



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2501 OF 2003

IN THE MATTER OF THE ESTATE OF ANDREW MUNGAI MUTHEMBA (DECEASED)

JUDGMENT

1. The application for determination is the summons dated 20th April 2010, which seeks confirmation of the grant of letters of administration intestate herein given to David Muthemba Mungai and Jane Njeri Mungai. The application before me is brought at the instance of one administrator, David Muthemba Mungai. The other administrator has filed two affidavits of protest sworn on 22nd October 2010 and 9th May 2011.

2. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, the court is required to address two main issues – confirming the administrators and distribution of the estate. With respect to administration, the court considers whether representation was made properly and whether the administrator has gone about administering the estate properly. Should it turn out that the process of obtaining representation was not conducted properly or that the administrator has not administered the estate properly, the court may decline to confirm the administrators, or may replace them, or order issuance of citations to portions that it feels ought to have been involved in the process. With respect to distribution, of course if the deceased died testate the estate would be distributed as per the terms of the will. If he died intestate, the court has to be satisfied as to the identities of the persons entitled to a share of the estate and of the shares of each of those persons.

3. In respect of the application before me, I should be interested in establishing the following main issues – whether the grant herein was obtained through a proper process, whether the administrators have gone about their duties in accordance with the law, who the survivors of the deceased who are entitled to a share in his estate, which assets make up the estate of the deceased and how should the estate be distributed.

4. On the issue of appointment of administrators, I have carefully gone through the papers filed by the opposing sides; none of them appears to have issues with the appointment of the other as administrator, and on how they have gone about administering the estate. I shall therefore not tax my mind on that issue.

5. On who the survivors of the deceased are, the two administrators have not spelt out who these are in their affidavits filed in the application dated 20th April 2010. They are however in agreement that the deceased was a polygamist having married twice. Other affidavits on record, sworn on 4th December 2003 by David Muthemba Mungai and Jane Njeri Mungai and 29th October 2007 by Jane Njeri Mungai, indicate that the deceased was survived by two houses, one belonging to his first wife, Joyce Wairimu Mungai, and the other belonging to the second wife, Jane Njeri Mungai. Joyce Wairimu has five children, namely David Muthemba Mungai, Rosalind Wangari Mungai, John Mungai Muthemba, Dedan Chege Mungai and Evans Kaburu Mungai; while the second wife has four children being Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihui Mungai and Kevin Chege Mungai. There is no dispute

that these are the persons who survived the deceased.

6. The affidavit sworn by the administrators to support their petition for representation lists the following as the assets that make up the estate, that is to say LR No. 209/10487, LR No. 209/11508, LR No. 3589/6/42, Kabete/Lower Kabete/ 1275 and 1279, 1668 shares in Kentazuga Hardwares Limited and Wena Holdings Limited. Other documents on record indicate that the deceased had several motor vehicles, KAJ 347, KSL 315, KYZ 820 and KUF 058. Jane Njeri Mungai, in her protest affidavit, adds another landed property, LR No. 209/7142/40.

7. In the application dated 20th April 2010 it is proposed that the landed assets be shared out between the two houses of the deceased, with the motor vehicles going to named individuals. LR No. 209/10487 and Kabete/Lower Kabete/1275 and 1279 are allotted to the first house; while the second house is allotted LR No. 3589/6/42 and No. 209/11508. The 53% shareholding in Kentazuga Hardwares Limited is to be shared equally between the two houses. Jane Njeri Mungai is allotted KUF 058; David Muthemba Mungai is given KYZ 820, John Mungai Muthemba KSL 315 and Kevin Chege Mungai KAJ 347.

