that he did not get any land from his father just like the sons of the other 2 wives. That the stock in the Emali commercial shops was to buy land for him but it got depleted before the land could be bought and as such, the family agreed that he would get half of land parcel Nzaui/Kikumini/158.

25. The 1st petitioner (Grace) agrees that indeed the stock in the Emali shop was to buy land for Daniel and contends that the plan was actually executed. She however did not place any material before the Court to show the land that was bought for Daniel from the alleged sale of the stock. PW1 is a son of the 1st wife and supports the proposal to give half of Nzaui/Kikumini/158 to Daniel.

26. Ideally, the available estate of the deceased should be distributed according to Section 40 of the Law of Succession Act which provides that the estate of a polygamist should be distributed according to the number of children with the wife as an additional unit however, I have looked at the two sets of minutes and it is evident that the three houses were represented in both minutes. The minutes reveal that the house of the 2nd wife did not get any land. Further, there is nothing to show that the land occupied by Daniel at Nguu was given to him by the deceased.

27. Accordingly, I am satisfied that Daniel is entitled to half of land parcel Nzaui/Kikumini/158. The other half should be registered in the name of the 1st petitioner.

Conclusion:

The grant should be confirmed as per the supporting affidavit of the 2nd petitioner. Thus the court makes the following orders;

i. That the deceased' estate to wit Nzai/ Kikumini/158 be share equally between Grace Maundu Kilung'ya and Daniel Nduva Maundu.

ii. No orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

.....

C. KARIUKI

JUDGE