



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 383 OF 2003

In the Matter of the Estate of the Mbaabu M'Abutu (Deceased)

MUSA MBAABU ALI.....PETITIONER

Versus

ANN AMINA MWARI.....APPLICANT

JUDGMENT

Sale after confirmation

[1] These proceedings relate to the estate of Mbaabu M'Abutu (deceased). The estate properties are:-

1. **L. R NO. NTIMA/IGOKI/1032 measuring approximately 1.6Ha.**
2. **L. R NO. NYAKI/KITHOKA/123 measuring approximately 2.2Ha.**
3. **L. R NO. NYAKI/KITHOKA/440 measuring approximately 2.4Ha.**
4. **L. R NO. KIIRUA/NKANDO/542 measuring approximately 35 acres.**
5. **Shares in BAT**

[2] I am considering Summons for Confirmation of Grant dated 26th November, 2014 filed by one of the administrators, SAINA KALIMI GEORGE. SAINA filed the following documents Supporting Affidavit, Proposed Mode of Distribution and Amended Proposed mode of Distribution on 9.12.2014, 1.12.2017 and 5.4.2018, respectively. In the last document, she proposed the estate property to be distributed as follows:

1. LAND PARCEL NO. NYAKI/KITHOKA/440 MEASURING 7 ACRES

- | | |
|-----------------------------------|--------------------|
| a) SAINA MARIAM ZUBERI | 0.875 ACRES |
| b) SAINA KALIMI GEORGE | 0.875 ACRES |
| c) ANN AMINA MWARI KIMATHI | 0.875 ACRES |
| d) MUSA MBAABU ALI | 0.875 ACRES |
| e) ADAMSON MUTHURI | 0.875 ACRES |
| f) NURU MBAABU ALI | 0.875 ACRES |
| g) JUDITH KAGWIRIA MOSES | 0.875 ACRES |

h) LAND BELONGING TO MUKARIA MBAABU ON BEHALF OF Y K – MINOR MEASURING 0.875 ACRES TO BE HELD IN TRUST BY SIANA MARIAM ZUBERI, SAINA KALIMI GEORGE, ANN AMINA MWARI KIMATHI & JUDITH KAGWIRIA MOSES

2. LAND PARCEL NO. NYAKI/KITHOKA/1032 MEASURING 2 ACRES

- a) SAINA MARIAM ZUBERI 0.49 ACRES
- b) SAINA KALIMI GEORGE 0.49 ACRES
- c) ANN AMINA MWARI KIMATHI 0.49 ACRES
- d) MUSA MBAABU ALI 0.49 ACRES
- c) ANN AMINA MWARI KIMATHI 0.49 ACRES
- d) MUSA MBAABU ALI 0.49 ACRES
- e) ADAMSON MUTHURI 0.49 ACRES
- f) NURU MBAABU ALI 0.49 ACRES
- g) JUDITH KAGWIRIA MOSES 0.49 ACRES

h) LAND BELONGING TO MUKARIA MBAABU ON BEHALF OF Y K – MINOR MEASURING 0.49 ACRES TO BE HELD IN TRUST BY SAINA MARIAM ZUBERI, SAINA KALIMI GEORGE, ANN AMINA MWARI KIMATHI & JUDITH KAGWIRIA MOSES.

3. LAND PARCEL NO. NYAKI/KITHOKA/123 MEASURING 5 ACRES

- a) RUTH NKIROTE 0.75 ACRES
- b) SAINA MARIAM ZUBERI 0.53 ACRES
- c) SAINA KALIMI GEORGE 0.53 ACRES
- d) ANN AMINA MWARI KIMATHI 0.53 ACRES
- e) MUSA MBAABU ALI 0.53 ACRES
- f) ADAMSON MUTHURI 0.53 ACRES
- g) NURU MBAABU ALI 0.53 ACRES
- h) JUDITH KAGWIRIA MOSES 0.53 ACRES

i) LAND BELONGING TO MUKARIA MBAABU ON BEHALF OF Y K – MINOR MEASURING 0.625 ACRES TO BE HELD IN TRUST BY SAINA MARIAM ZUBERI, SAINA KALIMI GEORGE, ANN AMINA KIMATHI & JUDITH KAGWIRIA MOSES.

4. LAND PARCEL NO. NYAKI/KITHOKA/542 MEASURING 35 ACRES

- a) SAINA MARIAM ZUBERI 5.25 ACRES
- b) SAINA KALIMI GEORGE 4.25 ACRES
- c) ANN AMINA MWARI KIMATHI 4.25 ACRES
- d) MUSA MBAABU ALI 4.25 ACRES
- e) ADAMSON MUTHURI 4.25 ACRES
- f) NURU MBAABU ALI 4.25 ACRES

g) JUDITH KAGWIRIA MOSES 4.25 ACRES

h) LAND BELONGING TO MUKARIA MBAABU ON BEHALF OF Y K – MINOR MEASURING 4.25 ACRES TO BE HELD IN TRUST BY SAINA MARIAM ZUEBRI, SAINA KALIMI GEORGE, ANN AMINA MWARI KIMATHI & JUDITH KAGWIRI MOSES.