8. The protestor does not agree with the proposed distribution principally on the ground that members of the first house had benefitted from several *inter vivos* dispositions. She explains that David Muthemba Mungai and John Mungai Muthemba had had 47% shareholding in Kentazuga Hardwares Limited allotted to them by the deceased. The deceased was also said to have ceded his entire shares in Kens Pumps & Allied Limited to John Mungai Muthemba and his entire shares in Commercial Hardware Limited. She further claims that both David Muthemba Mungai and John Mungai Muthemba, and their brother Dedan Chege Muthemba, had been allotted portions of the ancestral land at Lower Kabete, being Kabete/Lower Kabete/ 1276 1277 and 1278. She explains that the first wife lived at the Lower Kabete property but left after a dispute. She apparently never came back save for a week when she stayed with the deceased on LR No. 209/10487 after he left detention in 1981. She explains that after she, the protestor, was married in 1969, she cohabited with the deceased at Lower Kabete, LR No. 209/10487, and later at LR No. 3589/6/42. She proposes that the estate ought to be distributed as follows –

- (a) LR No. 3589/6/42 – to the second house;
- (b) LR No. 209/10487 – to both houses equally;
- (c) LR No. 209/11508 – to both houses equally;
- (d) LR No. 209/7142/40 – to both houses equally;
- (e) 53% shareholding in Kentazuga Hardwares Limited – to both houses equally;
- (f) Rest of the estate – to both houses equally;
- (g) The motor vehicles – to the persons who have possession and control of whichever motor vehicle.

9. As there was no agreement on distribution, the application was disposed of orally.

10. The first on the stand was John Mungai Muthemba. He testified on 8th May 2013. He identified the survivors of the deceased as the persons listed above in paragraph 5 hereabove. He also stated that the deceased died possessed of the assets listed in the petition and the motor vehicles. He however added LR No. 8172 to the list. He said that the deceased had money in named bank accounts, but he said he was unaware whether the accounts held any money, and if they did what became of it. He stated that LR No. 3589/6/42 had been specifically bought for the protestor. He described Kabete/Lower Kabete/ 1279 as his mother's past home. He proposed that Kabete/Lower Kabete/ 1275 and 1279 should therefore go to his mother's house. He conceded to having been allotted shares in Kentazuga Hardwares Limited, but stated that Commercial Hardware Limited shares were not allotted to any of the children during the deceased's lifetime, and in any even the company ceased to operate ages ago. He also denied that Kabete/Lower

Kabete/ 1276 1277 and 1278 were gifted to them by their father, explaining that they got them following a business deal with their father.

11. The second on the stand was the applicant, David Muthemba Mungai. He confirmed the survivors of the deceased to be the individuals listed in paragraph 5 hereabove. He also identified the assets for distribution to be those enumerated by John Mungai Muthemba in paragraph 10 hereabove. He explained that the first house initially lived on the Lower Kabete property, while LR No. 3589/6/42 is utilized by the second house. He explained none of the family members lived on LR No. 209/10487 which is occupied by a tenant. He explained that the first family claims LR No. 209/10487 because the deceased had bought LR No. 3589/6/42 for the second house as a way of separating the two families. He stated that the motor vehicles are in the hands of several members of the family - KUF 058 is with the second house, KYZ 820 to the first house, KSL 315 is with John Mungai Muthemba and KAJ 347 with Kevin Chege Mungai. He was of the view that the 53% shares in Kentazuga Hardwares Limited ought to be shared equally.

12. The protestor took the stand on 18th February 2015. She was in agreement with her stepchildren on the survivors of the deceased, adding that her co-wife, the first wife had passed on. On the distribution of the assets she was not agreeable that LR No. 209/10487 was at any time occupied by the first wife. She asserted that the first wife lived on her own property after she separated from the deceased, and that it was the protestor who raised the former's children at LR No. 209/10487. The deceased was said to have died on LR No. 209/10487 while living there with the protestor youngest child, Kevin. She explained that the Lower Kabete property was ancestral. The deceased subdivided it and gave three of the plots to his first three sons. He remained with two plots. He and the first wife were said to have been buried here. She conceded that the motor vehicles were in the hands of the persons named in the testimony of the applicant.

13. At the conclusion of the oral hearing, it was directed that the parties do file written submissions. There has been compliance with the directions for the parties have filed their respective written submissions. I have carefully perused through the same and noted the arguments made therein.

