



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION CAUSE 335 OF 2003
IN THE MATTER OF THE ESTATE OF SAMSON KILONZO NTHEI (DECEASED)
JIMMY MUSYOKI KILONZO.....PETITIONER
VERSUS
1. MAJOR (RTD) JOHN KYALO KILONZO
2. JOSEPH MUNYAO KILONZO
3. FRANCIS MWAKA KILONZO.....RESPONDENT/OBJECTORS
RULING

The deceased, **Samson Kilonzo Nthei** died on 12th June 1999 leaving behind the following beneficiaries of his estate;-

- Ruth Ndulu Kilonzo- widow
- Jimmy Musyoki Kilonzo- son
- George Makau Kilonzo – deceased now represented by Ruth Nthenya Makau
- John Kyalo Kilonzo –son
- Joseph Munyao Kilonzo –son
- Stephen Mutisya Kilonzo-son
- Francis Mwaka Kilonzo – son
- Charles Nthei Kilonzo – son
- Nichodemus Ngao Kilonzo – son

According to the affidavit in support of petition for letters of Administration intestate as well as affidavit in support of petition for Probate or for letters of Administration with written will annexed, the estate of the deceased comprised of Kangundo/Isinga/304 measuring 6.0 Ha and Kangundo/Isinga/235 measuring

2.6Ha.

On 7th March, 2008, **Lenaola, J** appointed the following as joint administrators of the estate of the deceased.

- Ruth Ndulu Kilonzo
- Jimmy Musyoki Kilonzo
- Major (Rtd) John Kyalo Kilonzo and
- Francis Mwaka Kilonzo

As parties could not agree on the mode of distribution, **Lenaola, J** on 21st July, 2008 directed them to file their respective affidavits on distribution. This was done and cause then proceeded for hearing.

Jimmy Musyoki Kilonzo testified that he was the first son of the deceased. Their step mother, **Ruth Ndulu Kilonzo** was alive. His scheme of distribution had been agreed upon by his stepmother; **Ruth Makau** (*sister in law*), **Nicholas Ngao** and **Stephen Mutisya**. Against his proposal were **Joseph Munyao, Francis Mwaka** and **John Kyalo**. It would appear however, from this petitioner's perspective that the deceased in fact left behind the following assets.

- Isinga/Kangundo/235 – measuring 2.6Ha
- Isinga/Kangundo/237 – measuring 0.8Ha
- Isinga Kangundo/304 – measuring 3 Ha
- Plot No. 56A with a shop at Tala
- Plot at Kathani Market

Apparently, before he died, the deceased had also subdivided his assets and indicated to each beneficiary where to settle. He even enlisted the services of **Messrs Gatume & Associates Surveyors**. The surveyor was guided by the deceased in the intended subdivision. The witness therefore wanted the wishes of his departed father respected. He tendered in evidence the survey report. The report shows that the witness was slated to inherit more land than his brothers. But this was because the deceased wanted it that way according to the witnesses. Before he died, the family realized that he owned Kshs. 60,000/= to Matungulu. The witness paid the same and the charge was discharged. He was not claiming a refund since the deceased gave him a plot together with his stepmother.

Cross-examined by **Mulekyo**, learned counsel for the Protester, he stated that he had no receipt to show that he paid Matungulu Kshs. 60,000/=. The Mutation form with regard to plot No. 235 was dated 29th May, 2002 long after the deceased had passed on. The surveyor was merely accomplishing the deceased's wishes. The witness had attempted to present the mutation form based on the surveyor's report but were rejected as well as those for plot Nos. 304 and 237. The deceased had wished the land to be subdivided as he had done. Title No. 237 belonged to their grandfather and their uncles had taken out a grant with regard to the estate and his late father had his share in that land. Regarding the shop at Tala plot No. 56^A the same was given to him by the deceased. The stepmother was present as was his nephew and uncle. None of his brothers were present. The stepmother and himself collected rent before it was sold. He was aware that he had been charged with forgery in Criminal Case No. 4953/2003 at Machakos. He maintained though that plot 56A was not part of the estate of the deceased as it had been transferred to him in 1992. He transferred it to himself after the death of the deceased and sold it to **Nduku Kawinzi** for Kshs. 300,000/=. He never shared the proceeds of the sale with his brothers.

Ruth Ndulu Kilonzo testified that the deceased was her husband. Before he died he had divided his property among his children, each of them is settled where their deceased father had wanted. The plot in Tala was given to her and PW1 by the deceased before he passed on. They later sold it but PW1 was arrested as a result.

