



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

SUCCESSION CAUSE NO 49 OF 2016

IN THE MATTER OF THE ESTATE OF WILLIAM MATHENDU KINAMA (DECEASED)

STEPHEN KINAMA MATHENDU.....1ST ADMINISTRATOR

VERSUS

SHERINA MWELU MATHENDU.....2ND ADMINISTRATOR/1ST PROTESTER/OBJECTOR

WAMBUA MATHENDU.....2ND PROTESTOR/OBJECTOR

WANZILA MATHENDU.....3RD PROTESTOR/OBJECTOR

JUDGMENT

BACKGROUND

It is a sad commentary on the state of family relations when members of the same household resort to litigation over inheritance. What was intended to be a source of continuity and remembrance of the deceased often becomes a cause of discord and estrangement. While the court appreciates that inheritance matters touch on deep emotions and long-standing family dynamics, it is nonetheless enjoined to intervene where disputes arise, to uphold the law and ensure a just, equitable, and lawful distribution of the estate in accordance with the governing principles of succession.

The dispute before the court arises from the estate of the late William Mathendu Kinama, who passed away on 8/4/2010, leaving behind a parcel of land described as Plot

number 29 at Kyuasini Market. The deceased is said to have been survived by a widow and nine children. The 1st Administrator herein petitioned for a grant of Letters of Administration intestate and the same was granted on 2/10/2016. Thereafter, the 1st Administrator applied for confirmation of the grant vide an application dated 21/6/2018 but filed on 4/7/2018. It was at the confirmation stage that a dispute arose regarding the mode of distribution and entitlement to the estate of the deceased.

THE APPLICATION FOR CONFIRMATION OF GRANT

The summons for confirmation of grant was filed by the 1st Administrator. In the application, the 1st Administrator asked the court to award him Plot No. 29 Kyuasini Market, absolutely. It is worth noting that this was the only property that was listed under the assets of the deceased at the time of death.

THE OBJECTION/PROTEST

The record indicates that on 15/5/2019, the objectors filed a notice of objection to the grant that had been issued to the 1st Administrator. The objection was premised on the following grounds:

- 1) The consent of the objectors was not obtained yet they were beneficiaries of the estate of the deceased;
- 2) Their names were included in the petition but they did not sign it;
- 3) The Petitioner listed one asset only and left out others which include Plot No. 1 Makindu Misongeni, unsurveyed land in Makindu measuring approximately 30½ acres and three motor vehicles;
- 4) The petitioner concealed from the objectors the fact that he had petitioned for a grant of letters of administration intestate;
- 5) The documents were filed without the signatures of the objectors;
- 6) The mode of distribution of the estate of the deceased had not been agreed upon by all the beneficiaries;
- 7) The petitioner had shown bias by filing the petition alone and excluding the objectors;
- 8) The petitioner had interfered with the properties of the deceased;

- 9) One of the objectors ought to be joined as a co-administrator for the fair management and distribution of the estate of the deceased.

The objectors simultaneously filed an affidavit of protest sworn by the 1st Objector. The deponent reiterated the contents of the notice of objection and attached copies of documents in support of the objection.

PROPOSAL ON DISTRIBUTION

The record indicates that on 8/2/2022, the 1st Administrator filed an affidavit on his proposed mode of distribution of the estate of the deceased. In the affidavit, the 1st Administrator proposed that Plot No.1 Makindu be shared equally between the 1st Objector, Zakayo Mathendu and Thomas Kyalo Mathendu. He further proposed that Plot No. 29 Kyuasini Market be given to him. The 1st Administrator deposed that the deceased did not have any motor vehicles and that he was not aware of any other properties.

DIRECTIONS ON DISPOSAL OF THE DISPUTE

The record indicates that the then trial court set down the matter for hearing of the objection without giving directions on how the same was to be canvassed. However, proper directions were taken on 7/10/2024 when the matter was before me. Parties agreed and the court directed that the objection be canvassed by way of *viva voce* evidence.

THE EVIDENCE

The Objectors' Case.

The Objectors called four (4) witnesses in support of their objection. OW 1 Selina Mwelu Mathendu testified that she was the deceased's surviving widow. The 1st wife was deceased. OW 1 testified that the deceased had two parcels of land. That one was at Ukia in Kilungu and the other was at Makindu. The evidence of OW 1 was that the 1st wife (deceased) was given the land at Kilungu whereas she was given the one at Makindu. That there were two plots at Makindu and Ukia. According to OW 1, Plot No. 1 Makindu was given to her whereas Plot No. 29 at Ukia was given to the 1st wife (deceased). OW 1 further testified that the deceased had a Tractor which was sold by the children of the 1st deceased wife. That the children also sold her land at Makindu. The witness adopted her affidavit of protest as part

of her testimony and the attachments were adopted as exhibits. OW 1 objected to the proposed mode of distribution by the 1st Administrator and urged the court to award her Plot No. 1 at Makindu and that Plot No. 29 Kyuasini Market be given to the children of the 1st deceased wife to the deceased herein.

OW 2 Joseph Wambua Mathendu adopted his statement filed in court as part of his testimony. He stated that OW 1 was his mother. That the deceased herein apportioned his property before his demise and that after his death, the members of the 1st house started causing trouble. The witness stated that 5 acres at Makindu were given to the 2nd Administrator and her children whereas 27½ acres at Kilungu were given to the 1st deceased wife and her children. OW 2 objected to the proposed mode of distribution by the 1st Administrator. He mentioned that the deceased owned motor vehicle registration number KNX 340 Datsun, which was taken by his half-brother, Zakayo Mathendu.