14. There is consensus on who the survivors of the deceased are. The deceased was a polygamist, and therefore the estate should be divided in terms of section 40 of the Law of Succession Act, where the overriding principle is equality amongst all the survivors. There is also common ground on the distribution of some of the assets of the deceased, to wit, LR No. 3589/6/42, LR No. 209/11508, 53% shareholding in Kentazuga Hardwares Limited and the motor vehicles. There is no agreement on LR No. 209/10487 and the Lower Kabete properties. LR No. 209/7142/40 does not appear to form part of the estate of the deceased for it is said to be registered in the name of Kentazuga Hardwares Limited.

15. What emerges from the evidence, both oral and written, members of both houses at one time or other lived on LR No. 209/10487. It is alleged that LR No. 3589/6/42 was bought specifically for the second house, and the protestor moved into LR No. 3589/6/42 soon after the same was developed. The implication was that LR No. 209/10487 was to be left to the first house. Yet it was the deceased who lived here alone until he died, occasionally staying there with the younger members of the second house. The first wife does not appear to have had lived here, save for a week or so. She did not move into it after the protestor moved into LR No. 3589/6/42. It would appear that this is a property that the deceased had reserved for himself.

16. Regarding the Lower Kabete property, it would appear that this was the original home of the family. Both families lived here, but more so the first house. The deceased was eventually buried here, and so was the first wife. To my mind this property was more closely associated with the first house than the second house.

17. I have noted that some members of the first house did benefit from *inter vivos* dispositions. The key beneficiaries were David Muthemba Mungai and John Mungai Muthemba. They got portions of the Lower Kabete property, as well as shareholding in the deceased's business firms. Their brother, Dedan Chege Muthemba, also got a portion of the Lower Kabete property. The other two members of the first house, that is to say Rosalind Wangari Mungai and Evans Kaburu Mungai, did not benefit at all. In

distributing the estate I shall bear that in mind, guided, as I should, by section 42(a) of the Law of Succession Act.

18. Taking everything into account, I shall determine the application before me in the following terms:-

(a) That I hereby declare the survivors of the deceased to be Jane Njeri Mungai, David Muthemba Mungai, Rosalind Wangari Mungai, John Mungai Muthemba, Dedan Chege Mungai, Evans Kaburu Mungai, Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihui Mungai and Kevin Chege Mungai;

(b) That I declare that the assets available for distribution are LR No. 209/10487, LR No. 209/11508, LR No. 3589/6/42, Kabete/Lower Kabete/ 1275 and 1279, 53% shares in Kentazuga Hardwares Limited, and motor vehicles registration marks and numbers KAJ 347, KSL 315, KYZ 820 and KUF 058;

(c) That I hereby confirm David Muthemba Mungai and Jane Njeri Mungai as administrators of the estate herein;

(d) That the estate shall be distributed as follows:

(i) LR No. 3589/6/42 – to Jane Njeri Mungai during life interest and thereafter to Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihui Mungai and Kevin Chege Mungai, in equal shares;

(ii) LR No. 209/10487 – to Jane Njeri Mungai, David Muthemba Mungai, Rosalind Wangari Mungai, John Mungai Muthemba, Dedan Chege Mungai, Evans Kaburu Mungai, Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihui Mungai and Kevin Chege Mungai equally;

(iii) LR No. 209/11508 – to Jane Njeri Mungai, David Muthemba Mungai, Rosalind Wangari Mungai, John Mungai Muthemba, Dedan Chege Mungai, Evans Kaburu Mungai, Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihui Mungai and Kevin Chege Mungai equally;

(iv) Kabete/Lower Kabete/1275 – to Rosalind Wangari Mungai absolutely;

(v) Kabete/Lower Kabete/1279 – to Evans Kaburu Mungai absolutely;

(vi) 53% shareholding in Kentazuga Hardwares Limited – to Jane Njeri Mungai, Rosalind Wangari Mungai, Dedan Chege Mungai, Evans Kaburu Mungai, Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihui Mungai and Kevin Chege Mungai equally;

(vii) The motor vehicles – KUF 058 to Jane Njeri Mungai, KYZ 820 to David Muthemba Mungai, KSL 315 to John Mungai Muthemba and KAJ 347 to Kevin Chege Mungai; and

(viii) The rest of the estate – to both houses equally;

(e) That the grant on record is hereby confirmed in those terms, and a certificate of confirmation of grant shall issue accordingly; and

(f) That costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE