



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 677 OF 2012

IN THE MATTER OF THE ESTATE OF PHILIP ITUMO KIVINDYO (DCD)

ROSEMARY NDINDI MBONGE.....1ST PETITIONER

GEORGE KIOKO KIVINDYO.....2ND PETITIONER

VERSUS

PRIESTLY MUTUKU ITUMO.....1ST OBJECTOR

RICHARD WAMBUA ITUMO.....2ND OBJECTOR

JOHNSON MUTINDA KIVINDYO.....3RD OBJECTOR

RULING

1. This matter relates to the estate of **Itumo Kivindyo** the deceased who died intestate on 4.5.2010. The Petitioners and the 1st and 3rd objectors applied for Letters of Administration intestate in the estate of the deceased. A grant was issued on 20.9.2012.

2. On 19th November, 2013, an application was made for confirmation of grant and rectification that the alias name of George Kioko Itumo as George Kioko Kivindyo. In the application for confirmation of grant the proposed mode of distribution was as follows:

PROPERTIES	BENEFICIARY	SHARES
MITABONI/ MUTITUNI/118	a) Nzula Itumo Kivindyo b) Jainer Koki Itumo c) Agnes Nditu Itumo	Hold in trust for themselves and their children
MITABONI/ MUTITUNI/1899	Jonathan Nzei Itus	Absolutely
IVETI/ MUNGALLA/115	a) Priestly Mutuku Itumo b) Jainer Koki Itumo	Half share each
MUMBUNI/ KASINGA/91	d) Nzula Itumo Kivindyo e) Jainer Koki Itumo f) Agnes Nditu Itumo	Hold in trust for themselves and their children
MACHAKOS/MUA HILLS/273	g) Agnes Nditu Itumo	Absolutely

NDALANI/MAVOLONI/BLOCK 1/436	h) Rosemary Ndindi Mbonge i) Esther Musyimi Mwikali	In equal shares
MUMBUNI/ KASINGA/105	j) Priestly Mutuku Itumo	Absolutely
IVETI/ MUNGALLA/113	k) Nzula Itumo Kivindyo l) Jainer Koki Itumo	In equal shares
MITABONI/ MUTITUNI/1893	m) Nzula Itumo Kivindyo n) Jainer Koki Itumo o) George Kioko Kivindyo	Hold in trust for themselves and their children
MAVOKO TOWN BLOCK 3/3389	p) Jainer Koki Itumo	Absolutely
MUMBUNI/ KASINGA/11	q) Nzula Itumo Kivindyo r) Jainer Koki Itumo s) Agnes Nditu Itumo	In divided shares
IVETI/ MUNGALLA/117	t) Nzula Itumo Kivindyo u) Jainer Koki Itumo v) Agnes Nditu Itumo	In divided shares
MBUKONI/ MUTITUNI/118	w) Nzula Itumo Kivindyo x) Jainer Koki Itumo y) Agnes Nditu Itumo	In divided shares
MITABONI/ MUTITUNI/1969	z) Esther Mwikali Musyimi	Absolutely
MAVOKO TOWN BLOCK 3/973	aa) Rosemary Ndindi Mbonge	Absolutely
PLOT NO 147-NDOVOLONI LUKENYA RANCH-MACHAKOS	a) Rosemary Ndindi Mbonge b) Esther Mwikali Musyimi	Equal shares
MAVOKO TOWN BLOCK 3/320	a) Rosemary Ndindi Mbonge b) Agnes Nditu Itumo	Half share
MUTITUNI MARKET PLOT NO 73	Jainer Koki Itumo	Absolutely
MAVOKO TOWN BLOCK 3/3649	a) Rosemary Ndindi Mbonge & Esther Mwikali Musyimi b) Nzula Itumo Kivindyo	20 acres 20 acres
IVETI/ MUNGALLA/2	a) Jonathan Nthei Titus	In divided shares

b) James Mutua Itumo

3. Before the grant was confirmed, objections were filed, firstly by **2nd and 3rd objectors** on 4th December, 2013 who claimed that Johnson Kivindyo Itumo was left out of the petition forms, that not all the assets of the deceased were disclosed by the 1st, 2nd and 4th petitioners and that not all the beneficiaries were consulted before the petition was filed and there was no consultation in the appointment of the surety hence Stephen Mutisya Makau the 2nd surety is not known to the objectors.

