



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

SUCCESSION CAUSE NO. 1056 OF 1994

IN THE MATTER OF THE ESTATE OF SAMSON SHAMOLA PERU (DECEASED)

MARITA MKAZIA.....1ST APPLICANT

HEMAN SHUNZA.....2ND APPLICANT

VERSUS

DORCUS AMAITSA.....1ST RESPONDENT

AGGREY MAGAMBO.....2ND RESPONDENT

WILFRED SHITOKA ELAVONGA aka JOEL IRIBONGA.....3RD RESPONDENT

JUDGMENT

1. The deceased herein Samson Shamola Peru died intestate on 27th October, 1991 and on the 9th June 1993 Dorcus Amaita and Aggrey Magambo describing themselves as wife and son petitioned this court for grant of letters of administration where they gave the names of survivors as follows;

- a. Dorcus Amaita - wife
- b. Mary Itavitsa
- c. Aggrey Magambo
- d. Kennedy Tsieri
- e. Fredrick Mulindi
- f. Julius Kibisu
- g. Calorine Makungu and
- h. Lindon Ingosi

2. A grant was issued on the 25th of August 1994 and same was confirmed on the 9th of June, 1995. Dorcus Amaita and Aggrey Magambo were to hold L.R. No. Kakamega/Cheptulu/613 and 615 and shares in Wanandege and KTDA in trust for themselves and for the other beneficiaries.

3. On 3rd of February, 2015 Marita Mkazia and Heman Shunza filed Summons for Revocation of the Grant that was issued on grounds that they were 1st widow and son of the deceased and had been left out of these succession proceedings and that on the 22nd of January 2015, a third party now third Respondent fenced L.R. No. Kakamega/Cheptulu/615 where they reside and threatened to evict them yet the 1st applicant has been living on the premises and continued to do so since the death of her husband. It is their contention that the grant was obtained fraudulently by making of false statements.

4. Several affidavits in opposition were filed. Important is that of the 1st Respondent who is the only one who testified and informed the court that her co-administrator who is her first son with the deceased has since died.

5. In her response to the application dated 5th February 2015 the 1st Respondent informed the court that alongside her children she lived in the two parcels of land. She did not know the Applicants and the 2nd applicant only appeared on the 16th of February 2015 armed with a court order. She admitted having sold L.R. No. Kakamega/Cheptulu/615 and stated further that L.R. No. Kakamega/Cheptulu/613 is unoccupied and the Applicants could get a share of the same.

6. Notable is that both parties did agree that the grave of the deceased and his mother are in property L.R. No. Kakamega/Cheptulu/615.

7. At the hearing the 2nd Applicant and the Respondent/Administrator gave evidence.

The 2nd Applicant informed the court that neither him nor his mother who is the 1st wife of the deceased were informed when the Respondent filed for the petition of grant of representation. It was also his evidence that his mother remains in occupation of her matrimonial home which is L.R. No. Kakamega/Cheptulu/615 and that they only learnt of this process when the 3rd Respondent attempted to fence off the land and when they reported the matter to the District Commissioner who summoned the 1st Applicant and the 1st Respondent but the 1st Respondent failed to turn up. It was his case also the 1st Applicant occupies in 615 whereas the 2nd Respondent occupies 613 which division was earlier done by the clan.

8. In her evidence the 1st Respondent admitted that she knew the 2nd Applicant Heman as her husband's child. She indeed claimed to have lived with him. She denied knowing the 1st Applicant and stated that as she got married the 1st Applicant had left the home. She produced a marriage certificate to prove that she got married in church. She, also admitted having sold the shamba as alleged and went ahead to state that the deceased had instructed Heman and her son share Kakamega/Cheptulu/613.

9. For now the court is being asked to revoke and annul the grant as the Petitioners had concealed important information from court. From the evidence of both sides the 2nd Applicant Heman is the first son of the deceased. His existence was concealed from the court and his input in the matter excluded. There is no evidence in this court to show that Heman's mother had left her home when the 1st Respondent got married or at any time but there is evidence that when the 3rd Respondent attempted to fence off and take occupation the matter 1st Applicant reported to the authorities as her occupation was threatened.

10. Section 76 of the Law of Succession Act empowers this court to revoke or annul a grant of representation whether confirmed or not if the said grant was obtained fraudulently by making of a false statement or by the concealment from the court of material facts.

11. The existence of the Applicants though material was concealed. Further even if the 1st Applicant is to be ignored, no consent of the 1st born son of the deceased was obtained at any stage of the proceedings neither his interests considered. He was entirely excluded from inheriting his father. The averments in the 1st Respondent's replying affidavit and her evidence before court are completely at variance. She is certainly not trust worthy. She admits that the 2nd Applicant is the deceased's son and does not explain why she excluded him in the proceedings.

12. Consequently the grant issued on the 27th of October, 1991 and confirmed on 9th of June 1993 is hereby revoked. The Land Registrar Kakamega is directed to ensure that title numbers Kakamega/Cheptulu/613 and Kakamega/Cheptulu/615 revert back to the name of the deceased. All other assets likewise do revert back to the name of the deceased pending further orders of this court.

13. As for the third Respondent he failed to present his case before the court. He is at liberty to pursue his matter elsewhere if he so desires.

14. Due to the conduct of the 2nd Respondent she is not fit to remain an administrator. The court hereby appoints Heman Shunza as the administrator herein and directs him within the next 90 days of the date hereof to apply for a fresh confirmation of the grant.

15. The Deputy Registrar is hereby directed to issue a fresh grant as directed.

16. Costs to the Applicants.

DATED AND DELIVERED IN NAIROBI ON THIS 5TH DAY OF MARCH, 2020.

ALI-ARONI

JUDGE