



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 1127 OF 2002

**IN THE MATTER OF THE ESTATE OF SIMON PETER MAINGI MBUBA KITAA-WELEJE
(DECEASED)**

MBULWA MAINGI.....PETITIONER

VERSUS

VERONICA NTHAMBA.....RESPONDENT

RULING

PLEADINGS

Peter Maingi Mbuba Kitaa-Weleje (deceased) died on 18th July, 1994. The Applicant, VERONICA NTHAMBA, a daughter of the deceased, filed summons for revocation or annulment of grant under **Section 76 and 83 of the Law of Succession Act Cap 160 and Rules 44 & 73 of the Probate & Administration Rules**. The Applicant sought to have the grant of letters of administration made to MBULWA MAINGI, the 4th wife of the deceased, on 22nd August 2002 and confirmed on 9th March 2011 revoked or annulled, and to have the same granted to the Applicant. The Applicant's case is premised on the following reasons:

1. There are properties of the deceased's estate that were left out in the petition for grant of letters of administration intestate, and they include:
 - a. Lukenya F&R Co. of Plot No. 280;
 - b. Registered grant No. 44436;
 - c. Syokimau Plot No. 12715/380;
 - d. Lukenya Plot No. 622; and
 - e. Plot No. 9923/22 now Kajiado Block No.1/142
2. The sale and transfer of Kajiado Plot No. 9923/22 now Kajiado Block No.1/142 Hamud Mohammud Osman be declared null and void and registration thereof annulled and the Applicant be registered as holding the same in trust for the beneficiaries of the estate of the deceased.
3. The Petitioner to give an account of the deceased's estate and liabilities and how she distributed the estate.

The Applicant relied on the following grounds:

- a. All the deceased's families were not included in the petition for the grant of letters of administration "VNI" is a list of the families of the deceased which comprises of 4 homes with 4

- wives;
- b. The administration did not obtain the relevant matter concerns of all beneficiaries allowing her to obtain the grant of letters of administration;
 - c. The administrator mismanaged the estate of the deceased as shown by letters of complaint attached and marked "VN2"; and
 - d. The administrator shared part of the estate of the deceased with other members not included in the Petition.

The administrator/Petitioner of the estate of the deceased Mrs Mbulwa Maingi through written submissions filed through her advocate Nyitha Mbulwa & Company Advocates pleaded as follows:

The entire family of the deceased met and agreed that the Petitioner applies for letters of administration because although the family consists of 5 houses the Petitioner is the youngest wife with the 4th house and the other wives are fairly elderly. She would represent their interests.

When letters of administration were issued on 22nd August, 2002, there was no issue as the Petitioner faithfully circulated and distributed rent received from the properties fairly to all family members.

In 2011, the family resolved to sell Plot No. 9923 NOW Kajiado/Block 1/142 and the purchase price was paid and distributed equally to the 4 houses of the deceased's family.

The Petitioner/Administrator called the meeting of the entire family and they met at Kajiado District Commissioner's Office. The distribution of proceeds from the sale of Kajiado/Block 1/142 was distributed to the family. The minutes of the meeting attached to the application show members of the 4 houses meeting and in the presence of the elders and witnesses.

The interested party Mr. Hamud Muhammed Osman filed a Replying Affidavit of 1st July, 2014 and deponed that he bought Plot Number 9923/Block 1/142 for Kshs. 4 million evidenced by attached documents marked "HMO3". At the time of the sale the petitioner Mrs. Mbulwa Maingi was the registered owner of the said land as shown in copies of the lease and the search annexed as "HMO 5 & 6".

The Petitioner admitted that full purchase price was paid and money distributed among the beneficiaries. The interested party was not part to any fraud or concealment of facts in the succession matter in Court. He is the registered owner of all that property Plot 9923 now Block 1/142 as shown by letters of the Sale Agreement and Title deed marked "HMO 1 & 2". He is not party to the ongoing family wrangles and he was never made aware of the disagreement within the family over the land and it was never brought to his attention at the time of purchasing the land.

SUBMISSIONS

This Court is presented with the district for determination and will do in form of resolving the following issues;

1. The beneficiaries and/or dependants of the deceased's estate;
2. Disclosure and consents of the beneficiaries and/or dependants;
3. The list of assets of the deceased's estate;
4. The nature of the mode of distribution of the estate, and whether consents from all the beneficiaries/dependants were obtained;
5. Whether the sale of Kajiado Block 1/142 was valid and regular; and
6. Whether the Administrator/Petitioner, Mrs. Mbulwa Maingi, acted in compliance with **Section 83 of the Law of Succession Act Cap 160** or she exceeded her remit and acted outside the statutory mandate;

EVALUATION

With regard to the beneficiaries and/or dependants of the deceased, **Section 29 and 40 of the Law of Succession Act Cap 160** is instructive. **The estate of the deceased should be distributed to the children, spouse(s) and or dependants of the deceased. There is no dispute that the applicant is one of the children of the deceased.**

On the one hand, in the petition filed on 13th May 2002, the Petitioner listed the beneficiaries of the deceased's estate as follows:

Kalonde Maingi (deceased) -- co-wife – 3rd house

Emma Kioko Maingi ----- co-wife – 1st house

Mbuva Maingi ----- son – 2nd house

Stephen Mbuva Maingi ----- son – 4th house

John Nzenge Maingi ----- son – 1st house

Patrick Kilonzo Maingi ----- son – 2nd house

Mary Mutio Maingi ----- daughter – 3rd house

Mbulwa Maingi ----- co-wife – 4th house

On the other hand, the Respondent listed all the beneficiaries of the deceased's estate by enumerating all the family members from the four (4) houses, and this is annexed to the Respondent's supporting affidavit of 6th June 2013 that is attached to her application for revocation of grant of 6th June 2013. According to this list, the family of the deceased is composed of the following:

- a. Emma Waoko Maingi
- b. Wilfred Nthiwa Maingi
- c. Christopher Kasomo Maingi
- d. John Nzenge Maingi
- e. Jennifer Kavuu Maingi
- f. Veronica Ngali Maingi
- g. Patrick Kilonzo Maingi
- h. Francis Wambua Maingi
- i. Mbuva Maingi
- j. Sabina Kalonde Maingi
- k. Charles Tumbo Maingi
- l. Elizabeth Wayua Maingi (deceased)
- m. Peter Maingi
- n. Patrick Waita Maingi
- o. Veronica Nthambe Maingi
- p. Mary Maingi
- q. Mbula Maingi
- r. Stanley Ndonga Maingi
- s. Mbula Maingi
- t. Dominick Mutuku Maingi
- u. Stephen Mwilikya Maingi
- v. John Kyungu Maingi
- w. Francisca Kathonu Maingi
- x. Priscilla Mwendu Maingi

Therefore, the beneficiaries of the estate of the deceased were excluded, and instead only one (1) house out of the four (4) houses was presented as the family of the deceased contrary to **Section 51(2)(g) of the Law Succession Act and Rule 7(1) Probate & Administration Rules**.

Consequently, non-disclosure of the other beneficiaries pre-empted the required written consents to be availed to petition for a grant of letters of administration and confirmation of grant.

Secondly, non-disclosure of the deceased as a polygamous man and the other three (3) households made the grant of letters of administration intestate and the confirmed grant to be processed in contravention of **Section 40, Section 58 and Section 84 of the Law of Succession Act Cap. 160**.

The mode of distribution of the estate of the deceased should have been as prescribed by **Section 40 of the Law of Succession Act Cap. 160**:

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 net 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.

Where there are more than one (1) family or one (1) house, the Administrator of the deceased's estate cannot be a single person, but rather representatives from each house. This is to ensure that each representative acts as trustee for the other members of that house or family that he or she represents. This is consistent with the provisions of **Section 58(1)(a) & Section 84 of the Law of Succession Act Cap 160**.

Section 58(1)(a) of the Law of Succession Act Cap 160 provides that:

Where a continuing trust arises –

No grant of letters of administration in respect of an intestate estate shall be made to one person alone, except where that person is the Public Trustee or a Trust Company.

