



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO 261 OF 2007**

**IN THE MATTER OF THE ESTATE OF MORRIS KILONZO MUSYIMI (DECEASED)**

**PRISCILLA MUMBUA KILONZO.....APPLICANT/1<sup>ST</sup> ADMINISTRATOR**

**VERSUS**

**PHOEBE MBENEKA KILONZO.....RESPONDENT/2<sup>ND</sup> ADMINISTRATOR**

**AND**

**DANIEL KILONZO AND FRANCIS KILONZO.....PROTESTORS**

**AND**

**SHADRACK MUSYOKI.....OBJECTOR**

**AND**

**BENARD MUTETI MUNG'ATA.....INTERESTED PARTY**

**RULING**

1. On 25<sup>th</sup> day of September, 2018 this court delivered a ruling in this Cause in which it found that the deceased and the 2<sup>nd</sup> Administrator intended that they be presumed to be husband and wife hence the Court ought not to put their desires asunder. Accordingly, the court proceeded to declare the 2<sup>nd</sup> Administrator a wife of the deceased and her children the children of the deceased.
2. The Court then directed, pursuant to the provisions of Article 159(2)(d) of the Constitution, that the parties attempt an amicable mode of distribution of the Deceased's estate, failure to which the Court would proceed to distribute the estate in accordance with the law.
3. On 5<sup>th</sup> March, 2019, counsel for the parties recorded a consent herein in which they agreed inter alia that the summons dated 12<sup>th</sup> October, 2018 be marked as withdrawn and that the application dated 6<sup>th</sup> March, 2017 be disposed by way of written submissions for which timelines were agreed. It is that application which was initially withdrawn but later reinstated that is the subject of this ruling. Regrettably, none of the parties has complied with the court's directions.
4. In the Summons for Confirmation of Grant dated 6<sup>th</sup> March, 2017, it is sought that the grant of letters of administration intestate made to **Priscilla Mumbua Kilonzo** on 26<sup>th</sup> February, and rectified on 24<sup>th</sup> October, 2012 to include **Phoebe Mbekena Kilonzo** as the 2<sup>nd</sup> administrator be confirmed in terms of the annexed schedule of distribution.
5. The application is supported by an affidavit sworn by the 1<sup>st</sup> Administrator, **Phoebe Mbeneka**. On 2<sup>nd</sup> July, 2019, I reserved the delivery of the ruling in respect of the said the application dated 6<sup>th</sup> March, 2017 for 7<sup>th</sup> October, 2019.
6. By Summons for Confirmation of Grant dated 11<sup>th</sup> October, 2007, the 1<sup>st</sup> Administrator/applicant herein, **Priscilla Mumbua Kilonzo**, on 6<sup>th</sup> March, 2017. According to the said affidavit., the deceased was survived by 10 dependants including the 1<sup>st</sup> and 2<sup>nd</sup> administrators who were his wives. I was deposed that the deceased owned Machakos/Kiandani/2783, Machakos/Kaliluni/1754, Machakos Kiandani/2601, Nzau/Kikumini/17, Nzau/Kikumini/692, Plot at Kativani and Plot at Masimba.

7. According to the 1<sup>st</sup> administrator, the identification of all persons beneficially entitled to the said estate have been ascertained and should be distributed in terms of the annexed schedule. According to the said schedule, Machakos/Kaliluni/1754 ought to be registered in the names of Priscilla Mumbua Kilonzo; Nzau/Kikumini/17, Nzau/Kikumini/692, Plot at Kativani and Plot at Masimba be registered in the names of **Phoebe Mbeneka Kilonzo** in trust for herself and her children who are the other beneficiaries of the estate of the deceased since the 1<sup>st</sup> administrator did not have a child; Machakos/Kiandani/2783 be registered in the name of **Elizabeth Kanini Mulumbi**; Machakos Kiandani/2601 be registered in the name of **Shadrack Musyoki**; and Machakos/Kiandani/2783 be registered in the name of **Benard Muteti Mungáta**.

8. In her further affidavit, the 1<sup>st</sup> Administrator averred that during his lifetime, the deceased allocated land number Machakos/Kiandani/2783 and Machakos/Kaliluni/1754 to her. According to her, the reason why she was allocated only two properties in Machakos is because that is where she lives and secondly, she can collect the small rents from Machakos/Kiandani/2783 to help herself due to her old age, unemployment and being childless with no child to help her. She however disclosed that one of the 2<sup>nd</sup> administrator's daughters has trespassed into the said Machakos/Kiandani/2783 where she has her matrimonial home and has defied her requests to return to her home in Makueni where their land is. According to the 1<sup>st</sup> administrator this the daughter has done taking advantage of her age and in her imaginations wants to take over the land from her.

9. The 1<sup>st</sup> administrator deposed that the rest of the properties, Machakos/Kiandani/2601 and 2784 were sold during the lifetime of the deceased and ought to be given to the purchasers.

