



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 650 OF 2012

IN THE MATTER OF THE ESTATE OF NEHEMIAH MUHATI LUSALA (DECEASED)

ESTHER ANGAYA NEHEMIAH1ST PETITIONER

SILAS AMWAYI MUHATI2ND PETITIONER

NAHASHON ODERA MUHATI

Alias SOLOMON3RD PETITIONER

VERSUS

PETER AYOYI MACHIKA1ST PROTESTOR

WILSON MBOYA MUHATI.....2ND PROTESTOR

JUDGMENT

1. This matter relates to the estate of the late Nehemiah Muhati Lusala, herein referred to as the deceased. The deceased was the husband to the 1st petitioner, Esther Angaya Nehemiah and father to Silas Amwayi Muhati and Nahashon Odera Muhati, the 2nd and 3rd petitioners herein. The deceased left behind land parcel No. Butso/so/Shiveye/452 (herein referred to as the suit land/property) which is the subject of these succession proceedings. The petitioners have proposed that the suit land be distributed as follows:-

- (a) Silas Amwayi Muhati - 3.5 acres
- (b) Nahashon Odera Muhati - 3.5 acres
- (c) Esther Angaya Nehemiah - Life interest in the portion allocated to Nahashon Odera Muhati

2. The petitioners' mode of distribution was opposed by Peter Ayoyi Machika T/a Weighland Investment Company and Wilson Mboya, the 1st and 2nd Protestors herein. The protestors propose that the estate be distributed as follows:-

- (a) Silas Amwayi Muhati - 2.0 acres
- (b) Wilson Mboya Muhati - 1.0 acres
- (c) Nahashon Odera Muhati - 2.0 acres
- (d) Peter Ayoyi Machika - 1.5 acres
- (e) Esther Angaya Nehemiah - 0.5 acres

3. The petitioners were represented by the firm of **V. A. Shibanda & Co. Advocates**. The protestors were unrepresented.

4. The protest proceeded by way of *viva voce* evidence whereby the protestors testified as the plaintiffs while the petitioners testified as the defendants. Both protestors testified and did not call witnesses. The three petitioners testified and did not call witnesses. The protestors however did not turn up in court when the petitioners testified in court though they had been served with the hearing date.

5. The 2nd protestor, Wilson Mboya Muhati, testified as PW2 in the case. His evidence was that he was a son to the deceased herein. That his mother is he 1st petitioner, Esther Angaya. That he was born in 1971. He grew up at the home of the deceased. He was circumcised by the deceased in accordance with Luhya customs. His father built him a house at the home. That his father died in 1995 and left him at the home. That in the year 2000, the 2nd and 3rd petitioners alleged that he was not a biological son of their father. They chased him and the 1st petitioner from the home and burnt his house. He rented a house at Lurambi estate in Kakamega town. After one year, the 2nd and 3rd petitioners accepted his mother back after convincing her to deny that he belonged to the family. His mother denied him. That in 2004 he and his mother sold 1.5 acres of the deceased's estate to the 1st protestor who was supposed to fund a succession cause in respect to the estate. That what he sold to the 1st protestor was his entitlement to the estate. He filed a succession cause at Mumias Law Courts with the consent of the 1st petitioner. That in 2006 he obtained a grant in his name. They gave the 1st protestor his portion of 1.5 acres but the 2nd and 3rd petitioners chased the 1st protestor away. The grant was later revoked by the High Court. He prayed that the land be distributed as per his proposal stated above.

6. The 1st protestor on his part testified that he bought a parcel of land from the estate of the deceased from the 2nd protestor. They entered into an agreement. That he is in occupation of the land. He sought that he be given his share of 1.5 acres.