3] In her Replying affidavit sworn on 19th January 2015, she deposed that Faith Karimi Marete, James Munyari Njagi and Maecella Kiburio are strangers for they purportedly purchased land belonging to the deceased from beneficiaries who at the time did not have any legal capacity to sell the land. She described the transactions as null and void. She suggested that, should the said parties have any claim against the beneficiaries, they should litigate their action elsewhere. She was of the view that they should not be joined as parties here.

[4] Saina Mariam Zuberi and Judith Kagwiria Moses supported the mode of distribution prop[osed by SAINA KALIMI. See their joint mode of distribution filed in court on 17th October 2017. Ann Amina Mwari also associated herself with the mode proposed the two. See her Replying Affidavit sworn on 11th December 2017 and Affidavit of Protest sworn on 14th May 2014.

[5] Some of the parties did not agree with the mode of distribution proposed by SAINA and filed separate modes of distribution. Adamson Muthuri filed his preferred mode of distribution on 15th March 2018. He proposed that the estate be distributed as follows:-

1. L.R.NO. KIIRUA/NKANDO/542

- | | |
|-------------------------|---------|
| 1. SAINA MARIAN ZUBERIA | 4 ACRES |
| 2. JUNIOR MBAABU | 3 ACRES |
| 3. MUSA MBAABU ALI | 3 ACRES |
| 4. ADAMSON MUTHURI | 3 ACRES |
| 5. NURU M. MBAABU | 3 ACRES |
| 6. MUKARIA MBAABU | 3 ACRES |
| 7. AMINA MWARI | 3 ACRES |
| 8. SAINA MBAABU | 3 ACRES |
| 9. MWENDA FATUMA | 2 ACRES |
| 10. JUDITH KAGWIRIA | ACRES |

2) LR. NTIMA/IGOKI/1032

- | | |
|--------------------|------------------|
| 1. NURU M. MBAABU | |
| 2. MUKARIA MBAABU | TO SHARE EQUALLY |
| 3. MUSA MBAABU ALI | |
| 4. ADAMSON MUTHURI | |

3) L.R.NO. NYAKI/KITHOKA/440

- | | |
|---------------------------|----------|
| 1. NURU M. MBAABU | |
| 2. MUKARIA ALI | TO SHARE |
| 3. ADAMSON MUTHURI MBAABU | EQUALLY |

4) LR.NO. NYAKI/KITHOKA/123

- | | |
|--------------------------|------------|
| 1. RUTH NKIROTE | 0.75 ACRES |
| 2. SILAS MUTHEE MUTHINJA | 1.00 ACRES |

| | |
|--------------------|------------|
| 3. MUSA MBAABU ALI | 1.00 ACRES |
| 4. ADAMSON MUTHURI | ¼ ACRES |
| 5. MUKARIA ALI | 1.00 ACRES |
| 6. NURU MBAABU | 1.00 ACRES |

He claimed that his mode of distribution was in accordance with the wishes of the deceased and reflects the consent of all beneficiaries filed in court on 21st November 2008.

[6] Nuru M. Mbaabu supported the proposal and averments by Adamson Muthuri. But provided other details; that (1) the deceased had, during his lifetime sold some portions of his land; and (2) the deceased had instructed that BAT shares be used to deduce tiles for beneficiaries. See his affidavit duped Affidavit in Support sworn on 15th March, 2018.

DETERMINATION

[7] Parties are not able to agree on distribution. I will therefore fall back to the law. At the hearing of the Summons for confirmation of Grant, the court shall consider the affidavits and any written protests which have been filed by the beneficiaries as well as by any other person interested. See rule 41 Of the Probate and Administration Rules below:-

41. Hearing of application for confirmation

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.

(4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

(5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.

(6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.

(7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given.

(8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced.

(9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.

[9] I see two divides; one side supports proposal by SAINA; the other supports proposal by Adamson. The following were listed by the chief to be the children of the deceased:

2. *Adamson Muthuuri Mbaabu* - son
3. *Muuru Mbaabu Ali* - son
4. *Mukaria Mbaabu* - son
5. *Mariam Mbaabu* - Daughter (married)
6. *Saina Mbaabu* - Daughter (married)
7. *Amina Mwari* - Daughter (married)
8. *Fatuma Kathambi* - Daughter (Deceased)
9. *Bahati Kagwiria* - Daughter (married)

There is no surviving spouse. Therefore, section 38 would apply. The section states that:-

38. Where intestate has left a surviving child or children but no spouse

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

[8] The proposal by Saina Kalimi is perfectly in line with the law as it proposes equal distribution of the estate. It has also provided for the family of Mukaria who is said to have disappeared. And more importantly, she has proposed the share due to Mukaria to be held in trust. In light thereto, I direct that the estate properties listed in paragraph 1 of this ruling shall be divided equally amongst all the children of the deceased except subject to the orders I will issue below on the purchasers' interest. Specifically the following dependants shall share the estate equally:

a) SAINA MARIAM ZUBERI

b) SAINA KALIMI GEORGE

c) ANN AMINA MWARI KIMATHI

d) MUSA MBAABU ALI

e) ADAMSON MUTHURI

f) NURU MBAABU ALI

g) JUDITH KAGWIRIA MOSES

h) MUKARIA MBAABU- The share due to him shall be held in trust by the administrators for the benefit of his children, namely Y K, minor.