OW 3 Anderson Makau Kithome testified that he was a retired Senior Assistant Chief of Manyatta Sub-location. That the 2nd Administrator was the deceased's widow. OW 3 testified that he gave the deceased a permit to hold a clan meeting for purposes of distribution of his parcels of land. That after the meeting, the deceased informed him that he had given the land at Makindu to the 2nd Administrator. OW 4 Japhet Ngungi Muumbi testified that he was the Chairman of the Aombe clan to which the deceased belonged. The witness stated that the deceased convened a meeting of the clan members where he apportioned his land between his two wives. The witness stated that he knew the 2nd Administrator as a wife to the deceased. That the land at Kilungu was given to the 1st wife whereas the one at Makindu was given to the 2nd wife (2nd Administrator).

The Respondent's Case

Only the respondent testified in support of his case. His evidence was that he informed the objectors about the Succession cause but they declined to sign the petition papers. The respondent stated that he did not include the plot at Makindu because it had been given to three people who included the 2nd Administrator, Zakayo and Kyalo. The respondent admitted that the deceased had apportioned his property before he died. He also mentioned that there was land at Nzilani area which was unsurveyed. The respondent urged

the court to distribute the estate according to the wishes of the deceased or how he had apportioned the property.

MAIN ISSUES OR QUESTIONS FOR DETERMINATION

Having perused the application, I find that the main issues or questions for determination are as follows:

- i. Whether the objection to confirmation of grant should be upheld;
- ii. Whether the court should proceed and distribute the estate of the deceased;
- iii. If so, how should the court distribute the estate of the deceased;
- iv. What other orders should the court make if need be.

SUBMISSIONS BY THE OBJECTORS/PROTESTORS

The objectors filed written submissions. They submitted that the deceased was polygamous. That the 1st Administrator initiated the succession cause alone without notifying and involving the objectors. The objectors argued that the 1st Administrator violated the law by failing to obtain consent and involve the objectors. The objectors further argued that the estate ought to be distributed equitably and that any distribution that tends to give undue advantage to one house is discriminatory and contrary to law. They urged the court to dismiss the 1st Administrator's proposed mode of distribution and uphold the objection. They also urged the court to hold that the unregistered/unsurveyed parcel of land at Nthilani forms part of the estate of the deceased and proceed to distribute the estate according to section 40 of the Law of Succession Act.

THE 1ST ADMINISTRATOR'S/RESPONDENT'S SUBMISSIONS

According to the respondent, the main issue was how the estate of the deceased ought to be distributed. That there was no dispute as to the beneficiaries of the estate of the deceased. The respondent argued that the apportionment of the estate by the elders can only be adopted by the court if the parties consent but is not binding upon the court. It was submitted that the evidence revealed that estate of the deceased comprised of two parcels of land being Plot No. 1 Makindu and Plot No. 29 Kyuasini market. The respondent urged the court to ignore the other mentioned properties as no evidence was adduced to prove their existence.

The respondent argued that the court had no jurisdiction over unsurveyed land as there is no way the court can verify its existence, extent and ownership. He urged the court to adopt his proposed mode of distribution or apportion the two plots of land equally between the ten beneficiaries. The respondent relied on the authority of Re estate of *John Musambayi Katumanga [2014] eKLR*.

ANALYSIS AND DETERMINATION

I have considered the objection as well as the evidence on record. Following the consent to include the 1st objector as a co-administrator of the estate of the deceased, the objection can be narrowed down to two issues:

- i. Addition of the deceased's other assets allegedly left out; and
- ii. Distribution of the estate of the deceased.

From the evidence of both parties, it is clear that the deceased person's other assets were left out. The parties agreed that the deceased owned Plot No. 1 Makindu and another parcel of land at Nthilani. It is said that the land is unsurveyed or unregistered. In the evidence, the parties mentioned other parcels of land allegedly apportioned by the deceased prior to his demise. There is evidence of ownership by the deceased, of Plot No. 1 Makindu and Plot No. 29 Kyuasini. No documentary evidence was adduced to confirm ownership of the unsurveyed parcel of land by the deceased. What is to be determined is whether the court can include the extra properties at this stage then proceed to distribute the estate of the deceased.

In my view, inclusion of omitted properties is a substantial step that cannot be done casually. The only property that was indicated in the petition was Plot No. 29 Kyuasini market. The application for confirmation was limited to Plot No. 29 Kyuasini market. I am of the considered view that the court must be moved appropriately to have omitted properties included before distribution is done. Inclusion of omitted properties cannot be done simultaneously with distribution, particularly in the absence of a proper application to include the properties. Such inclusion cannot, in my view, be done by way of a notice of objection or affidavit of protest. It is my finding that the court's jurisdiction has not been properly invoked as far as inclusion of omitted assets is concerned.

That being the case, the court lacks authority to distribute assets not forming part of the petition or grant. The next question would then be; should the court proceed with the distribution of Plot No. 29 Kyuasini alone? I think not. Since it has been established that other asset(s) were left out, it would not be prudent for this court to proceed with the distribution without giving the parties a chance to rectify the situation. For that reason, the confirmation of grant will be halted.

DISPOSITION

Consequently, I make the following orders:

- a) The summons for confirmation of grant dated 21/6/2018 is hereby dismissed;
- b) The administrators, although adversaries, to move the court appropriately with regard to the asset(s) omitted from the petition and grant. They should find a way of working together;
- c) Given the relationship between the parties, there shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 13TH DAY OF
NOVEMBER, 2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.