7. The 1st petitioner testified that she got married to the deceased herein in 1973. That she had by that time given birth to the 2nd protestor with a different father. She went with him to the home of the deceased. He was later on taken by his father. Therefore that the 2nd protestor is not a biological son to the deceased. That in the year 2004 the two protestors duped her into signing some papers on pretext that they were to be used in filing a succession cause in respect to the estate of her husband. She later on discovered that a succession cause had been filed and the 1st protestor had allocated himself 1.5 acres of the deceased's estate and the 2nd protestor 1 acre of the estate. She also learnt that the 1st protestor was purporting that he had bought the 1.5 acres from the estate and that she was a witness to the transaction. That in 2015 the 1st protestor forcibly entered into the deceased's land and curved himself 1.5 acres from the land. That when the petitioners resisted the invasion the 1st protestor initiated criminal proceedings against them at Kakamega Law Courts. The 1st protestor forcibly put up a house on the land. That the protestors took advantage of the fact that she is illiterate to defraud the deceased's estate. She sought that the estate be distributed as proposed above.

8. The 2nd petitioner testified that the 1st petitioner is his step mother. His mother was Dorcas Adeyo Muhati who is deceased. That she saw it when the 1st petitioner was married by his father. She came to the home with the 2nd protestor. His father sired two children with her, the 3rd petitioner and Siphora Muhati. After the death of his father he later on learnt that a succession cause had been filed at Mumias Law Courts. The grant therein was revoked. The 1st protestor forcibly occupied the deceased's land and built a house therein. That the 2nd petitioner was not living with them when his father was alive. That he was taken by his father long time ago. He proposed that the land be shared equally between him and Nahashon, the 3rd petitioner.

9. The 3rd petitioner testified that the 1st petitioner is his mother. That the 2nd protestor is a son to his mother but from a different father. That he is not a son to the deceased. That the land should be shared equally between him and the 2nd petitioner. That he currently stays with his mother and she can have a life interest in the portion allocation to him.

10. The firm of **V. A. Shibanda & Co. Advocates** filed written submissions. They submitted that the evidence adduced before the court showed that the 2nd protestor is not a son to the deceased. That he lives with his father. That the mere fact that the 2nd protestor was living in the deceased's compound before the deceased died does not make him a beneficiary to the estate.

11. That the protestors conspired to intermeddle with the deceased's property after taking advantage of the 1st petitioner's illiteracy to sign some documents. That the protestors are not beneficiaries of the estate. The advocates urged the court to dismiss the protest.

Analysis and Determination –

12. The questions for determination are:-

- (1) Whether the 1st protestor lawfully bought land from the 2nd protestor.
- (2) Whether the 2nd protestor is a son to the deceased herein.
- (3) Whether the 2nd protestor has any entitlement in the estate of the deceased.
- (4) How should the estate be distributed?

13. The 1st protestor is claiming 1.5 acres from the estate of the deceased on grounds that he bought it from the 2nd objector who according to him is a son of the deceased and a beneficiary to the estate of the deceased. Arising from the sale the 1st protestor proceeded to occupy part of the deceased's land.

14. The sale agreement between the protestors is dated 25/10/2004. The 2nd protestor conceded that he did not possess a grant of representation when he sold the land to the 1st protestor. Section 45 of the Law of Succession Act makes it a criminal offence for any person not possessed of a grant of representation for any purpose to –

“take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

Section 82 (b) (ii) of the Act outlaws the selling of immovable property of a deceased person before confirmation of a grant.

15. In **re Estate of Jaswant Singh Boor Singh Dhanjal (Deceased) 2016 eKLR** where the property of the deceased was transferred before a grant was issued, Thande J. cited the case of **Peter Ombui Ngangoto –Vs- Elizabeth Matundura & Another (2013) eKLR** where the Court of Appeal held that:-

“The second respondent’s active consent in the transaction that ended in complete violation of the Law of Succession Act did not and cannot make that transaction legal. It remains illegal and all who participated and/or could have participated in such illegality would still have taken part in an illegal activity.”

16. The sale agreement between the protestors stated that the 2nd protestor was to institute a succession cause in respect to the estate of his father. The 1st protestor therefore knew that the land belonged to a deceased person when he bought the land. He knew that the 2nd protestor was not seized of a grant of letters of administration when he bought the land. The act of the protestors in selling and buying the property of the deceased when not seized of a grant of representation was outright intermeddling with the free property of the deceased. The sale was null and void *ab initio*. The occupation of the deceased’s land by the 1st protestor is therefore illegal. I hold that 1st protestor is not a beneficiary to the estate of the deceased and is not entitled to any share/portion of the suit property.

