



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

SUCCESSION CAUSE NO. 106 OF 2017

IN THE MATTER OF THE ESTATE OF JOHN MUTUA MUSYOKI (DECEASED)

JEAN MUSENGYA MWONGA.....CO-ADMINISTRATOR/APPLICANT

-VERSUS-

1. REGINA WAVINYA)

2. KWIA NZYIMI).....CO-ADMINISTRATOR/PROTESTORS

-AND-

1. LOISE MUKII MUSAU)

2. ALICE KAWELA KINGI)

3. JANE SYOMOI NZELU)

4. JOYCE SYOKAU MUSYOKA)

5. MARY NDUMI MUTHIANI).....PROTESTORS/BENEFICIARIES

RULING

1. There were 2 causes over instant decease estate herein namely MKS HCSUCC 325 of 03 and 242 of 03.They were consolidated in cause no 325 of 03 filed by George M Mutua and Josphine N Nzyimi.

2. In 325 of 03 Regina wavinya and kwia Nzyimi were the Petitioners. Thus in the consolidated matter Regina Wavinya became an administrator making them 3 administrators via a consent order of 11/3/05.

3. By a further consent order of 9/3/07, and filed on 16/3/07,grants of letter of administration was issued to George mutual,Regina wavinya and kwia nzyimi. Thereafter George M Mutua passed on and was substituted by his sister Jean M mwonga.

4. The petitioners in 242 of 03 then; George Musyoka Mutua, Josphine N. Nzyimi both son and daughters in-law of the deceased respectively listed only;

- George Musyoki (son).
- Josphine Muthini (daughter in-law).
- Kwia Nzyimi (daughter in-law).
- Regina Peter Mumo (daughter in-law).
- Patrick Kithuku (buyer) as the survivors of the deceased.

5. Thereafter an application to confirm grant dated 22/8/2013 was lodged and now Jean Mwonga listed 3 deceased person's properties for distribution namely; Kiteta/Kakuswi/461, Kiteta/Kakuswi/594 and Plot 2 at Tawa. She also listed 9 children of the deceased; 3 sons and 6

daughters as survivors and the heirs.

6. She proposed that from LR No. Kiteta/Kakuswi/461, 20 acres be excised and registered in names of Patrick Kithuku (buyer) as he bought same from deceased and the balance be shared equally between the 9 children of the deceased. As for No. Kiteta/Kakuswi/594 and Plot 2 Tawa, she proposed both be sold and proceeds be shared by the 9 heirs.

7. In Regina Wavinya protest affidavit sworn on 24/1/2018 she stated that in No. Kiteta/Kakuswi/461 was divided by clan amongst; herself, Kwia Nzyimi, Luka Mutua's family. That the clan decision was affirmed in LDT Matter No. 122/1998 and division of the suit land thus same not available for distribution. She stated that only Kiteta/Kakuswi/594 was available for distribution. She proposed sale of Kiteta/Kakuswi/594 as proposed by Jean Mwonga.

8. Jean Mwonga filed further affidavit sworn on 22/8/2018 to strengthen her position and also to respond to protest by Regina Wavinya. Her sister also Mary Ndumi Muthiani also swore an affidavit in support of confirmation of grant taking the same position as her sister Jean Mwonga.

9. Eventually the court directed matter be heard on distribution. The protestor case was via testimony by Regina Wavinya Mumo Peter daughter inlaw of the deceased and wife of late Peter Mumo Mutua son of deceased. She agreed the deceased had 6 daughters and 3 sons.

10. The daughters are all married. She stated that deceased left the following properties; Kiteta/Kakuswi/461, Kiteta/Kakuswi/594, 56, Plot 2 Tawa, and Plot 98B Tawa. That the deceased shared parcel No. Kiteta/Kakuswi/461 to his 3 sons in presence of the clan members but in absence of the daughters.

11. Plot 2 Tawa was given to her husband by deceased and is now in her name. She has developed it and has permanent structures and runs business therein. Plot No. 98B was given and developed by George Musyoka's family. They occupy the same. LR 56 is occupied by George Musyoki's family and they occupy same. She opposes Mary Ndumi's husband Patrick Kithuku getting 20 acres of Kiteta/Kakuswi/461 he bought from the deceased. She opposes daughters getting shares in Kiteta/Kakuswi/461 but can get Kiteta/Kakuswi/594.

12. On cross examination by Mulyungi she stated that the 6 daughters can get LR Nos Kiteta/Kakuswi/594 and 56. She says the clan's decision on division of Kiteta/Kakuswi/461 was affirmed by LDT Case No. 122 of 1998 Makueni in 2001 long after deceased had passed on. She agrees at the time of his demise, the deceased had not transferred Plot 2 Tawa to the witness, although she developed it and changed it from the deceased name to her own name.

