



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 274 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE WILLIAM MABISHI MITSUNGURU (DECEASED)

FENI WILLIAM SHAKE

MOI PETER MABISHI

FREDRICK MWANGOMBE.....APPLICANTS

VERSUS

HENRY KENGA MABISHI

ANNAH KAMENE WAMBUA.....RESPONDENTS

JUDGMENT

1. The deceased herein died intestate on 11/6/13. On 2/7/2014, one Henry Kenga Mabishi describing himself as the son and the only beneficiary to the deceased petitioned for a grant of representation. He listed motor vehicle registration Nos. KAB 700R and KAH 028H and plot No. 5639/I/MN as the only assets comprising the estate. A grant was made on 28 October 2014 and issued on 5/11/2014 to the petitioner/Applicant as the sole beneficiary.

2. Later, Annah Kamene Wambua claiming to be a widow to the deceased filed summons dated 26/3/15 seeking revocation of the grant on grounds that as a widow she was not involved nor consulted. By consent, the application was compromised with orders that Annah be included as a beneficiary of the estate with the applicant in equal shares.

3. Subsequently, one Feni William Shake moved to this court on 20/11/2015 vide a summons for revocation dated 9/11/15 claiming that as the mother to the deceased, she was never consulted and therefore left out together with her sons; Moi Peter Mabishi and Fredrick Mwangombe in their capacity as brothers and therefore dependants to the deceased. Unfortunately, Henry did not participate in the hearing of this application.

4. On 16/11/18, the court revoked the grant and appointed Feni William Shake and Fredrick Mwangombe as the administrators of the estate of the deceased. The court however did not recognize Annah Kamene as wife to the deceased. Aggrieved by this decision, Henry Kenga Mabishi filed an application dated 17/12/18 seeking reasonable provision as a dependant to the deceased. He urged the court to order that Plot No. 5639/1/MN be sold and proceeds be shared out equally between Feni William Shake, Moi Peter Mabishi, Fredrick Mwangombe and himself.

5. In the said application, the administrators vehemently opposed the application claiming that Henry Mabishi was chased away by the deceased hence he was not a dependant at the time the deceased died. In its ruling delivered on 31/5/2021, the court recognized that the applicant was indeed a son to the deceased who was entitled to provision out of the estate of the deceased.

6. In the said ruling, the court made directions as follows;

i. Feni William Shake and Fredrick Mwangombe the administrators of the estate of William Mabishi Mitsunguru shall file a summons for confirmation of grant within 30 days from the date hereof.

ii. Feni William Shake and Fredrick Mwangombe shall include the applicant Henry Kenga Mabishi as one of the beneficiaries of the estate and involve him accordingly.

iii. Mention to confirm compliance on 1/7/19.

iv. This being a family matter, there shall be no order as to costs.

7. Pursuant to the said directions, on 25/6/19, the administrators filed a summons for confirmation dated 21/6/2019 seeking to have the grant confirmed and the estate shared out as follows;

i. Plot Number 5639/1/MN be given to Feni William Shake.

ii. Motor vehicle Registration No. KAH 028H Renault to Feni William Shake.

iii. Motor vehicle Registration No. KAB 700R Blue Bird Nissan to Fredrick Mwangombe.

8. Further, that the house on plot No. 5639/1/MN be let out and the rental income be apportioned as follows;

i. Feni William Shake – 40%

ii. Moi Peter Mabishi – 25%

iii. Fredrick Mwangombe – 25%

iv. Henry Kenga Mabishi – 10%

9. Dissatisfied with the proposed mode of distribution, Henry Kenga filed an affidavit of protest sworn on 28/6/19 and filed on the same day claiming that; under Section 38 of the Law of Succession Act, he is entitled to the entire estate as the only surviving child. That the two motor vehicles are shells which are grounded hence the only property remaining for distribution is Plot No. 5639/1/MN.

10. He further stated that he does not see eye to eye with the administrators hence not possible to share rent from the said house. He contended that the only long lasting solution is to sell the property and share the proceeds as follows; Henry Kenga Mabishi 60%, Feni William Shake 20% and Moi Peter Mabishi 20%. That Fredrick Mwangombe should not get any share as he was not dependent on the deceased immediately before he died. He further averred that Feni having been bought property at Taita by the deceased during his lifetime, she has already been provided for hence does not deserve any further provision out of the net estate.