Cross-examined, she maintained that the deceased's land should be shared equally amongst his sons. Plot No. 56A was given to her and PW1. They later sold it for a sum she did not know. All she could recall however, was that she got Kshs. 40,000/= from the sale. PW1 was later arrested regarding the sale. With that the petitioner closed their case.

Thereafter, **Lenaola, J** left the station on transfer. The cause then went dead until 6th May, 2011 when **Kihara Kariuki, J** resurrected it.

The Protester, **Major Kilonzo (Rtd)** testified before him that he was a beneficiary of the estate of the deceased just like the petitioners. They were 8 brothers. Out of the eight, six were alive. **Dr Daniel Kilonzo** died in April, 2005 and left a family, a wife and five daughters. The other deceased brother was, brother **Nthei Kilonzo** who also died in January 2005. He was not survived by a wife nor children. They had 3 living sisters, **Rebecca Mwangeli, Nyivahai** and **Kaveso Wabai**. They were all married and living happily. His stepmother had no children. He pleaded with the court to adopt his scheme of distribution as set out in the affidavit dated 27th April, 2008. He wanted the plot in Kangundo shared equally amongst the beneficiaries. The deceased share in plot 304 should similarly be shared equally. The same goes for plot 235.

However, **Kihara Kariuki, J**, could not conclude the cause as well. He was soon also transferred from the station. The task of bringing this cause to a closure then fell on me. Parties agreed that I should take over from where **Kihara Kariuki, J** had left.

Since, the Protester had not concluded his testimony, this is where we started. He further testified that the property Kangundo/Isinga 237 never belonged to their grandfather. He bought it from **Nthai Muhamoi** in 1975 or 76 and took possession. This is where he resides. Plot 237 was to devolve to all the sons of his grandfather, his deceased father included. Plot No. 56A Tala belonged to their grandfather, but was developed by the deceased. PW1 & 2 sold the plot purporting that it was given to them by the deceased. The same which was valued at Kshs. 500,000/= should revert to the estate. The mutation forms exhibited by PW1 were fake. The deceased died on 12th June 1999 and he could not therefore have been around in 2002 to sign them. With regard to plot 235, he wished that the stepmother continues to reside on the same for as long as she is alive. He proposed otherwise that the estate of the deceased be shared equally among the beneficiaries.

Cross-examined by **Masika**, learned counsel for the petitioners he stated that he had a certificate of search showing that plot no. 235 had no loan outstanding. He did not agree that the loan was paid by the Petitioners. Any documents in possession of the Petitioners showing to the contrary were fake. Plot No. 237 belonged to **Muhamoi** and never devolved. The deceased had no share therein since he had bought the portion that would otherwise have devolved to the deceased. He did not though have a sale agreement. The deceased share was in plot No. 304. He denied that the plot at Tala Market had been given to PW1 & PW2. He reported PW1's forgery and he was arrested, charged but was never convicted for the offence. Otherwise the family resides and cultivates Plot No. 235. There was no love lost between him and PW1. All his brothers save the PW1 supported his distribution scheme. He denied that before the deceased passed on, he had pointed out to his sons where to settle. He wanted the estate shared equally. With that, the Protester closed his case.

Parties then agreed to file and exchange written submissions. This was subsequently done and I have carefully read and considered them.

As I see it, there are basically two issues for determination in this cause one, what is available for distribution and two, the mode of such distribution. All parties are in agreement that Kangundo/Isinga/235 registered in the name of the deceased and a share of the deceased in land parcel

Kangundo/Isinga/304 is available for distribution. However, they are in total disagreement as to whether Plot No. 56A Tala and Kangundo/Isinga/337 is available for such distribution.

Dealing with plot No. 56A at Tala Market, it has been argued by the Protester that it belongs to the estate and that it was not given to PW1 & PW2 as a gift *inter vivos* while the deceased was alive. On the other hand, PW1 & PW2 have argued vehemently that the plot was given to them as aforesaid long before the deceased passed on. It is common ground that this plot is no longer registered in the name of the deceased. In his own evidence and that of PW2 they all concede that they had sold and transferred the same to one, **Nduku Mwinzi** for a consideration of Kshs. 300,000/= or thereabouts. Apparently, the deceased had transferred the plot to them in 1992. If that be the case, then said plot cannot form part of the estate of the deceased. It is also common ground that PW1 was subsequently charged with the offence of forgery arising from the transaction. That was in Criminal Case Number 4953 of 2003. Apparently, the charges were dismissed for lack of evidence, thereby putting to rest the allegation that PW1 had forged the documents with which he transferred the plot to himself and subsequently to **Nduku Mwinzi**. That issue cannot again be resurrected and or revisited in this cause. It is instructive that most of PW1's brothers testified in that case against him. The learned magistrate was emphatic that-

“in the absence of evidence to the contrary, that the late Samson Kilonzo Nthei is the one who signed the transfer from exhibit 1 intending and did transfer the said Plot No. 56^A to the accused and PW9 Ruth Ndulu Kilonzo, there is no other evidence to a different finding...”

