REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

P&A CAUSE NO. 186 OF 2011

IN THE ESTATE OF THE LATE MUEKE KIMAKU MWAKE (DCD)

ALICE NZUVA MUEKE.....1ST ADMINISTRATOR/PROTESTOR

VERSUS

JOSEPH MUTUNGA MWEKE.....2ND ADMINISTRATOR/RESPONDENT

RULING

1. The 1st Administrator/Protestor and the 2nd Administrator were granted letters of grant of administration intestate to the estate of **Mueke Kimaku Mwake** (deceased) on the 24/10/2012. The 2nd Administrator later filed summons for confirmation of grant dated 3/5/2016 where he made a raft of proposals on the mode of distribution of the estate.

2. The Protestor filed several affidavits of Protest dated 02/06/2011 and 30/06/2016 where she vehemently opposed the mode of distribution maintaining that **Parcel Number Kyangwithya/Mulutu/165** had been given to her by the deceased during his lifetime save that a portion thereof constituting the homestead of her co-wife measuring 0.5 Ha was to be hived off. She further averred that the consent entered herein on the 19/06/2012 had set aside orders that had been made by **Kitui PM's Court in P& A No. 113 of 2005** whereby all transactions, subdivisions and transfers were nullified. She further proposes that **Parcel Number Kyangwithya/ Mulutu/160** be given to her co-wife and her children. Finally, she deposed that **Parcel Number Kyangwithya/Mulutu /165** which measures 4.6 Ha should be reduced by one acre to cater for the homesteads of the two widows and she is thus left with 3.6 Ha for her children while her co-wife also gets 3.6 Ha in **Kyangwithya/Mulutu/160** whose acreage is exactly 3.6 Ha.

3. Parties filed witness statements. The protest was heard by way of viva voce evidence. The protestor called three witnesses while the 2nd administrator called two witnesses.

4. The Protestor in her evidence stated that she is the second wife to the deceased herein who gave her **Parcel Number Kyangwithya/Mulutu /165** while the first wife's family was given **parcel Number Kyangwithya/Mulutu /160.** She went on to state that the deceased had subdivided the compound whereby each family occupied half a hectare. She averred that the first house has now taken up her parcel and locked her out since the year 2008 despite the existence of a status quo order agreed by consent before this court. She wants the court to agree to her proposed mode of distribution of the estate so that justice can be seen to be done. On cross – examination, she confirmed that there was no family meeting held by the deceased and neither did he take them to the lands offices to effect transfer of the properties. She also confirmed having been charged with an offence of trespass on private land and jailed for six months. On re-examination, she stated that both families reside on parcel 165 but that the compounds should be divided and the rest of the land given to her while the first house takes up parcel Number 160.

5. **Daniel Muendo Mueke** a son to the Protestor reiterated his averments on his witness statement dated 21/2/2017 and corroborated his mother's claim that the deceased had given the Protestor parcel No. Kyangwithya/Mulutu/165 but that one hectare thereof was hived off by the deceased to accommodate the two homesteads each occupying a portion of 0.5 Ha. He averred that the first house secretly lodged a Succession Cause in Kitui Law Courts and began to disinherit them forcing them to move to this court where an order was issued revoking the grant issued by the Kitui Court and nullifying any subdivision or transfers. On cross-examination, he maintained that the deceased had held a family meeting involving the clan but could not avail the minutes in that regard. He also denied that any of his siblings reside on parcel 160 and opposed equal sharing of the property.

6. **Jonathan Muimi Mueke** also a son of the Protestor stated that parcel Number 165 had been given to the Protestor by the deceased who had instructed the members of the first house to relocate to parcel Number 160. He confirmed that one hectare from parcel Number 165 had been reserved for the two homesteads and that the estate should be distributed as proposed by the protestor as that is in accordance with the deceased's distribution during his lifetime. On cross – examination, he stated that he has not seen the deceased's will.