17. The 2nd protestor contends that he is a son to the deceased and that he was brought up by the deceased at the home of the deceased. That the deceased left him at the said home when he died and he stayed there until when he was chased away by the 2nd and 3rd petitioners. That he has been renting a house at Lurambi estate in Kakamega town.

18. The petitioners on the other hand contend that the 1st petitioner is not a son to the deceased. That he was already born when his mother was married by the deceased. That his mother went with him to the home of the deceased when she was married by the deceased but he was later on taken by his father. That he currently stays at the home of his father.

19. The burden of proof in a civil case is on a balance of probabilities. Section 108 of the Evidence Act provides that the burden of proof in a suit lies on that person who would fail if no evidence at all was given on either side. Though the 2nd protestor strenuously insisted that he is a son to the deceased I am at a loss as to why he could not produce not even a single witness who could support his evidence that he is a son to the deceased and that the deceased left him at his home when he died.

20. The 2nd protestor was asked in cross-examination why he has not gone for a DNA test to ascertain whether he is a son to the deceased. His explanation was that he cannot do a DNA test because his father is dead. This is not a convincing explanation as a DNA test can be done to ascertain whether he is related to the 2nd and 3rd petitioners. The inference to be drawn as to why the 2nd petitioner has not demanded for a DNA to be conducted is that he fears for the truth to come out. In today’s modern world questions of paternity are better of determined by a DNA test.

21. Though the petitioner filed a birth certificate showing that he is a son to the deceased, it was obtained during the pendency of this case. It is therefore of little probative value.

22. The petitioners alleged that the 2nd protestor currently lives at the home of his father. The 2nd petitioner swore an affidavit on 6/9/2011 stating that the 2nd protestor’s father was alive and known by the name Jacob Ogada Omukunda and that the 2nd protestor had put up a house at the home of the said person at Ebumamu area within Kakamega County.

23. The 2nd protestor stated in cross-examination by the 1st protestor that he has a brother called David but that he did not know where he lives. When pressed further he stated that David went to his father’s home. Does that mean that the 2nd protestor and David have a father who is not the father of the 2nd and 3rd petitioners? Whereas the 2nd protestor says that he stays in a rented house at Lurambi estate he did not produce any rental receipts or call his landlord to support his evidence that he lives in a rented house. I do not find sufficient evidence that the 2nd protestor lives in a rented house. It is possible that he lives at the home of the above said person, Jacob Ogada Omukunda. I find no evidence that the 2nd protestor was a dependant of the deceased before the deceased died.

24. The protestors admitted that the 1st petitioner is illiterate. It is possible that 1st petitioner did not understand the contents of the succession papers when she signed them.

25. Upon considering all the evidence adduced before the court I do not find sufficient evidence that the 2nd protestor is a son to the deceased. The 1st protestor has not proved that he is entitled to some inheritance in the estate of the deceased. The upshot is that the protest has no merit. The same is dismissed with costs to the petitioners.

26. I find that the proposal by the petitioners on the distribution of the estate is reasonable and fair. In the premises I allow the summons for confirmation of grant dated 20/3/2011 in the following terms:-

(1) The grant made to **ESTHER ANGAYA NEHEMIAH** and **SILAS AMWAYI MUHATI** on 3/11/2010 are hereby confirmed.

(2) The suit property known as **Butsotso/Shibeye/452** is to be shared between **NAHASHON ODERA MUHATI** and **SILAS MUHATI** in equal proportions of 3.5 acres each.

(3) **ESTHER ANGAYA NEHEMIAH** is to continue to occupy the house where she currently resides and have life interest in the portion of the suit property bequeathed to **NAHASHON ODERA MUHATI**.

(4) **PETER AYOYI MACHIKA** also T/a Weighland Investment Company is ordered to vacate the portion of land he occupies on land parcel **Butsotso/Shibeye/452** within 31 days of the date of delivery of this judgment failure to which eviction orders are to issue against him.

Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 21st day of February, 2020.

J. NJAGI

JUDGE

In the presence of:

Mr. Munyendo holding brief for Shibanda for petitioners

Petitioners - present

Protestors – 1st present

Court Assistant - Polycarp

30 days right of appeal.