Purchaser's interest

[8] That is not the end of things. As I have stated above, it is a matter of legal obligation that the court should determine purchasers' interests claimed by Faith Karimi Marete, James Munyari Njagi, Marcella Kiburio and Ruth Nkirote. The first three applicants claim to have purchased land on 6.3.2012, 12.10.2010 and 26.4.2011 respectively from Noor M. Mbaaabu, Adamson Muthuri and Michael Mwaniki Ngari who had purchased from Adamson Muthuri. Saina claimed that these individuals purchased land from beneficiaries who did not have capacity to sell the estate land. She suggested that if they have any claim against the particular beneficiaries they should litigate their cause of actions elsewhere. Could she be invoking the prohibition of sale of immovable property under section 82(b) (ii) of the Law of Succession Act which states that:-

(ii) no immovable property shall be sold before confirmation of the grant;

[11] The prohibition in section 82 above is sale of immovable property of the deceased before confirmation of grant. In this case, the claimants purchased land from the administrator at the time and other beneficiaries after confirmation of grant. Confirmation certificate was issued on 26th November 2003. Therefore, the argument by Saina does not hold sway. What does the law say about such situation?

[12] Section 93 of the Law of Succession Act provides that:-

93. Validity of transfer not affected by revocation of representation

(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act. (2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.

[13] This section is to be used as a shield and not as a sword. The Petitioner and Adamson sold the land in question. The two cannot escape liability and this court will not provide them with any comfort. I feel obliged to state what I have said before, that, unscrupulous parties who use the law to commit fraud on others will be resisted by the court. It is this court's duty to suppress such veiled suppression and dishonesty. Therefore, their title in respect of the parcels they bought is valid against Noor and Adamson. I therefore order that the three shall take their respective plots from the share of Nuru and Adamson.

Setting aside land

[14] I move to the claim by Ruth Nkirote pleaded that she bought land from Alima Kagoro Ali wife of the deceased on 22.2.1977. Ruth Nkirote has annexed the agreement and all payments receipts thereto. She stated that she took possession of the land in February 1977 and has constructed a stone house and other houses for her family members. She has also substantially developed the said land. This land constitutes her home. She claimed that Musa and Adamson were aware of and recognized her said land. Documents to this effect have been annexed. She claims a share of 0.75 acres.

[15] I note that she purchased land from the wife of the deceased. The deceased was still alive at the time. She took possession, occupied and developed the land. And she has lived on the land since 1977. The family of the deceased seems to have recognized her entitlement and provided for her in the initial grant. She may have a genuine claim in the land. However, this court does not have jurisdiction to determine land ownership disputes. I will therefore invoke the power conferred upon the court in rule 41 of the Probate and Administration Rules.

Final orders

[16] In the upshot, I make the following final orders:-

a. I declare that the claim by Ruth Nkirote cannot be conveniently or lawfully determined in this cause. Accordingly, I set aside that portion occupied by Ruth Nkirote (0.75 acres) to be curved out of L. R NO. NYAKI/KITHOKA/123 so that ownership thereof shall be determined by the Environment and Land Court (Hereafter ELC).

b. The decision of LEC thereof shall be presented to and this court shall give it effect.

c. Unless the ELC otherwise directs, the personal representative of the deceased shall be the person seeking determination of the above question, and Ruth Nkirote or other person duly appointed by the court or authorized by her to represent her shall be the respondents.

d. In order to safeguard the share appropriated and set aside above, the said share shall be held by the administrators of the estate as trustees for whoever shall be ultimately entitled to the said share.

e. After the share claimed by Ruth Nkirote has been curved out of from L. R NO. NYAKI/KITHOKA/123, all the properties listed below shall be shared equally amongst all the children of the deceased as I have stated elsewhere in this ruling:

(i). L. R NO. NTIMA/IGOKI/1032 measuring approximately 1.6Ha.

(ii). L. R NO. NYAKI/KITHOKA/123 measuring approximately 2.2Ha less share set aside above.

(iii). L. R NO. NYAKI/KITHOKA/440 measuring approximately 2.4Ha.

(iv). L. R NO. KIIRUA/NKANDO/542 measuring approximately 35 acres.

(v). Shares in BAT

f. The portion sold to Faith Karimi Marete, James Munyari Njagi and Marcella Kiburio shall be curved out of the share of Nuru Ali and Adamson Muthuri provided in (e).

Dated, signed and delivered in open court at Meru this 10th day of July, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Mutuma advocate for Mr. Carl Peters for Petitioner and Interested Parties.

Mr. Mutuma advocate for Mr. Muriuki for beneficiaries.

Mr. Nyenyire advocate for beneficiaries – absent

Mr. Mutungi advocate for beneficiaries - absent

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F. GIKONYO

JUDGE