13. On cross examination by Mulu, she stated the clan meeting which shared land was held on 18/9/1993 – The deceased had died in 1990. She listed 7 buyers who are said to be in occupation of the suit land LR. Kiteta/Kakuswi/461. She denies selling to any of them.

14. On re-examination by Ms Nzei she stated that the clan shared land on 19/9/1993 and showed boundaries. The clan executed deceased's directives. The Tawa plot was given to her family. The deceased allowed her family to develop same. She had nothing to show Plot 2 Tawa was transferred to her.

15. On close of protestors' case the 1st administrator testified. She stated that she is a daughter of the deceased but married. Her late father died on 6/5/1990. She was issued with grant and sought confirmation of the same on 22/8/2013. As earlier stated she set out her proposal on distribution that all beneficiaries/children of deceased to get each shares of Kiteta/Kakuswi/461 after 20 acres are excised and transferred to Patrick Muthiani (buyer).

16. Parcel No. Kiteta/Kakuswi/594 and Plot 2 Tawa be sold and proceeds be shared equally by 9 children of the deceased. Plot No. 98B Tawa was given to George Musyoki by the deceased. She has no claim over it. The buyers on land bought portions of suit land from Wavinya and Sophia after deceased's death. She says that she was not notified of the clan meeting which alleged subdivided deceased's land Kiteta/Kakuswi/461.

17. She states that deceased never divided the land No. Kiteta/Kakuswi/461. Plot 2 Tawa was in deceased name as at the time of his death. It was never gifted to Peter Mumo, Regina's husband. The document from County Council Machakos of 2012 showed it was John Mutua property. There was no subdivision of deceased estate in 1993 which she was aware of done by the clan. In event if there was any, it was done 3 years after deceased demise. Regina has sold some portions of the LR. Kiteta/Kakuswi/461.

18. On cross examination by Mr. Mulu she stated that Regina and Kwia have sold portions of LR. Kiteta/Kakuswi/461 and they never accounted for proceeds thereof. Patrick Kithuku husband to Mary Ndumi bought 20 acres from deceased on 18/9/83. There is an agreement and witnesses. They seek 3 brothers and 6 sisters to share estate equally. Deceased died before sharing the land. She did not know who called clan nor was she notified of the clan meeting.

19. On cross examination by Ms Nzei advocate, she stated that the clan meeting was not signed by any of the family members. There was a land LR. 569 which deceased gave George vide letter issued on 6/7/82. Deceased also gave George Plot 98B Tawa. She said she was not aware of deceased giving Regina Plot No. 2 Tawa.

20. Regina occupies and does business in Plot 2 Tawa. She has a shop she constructed. She is not aware she occupied Plot 2 Tawa before deceased demise. She was not aware whether Patrick ever demanded from administrators 20 acres he bought from the administrators of the estate herein.

21. Any sale of land issue should go to ELC Court. Not this Probate and Administration Court. Other than Mary Ndumi all other sisters settled elsewhere not in LR. Kiteta/Kakuswi/461. Buyers are partly in occupation. Parcel No. Kiteta/Kakuswi/594 should be sold and

proceeds be shared by 9 beneficiaries. LR. Kiteta/Kakuswi/461 was never shared to 3 sons before he died. All the deceased late 3 sons' families are settled in LR. Kiteta/Kakuswi/461 as they were shown by the deceased herein.

22. On re-examination by Ms. Mutinda – she stated that, the agreement for sale of land to Patrick described land sold to him. Plot 2 Tawa was in deceased's name by the time he died. No evidence to show same was gifted to Reginah by deceased. Plot 2 Tawa was built by iron sheets but later constructed with permanent structure without consultation.

23. The 1st administrator's case was closed.

THE CASE BY BENEFICIARIES/PROTESTORS:

24. Mary Ndumi Muthiani stated that she was deceased's daughter married by Patrick Muthiani. She produced agreement and translation of sale of 20 acres to her husband. Also produced letter of County Council showing Plot 2 Tawa was property of deceased at the time of his demise. She said she has permanent house on LR. Kiteta/Kakuswi/461. She said the clan came to divide the land after deceased died.

25. On cross examination by Ms. Nzei she stated that the county Government document she showed in court indicated that, in 1991 Plot 2 Tawa was in deceased's name.

26. The case was closed at this stage.

27. The parties agreed to canvass submissions by filing and exchanging their arguments. As by the time of this ruling writing, none of the parties had complied with the time lines.

28. After going through the pleadings, affidavits and tendered evidence, I find the issues are:

i. How is the estate of the deceased to be distributed?

29. The deceased died intestate and was not survived by his spouse. He had 9 children – 6 daughters and 3 sons (now demised) but survived by their families.