7. The 2nd Petitioner called his mother Kalunda Mueke who testified that she is the first wife of the deceased and lived with him for about 23 years before the protestor was brought in as second wife. She further stated that she would like to have the land divided equally and each

family to remain with their children. On cross – examination, she confirmed that at the time of the demise of the deceased they were residing in one compound. She also confirmed that she and her children used to farm on parcel 160 and that she would like all the children of the deceased given an equal share.

8. **Joseph Mutunga Mueke** was the 2nd Administrator. He stated that upon the death of the deceased, the Protestor ordered them to move out of parcel 165 and move onto 160. He was compelled to file a Succession Cause at Kitui law Courts where he obtained grant after which parcel 165 was subdivided into two portions namely 998 and 999. He now wants his proposal to be adopted as adopted by Kitui Court. On cross-examination, he confirmed having sworn an affidavit before Kitui Court seeking that the Protestor and her family were to move out and built elsewhere notably the new parcel 999. He maintained that he is not agreeable to the property being shared according to the houses since the first house has many children.

9. Parties filed written submissions.

10. Learned counsel for the Protestor submitted that since the deceased was a polygamous man then the distribution of his intestate estate should be in line with Section 40 of the Law of Succession Act and in accordance to the number of houses taking into account the number of children in each house. Learned Counsel sought reliance in the case of **Mary Rono =Vs= Jane Rono & Another [2005] eKLR** and **in Re Estate of John Muia Kalii (deceased) [2008] eKLR.** It was further submitted that the proposal by the Protestor is an equitable one and is in accordance with Section 40 of the Law of Succession Act as it tallies with what is on the ground as earlier arranged by the deceased.

11. It was submitted for the 2nd Administrator that this court should ensure that the distribution is done equitably taking into account the circumstances of the case as per the decision in **Mary Rono =Vs= Jane Rono & Another [2005] eKLR**. It was submitted that Section 40(1) of the Law of Succession Act provides that the net estate be divided among the houses taking into account the number of children in each house. Counsel added that the 2nd administrator's proposal is equitable since the disharmony would be resolved by the Protestor being moved to parcel Kyangwithya/Mulutu/999 while the Administrator's mother occupies Kyangwithya/Mulutu/998. It was also submitted that the Protestor's claim that the deceased had given her land parcel Kyangwithya/Mulutu/165 has not been proved at all as nothing in writing has been presented. The case of **Dan Ouya Kodwar =vs= Samuel Otieno Odwar & Another [2016] eKLR** was relied upon.

12. I have considered the rival affidavits as well as the evidence adduced herein. I have also considered the submissions and authorities cited by the learned counsels. Certain issues in this matter appear not to be in dispute. Firstly, that the deceased herein was a polygamous man who had married two wives namely **Kalunda Mueke Kimaku (1st wife)** and **Alice Nzuva Mueke (2nd wife and 1st Administrator/Protestor).** Secondly, the first wife had 12 children making a total of 13 units while the second house had 8 children making a total of 9 units. Each of the houses lost one child. Thirdly, the two houses established their compounds measuring 0.5 Ha each on **Parcel No. Kyangwithya/Mulutu/165**. Fourthly, the 2nd Administrator had filed a Succession Cause at Kitui Law Courts namely **PMCC P&A No. 115 of 2005** which led to subdivision of **Parcel Kyangwithya/Mulutu/165** into two portions namely Kyangwithya/Mulutu/998 and Kyangwithya/Mulutu/999. Fifthly, a consent was entered into by the parties dated 10/1/2012 wherein the earlier grant by the K**itui PM's Court in P&A 115 of 2005** was revoked and all transactions, subdivisions, transfers or sharing of assets of deceased pursuant to the grant nullified and a fresh grant was thus issued in the names of the Protestor and 2nd Administrator. Sixthly, the deceased did not make a will and hence the present intestate succession proceedings. The only issue for determination is the mode of distribution.