10. According to the 1<sup>st</sup> administrator, after the 2<sup>nd</sup> administrator was married because the 1<sup>st</sup> administrator was childless, the 2<sup>nd</sup> administrator was taken to Makueni and land number Nzau/Kikumini/17, Nzau/Kikumini/692, Plot at Masimba and at Kativani were placed under her care and she is still settled in Makueni todate. According to the 1<sup>st</sup> administrator, the reason why the 2<sup>nd</sup> administrator was given control of the majority of the properties is because she had several children.

11. The 1<sup>st</sup> administrator disclosed that after the first grant was confirmed, she sold Machakos/Kiandani/2783 to the interested party herein and transferred Machakos/Kaliluni/1754 to herself thus they do not form part of the deceased's estate. It was her case that after the death of the deceased the 2<sup>nd</sup> administrator started causing problems and compromised the elders to distribute the deceased's estate contrary to his will and instructions.

12. It was therefore the 1<sup>st</sup> administrator's proposal that she ought to get the two properties as awarded by the deceased while the other properties can be given to the 2<sup>nd</sup> administrator.

13. In support of her submissions the 1<sup>st</sup> administrator contended that Machakos/Kiandani/2783, Machakos/Kiandani/2601 and Machakos/Kiandani/2784 were sold. While the latter two were sold by the deceased but were not transferred, the first one was sold her herself and was duly transferred to the interested party herein. The said sale having not been challenged, the said property does not form part of the deceased's estate. In this regard the 1<sup>st</sup> administrator relied on the case of **Estate of Tumbo Lavu (Deceased) Machakos Succession Cause Number 80 of 2011** and section 93 of the **Law of Succession Act**, Cap 160 Laws of Kenya. According to the 1<sup>st</sup> administrator, pursuant to the said provision the said transaction is protected as the interested party was not aware of the factors that led to the revocation of the grant being a *bona fide* purchaser for value without notice. In this regard the 1<sup>st</sup> administrator relied on **Musa Nyaribabri Gekone & 2 Others vs. Peter Miyienda & Another [2015] eKLR**. It was further submitted based on the case of **Re Estate of Makai Kaluti Ndunda (Deceased) [2018] eKLR** that this court has no jurisdiction to cancel title once issued.

14. The court was urged to consider the special circumstances of the 1<sup>st</sup> administrator, such as her age and the fact that she has no source of income and no helper deceased.

15. The said summons was however opposed by way of an affidavit of protest sworn by **Phoebe Mbeneka Kilonzo**, the 2<sup>nd</sup> administrator herein. According to her at no time had the beneficiaries of the Estate of the Deceased and/or administrators agreed to have the estate distributed in the proposed manner and in particular the 2<sup>nd</sup> administrator referred to the proposal to have Machakos/Kiandani/2783 registered in the name of **Benard Muteti Mungáta**. According to the 2<sup>nd</sup> administrator, the 1<sup>st</sup> administrator purported to be an administrator of the deceased's estate without knowledge and consent of the 2<sup>nd</sup> administrator and some of the beneficiaries and sold 6 houses situate on the said land to the interested party herein, **Benard Muteti Mungáta**, while the other 6 units she allocated to herself. According to the 2<sup>nd</sup> administrator she has been managing the said property as a landlady and only learnt of the unlawful sale when her tenants were issued with a Notice to Vacate the said premises and to give vacant possession to the said interested party who was then then Speaker of the Machakos County Assembly. This was despite the fact that the 2<sup>nd</sup> administrator still held the original title deed for the said property in her custody. It was the 2<sup>nd</sup> administrator's case that it was due to the foregoing reason that the grant which was issued to the 1<sup>st</sup> administrator was rectified to include her as the 2<sup>nd</sup> administrator since the same had been obtained by concealment of material facts. The 2<sup>nd</sup> administrator therefore asserted that the purported sale and transfer of Machakos/Kiandani/2783 was fraudulent and illegal hence the interested party ought not to be included or entitled to a share of the same.

16. The 2<sup>nd</sup> administrator however expressed her willingness to agree with the 1<sup>st</sup> administrator and all the beneficiaries on how the said property should be distributed.

17. It was the 2<sup>nd</sup> administrator's case that the Plots at Kativani and Masimba do not form part of the deceased's estate as the same are registered in her names.

### **Determination**

18. I have considered the issues raised hereinabove. On 1<sup>st</sup> April, 2019, I directed the parties herein to canvas the protest by way of submissions and gave the timelines for the foiling thereof. On 2<sup>nd</sup> July, 2019, the parties herein appeared before me and while the 1<sup>st</sup> administrator confirmed that her submissions had been filed, the 2<sup>nd</sup> administrator relied wholly on the contents of the affidavit of protest.