30. Under section 38 Succession Act Cap 160 Laws of Kenya, **“where intestate has left surviving..... children and no spouse surviving him.... the net intestate shall devolve upon the surviving children and to be divided equally among them.”**

31. The spirit under **Part V of the Act especially Sections 35, 38 and 40 Law of Succession Act Cap 160 Laws of Kenya** is equal distribution of the intestate estate amongst the children of the deceased. There has been though debates on whether this distribution should be equal or equitable, but the reading of the provisions of the law envisage equal distribution for the word used in Section 35(5) and 38 is “equally” and not “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms: *‘the property shall ... be equally divided among the surviving children’*. This equal distribution is envisaged regardless of the ages, gender, financial and marital status of the children.

32. 13. In **Re: The Estate Of Lenonka Ole Ntutu – Deceased [2008] eKLR Rawal, J**, (as she then was), held that daughters of a deceased were entitled to inherit a share from their father's estate just like the sons, and in **Re: Estate of Solomon Ngatia Kariuki – deceased [2008] eKLR, Makhandia J**. (as he then was) stated:-

“The law of Succession Act does not discriminate between the female and male children married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of customary law. Like most other customary laws in this country they are always biased against women and they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”

33. The free estate of the deceased left is Plot No. 2 Tawa, Kiteta/Kakuswi/461 and Kiteta/Kakuswi/594. The beneficiaries are not agreeable as to the sharing of the above deceased's property.

34. According to Regina Wavinya protestor, the estate should be shared as follows; Plot 2 Tawa to her family. This is because the deceased gifted the same to her husband and she has developed the same. LR. No. Kiteta/Kakuswi/461 should be shared among the families of the 3 sons of the deceased as the deceased had so directed and clan did in 1993 divide same to the same effect. LR. No. Kiteta/Kakuswi/594 to be given to the daughters.

35. According to Jean Musengya Mwonga, a daughter to the deceased, the sharing should be as follows; Plot 2 Tawa and LR. Kiteta/Kakuswi/594 be sold and proceeds shared to the 9 beneficiaries of the deceased. LR. No. Kiteta/Kakuswi/461 be excised 20 acres for Patrick who bought from the deceased and the balance be shared equally by all the beneficiaries.

36. There is also mention by the witnesses of the presence of buyers in LR. No. Kiteta/Kakuswi/461 who nobody want to take responsibilities of selling them the portions of the LR. Kiteta/Kakuswi/461. The buyers who bought from the beneficiaries can only deal with the sellers once they get their shares.

37. Thus court cannot deal with their issues as they are not parties in the matter. In any case they have no business in gatecrashing in the distribution herein. They do not qualify to be deceased creditors and who ever sold to them have no locus standi to do so or even capacity to do sell. See estate of Veronica Njoki Wakagoto HC P&A 1974 of 200 of [2013] eKLR.

38. As for Mr. Patrick Muthiani – agreement of 1984, the sale agreement ought to have been enforced against the deceased when he was alive. Otherwise under the provisions of the Cap. 22 the same is time barred. He would maybe move ELC Court to see whether he could have adverse possession claim against administrators. This court cannot enforce same agreement herein. In any event he is not a party in the matter.

39. On Plot No. 2 Tawa, the witness does not agree on whether the same was gifted to Peter Mumo or Regina family before deceased died.

40. As for LR No. Kiteta/Kakuswi/594 all the 9 beneficiaries have equal stake as children of the deceased. The same shall be sold and the proceeds shall be shared equally by the named beneficiaries herein.

41. As for LR. No. Kiteta/Kakuswi/461 the 9 beneficiaries will share same equally as provided by section 38 of Cap. 160 Laws of Kenya.

42. The beneficiaries who occupy same shall get their shares where they have occupied and developed unless it is not possible on the ground. However as for plot 2 Tawa market,same is not denied that the same has been developed with permanent structures by Regina Wavinya family. The occupation commenced at the live time of the deceased.

43. Though Regina did not prove same has been transferred to her by the deceased, no beneficiary has ever objected to the occupation and development by Peter Mumo family. Thus the court is prepared to let Regina Wavinya, Peter Mumo’s family to retain the same.

44. The survey and transfer expenses shall be shared equally and in event some beneficiaries are not able to raise the same, their shares in Kiteta/Kakuswi/594 shall be utilised to effect subdivision and transfers expenses provided if there will be balances after paying expenses for the process, they will get the same from the administrators.

45. Thus the court makes the following orders;-

(i) Plot No. 2 Tawa goes to Regina Wavinya on behave of the late peter Mumo family.

(ii) LR. No. Kiteta/Kakuswi/594 to be sold and proceeds be shared to 9 beneficiaries.

(iii) LR. No. Kiteta/Kakuswi/461 to be shared equally to the 9 beneficiaries/children of deceased.

(iv) The costs for subdivision and transfer shall be contributed equally by all the beneficiaries and those who will be unable and / or fail to contribute their shares in (ii) above share be utilized to the extent of the contribution requirements.

(v) No orders as to costs.

(vi) There will be liberty to apply.

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

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C. KARIUKI

JUDGE