13. The issue of distribution is quite an emotive one in view of the fact that the deceased left behind two widows who appear not to get along well together upon the demise of their husband. It is common knowledge that majority of co-wives have no love lost and the spite and scorn for each other at times extends to their children. It has been confirmed that there is no harmony between the two houses as evidenced by the imprisonment of the protestor over allegations that she had trespassed onto a private land that had been created as a result of the grant issued by Kitui PM's Court but which was later revoked and the said subdivisions and title transfers cancelled. I note that the 2nd Administrator's proposal seeks to rely on the distribution that had been made before the Kitui Court in the absence of the Protestor yet the said grant and all consequential processes has already been revoked and annulled. This appears to be the main point of disagreement between the parties as regards the issue of distribution. The Protestor's view is that 0.5 Ha each be excised from parcel Kyangwithya/Mulutu/165 to cater for the two homesteads of the two houses while the remainder be held by the Protestor and her family and that the first house take over parcel No. Kyangwithya/Mulutu/160. Both parties are in agreement that prior to the death of the deceased both houses had developed their homes on 0.5 Ha each on parcel Kyangwithya/Mulutu/165.

14. The law relating to the distribution of the intestate estate of a polygamous man is found in Section 40 of the Law of succession Act which provides as follows:-

> "40(i) ***where an intestate has married more that once under any system of law permitting polygamy, his personal and household effects and the residue of the net estate 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.***
>
> ***(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall be in accordance with the rules set out in Sections 35 to 38."***
>
> ***Section 35 of the said Act provides that where an intestate has left a surviving spouse and child or children the surviving spouse shall be entitled to a life interest in the whole of the net intestate estate.***

The 2nd Administrator has vehemently opposed the suggestion by the Protestor that the assets be shared equally between the two houses on the ground that the first house which has more units are likely to be disadvantaged and they want an unequal distribution. It emerged from the testimonies and the rival affidavits and witness statement that indeed both houses had developed their homes on 0.5 Ha each on parcel Kyangwithya/Mulutu/165 while the remainder was left for grazing the animals and that the 1st house had been farming on parcel Kyangwithya/Mulutu/160 while the 2nd house farmed a quarter acre on parcel Kyangwithya/Mulutu/165. Indeed the 1st wife Kalunda

Mueke Kamaku admitted on cross-examination that she and her children used to cultivate on parcel Kyangwithya/Mulutu/160. It would appear to me that that was the state of affairs during the lifetime of the deceased. Things changed after his demise and hence these proceedings. The sharing of assets of an intestate of a polygamous person poses great difficulties due to the competing interests of the various houses as well as hostilities brewed by the surviving spouses and children. This is exactly what is happening regarding the estate of the deceased. It seems after the demise of the deceased, the first house embarked on an agenda to kick out the second family leading to the arrest and imprisonment of the Protestor. After the signing of the consent dated 10/1/2012 and issuance of a new grant the tumult cooled down somewhat. The revocation and annulment of the grant led to cancellation of the titles that had been issued following the sub-divisions and now the status is that everything has been reversed back so that title number Kyangwithya/Mulutu/165 has been restored back. The other parcel Kyangwithya/Mulutu/160 is still intact. A court while distributing an intestate estate's properties in a polygamous set up as indicated in Section 40 of the Law of Succession Act has to ensure equity and fairness. Each of the parties herein insist that their proposal is equitable. I am now duty bound to balance the scales and ensure that a fair distribution is achieved. It transpired from the evidence that the protestor was married as a second wife to the deceased about 23 years after the 1st wife had been married. Hence ordinarily, the 1st wife and her children are expected to have had a head-start in life unlike the second wife and children. The protestor clearly indicated that her family are poor as compared to the first house and they feel they have been overpowered by the said first house. I am inclined to take these factors into account.

15. The Application of Section 40 of the law of Succession Act in the distribution a polygamous intestate estate was discussed by the Court of Appeal in **Eldoret Civil Appeal No. 66 of 2002 Mary Rono =Vs= Jane Rono and William Rono [2005] eKLR** where Omolo JA (as he then was held as follows:

> "***I had the advantage of reading in draft form the judgement prepared by Waki JA and while I broadly agree with that judgement, I nevertheless wish to point out that I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act Cap 160 Laws of Kenya lays down as a requirement that heirs of a deceased person must inherit equal portion of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provisions in the Act.***
>
> ***..... my understanding of the Section is that while the net intestate estate is to be distributed according to houses, each having been treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.***
>
> ***Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or boy were to get an equal inheritance with another who is already working and for whom now school fees and things like that were to be provided , such equality work an injustice and form my part I am satisfied that the Act does not provide for that kind of equality."***

16. I am guided by the above authority and find that though the children from both houses are adults those from the first house having been born earlier have had a head start in life as compared to those from the second house. I have noted that each house is settled on 0.5 Ha from parcel Number Parcel No. Kyangwithya/Mulutu/165 and that it would be unfair to uproot either of the homesteads since that is the base or roots of the two families and therefore the area comprising the homesteads must be left intact for each of the houses. The proposed mode of distribution by the Protestor appear to me to be fair in the circumstances since each of the homesteads will not be interfered with while remainder of Parcel No. Kyangwithya/Mulutu/165 will go to the second house and likewise Parcel No. Kyangwithya/Mulutu/160 will go to the first house. I note that the 2nd Administrator in his proposal has brought up the issue of the two sub-divisions namely Parcel No. Kyangwithya/Mulutu/998 and Parcel No. Kyangwithya/Mulutu 999 yet the same were cancelled and or nullified vide the consent dated 10/1/2012. These parcels are no longer in existence and it is therefore quite mischievous for the 2nd Administrator to purport to distribute lands that do not exist. I find the conduct of the 2nd Administrator to be going against the grain yet he is fully aware of the consequences of the consent order dated 10/1/2012. It is clear that he is out to disinherit the Protestor and her children by suggesting that they move out of their homestead and land to a parcel of land that does not exist anymore. The proposal by the Protestor is in my view quite fair and reasonable as it resonates well with what used to obtain prior to the demise of the deceased. The first house seems to want to distort the earlier arrangement and confirmed by both the 2nd Administrator and his mother that they used to cultivate parcel Number Parcel No. Kyangwithya/Mulutu/160. The protestor in her proposal is magnanimous by suggesting that the homesteads occupying 1 Ha from parcel 165 be saved for each house and she will then remain with the balance of 3.6 Ha plus the homestead while the first house takes parcel Number 160 which measures 3.6 Ha in addition to the homestead. I am satisfied that the proposal by the Protestor is fair, reasonable and equitable taking into account all the circumstances of the case. The claim by the first house that they are likely to get less acreage due to the extra units in their house lacks basis since Section 40 of the Law of Succession Act does not provide for that kind of equality. In any event the 1st house and their children have had a head-start in life as compared to the second house and they should not grumble over the distribution which is in tandem with what the deceased had desired in his lifetime.

17. In the result, I am disposed to distribute the estate as proposed by the protestor which is reasonable in the circumstances and is in tandem with the prescribed scheme of distribution in Section 40 of the Law of Succession Acts. Consequently, I uphold the protest and direct that the estate shall be distributed the as follows:-

1. LR. NO. Parcel No. Kyangwithya/165 be shared as follows:-

(a) Kalunda Mueke Kimaku

In trust for herself and children .....0.5 Ha

(b) Alice Nzuva Mueke

In trust for herself and children .....0.5 Ha

(c) Alice Nzuva Mueke

In trust for herself and children .....3.6 ha

2. LR. No. Parcel No. Kyangwithya/160 to be registered in favour of Kalunda Mueke Kimaku in trust for herself and children.

18. The administrators are now directed to fix a date on priority basis when the beneficiaries will appear to endorse the mode of distribution approved by this court. As parties are members of one family I order that each should bear their own costs.

Orders accordingly.

Dated and Delivered at Machakos this 9th day of October, 2019.

D. K. Kemei

Judge