



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

FAMILY CIVIL APPEAL NO.8 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE MATHEW MUTHOKA KITENYE *alias* MATHEWS MUTHOKA KITENYE (DECEASED)

JUSTUS MUTISYA MUTHOKAAPPELLANT

VERSUS

GEORGE MUSOMBA MUTHOKARESPONDENT

(Being an appeal from the Ruling of Honourable James Mwaniki SPM Makueni Law Courts delivered on 4th December 2019 in Makueni Succession Cause No. 9 of 2015).

JUDGMENT

1. This is an appeal from the ruling delivered in Makueni SPM Succession Cause No. 9 of 2015 on 4/12/2019, in which the magistrate's court concluded as follows –

“24. The court finds merit in the objector's case.

25. The court in the end issue order that the grant issued on 22/7/2015 and dated 30/7/2015 in this succession cause and certificate of confirmation of grant dated 22/5/2017 be and is hereby revoked and the subsequent orders and transfers issued using the said grant and confirmation including the resultant title numbers Makueni/Unoa/4700 to Makueni/Unoa/4807 be cancelled and the titles revert back into the names of the deceased.

26. Costs to the objector/applicant.”

2. The appellant who was the petitioner in the succession cause, being aggrieved by the decisions of the trial succession court, has now come to this court on appeal on the following grounds –

1. The magistrate erred in law and fact in determining the paternity of the three objectors to be children of the late Mathew Muthoka Kitenye, 22 years after death of Mathew Muthoka Kitenye without proof of marriage or paternity at all.

2. The honourable magistrate erred in law and fact in developing a theory on paternity which was not supported by evidence placed before him and hence arrived at a wrong decision.

3. The court erred in law and fact in shifting the burden of proving paternity from the objector/applicant to the respondent contrary to the law.

4. The honourable magistrate erred in law and fact in ignoring evidence by the appellant herein that the actual father of the objectors is a person known to the three objectors in the lower court, a fact which the three applicants never denied before the lower court.

5. The honourable court erred in law and fact in ignoring and overlooking the evidence of the appellants before the lower court without giving reasons as required.

6. The honourable magistrate erred in law and fact in ignoring admission by the objectors and their witnesses that this was their first time to raise a claim on LR MAKUENI/UNOA/220 since 1997 when Mathew Muthoka Kitenye died hence were time barred.

3. With the above grounds of appeal, the appellant has asked this court to set aside the succession cause ruling delivered on 4/12/2019 in

Makueni Magistrates' Court Succession Cause No. 9 of 2015 and dismiss the summons dated 30/7/2019 with costs.

4. The appeal proceeded through filing of written submissions. Both the counsel for the appellant and counsel for the respondent filed written submissions, which I have perused and considered.

5. This being a first appeal, I am required to re-evaluate the evidence on record independently and come to my own conclusions and inferences – see **Selle –vs- Associated Motor Boat Co. Ltd [1968] E.A 123**.

6. This being in the nature of a civil case, the standard of proof is on the balance of probabilities, which standard of proof was applicable in the magistrates' court.

7. I note that before the magistrate's court, each side tendered evidence through witnesses who had filed witness statements. The witnesses for the objectors (now respondents) were Philip Nthei, Henry Kaunda, Hellen Ngina, Johnstone Makau Mbuvi.

The petitioners (now appellants) witnesses were Justus Mutisya, Brigid Mbaika Mutiso, John Ndambuki. They testified and were cross examined, and the main issue was whether the deceased had a second wife Alice Munyiva Muthoka, two sons and a daughter.

8. I have considered the evidence on record on both sides. I have also considered the ruling of the trial court. In my view, from the evidence on record, the respondent did not prove on the balance of probabilities that the deceased herein was married to Alice Munyiva Mbuvi and they had three children.

9. The first reason for the inadequacy of the evidence of marriage is that there is no independent witness who testified to the alleged marriage. In my view, even if the marriage ceremony was done secretly, there would still be independent people who would have seen the two cohabiting and also getting the three alleged children during such cohabitation.

10. Secondly, if indeed the deceased was maintaining and educating the children and constantly visiting them, there would be at least one independent witness who could attest to this in evidence which did not happen.

11. Thirdly, though I am aware of Akamba traditional custom that children can be named indicating the father to be the grandfather, such naming occurs only when the biological father has abandoned them. In the present case the allegation is that the deceased cared for, educated and visited the children, which would displace the need to name the children after the grandfather. Thus in my view there would be no basis for naming them as children of the grandfather if their father was known and caring for them. On these three reasons, I find that neither proof of marriage or proof of paternity was proved and thus the appeal will succeed.

12. With regard to the grounds of time bar, the law that applies to succession matters is the Law of Succession Act (cap.160) which overrides the general requirements under the Limitation of Actions Act (cap 22). Under the Law of Succession Act, a grant of representation of letters of administration can be challenged at any time, irrespective of the nature of assets involved and irrespective of whether those assets have been disposed. There is no time limitation imposed by statute. This is clear from the provisions of section 76 of the Act, the relevant part of which states as follows –

76. A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides either on application by any interested party or on its own motion.....”

13. Thus the summons for revocation or annulment of grant of letters of administration herein filed in the magistrates' court was not statute barred, as the succession matter herein is not governed by the 12 years limitation period applicable to land matters. However, the appeal will be allowed for want of proof of marriage and paternity of the children to the required standards, as I have found above.

14. I thus find merits in the appeal and allow the same. I set aside the ruling of the magistrates' court dated 4/12/2019 thus dismissing the summons for revocation of grant and reinstate the earlier orders of confirmation of grant of letters of administration. This being in the nature of a family matter however, I order that parties will bear their respective costs of appeal, and proceedings in the magistrates' court.

DELIVERED, SIGNED & DATED THIS 30TH DAY OF SEPTEMBER, 2021, IN OPEN COURT AT MAKUENI

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GEORGE DULU

JUDGE