



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Succession Cause 200 of 1998

IN THE MATTER OF THE ESTATE OF JOHN MALINDA NDISO (DECEASED)

1. GIDEON MBITHI MALINDA

2. WILSON WAMBUA MALINDA.....PETITIONERS

AND

ISAAC NDISO MALINDA.....PROTESTER

RULING

This cause was filed in this court on 21st September, 1998, that is about 14 years ago. The Petitioners were **Gideon Malinda** and **Wilson Wambua Malinda**. In the affidavit in support of Petition for Letters of Administration intestate they indicated that the deceased died intestate and left the following surviving him

§ Gideon Mbithi Malinda- son then aged 52 years

§ Wilson Wambua Malinda – son then aged 42 years

§ George Malinda Mbithi – son then aged 34 years

§ Ndunge Malinda – widow then aged 80 years

The estate of the deceased consisted of only Kalama/Katanga/162 measuring 3.6 Hectares. as the sole asset.

However, before a grant could issue, one **Isaac Ndiso** got wind of the goings and presented his objection to making of grant and cross-petition complaining that he had been left out as a survivor and beneficiary of the deceased's estate. This fact was immediately conceded to by the Petitioners. Having heard the objection **Lenaola, J** on 11th February, 2009 ruled thus :-

“... since it is admitted that Isaac Ndiso Malinda is a son of the deceased and has equal rights to the

petitioners, then under section 66 aforesaid the proper orders to make in this cause are these:-

a. Let the following be appointed Administrators of the deceased's estate jointly;

- i. Gideon Mbithi Malinda*
- ii. Wilson Wambua Malinda*
- iii. Isaac Ndiso Malinda*

b. Letters of Administration to issue to them forthwith

c. Parties to take a mention date for directions on how to proceed on the issue of distribution..."

On 3rd June, 2010, the 1st Petitioner took out a summons for confirmation of grant. In the affidavit in support of the application, he proposed that the distribution of the only asset of the deceased be done in accordance with the decision of the clan. By an affidavit filed herein on 14th August, 2009, the 2nd Petitioner was of a different opinion. He proposed that the parcel of land be shared equally among the 3 administrators who would in turn share it out to their respective beneficiaries. Later on 24th September, 2009, the 1st Petitioner filed yet another affidavit on distribution in which he changed his position somewhat. He now wanted 1.5 acres granted to 1st wife of the deceased, **Ndunge Malinda** who was still alive and the remainder apportioned in 3 equal portions in respect of 1st wife's family, the 2nd wife's family and the 2nd Petitioner.

Isaac Ndiso, hereinafter "*the Protester*" filed his affidavit of protest on 18th November, 2011 in which he stated that before his demise, the deceased had distributed his assets to his heirs, documented and communicated the same to his family who included the petitioners. In that scheme, the 2nd Petitioner was allocated 0.34 hectares out of land parcel number 162 Katanga Kalama Machakos where he lives to-date. **Stephen Malinda** and Protester were each allocated 1.9 hectares on their behalf and that of their sisters – **Ivovynne Mukenyi Malinda, Sally Waeni Malinda, Catherine Mwelu Malinda, Mary Ngati Malinda, Harrahs Ndinda Malinda, Rhoda Mueni Malinda** and **Ruth Nduku Malinda**. The final wishes of the deceased aforesaid were attested and confirmed by the area chief. Otherwise the 1st petitioner together with his siblings, **Rebecca Ndunge, Florence Mailu** and **Mutua Mbithi Malinda** were to share assets of the deceased in their possession and that of their said mother in Kangundo/Matungulu/Sengani. At no time have the 1st Petitioner nor his mother lived on Kalama/Katanga/162. Otherwise the 2nd Petitioner after the demise of the deceased became very hostile to his siblings, evicted them and without any colour of right has been using and abusing the deceased's estate to the detriment of the other beneficiaries. He therefore urged me to respect the wishes of the deceased and confirm the grant in terms of his paragraphs 4 and 5 of the affidavit of protest.

When the application for confirmation of grant and affidavit of protest came up for hearing before me on 28th March, 2012, the issue in dispute was limited to distribution. Accordingly, it was agreed that the issue be dealt with on the basis of the affidavits on record and written submissions. Written submissions were subsequently filed and exchanged, which I have carefully read and considered.