11. In her rejoinder, Feni filed what is described as “objector’s replying affidavit” sworn on 16/2/21 stating that the court did not in its ruling of 31/5/2019 order that the protestor be included as a beneficiary. That the administrators have duly complied with the directions in the ruling of 31/5/19 and that the issue as to who is a beneficiary to the estate was determined in the ruling of 31/5/2019.

12. It was further stated that the protestor had in his application dated 17/12/2018 proposed that he had no objection in sharing out the property with the respondents equally hence he cannot now claim the entire estate. When the matter came for hearing, both Counsel agreed to orally submit based on affidavit evidence. None of them was willing to call witnesses as the salient issues had earlier on been resolved in several revocation applications.

13. Mr. Oluga for the petitioner/protestor basically reiterated the averments contained in the affidavit of protest. He contended that, as the only child surviving the deceased, the protestor was entitled to the estate wholly. That the respondents were dependants who can get some reasonable provision upon proof of dependency. Counsel submitted that only the 1st and the 2nd respondents were dependent upon the deceased immediately preceding his death. Counsel made reference to the testimony of the 2nd respondent one Mwangombe during the hearing of the revocation application in which he admitted he was not a dependant to the deceased.

14. On his part, Mr. Anangwe submitted that Judge Thande had in her ruling of 31/5/2019 addressed the issue of beneficiaries with Fredrick Mwangombe being one of them. That in compliance with the said ruling, the respondents have made reasonable provision for the protestor.

Determination

15. Before me is a summons for confirmation of grant and a protest thereof. According to the applicants/administrators, the protestor is only entitled to reasonable provision. On the other hand, the protestor the only surviving child to the deceased is claiming to be the sole beneficiary hence entitled to the entire estate.

16. The only issue for determination is whether the protestor is entitled to the entire estate or reasonable provision.

17. In her ruling of 31/5/2019, Justice Thande held that the protestor was a son to the deceased hence entitled to reasonable provision. According to the proposed mode of distribution, the deceased’s only contested property is LR Plot No. 5639/1/MN which has been allocated to Feni the mother to the deceased. The only benefit accorded to the protestor and the two brothers to the deceased is a share of monthly rental income out of the said property distributed as follows; Feni William Shake 40%, Moi Peter 25%, Fredrick Mwangombe 25% and Henry Kenga 10%.

18. I do not think the allocation of rental income to the protestor and the other beneficiaries amount to distribution of the estate contemplated under Section 71(2) of the Law of Succession Act which provides that; during confirmation, the court must be satisfied as to the respective identities and shares of all persons subsequently entitled and that when confirmed such grant shall specify all such persons and their respective shares. Basically, the administrators have not distributed or allocated any share of the estate to the protestor.

19. Mere distribution of rent without conferring right of ownership or possession of some beneficial interest of the deceased's estate does not amount to distribution of the estate. The administrators are basically circumventing the directions of the court in its ruling of 31/5/2019. The protestor has not been accorded any share of the estate in contravention of that ruling.

20. What share is the protestor entitled to? There is no dispute that the protestor has been recognized as a son to the deceased and the only surviving child to the deceased. It is also not in dispute that he is the one who has been and is still staying in the house where the property (house) in dispute is located. What beneficial interest does a child have in his/her parent's estate.

21. It is not true that the ruling of 31/5/2019 did not recognize the protestor as a beneficiary. By virtue of being recognized as a child, he is entitled to a share automatically as a dependant in the first line without necessarily proving whether he was being maintained by the deceased father immediately prior to his death. The court did recognize the deceased mother and the two brothers as beneficiaries as well. I need not belabour on this matter as the same has already been settled. The only remaining question is the share entitlement of each beneficiary.

22. Section 38 of Law of Succession Act does provide guidance as follows;

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divide among the surviving children.”

