



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO 3057 OF 2014

AND

IN THE MATTER OF THE ESTATE OF WILLIAM SAPURO KEMANAA(DECEASED)

JUDGMENT

1. The deceased herein, William Sapuro Kemanaa died intestate on the 5th of May, 2013 in Kajiado within the Republic of Kenya and, on the 20th of February 2017 the court issued a grant of letters of administration to the following family members; Elizabeth Wajiru Sapuro, Maxwell Tajiri Sapuro, Lenana Sapuro and Naisola William Sapuro, being the deceased first wife, her daughter, son and a son from the second house.
2. In the petition filed in court the following were named as survivors;-
 - a. Elizabeth Wanjiru Sapuro (1st wife)
 - b. Naisola Sapuro(daughter)
 - c. Lenana William Sapuro(son)
 - d. Maxwell Tajiri Sapuro(son)
 - e. Samson Keng'oore Sapuro(son)
3. A few applications have been filed by the administrators in a bid to safeguard the estate. However, the grant is yet to be confirmed.
4. On the 15th November 2018 Moses Ng'ethe on his behalf and that of John Joshua Ole Kemanaa filed an Affidavit of Protest, claiming to be sons of the deceased and his first wife Elizabeth Wanjiru Sapuro and seeking to be recognised as beneficiaries of the deceased estate.
5. The duo claim that when the deceased married their mother in 1965 the two were 3 and 1½ years of age respectively, and in line with Maasai culture the deceased took them in as his sons, maintained them, paid their school fees, circumcised them, married them off and participated in giving names to their children. That the deceased considered them as his sons, and they participated in his burial arrangement including his burial and were recognised as such in his burial programme. They urge that in the circumstances, and bearing in mind the fact that the deceased acquired parental responsibility over them, they ought to be considered alongside his other heirs in the distribution of his estate.
6. The administrators do not seem to read from the same script as the said protest seems to have divided them. Elizabeth and her daughter Naisola support the protest yet Maxwell Tajiri and Lenana Sapuro are on the opposite side.
7. The issue therefore before court is whether the protestors have made out a case to be considered as dependants and heirs of the deceased.
8. The position taken by the two protestors, Elizabeth Wanjiru Sapuro, Naisola and their other witnesses who testified in support of the protestors is that since Elizabeth got married to the deceased in 1965 she moved in with her two sons; the protestors then aged 3 and 1½ years respectively and the deceased acquired parental responsibility over the two as he considered them his sons. And that upon the deceased and Elizabeth getting their own children the two continued living together as one large family consisting of Moses, and John the protestors and the other three children; Lenana, Naisola and the late Marset. Further that the deceased maintained, and educated all the five children without any discrimination, participated in their circumcision ceremonies and had indeed rented a house far from home so as to stay with Moses before Moses joined a boarding school in Ngong. As regards JK, he is of unsound mind since the age 15 years, he harboured no

intentions of harming or killing the deceased at any time, and indeed the deceased had ensured that J was medically taken care of.

9. Both Elizabeth and Naisola confirmed that the two Protestors participated in the deceased burial as sons would and considered as such in his eulogy.

10. It was also the case for the protestors that they did not interact closely with the 2nd family, the second wife was never formally introduced to 1st family the sons of the 2nd wife came much later in the deceased life and may not appreciate the setup of the first family.

11. On the other hand, the position taken against the protestors by Lenana, Tajiri and their witnesses is that the protestors do not form part of the deceased family as the deceased did not consider them as such, he never took parental responsibility over the two and they ought not be considered as his heirs. Further the two protestors were not in good books with the deceased, they did not participate in his burial and were not considered as his sons during the burial. They further contended that in the event the deceased paid for the protestors education and maintenance, he did so out of sheer kindness which ought not to be mistaken.

12. Section 3(2) of the law of succession Act (“the Act”) provides as follows;

“Reference in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and in relation to a male person, any child whom he has expressly recognised or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility”

13. Whether or not the deceased took over parental responsibility over the protestors and treated them as his children is indeed a matter of fact to be established by way of evidence.

14. Elizabeth the first widow informed the court that her husband took responsibility over the protestors as soon as he married her, in that the deceased circumcised the two, paid school fees and was a father in all ways. She was supported by her husband’s sister in law, a long-time neighbour and her daughter.

15. In evidence both Tajiri and Lenana produced a letter dated 6th November, 1992 written by the officer in Charge Namanga Police Station and addressed to the director Mathare Mental Hospital in reference to John Joshua Kimanaa stating that he had burnt his father’s house an indication of his state of mind which supports the assertions made by Moses, Elizabeth and Naisola.

16. The said letter confirms three things, firstly John Joshua did burn the deceased house. Two, the said person was indeed mentally ill. Thirdly the deceased considered him his son and reported as such to the police.

17. The current chief of the area where the deceased resided, who was a witness for Tajiri and Lenana in his own words stated that he became a chief in 2007, and did not know how the first family lived since 1965. He equally stated that he did not know whether the deceased took parental responsibility over the protestors or not.

18. The court was not impressed by Mingati Kisarmoi. He did not come out as a truthful and credible witness. As a close relative of the deceased he ought to at least have known the undisputed facts such as his aunt Elizabeth come to his uncle with two young children when she got married a fact agreed upon by all parties and acknowledged by extended family member

19. The court found Elizabeth and her Daughter Naisola to be truthful and credible. Naisola who stands to get less of her father’s estate from their mother’s side if her brothers are considered heirs was very clear that all five children from her mother were brought up together, taken to same schools and treated the same by the deceased. She agreed with her mother that the protestors were circumcised in the Masai tradition by the deceased and the deceased had gone further to get a house in Ngong far away from home to stay with Moses when Moses had been admitted at Masaai Technical for his secondary school before he got boarding school facilities. This was not controverted. And admittedly a father would only do this for a son!

20. In my view the first widow and her daughter made serious statements of facts that were not controverted by any credible evidence.

21. Though Lenana and Tajiri did not agree with their mother and sister, their disagreement is based on the fact that no school fees receipts were brought forth, they allege the deceased did not maintain the two, had asked them to set their homes far, did not circumcise the two and never invited them to any family gatherings. In ordinary life receipts for payment of school fees and maintenance would not be kept and not for several decades. Further, the court tends to believe Elizabeth when she stated that her husband paid school fees and maintained all her children including the protestors to the extent that he rented a house far from home just to be with Moses when he first went to secondary school. The court equally believed her when she said the deceased circumcised the two in accordance with Maasai culture. Naisola Elizabeth’s daughter corroborated the evidence by her mother and the protestors.

22. A program was produced by the protestors of their participation and recognition as sons in the funeral of the deceased. Naisola confirmed their participation and recognition. She struck the court as not only being eloquent but as a forthright person telling nothing but the truth. The court disregarded therefore the 2nd programme exhibited by Tajiri and Lenana.

23. After analysing the evidence of the witnesses, considering submissions by counsel on record and the law the court is convinced on a balance of probabilities that, the deceased upon marrying the protestors mother, he took up parental responsibility over them, by maintaining them, educating them, circumcising them, marrying them off and naming their children all these having recognised them as his sons and as such they fall under the definition of children under Section 3(2) and are dependants within Section 29 of the Act.

24. Therefore the court does find and declare the protestors dependants and heirs of the estate of the deceased herein and directs that they should be considered and provided for in the distribution of the estate of the deceased alongside other heirs.

25. This being a family matter each party will meet their own costs,

DATED and DELIVERED in NAIROBI this 27th day of May, 2020.

ALI-ARONI

JUDGE