4. Secondly, an objection was filed on 17th August, 2015 by the 1st objector who was a son to the deceased and stated that the deceased had distributed his estate verbally and the petitioners/ beneficiaries occupy the land according to the verbal distribution and live there permanently and have developed the land, however the 1st petitioner wants to evict some of the beneficiaries from the portions that they have settled in order to dispose those portions and that the 1st petitioner who is a daughter of the first wife and is married is aware of the verbal distribution and as such the confirmation of the estate should not be granted without the consent of the beneficiaries because it will affect the developments made by the beneficiaries on the respective portions.

5. The Petitioner countered this vide affidavit filed on 5th October, 2015 and in response stated that it is not true that the deceased distributed his estate before his death and the objector wants to benefit from the parts of the estate that he allocated to himself before the letters of administration were issued. She also denied trying to evict the beneficiaries from the land.

6. In further response to the objections filed on 17.8.2015 and 28.5.2013, four responses were filed on 12th November, 2015. Jonathan Nthei Titus averred that it is not true that the deceased distributed his estate before his death and that no one wants to evict any beneficiary from where they currently reside. Esther Mwikali Musyimi averred that it is not true that the deceased distributed his estate before his death and that no one wants to evict any beneficiary from where they currently reside and George Kioko Kivindyo reiterated these averments. Rosemary Ndindi Mbonge averred that all assets of the deceased were included in the petition and further that all family members were consulted vide a meeting held at the chiefs offices that was held on 4.3.2012 and minutes of the same were attached to her affidavit.

7. Rosemary Ndindi Mbonge vide further affidavit filed on 18.4.2016 sought that the grant be confirmed as prayed and attached copies of searches in respect of the deceased's properties.

8. In response to the summons for confirmation, the 2nd objector proposed a mode of distribution that according to him was as per the deceased's will as follows:

PROPERTIES	BENEFICIARY	1 st petitioners proposal
MITABONI/ MUTITUNI/118	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo	
MITABONI/ MUTITUNI/1899	Jonathan Nzei Titus	
IVETI/ MUNGALLA/115	c) Priestly Mutuku Itumo d) Jainer Koki Itumo	
MUMBUNI/ KASINGA/91	Esther Nzula Itumo Jainer Koki Itumo Agnes Nditu Itumo	
MACHAKOS/MUA HILLS/273	Esther Nzula Itumo Jainer Koki Itumo Agnes Nditu Itumo	Was allocated to Agnes Only
NDALANI/MAVOLONI/BLOCK 1/436	Esther Nzula Itumo	Rosemary Ndindi

	Jainer Koki Itumo Agnes Nditu Itumo	Mbonge Esther Musyimi Mwikali
MUMBUNI/ KASINGA/105	Priestly Mutuku Itumo	
IVETI/ MUNGALLA/113	Esther Nzula Itumo Jainer Koki Itumo	
MITABONI/ MUTITUNI/1883	Esther Nzula Itumo Jainer Koki Itumo Agnes Nditu Itumo	Nzula Itumo Kivindyo Jainer Koki Itumo George Kioko Kivindyo
MAVOKO TOWN BLOCK 3/3389	Jainer Koki Itumo	
MUMBUNI/ KASINGA/11	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo	
IVETI/ MUNGALLA/117	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo	
MBUKONI/ MUTITUNI/118	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo	
MITABONI/ MUTITUNI/1969	Esther Mwikali Musyimi Rosemary Ndindi Mbonge	Esther Mwikali Musyimi
MAVOKO TOWN BLOCK 3/973	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo	Rosemary Ndindi Mbonge
PLOT NO 147-NDOVOLONI LUKENYA RANCH-MACHAKOS	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo	Rosemary Ndindi Mbonge Esther Mwikali Musyimi
MAVOKO TOWN BLOCK 3/320	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo	a)Rosemary Ndindi Mbonge b) Agnes Nditu Itumo

MUTITUNI MARKET PLOT NO 73	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo	Jainer Koki Itumo
MAVOKO TOWN BLOCK 3/3649	Esther Mwikali Musyimi Agnes Nditu Itumo	a) Rosemary Ndindi Mbonge & Esther Mwikali Musyimi b) Nzula Itumo Kivindyo
IVETI/ MUNGALLA/2	a) Jonathan Nthei Titus b) James Mutua Itumo	

9. The 1st petitioner opposed the distribution and averred that she had not been given her fair share. Richard Wambua Itumo opposed the distribution vide summons dated 7th November, 2013 and proposed as follows;

PROPERTIES	BENEFICIARY allocated by 1 st objector and administrator	SHARES
IVETI/ MUNGALLA/2	Jonathan Nthei Titus b) James Mutua Itumo	To be divided equally among the 4 households in trust for their siblings
NDALANI/MAVOLONI/ BLOCK 1/436	Esther Nzula Itumo Jainer Koki Itumo Agnes Nditu Itumo and Rosemary Ndindi Mbonge Esther Musyimi Mwikali respectively	To be divided equally among the 4 households in trust for their siblings
MAVOKO TOWN BLOCK 3/973	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo and Rosemary Ndindi Mbonge respectively	To be divided equally among the 4 households in trust for their siblings
MAVOKO TOWN BLOCK 3/320	Nzula Itumo Kivindyo Jainer Koki Itumo Agnes Nditu Itumo and Rosemary Ndindi Mbonge Agnes Nditu Itumo respectively	To be divided equally among the 4 households in trust for their siblings

10. Rosemary Ndindi Mbonge, George Kioko Kivindyo, Esther Mwikali Musyimi and Jonathan Ntheu Titus consent to the proposed mode of distribution by Rosemary Ndindi. However Priestly Mutuku Itumo opposed the said mode and his proposal was supported by Stephen Musyoka Itumo, James Mutua Itumo. Johnson Mutinda Kivindyo, Sebastian Muthoka Itumo and Richard Wambua Itumo object to both modes of distribution and Nzula Itumo Kivindyo is yet to see the proposed mode.

11. Priestly Itumo's submissions reiterated the fact that his mode of distribution ought to be allowed and that of the 1st petitioner be disallowed. The 1st petitioner in her submissions averred that the 1st objectors gravamen are that the 1st petitioner is married; she reiterated her proposed mode of distribution and submitted that the 1st objector has not satisfied the court that the deceased distributed his property before he died and because the beneficiaries had not consented to his mode of distribution therefore hers ought to be allowed.

12. The parties herein adduced evidence in Court vide their affidavits that were filed. I have considered all the evidence adduced. There are three issues which arise for determination:

- Who are the beneficiaries entitled to the estate of the deceased"

- How should the estate be distributed"

8. **Who are the beneficiaries"**

The deceased was survived by 4 wives namely:

