



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 454 OF 2014

IN THE MATTER OF THE ESTATE OF JOHN MUIA KOTI (DECEASED)

RULING

1. The deceased herein died on 27th October 2013. A letter from the Assistant Chief of Katanga Sub-Location, Kola, Machakos, dated 30th November 2013, indicates that the deceased was survived by his only wife, Susan Mwikali, and five children, being Robert Mwalili, Michael Muia, Mwanzia Koti, Charity Mumbua and Rosalind Katumbi.

2. Representation to his estate intestate was sought in a petition lodged herein by Susan Mwikali and Michael Muia, in their capacities as widow and son, respectively, of the deceased. The listed the persons named in the Assistant Chief's letter as the survivors of the deceased. They have listed several assets as making up the estate of the deceased. these include LR Nos. 12715/405 and 422 Syokimau, Nairobi Block 32/540, Konza North Block 1/224, 323, 324 and 325, Konza plots numbers 0722 and 00146, Konza Kwa Katheke Plot No. 426, Konza Kwa Mautio Plots Nos. 429 and 1156, Aimi ma Kilungu Farming and Ranching Cooperatives Society Limited Plots No. 676 and 1288, Malili Farming and Ranching Cooperative Society Limited Plots Nos. 1436 and 2639, Lukenya Ranching and Ranching Cooperatives Society Block 3/4443, Muvuti/Kiima Kimwe/207, Kalama/Iiuni/992, Plots Nos. Kalama/Machakos/Katanga/6, 8, 9 and 19 (Rim Nos. 23, 26 and 28), Plots Nos. Machakos numbers Katanga/6, 12 and 15. There was also an allotment in respect of Athi River Mulinge Scheme, No. 96. There are also shares in Katelembo Athiani Muvuti Farming and Ranching Society, Ardhi Cooperatives Saving Society, Kiu Ranching and Farming Cooperative Society Limited, , Standard Chartered Bank, Kenya Commercial Bank and National Bank of Kenya. there was also money held in accounts in Commercial Bank of Africa (A/C No. 6463740011-0102204018) and Standard Chartered Bank (A/C No. 0151276372200), and a motor vehicle, Mitsubishi Pajero. A grant of letters of administration intestate was made on 7th May 2014 to the petitioners.

3. The application that I am called upon to determine is dated 5th April 2016. It is brought at the instance of the joint administrators seeking confirmation of their grant. It is proposed that the estate devolves wholly upon the widow of the deceased, Susan Mwikali Koti. Three out of the four non-administrator children of the deceased signed a consent on 5th April 2016 to support the proposed distribution. It is only Mwanzia Koti who did not consent to the proposal.

4. When the matter was initially placed before me on 13th September 2016, I directed that the matter be heard on 19th October 2016, and that all the survivors of the deceased be in attendance. As at that date no objection had been lodged against the proposed distribution. To date there is nothing on record to indicate that there is an objection to the proposed distribution.

5. The hearing was conducted on 15th November 2016. All the six survivors - Susan Mwikali, Robert Mwalili, Michael Muia, Mwanzia Koti, Charity Mumbua and Rosalind Katumbi – were in attendance. On

the said date, a further affidavit was lodged at the registry, sworn on 3rd October 2016, to alter the distribution proposed in the affidavit of 5th April 2016. The new proposal is that the earlier proposed distribution remains intact save that each of the five children is allocated two assets. There is a consent to support the new proposal signed by three of the four non-administrator children of the deceased. Mwanzia Koti did not sign the consent.

6. At the hearing, it was clear that five out of six survivors were in support of the proposed distribution. It was Mwanzia Koti who was not in agreement with the rest. He made an unsworn statement to the court where he said that he was not party to what was being proposed, and basically left it to the court.

7. I have noted that the further affidavit sworn on 3rd October 2016 was filed without leave of the court. The estate is fairly vast, and no valuations have been done to confirm whether the two assets given to each of the children were of equal value. One of the survivors is not agreeable to what is proposed. He has not filed any papers to propose an alternative mode of distribution, but he is entitled to his day in court.

8. The deceased died intestate, after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. His estate therefore falls for distribution in terms of Part V thereof. He was survived by a widow and children, and therefore section 35 of the Act governs distribution of this particular estate. The relevant portions of the said provision states as follows:

'35(1). Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –

a. the personal and household effects of the deceased absolutely; and

b. a life interest in the whole residue of the net intestate estate...

(5). Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate shall on the death, or, in the case of a widow, remarriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'

9. Under that provision, the widow of the deceased is entitled absolutely to personal and household goods, and to a life interest in the rest. So that in the instant case, the widow is entitled only to the household goods absolutely, and a life interest in the rest. The proposed distribution has not disposed of any household goods, what the widow would be entitled to absolutely. She has been allotted landed assets absolutely, which constitutes allocation to her of property that she can only hold in trust for the children. Such allocation can only be made in cases where the children all consent to the same. In this case, one child is not consenting and therefore that proposal cannot be said to be binding.

10. The law requires that the net intestate estate be held by the widow in trust for her children, to be distributed thereafter in terms of section 35(5) of the Act. Devolving the entire estate to the widow as proposed would render ineffective section 35(5). I believe it was to ameliorate that, and perhaps to appease Mwanzia Koti, that it is proposed in the affidavit of 3rd October 2016 that the each of the children be allotted two assets.

11. Where parties fail to agree on how to depart from what is prescribed by the law, the court has no option but to apply the law. I shall therefore distribute the estate herein strictly in terms of section 35(1) of the Law of Succession Act.

12. Consequently, I shall determine the application dated 5th April 2016 in the following terms:

a. that the monies in the bank, the shares in the various firms and the motor vehicle shall devolve wholly upon the widow of the deceased, that is to say, Susan Mwikali Koti;

b. that the rest of the assets, that is to say the landed property, shall be held by the widow, Susan Mwikali Koti, during her lifetime and thereafter to the children - Robert Mwalili Koti, Michael Muia Koti, Mwanzia Koti, Charity Mumbua Koti and Rosalind Katumbi Koti – in equal shares; and;

c. that the grant herein shall be confirmed in the terms stated above and a certificate of confirmation of grant shall issue accordingly.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE