



**REPUBLIC OF KENYA**

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

**PROBATE & ADMINISTRATION NO.237 OF 2010**

**JOHN WANDERA MAGONDA .....DECEASED**

**VERSUS**

**CECILIA MUDONDO WANDERA.....1<sup>ST</sup> APPLICANT**

**MATILDA WANDERA .....2<sup>ND</sup> APPLICANT**

**RULING**

1. Cecilia Wandera (**Cecilia**) and Matilda Wandera (**Matilda**) are the joint Administratrixes to the Estate of John Wandera Magonda (Deceased). They also are his widows. They are not entirely agreed on the distribution of the Deceaseds Estate and have asked this Court to interpose.
2. That request was contained in a consent of 8<sup>th</sup> May 2013 where parties agreed as follows:

a. **“The following three properties shall be divided equally between the houses of Cecilia Wandera and Matilda Wandera.**

- I. **Samia/Luanda-Mudoma/383**
- II. **Kisumu Nyalenda “A”/1053**
- III. **Kisumu/Korando/4163**

b. **The following properties already with Matilda shall remain with her:-**

**(1) Posho Mill (2) Wielding Machine (3) m/v 944 (4) motor cycle**

c. **Matilda Wandera shall be entitled to Mombasa Municipality/Changamwe/tenant purchase house No.82.**

d. **The Court shall make a decision on distribution of the following:**

- I. **Samia/Luanda Mudoma/461,1420,1482,1436**
- II. **Funyula Town Council Plot No.58**
- III. **Kisumu Municipality Block 10/10**

e. **The parties to discuss and agree on the division of Samia/Luanda Mudoma/656 and plot at Namboboto Trading Center.**

**Oral Evidence to be led in respect to the contested issues.” (my emphasis)**

This decision is in respect to the contested issues.

3. It was Matilda's evidence that the property described as Kisumu/Municipality Block 10/10 (Plot 10) which is registered in the names of the Deceased belonged solely to the Deceased. On it is a 3 bedroom main house and a staff quarters. The entire property was on 21<sup>st</sup> August 2012 valued at ksh.8,500,000/= by Add Property Consultants. It was also her evidence that before his death, the Deceased received the rent income therefrom but thereafter Cecilia has received and kept the rent in disregard of the rest of the family.
4. Cecilia's position is that plot 10 belongs to her. This is because, she alleges, the Deceased sold her matrimonial home at Kongowea Mombasa and bought it in its stead. It was her evidence that even during the life of the Deceased, she took care and managed that Kisumu property. She admits that she collects rent in respect thereof.
5. Before Court was evidence that Cecilia owns a house in Kisumu (House No.171 and now described as Kisumu Municipality Block 4/392 (Plot 392)). Cecilia's testimony is that she bought and improved this house solely from her own resources. On her part, Matilda told Court that a property previously purchased by her husband for her at a place called Migosi was sold to pay the contractors bill for developing Plot 392. This aggrieved her and that upon complaining to the Deceased, the Deceased gifted her with the Chagamwe house. Matilda's position is that development of the Plot 392 was carried out by the Deceased. She then argues that whilst Matilda should keep Plot 392 as she keeps the Chagamwe house, Plot 10 should be shared equally by the two houses.
6. This Court has considered the evidence. It is without doubt that Plot 392 was allocated to Cecilia by the then Kisumu Municipal Commission. The receipts for the money paid in deposit for that property are in her names. There was however evidence that she needed her husband's help to construct the house thereon. In her letter of 13/2/97 (P Exhibit 2) she writes this to her husband;

**“Box 94,**

**KISUMU**

**13/2/97**

**Dear Husband,**

**Please arrange to complete school fees balances to save children from sending them at home while others are learning.**

**Enclosed herewith is also a letter from Gesoko Building construction dated 12-2-98 addressed to Mr & Mrs John Wandera Magonja come and see them immediately I do not want inconveniences. Hurry up I am not ready to get problems with Mr. J.OL Nyakundi.**

**Signed:**

**Cecilia Wandera”**

7. In reaction to this concern, her husband (the Deceased) authorized the sale of the Migosi property. The authority was given to Tom Wandera & Omariba Nyauudi.

It reads,

**“22-2-98**

**House No.4 SITE SERVICE MIGOSI**

**Authority is hereby given to M/s Tom Wandera and Omariba Nyakundi to look for a buyer of my house above number in order to settle the outstanding bills in his book pertaining to my account. Also pay off the Housing Co-operation Loan still outstanding and give balance thereof to me to**

account for the Expenses so incurred on the House by Mama Matlida Wandera

Yours faithfully

John Magonda Amo

Amount required:

Signed:

Municipality 85000

Nyakundi - 165000

(John Wandea self) 120000

37000

(Total Amount: Three hundred Seventy thousand only)

Witness - Wandera

MR. J. NYAKUNDI – signed:

MR. JOSEPH BOSIRE – signed:” (my emphasis)

Nyakundi was the contractor who developed Plot No.392. Tom gave evidence in support of this.