19. Section 40 of the **Law of Succession Act** provides that:-

**“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 next intestate 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.”**

20. This provision was extensively dealt with by the Court of Appeal in Scolastica Ndululu Suva vs. Agnes Nthenya Suva [2019] Eklr where the Court expressed itself at paras 15-21 as hereunder:

**“In Mary Rono vs Jane Rono & another (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased’s estate but that the discretion must be exercised judicially on sound legal and factual basis. In the same judgment, Omollo JA stated the position more clearly as follows:**

**‘My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they 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 injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.’**

In Douglas Njuguna Muigai & vs John Bosco Maina Kariuki & another (supra) this Court noted the absurdity of a blind application of section 40(1) of the Law of Succession Act as follows:

**‘Back to section 40(1) of the Law of Succession Act, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased’s estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and, in our view, that failure to recognize her contribution is tantamount to discrimination.’**

It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate. In regard to the question whether the respondent contributed towards the purchase of the two (2) properties, the trial judge had this to say:

**‘The protester testified that she was married to the deceased in the year 1983 and found the applicant already married to the deceased. She further stated that she found the two properties in issue herein had already been acquired, though she was not sure of the exact year of the acquisition. It was her testimony that at the time of her marriage to the deceased she found him living together with the applicant on the same land. It is thus safe to hold that the protester never contributed to the purchase of the two properties herein. It also emerged that the applicant herein was gainfully employed as a teacher in the year 1973 and retired in the year 2005. It was admitted by the protester and her witness Johnson Musyimi Suva that the applicant was working as a teacher when the deceased bought the parcels, she signed one of the agreements as the purchaser. I accept her evidence that she contributed financially towards the acquisition of the two parcels; Kathekani/76 and Kathekani/730. In the circumstances, it would be unfair to share the proceeds half - half between the two (2) widows of the deceased, or to find that each beneficiary should get equal proceeds of the share.’**

On our own evaluation of the evidence, we are entirely in agreement with the conclusion that the trial judge arrived at that the respondent contributed financially to the acquisition of the two properties. We are alive to the fact that what was before the learned judge was a succession cause and not a matrimonial dispute. However, the succession cause was anchored on the matrimonial circumstances of the deceased. The fact that the deceased acquired the two (2) properties during the subsistence of his marriage to the respondent, before the appellant came into the scene, and the fact that the respondent was employed, clearly, supported her allegation that she contributed to the acquisition of the two (2) properties. It would not therefore be fair nor just to treat the appellant and the respondent equally in the distribution of the estate. The following excerpt of the judgment reflects the distribution adopted by the trial Court as follows:

**‘All the 13 beneficiaries (including the applicant and the protester) entered into a consent on 10/2/2015 and shared Kshs11,000,000/= equally. The balance from the proceeds of the parcels at Kshs11,908,595/=(sic). In the circumstances of the case, I ask (sic) that 40% of the Kshs11,908,595/= shall go to the applicant Agnes Nthenya. It works to Kshs.4,763,438/=. The protester Scolastica Ndululu Suva, Mark Maweu Suva, Felix Munyoki Suva, Barnaba Iwia Suva, Clement Moki Suva, Jonathan Kaloki Suva, Methussella Kivila Suva, Isaac Ngolano Suva, Roy Silas Suva, Metes Mwonge Suva, Abednego Andrew Munyoki and Sarah Muyoki Suva shall equally share the balance of Kshs7,145, 157/=. Each will get Kshs.595,429/75. Lastly the proceeds of the treasury Bills Nos A0009717 and A0009718 shall be equally shared among all the 13 Beneficiaries.’**

**From the above it is apparent that apart from the amount of Kshs11,908,595/= of which the respondent received 40 percent, the rest of the proceeds were shared out equally. An arithmetical calculation reveals that the respondent actually got only about 25 percent of the total sum whilst the rest was shared out equally amongst the remaining 12 beneficiaries. In the circumstances the appellants' contention that the distribution was unfair has no substance."**

21. In this case the 1<sup>st</sup> administrator avers that three of the properties mentioned are not available for distribution. This is due to the fact that three of them have been sold. Two of the properties were sold by the deceased himself though their transfer was yet to be affected. The third property was sold by the 1<sup>st</sup> administrator before the grant was revoked. That the third property was sold and transferred to the interested party is supported by the documentary evidence herein. I agree that without the said sale being reversed by a court of competent jurisdiction this court cannot, in these proceedings proceed as if the said property belongs to the estate of the deceased. As regards the properties sold by the deceased, there does not seem to be any serious challenge to that contention.

22. I have considered the averments by the 1<sup>st</sup> administrator as regards the reasons behind her contention that the deceased allocated to her two of the properties in question. In my view based on the reasoning of the Court of Appeal in **Douglas Njuguna Muigai & vs. John Bosco Maina Kariuki & Another** it would be unjust to treat the 1<sup>st</sup> administrator in the same way as one would treat any of the children of the 2<sup>nd</sup> administrator. In arriving at my decision, I have considered the Plots at Kativani and Masimba as part of the estate of the deceased since the 2<sup>nd</sup> administrator did not adduce any evidence to the contrary.

23. It is therefore my view that the estate of the deceased ought to be distributed in the manner proposed by the 1<sup>st</sup> administrator. In the premises Summons for Confirmation of Grant dated 6<sup>th</sup> March, 2017 succeeds and is allowed as prayed.

24. There will be no order as to costs.

25. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 7<sup>th</sup> day of November, 2019.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Muema for for Mr A K Mutua for the 2<sup>nd</sup> Administrator and interested party**

**CA Geoffrey**