23. Section 39 of the Law of Succession goes further to provide that, where the intestate had not left any spouse or child the intestate estate shall devolve to the;

(a) **father; or if dead**

(b) **Mother; or if dead**

(c) **brothers and sisters, and any child or children of deceased brothers and sisters in equal shares; or if none**

(d)

(e)

24. Equally, Section 29 of the Law of Succession ranks a spouse and children in priority in inheriting the property of a deceased person. See **In re estate of the late Ann Graff (2019)eKLR where the court stated that:**

“Section 29(a) creates a special category of dependants who are dependants due to their relationship to the deceased. Here the wife, wives, former wife or wives and the children of the deceased are automatic dependants and it is immaterial whether or not they were being maintained by the deceased immediately prior to his death”

25. In this case, the protestor is entitled in priority to take the entire share of the estate under Section 38 of the Law of Succession. However, since there is already admission that the mother and the brothers are also beneficiaries on account of dependency, then, they will be entitled to a share.\

26. In the course of canvassing various applications in this file, parties have been making different proposals on how to share the estate. For instance, in his application dated 17/12/2018, the protestor sought for reasonable provision. At paragraph 5 of the said application, he stated that;

“Property No. 5639 Section 1 in Mainland North situate In salama estate in Nyali Mombasa County and registered in the name of William Mabishi Mitsunguru the deceased herein be sold and proceeds thereof be shared equally between the applicants and the objectors herein.”

27. With this pleadings, the protestor cannot be allowed to keep shifting goal posts now and then thereby claiming the entire estate. It trite that parties are bound by their pleadings. See **Independent Electoral and Boundaries Commission and another vs Stephen Mule & 3 others (2014) eKLR**. I am however alive to the fact that in an intestate estate where there are direct beneficiaries (spouse/s and children), other relatives like parents and brothers and sisters have no right to claim a share of the deceased estate unless they prove dependency. See **In re of the estate of Joshua Orwa Ojodeh (deceased) (2014) EKLR** where the court held that;

“The law ensures that widows and orphans are given first priority in terms of access to the property of a deceased husband and father. The other relatives including parents, are relegated to a secondary position and only access the property in the event there is no widow or child or if they convince the court in a proper application that they were dependant on their dead child or sibling or other relative and that the court should then make provision for them out of the estate of the dead child.”

28. Similar position was held in the case of **Veronica Njoki Wakagoto (deceased) (2013) eKLR and in the estate of Joyce Kanjiru Njiru (deceased) (2017) eKLR** where the court held that the children of the deceased are dependants whether or not they were maintained by the deceased prior to his death.

29. In the circumstances of this case and considering that the protestor had proposed on distributing the estate equally between himself, the

grandmother and the two uncles on account of dependency, he cannot now claim the entire estate. Equally, the respondents (administrators) should appreciate the protestor's goodwill gesture for ceding ground to their advantage.

30. In view of the fact that the protestor was agreeable to equal sharing of the property, I will take this proposition as the most suitable and reasonable mode of distribution in respect of Plot No. 5639. Accordingly, the said property shall be shared equally between the four beneficiaries namely; Henry Kenga Mabishi, Feni William Shake, Moi Peter Mabishi and Fredrick Mwangombe. The property to be registered in their joint names. Alternatively, the property can be sold and parties share proceeds equally.

31. Regarding the two motor vehicles, the protestor said they were shells hence does not need them. He further stated that motor vehicle KAB 700R did not belong to the deceased. I will therefore not interfere with their allocation to Feni William Shake and Fredrick Mwangombe as proposed in the application for confirmation.

32. Accordingly, the application for confirmation is allowed and grant issued on 30/8/2019 confirmed with orders that;

a. L.R Plot No. 5639/1/MN be registered in the joint names of Henry Kenga Mabishi, Feni William Shake, Moi Peter Mabishi and Fredrick Mwangombe in equal share.

b. In the 1 alternative, the property mentioned in (a) above be sold and proceeds shared out equally amongst the four beneficiaries.

c. That Henry Kenga Mabishi, who is in occupation of the said house shall continue to stay therein until the registration process is completed and or sale concluded.

d. Motor Vehicle Registration No. KAH 028H be given to Feni William Shake

e. Motor vehicle Registration No. KAB 700 R be given to Fredrick Mwangombe.

f. Each party to bear own costs.

DATED, SIGNED, DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE 2021.

J. N. ONYIEGO

JUDGE