8. This Court believes that the development of Plot 392 was funded, at least partly, from the proceeds of sale of the Migosi property. To that extent that property was funded, in part, by the Deceased. It is for this reason that while deserving to keep the Plot 392, I am unable to agree with Cecilia that she alone should keep plot 10. In my view, the Deceased had made a gift of the Changamwe property to Matilda during his lifetime. Similarly, the Deceased had by contributing to the development of Plot No.392 made an advancement to Cecilia during his lifetime. Both benefitted from the Deceased. It is for this reason that Plot 10 which is still in the name of the Deceased should be available for distribution between the two houses. The specific shares to the two houses shall be guided by the provisions of Section 40 (1) of the Law of Succession Act which provides:-

**“40.(1) 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.”**

9. One other matter in respect to Plot 10, Cecilia has been collecting rent therefrom since the death of the Deceased. She would have to render an account for that rent.
10. This Court proposes to deal simultaneously with land parcels Samia/Luanda/Mudoma/461 and 1436. There was evidence that prior to his death, the Deceased had made his wishes known in respect to the sharing out of these plots. The Deceased had sought and obtained consent for the subdivision and transfer of the parcels to sons, Peter, Simon, Gerald, Winston and Isaac. But he died before effecting formal subdivision and transfer thereof. When he took the step of obtaining that consent he was making it clear, beyond peradventure, of his intention to gift his children as proposed. Whilst argument can be made that these are incomplete gifts because no transfers had been effected, I am of the view that the arrangement should not be disrupted. This is my reason. I listened keenly to Cecilia give evidence. She never sought to challenge what Matilda told Court about the Deceased’s wishes in respect to plots 461 and 1436. She never stated or implied that the wishes of Deceased, though not formerly carried through by way of legal transfers, should be disregarded. When it came to the Farms, Cecilia’s concern was in respect to the ancestral land (Samia/Luanda Mudoma/656). But the ancestral land was not one of the properties I was asked to

- distribute. (See clause ( e )of the consent of 8<sup>th</sup> May 2013: Paragraph 2 of this decision.
- 11.Then to Samia/Luanda Mudoma/1420. There was no written proof that the Deceased had shared this property amongst his wives or children. This land is available for disposal by the Court and will have to be dealt with in accordance to Section 40 (1) of the Law of Succession Act. (see paragraph 8 of this decision).
  - 12.In respect to Samia/Luanda Mudoma/1422, it was Matilda’s evidence that it had been given to Thomas Wandera (PW2) as a gift by the Deceased during his lifetime. It was also the evidence of the two witnesses that this was a reward from the Deceased to Thomas for the errands that Thomas would run on his behalf from time to time. It was their further evidence that Thomas has resided on that land since 1990. Cecilia resisted the claim by Thomas. On my part, I was unable to find strong evidence that the Deceased had in fact given this land to Thomas as a gift. From the evidence, the Deceased was a fairly sophisticated man and where he intended to do something, he either put it in writing or took steps that clearly demonstrated his intention. For this reason I would agree with Cecilia that the land should be available for Distribution amongst the Beneficiaries of the Deceased’s Estate. That land, again, will be dealt with in accordance with Section 40(1) of the Law of Succession Act. If however Thomas has a legal claim in respect therefore, say in adverse possession, he can assert his claim against the Deceased’s Estate at a right forum.
  - 13.Lastly there is Funyula Town Council plot no.58. Matilda told Court that the Deceased passed on while she was constructing it. That she constructed it using her retirement benefits. That she occupies and uses it and pays rates due to the County Government. For some reason, Matilda never produced any documentary evidence in proof of the construction or payment of rates. Her word without more, does not persuade this Court that this property is beyond the reach of the Estate. This property again, shall be shared amongst the two houses and dealt with in accordance with Section 40(1) of The Law of Succession Act. As Matilda has had the sole benefit of this property, she would have to account for it.
  - 14.The business of this Court is done, it has made a decision of distribution of the contested properties. There is no clear winner or loser to the contest and in any event, the contestants are co-wives. Each shall bear their own costs.

**F. TUIYOTT**

**J U D G E**

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 12<sup>TH</sup> DAY OF JUNE 2014.**

**IN THE PRESENCE OF:**

**MUTAHI.....COURT CLERK**

**.....FOR 1<sup>ST</sup> APPLICANT**

**.....FOR 2<sup>ND</sup> APPLICANT**