- **Rhoda Itumo (deceased)**

- **Nzula Itumo Kivindyo**

- **Jainer Koki Itumo**

- **Nditu Itumo**

He was survived by the following children

- **Rosemary Ndindi Mbonge**

- **Esther Mwikali Itumo**

- **Priestly Mutuku Itumo**

- **Margaret Ndunge Kiilu**

- **Jonathan Nthei Itumo alias Jonathan Nthei Titus**

- **Syombua Mwololo**

- **Stephen Musyoka Itumo**

- **Mutua Itumo**

- **Lilian Kanini Sila**

- **Johnstone Mutinda Kivindyo**

- **Richard Wambua Itumo**

- **Mutisya Itumo**

- **Wavinya Itumo**

- **Kivindyo Itumo**

- **Nzioki Itumo**

- **Ndila Muli**

- **Mwongeli Ndolo**

- **Mutheu Ndolo**

- Nzomo Itumo
- Kyalo Itumo
- Mutile Itumo
- Muthoka Itumo
- George Kioko Kivindyo
- Wanzila Mbuli
- Nthenya Itumo
- Nyamai Itumo
- Kalekye Itumo
- Katuku Itumo
- Mwithi Itumo
- Munyao Itumo
- Ndunda Itumo

Section 29 of the **Law of Succession Act** provides:

“For the purposes of this Part, “dependant” means –

(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

Thus, the children of the deceased and the wives are dependants whether or not they were maintained by the deceased prior to his death. The above named who are wives and dependents of the deceased are therefore dependants who are entitled to the estate of the deceased.

13. This brings me to the last consideration which is the distribution of the estate. I have looked at the modes of distribution of the 1st objector and the 1st petitioner and find that they do not indicate that all the dependants have been given a share of the estate. The proposal that seems to account for all the dependants is the proposal by Richard Wambua Itumo. The 1st objector averred that the deceased left an oral will. However the court is not satisfied that the same has been proven and as such the distribution must be under intestate succession and in any case the 1st objector filed this cause as an intestate succession. **Section 34** of the **Law of Succession Act** provides:

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

14. In the case of **Elizabeth Chepkoech Salat v Josephene Chesau, Chepkaron Salat (2015) eKLR**:- the court held as follows:

“For an oral will to be valid, it has inter alia to be made before two or more competent witnesses (Section 9(1) (a) of the Act)”

15. The deceased was polygamous. **Section 40** of the **Law of Succession Act** deals with the issue of polygamous families and stipulates as follows:-

Section 40 (1):-

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

Section 40 (2):-

“The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

16. Having established the law relating to the distribution of the estate of the deceased, and having established who the beneficiaries of the estate of the deceased are, because the deceased had 4 houses, **Section 3** of the **Law of Succession Act**, defines the “**house**” as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. There is no permission for discrimination of the children on grounds of their sex. All the three surviving wives of the deceased and all their children and the deceased’s wife’s children are therefore entitled to a share of his net intestate estate equally as provided for by **section 40** of the **Law of Succession Act**.

17. I am of the view that the estate of the deceased should devolve as provided under **Section 40** of the **Law of Succession Act (supra)**.

18. **Section 38** of the **Law of Succession Act** provides:

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

In **Christine Wangari Gichigi v Elizabeth Wanjira Evans & 11 Others (2014) eKLR** the Court held that:

“Under Section 38 of the Act all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have dissenting consideration in respect of 2, 3 and 4 cross appellants in the absence of renunciation of respective claims to the estate.”

19. I order that the estate of the deceased be distributed as proposed by the 2nd Objector Richard Wambua Itumo. That is to say that the properties be divided equally among the 4 households in trust for their siblings. This proposed scheme of distribution of the estate appears to be quite fair and in tandem with the provisions of the Law of Succession Act However the respective shares ought to take into account where the matrimonial homes stand. In light of the foregoing authority, I caution against excluding the dependents of the deceased who have not participated in the litigation and that all the beneficiaries must be involved in the distribution of the estate. The parties are now directed to proceed and commence the distribution exercise in line with the proposal by the 2nd Objector Richard Wambua Itumo that has been accepted by this court as fair and appropriate. The grant herein is hereby confirmed and the estate be distributed in terms of the proposal by the 2nd objector Richard Wambua Itumo. This being a dispute involving family members, each party will bear its own costs.

It is so ordered.

Dated and delivered at Machakos this 2nd day of July, 2019.

D.K. KEMEI

JUDGE