



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 335 OF 2003**

**IN THE MATTER OF THE ESTATE OF SAMSON KILONZO NTHEI (DECEASED)**

**JIMMY MUSYOKI KILONZO .....PETITIONER**

**VERSUS**

**MAJOR (RTD) KYALO KILONZO**

**JOHN MUNYAO KILONZO.....RESPONDENTS/OBJECTORS**

**RULING**

1. Before me is a summons dated 3/5/2017 filed by the Objector/ Applicants herein seeking for prayers inter alia that this Honourable court be pleased to appoint Joseph Munyao Kilonzo as the 4<sup>th</sup> Administrator of the estate of the deceased herein in place of Francis Mwaka Kilonzo and accordingly issue letters of administration; that the costs of the Application be provided for.

2. The Application is supported by the annexed affidavit of the objectors/applicants herein sworn on even date and further on several grounds namely:-

(i) That this Honourable appointed four administrators on the 7/3/2008 namely **Ruth Ndulu Kilonzo, Jimmy Musyoki Kilonzo, Major (Rtd), John Kyalo Kilonzo and Francis Mwaka Kilonzo** to administer the estate of the deceased.

(ii) That on 26/4/2016 an application to confirm the grant was filed by the applicants herein.

(iii) That the 4<sup>th</sup> Administrator Francis Mwaka Kilonzo died before the grant was confirmed and which necessitates that he be substituted with his son Joseph Munyao Kilonzo.

(iv) That the rectification will not prejudice the Respondents.

(v) That it is in the interests of justice to grant the application.

3. The application was opposed by the Petitioner/Respondents. A replying affidavit was filed by Jimmy Musyoki Kilonzo on his own behalf and on behalf of the other Administrators/Petitioners and the following grounds of objections were raised namely:-

*(i) That the proposed appointment of Joseph Munyao Kilonzo as an administrator is opposed on account that he is not the best steward as he is not trusted having intermeddled with the estate by disposing some of the assets before the grant was confirmed.*

*(ii) That the issue of concern is about the distribution of the estate and not administration.*

*(iii) That the proposed administrator does not enjoy cordial relations with other beneficiaries.*

*(iv) That prejudice will be occasioned if the said Joseph Munyao Kilonzo is added as an administrator as relations will deteriorate and he might use his new position to frustrate questions about his intermeddling of the estate and evade accountability which will prolong the matter.*

*(v) That the remaining three administrators are capable of administering the estate.*

4. Learned counsels for the parties agreed to canvass the application by way of written submissions. The submissions were a reiteration of the averments contained in the rival affidavits. I have considered the said submissions and the rival affidavits. It is not in dispute that one of

the administrators Francis Mwaka Kilonzo has since passed on. It is also not in dispute that this is a fairly old matter and parties were about to conclude by setting down the summons for confirmation of grant already filed for hearing. The only issue I raise for determination is whether or not the remaining three administrators are sufficient to carry on with the administration of the estate herein.

The issue of death of the one of administrators to an estate of a deceased is captured under Section 81 of the law of Succession Act which provides as follows:-

***“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them;***

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him”.

The Applicants herein have proposed that Joseph Munyao Kilonzo be brought on board to replace the deceased administrator Francis Mwaka Kilonzo who is actually his father. The Applicants have contended that the appointment of the four administrators had been selected on the basis that two from the Petitioner’s side and two from the Objector’s side would be appropriate in the circumstances. It is on this basis that the Applicants are now proposing Joseph Munyao Kilonzo to replace his later father who was the fourth administrator. However the two Petitioners have maintained that the remaining three administrators are capable administering the estate and further contended that the main concern currently is on the distribution of the estate of the deceased so that the matter is finalized. The petitioners have further claimed that the proposed administrator does not even have the blessings of the rest of the beneficiaries as he is not likely to be a good steward.

The estate still has three administrators alive and going by the provisions of Section 81 of the Law of Succession Act the powers and duties of administration shall vest in the surviving administrators. Nothing to the contrary has been shown that the remaining administrators will not manage the task of administering the estate unless a new one is brought on board to replace the deceased administrator. If the sole purpose of bringing in Joseph Munyao Kilonzo to take care of the interests of his late father Francis Mwaka Kilonzo, then that concern has already been taken care of in the distribution of the estate. I do not suppose that the proposed administrator is meant to join the side of the objectors in these proceedings so as to checkmate the petitioners. That would definitely not be one of the functions of an administrator since the duties of administrators are fiduciary in nature and clothed with trust and their role is to act in the best interest of the estate and beneficiaries. It is noted that this matter had substantially proceeded and that the teething issues on distribution of the estate have already been addressed by this court as can be seen from the several rulings delivered herein. For instance Hon. Justice Makhandia (as he then was) delivered a ruling dated 6/7/2012 which dealt with the issue of distribution of the estate of the deceased. Again Hon. Justice B. Thurania Jaden delivered a ruling dated 4/9/2013 in which the acreage of one of the parcels namely **Kangundo/Isinga/237** was to be rectified so as to accord with the ruling dated 6/6/2012. It would appear therefore that all the issues on distribution have since been addressed by the court and that it is expected that the beneficiaries have accessed their rightful entitlements under the estate. It is noted also that one of the parties herein made an attempt to lodge appeal out of time to the court of appeal vide an application dated 20/2/2014 but that the same was dismissed by Hon. Justice Philip N. Waki of the Court of Appeal. Hence the status of the matter is as per the rulings of Makhandia J (as he then was) and B. Thurania Jaden J and that a certificate of confirmation of grant was to be issued. I have seen a draft of the same which had been forwarded to the Deputy Registrar of this court for purposes of endorsement. It seems the parties have not yet moved the court over the same and to confirm that the schedule of distribution is in tandem with the rulings aforesaid. It is clear that this matter has reached the tail end on the distribution of the estate of the deceased and therefore I find the bringing in of a new administrator is likely to delay this matter further. It is without doubt that this is an old matter which should be concluded without further delay so that the rightful beneficiaries obtain their entitlements under the estate. I find the prudent thing in the circumstances is to allow the three remaining administrators to carry on with the task of administering the estate of the deceased.

5. In view of the foregoing observations, I make the following orders:

*(a) The Objectors/Applicants Application dated 3/5/2017 is dismissed with no order as to costs.*

*(b) A certificate of confirmation of grant do issue in the names of **RUTH NDULU KILONZO, JIMMY MUSYOKI KILONZO and MAJOR (RTD) JOHN KYALO KILONZO.***

Orders accordingly.

**Dated and delivered at Machakos this 19<sup>th</sup> day of July, 2018.**

**D.K. KEMEI**

**JUDGE**

**In the presence of:-**

Nzioka - for the Petitioner

No appearance Ndeto - for the objectors

Josephine - Court Assistant