With this finding, the issue whether or not the deceased transferred the said plot to PW 1 & 2 in his life time was settled once and for all. That Plot is therefore not available for distribution. But in distributing the remainder of the estate of the deceased, regard will be had to that fact. In any event PW1 & 2 were able to produce document to show that indeed the plot was given to them as a gift long before the deceased died. PW1 also testified to the effect that by the time he was transferring this plot to **Nduku Mwinzi**, he had a grant but he never sought or obtained consent to the transfer. This evidence was not seriously challenged. In terms of section 93 of the Law of Succession Act, such transfer is not liable to impeachment.

I now come to land parcel Kangundo/Isinga/237. According to the Petitioner, there is no doubt that this property belongs to the estate of the deceased. Indeed it is where the Protester resides. In their submissions, they state that “there is no doubt that Plot No.237, a portion of Plot No. 304 and Plot No.235 form the estate of the deceased and since Plot No.237 is where the Protester lives and cultivates let him have that portion and no other while a share of the deceased in plot No. 304 and plot No. 235 in the name of the deceased be shared equally without the involvement of the Protester.

In his evidence, the Protester states that plot No. 237 which he is in occupation initially belonged to **Mr. Nthei Muhamoi** from whom he purchased with his own money in or about 1975 and took possession. However, under cross-examination he concedes that what he actually bought is what the deceased would have inherited. Pressed for documentation in verification of his assertions, all he could say was that he did not have a sale agreement. Indeed he had no other documentation showing that the said parcel of land legally belonged to him. In the absence of such evidence, I can only hold that the said parcel of land belongs to the estate. I am fortified in this holding by the fact that when mutation forms for this parcel of land were presented for registration, they were rejected on account of the presenter being not the registered owner.

All in all the following are the assets of the deceased available for distribution –

- Kangundo/Isinga/235
- A share of the deceased's in his father's land known as Kangundo/Isinga/304 and,
- Kangundo/Isinga/237 in which the deceased had a share also.

How is the estate to be distributed? Whereas the Petitioners propose that the estate be shared as per their

proposal which they claim was the wish of the deceased, the Protester wishes that the distribution be equal and the court to take into account that PW1 sold plot No. 56A at Tala and pocketed the proceeds solely with PW2.

The deceased no doubt was polygamous. His estate must then be distributed in accordance with section 40 of the Law of Succession Act which is to the effect that:-

“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”.

However, in this cause, the widow has no children, in which event then she must be treated as a unit on her own. Again since the surviving widow has no children, the law allows her a life interest in the estate of the deceased in accordance with section 37 of the Law of Succession Act. Her share will however, eventually be divided equally amongst her surviving step children.

In the conclusion I have arrived at the decision that the grant be confirmed in these terms:-

1. Land parcel No. Kangundo/Isinga/235 shall be shared equally among the beneficiaries of the estate of the deceased.
2. The approximate area of land parcel Kangundo/Isinga/237 is given as 0.8Ha. In the event that the subdivision of Kangundo/Isinga/235, results in more or less the same acreage as 0.8, then the Protester should be allowed to keep the said parcel of land wholly and with no claim to land parcel Kangundo/Isinga/235. But in the event that subdivision of Kangundo/Isinga/235 result in smaller portions than 0.8Ha, then land parcel Kangundo/Isinga/235 shall then be subdivided and shared equally by the beneficiaries.
3. The share of the deceased in Kangundo/Isinga/304 shall again be shared equally among the beneficiaries. Minus the 1st petitioner and step mother on account of the gift intervivos to them by the deceased being plot No. 56A Tala, which they sold and pocketed the proceeds solely.
4. For avoidance of doubt, the widow of the deceased shall be considered as A beneficiary so are the widows of the deceased sons who have since passed on.
5. In carrying out the subdivisions regard should be had to where each beneficiary currently resides and cultivates. This is with particular regard to Kangundo/Isinga/237
6. This being a family dispute, I will make no order as to costs.

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

**ASIKE -MAKHANDIA
JUDGE**