Section 84 of the Law of Succession Act Cap 160 provides that:

Where the administration of the estate of the deceased person involves any continuing trusts, whether by way of life interest or otherwise, the personal representatives shall, unless other trustees have been appointed by a will for the purpose of the trust, be the trustees thereof;

Provided that, where valid polygamous marriages of the deceased person have resulted in the creation of more than one house, the court may at the time of confirmation of the grant appoint separate trustees of the property passing to each or any of those houses as provided by section 40.

In the case of *Naomi Watiri Githuku v Naphtali Kamau Githuku & Another [2006] eKLR*, the Court nullified the grant since the beneficiaries/dependants were not provided for. In the confirmed grant herein the mode of distribution is not shown, and it also fails to disclose the identity of the beneficiaries and their share of the deceased's estate.

Therefore, in sum total of the above legal provisions, the beneficiaries and dependants of the deceased were not fully disclosed; those disclosed were representatives of each house presented as family members of one (1) house, presumably of the youngest wife of the deceased. It is alleged that the other families acceded to the 4th family widow obtaining the letters of administration on their behalf. There is no evidence on record that such a meeting was held and/or an agreement reached to the effect that it was only the 4th widow who was to obtain letters of administration on behalf of four (4) families or houses.

The 3rd issue is with regard to the list of assets and liabilities of the deceased's estates. It was alleged by

the Applicant that a full inventory of the deceased's assets and liabilities was not provided. The Petitioner provided documents for Registered Grant No. 44436 and Syokimau Plot 12715/380 but not the entire estate.

In the affidavit of the Applicant annexed to the application of 6th June 2013, the properties stated as excluded are:

- a. Lukenya F&R Coop. Plot No. 280
- b. Registered Grant No. 44436
- c. Syokimau Plot No.12715/380
- d. Lukenya Plot No. 622 and
- e. Plot No. 9923/22 now Kajiado Block No. 1/142.

In the petition got grant of letters of administration filed on 13th May 2002, the list of assets of the deceased's estate includes:

- a. L.R 12715/380 – 5 acres – Athi River
- b. Plot No. 622 – 40 acres – Lukenya
- c. Plot No. 9923/22 at Kajiado
- d. Plot No 280 at Lukenya F & R Co-op.

The Court finds that unlike the Applicant's statement, all the properties have been disclosed except for **'Registered Grant 44436'** which should be further investigated and then included in the assets of the deceased's estate.

Finally, questions remain as to whether the sale of Plot No.9923/22 at Kajiado was valid and regular, and also whether the proposed sale of LR No.12715/380 Athi River (5 acres) valid regular or not and has it been sold or not.

The petition for grant of letters of administration was filed on 13th June, 2002. The grant was issued and confirmed on 9th March, 2011. Plot No. 9923/22 registered in the name of Mrs. Mbulwa Maingi as shown in the confirmed grant of 9th March 2011, as alleged, all parties agreed that the mode of distribution would be that all properties be transferred to Mrs. Mbulwa Maingi absolutely.

The sale of Plot Number 9923/22 by the Administrator to the interested party was for the purchase price of Kshs. 4 million as evidenced by the Sale Agreement attached to the interested party's affidavit. Bank statements confirm the full payment of purchase price to the Administrator. There are also banker's cheques drawn in the names of the beneficiaries listed in the petition and agreements signed by the beneficiaries on receipt of payment of the proceeds. What is not clear is whether all beneficiaries received the proceeds of the sale directly from the administrator or through their representatives in the succession process or at all.

The fact of the Administrator not consulting all beneficiaries and failing to obtain consents in applying for letters of administration, confirmation of grant to the deceased's estate, and the sale of land from beneficiaries of the four (4) families and houses cannot vitiate the sale as each house was represented whether by design or default and therefore were equally represented in the petition of grant of letters of administration and in the confirmed grant.

The discrepancy by the Administrator of not obtaining all relevant consents from beneficiaries cannot be blamed on the purchaser of the property as evidenced by the annexure of the interested party and purchaser's Replying Affidavit; he paid the sale price upfront and obtained title to the land from the registered owner, the Administrator, Mrs. Mbulwa Maingi. The interested party is a *bona fide* purchaser without knowledge of any defect of title. The proprietary interest in the land passed from the Administrator to the purchaser upon payment of the full purchase price and he registered the land in his name as per the certificate of sale attached to the affidavit.

The position is buttressed by the provision of **Section 93(1) of the Law of Succession Act Cap 160**, which provides:

A transfer of any interest in immovable or movable property made to the purchaser either before or after 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.

The interested party and purchaser was not party to the ongoing family wrangles, he was never made aware of any disagreement within the family over the land and it was never brought to his attention at the time of purchasing the land that there was any problem or dispute. He complied with requirements of sale of land.

The 2nd sale of L.R 12715/380 is from an application filed in Court by the Administrator for leave to sell the land during the life interest. There is no evidence on record that the land was sold under **Section 35 Law of Succession Act**. The consent to sell ought to have been obtained from all the beneficiaries of the estate before the sale. If the land was sold, then all the beneficiaries shall obtain their rightful share of the proceeds.

The Court therefore finds as follows:

- a. The grant of letters of administration intestate and confirmation of grant was obtained contrary to Section 51 and 78 of the Law of Succession Act Cap 160. Although the beneficiaries cited in the petition are two (2) representatives from each house of the deceased's four (4) families. Legally, all the beneficiaries as listed in the meeting at the District Commissioner's office at Kajiado should have been named in the petition for grant of letters of administration, and written consents obtained for the Administrator to petition for letters of administration on their behalf. Subsequently, the beneficiaries were to consent to the confirmation of grant and the mode of distribution of the deceased's estate.
- b. The Petitioner/Administrator should not obtain letters of administration alone where the deceased's family is polygamous; legally each house or family ought to be presented by a family member as trustee to their share of the estate. The Administrator wrongly and illegally obtained the letters of administration alone as provided by **Section 58 and Section 84 of the Law of Succession Act Cap 160**.
- c. In the absence of full disclosure of all beneficiaries and written consents, the grant of letters of administration and confirmed grant are revoked and annulled by virtue of **Section 76 of the Law of Succession Act Cap 160**.
- d. The new grant be issued to the following Administrators representing each of the four (4) houses or families of the deceased:
 1. John Nzenge Maingi
 2. Patrick Kilonzo Maingi
 3. Veronicah Maingi
 4. Mbulwa Maingi

The above-named Administrators shall represent each home and act as trustees for all beneficiaries.

- e. The Administrator's handling of the deceased's estate is not consistent with diligent management as required by **Section 83 of the Law of Succession Act Cap 160**. The Administrator obtained a confirmed grant in 2011, and proceeded to put up for sale two (2) of the four (4) or five (5) properties without having first obtained the requisite consents of all beneficiaries. After the sale of the plot Kajiado Block No. 1/142 she distributed the proceeds to the beneficiaries, but there is no proof of payment to all beneficiaries except representatives of each home.
- f. The sale of Plot No. 9923/22 Kajiado Block No. 1/142 is a valid and regular sale. The purchaser bought the land without knowledge of defective title (due to lack of consent from all

- beneficiaries), and thus he is a *bona fide* purchaser for value and without notice of defective title. This proprietary right has transferred to the interested party. The interested party has not been shown to have done anything underhand or irregular. The sale cannot legally be vitiated by an internal family dispute. The sale is valid and is not revoked.
- g. The Administrator shall confirm the existence of the properties of the deceased and the payments made to beneficiaries from proceeds of sale of the sold properties.
 - h. The Administrators to file proposed mode of distribution of the remaining existing properties in Court within 30 days.
 - i. In default of agreement, each Administrator to file proposed mode of distribution to the Court for the determination of the fair and equitable distribution of the estate of the deceased.
 - j. No evidence was adduced or is on record of persons who are not family members who benefited from the deceased's estate.
 - k. This being a family matter there will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2015

M. MUIGAI

JUDGE

In the presence of:

Mr. Ibrahim holding brief

Mr. Malova holding brief for Mr. Haya for the Respondent.