It is common ground that the deceased had only one asset Kalama/Katanga/162 which measures 3.6 Ha. It is self-evident that in the document marked as exhibit 3, in the protester's affidavit, the deceased bemoaned the trouble and heartache that his 1st wife, **Ndunge Malinda** had caused him. Theirs was not a good marriage. Though married to her in 1937, their cohabitation was on and off. If anything it was short-lived. In 1946, the deceased learned that she had conceived with another man. This appears to have broken the camel's back. Apparently over time, the 1st wife had also been selling the deceased's property without his knowledge or consent. From the proceeds she had bought herself land at Kyanzavi which she later settled on and resides on it to date. The deceased had been patient in his long sufferings. He neither demanded back his properties paid to her parents as dowry nor took any legal action against her. It was

his wish therefore that his 1st wife and her family continue to reside where they had lived for the whole of these years since they had been estranged.

On the other hand, he wanted the family of the 2nd wife to be settled on Kalama/Katanga/162. Posing here for a moment, it is quite clear that the deceased did not buy or settle the first family at Kangundo. Rather, it is the 1st wife who settled there on her own. The deceased felt that out of his properties she had stolen and sold, she was able to acquire the said property. However, there is no such evidence. Whether or not the 1st wife was estranged, she was still a wife of the deceased at the time of his death. By his own admission, the deceased never dissolved the marriage. He never demanded back the dowry of 76 goats, 2 oxen, a cow, Kshs. 350/=, long coat and a blanket that he paid the 1st wife's parents as dowry. A customary marriage is dissolved with the return of the dowry paid.

The deceased having not dissolved the marriage, the 1st wife is deemed to be his wife. In any event under the definition section of the Law of Succession Act "wife" includes a wife who is separated from her husband and includes former wife or wives.

In the premises, whichever way one looks at the situation the 1st wife and his children are entitled to benefit from the estate of the deceased. The story may have been different had the deceased bought the land in Kangundo and settled the 1st wife's family there.

Under the law of Succession Act "estate" means the free property of a deceased person. To the extent, that Kalama/Katanga 162 is solely registered in the name of the deceased; it is a free property of the deceased. The Protester has claimed that the said parcel of land though registered in the name of the deceased, it was acquired, developed and maintained also by the late **Monicah Mune Malinda**, the deceased's 2nd wife and mother to the protester. I have combed through the entire record of the court and have not come across any scintilla of evidence that can back up the Protester's assertion. If indeed what he asserts is true, one would expect that the parcel of land would probably have been registered in the joint names of the deceased and his 2nd wife.

The law of Succession also defines, "free property" in relation to the deceased person, to mean the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death. Kalama/Katanga/162 is such property.

The Protester has pleaded that the wishes of the deceased be respected with regard to the distribution of his estate. That is all fine. However, such wishes can only come to pass if the beneficiaries agree. If they do not, then the law must take its course. This is the case here. Again the deceased wishes will be ignored if they are unfair, illegal, discriminative and outright selfish and untenable. In this case there is no legal or factual basis why the 1st wife and her children should be disinherited. The deceased may have been angered by the 1st wife's indiscretions but that cannot in law be the basis for him to disinherit her and her children as the deceased had purported to do in his distribution. That is the reason why I have ignored those wishes.

Section 40 of the Law of Succession defines how the estate of the deceased who was polygamous as in this case, should be distributed. It is in these terms:-

"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".

It would appear that the 1st house consist of six units including the 1st wife; whereas the 2nd house has eight units. The units in the 1st house consist of **Gideon Malinda, Wilson Malinda, George Malinda Mbithi, Florence Mailu, Mbithi Malinda** and **Ndunge Malinda**. Those in the 2nd house, consists of **Isaac Ndiso, Ivoyne Mukenyi Malinda, Sally Waeni Malinda, Catherine Mwelu Malinda, Mary**

Ngali Malinda, Harras Ndinda Malinda, Rhoda Mueni Malinda and Ruth Nduku Malinda. In total therefore there are fourteen (14) units. Accordingly, land parcel Kalama/Katanga/162 shall be shared equally among the aforesaid fourteen (14) units. The grant is accordingly confirmed in those terms. This being a family dispute, I make no order as to costs.

RULING DATED, SIGNED, and DELIVERED at MACHAKOS this 6TH day of JULY 2012

ASIKE -MAKHANDIA

JUDGE