



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 40 OF 2014

IN THE MATTER OF ESTATE OF ALPHONCE MUSINE AMARE (DECEASED)

AND

FLORENCE MAKUTSA MUSINE PETITIONER

VERSUS

BERNADETTE MMBWANI MUTONGOI PROTESTOR

RULING

1. The petitioner in this succession cause has filed summons for confirmation of grant dated 1st April, 2016 seeking to distribute the deceased's parcel of land No. Isukha/Shirere/2659 as follows:-

Florence Makutsa Musine-(petitioner) - 1.01 Ha

Bernadette Mmbavi Mutongoi(protestor) - 0.08 Ha

2. The protestor filed an application opposing the mode of distribution proposed by the petitioner vide an affidavit of protest dated 8th September, 2016 on the grounds that she had purchased a parcel of land from the estate of the deceased measuring 0.36 Ha. She urged the court to make provision of her share of 0.36 Ha.

3. The petitioner was represented by **Mr. Mukavale, Advocate**, while the protestor was unrepresented.

4. The protest proceeded by way of *viva voce* evidence. The protestor testified as PW1 and called three witnesses - Josphat Masinde Munai PW2, Kizito Indech Alusio PW3 and Anthony Shiaba PW4. The petitioner testified and called one witness.

5. It was the evidence of the protestor that in the year 1990 the deceased sold her a parcel of his land parcel in the presence of his mother and a brother. That the deceased had also sold a parcel of land to one Evans Karani. She bought the parcel sold to Evans Karani to add to what the deceased had sold her. She says tht she is in occupation of both parcels.

6. PW2 testified that the deceased was his co-villager. So is the protestor. That sometimes back the deceased had sold him a portion of his land. He was unable to complete payment and they revoked the agreement. The protestor then bought the land. She built a house on the land. That the late Evans Karani had also bought land from the deceased. Evan's money was refunded. The protestor then bought the parcel of land that had been sold to Evans.

The witness however said in cross- examination that he was not present when the sale agreements between the sellers and the buyers were made but that he came to learn of the sale.

7. PW3 testified that he is a mason. That the deceased was his village-mate. So is the protestor. That sometimes back about 20 years ago the protestor contracted him to fence a piece of land that she had purchased from the deceased. He went to do the work. He was shown the boundary by the deceased, his mother Anota and a brother called Henry. He fenced the land. That at the time that he fenced the land the deceased had separated with his wife, the petitioner who had gone back to her parents. She was not there when he fenced the land. Later on the decease died. The petitioner returned to the home of the deceased and started to stay with the deceased's mother and Henry. Later her mother-in-law and Henry died.

The witness said that the fence is todote the way he fenced it.

8. PW4 stated that he is a son to the protestor. That his family lives on the subject land that his mother bought more than 20 years ago. That the land is fenced. The fence is still the same way as when it was fenced. However that he was not there when the land was bought or when it was fenced.

9. In her evidence the petitioner admitted that the protestor is occupying part of the deceased's land. That she has been in occupation of the land for a long time. However that she does not know the circumstances under which she came into occupation of the land. That she does not know whether her late husband sold the parcel of land to the protestor. That the deceased did not tell her of any such sale. She denied in cross-examination that she had at any time separated from her husband.

10. The petitioner's witness DW2 stated that the late Evans Karani was his brother-in-law. That Evans Karani had bought a parcel of land from the deceased herein. That Evans sold the land to the protestor. However that he is not aware that the petitioner had purchased some other land from the deceased himself.

11. The petitioner in her summons for confirmation of grant indicated that the protestor's share is 0.08 Ha. She contended that the protestor was occupying 0.08 Ha on the ground. The protestor on the other hand contended that she was occupying 0.36 ha. The court ordered the parties to send a surveyor to the land to ascertain the size of land that the protestor was occupying on the ground. A surveyor's report was filed that indicated that the protestor is occupying 0.35 Ha.

12. I have considered the grounds in support of the application and the objection thereto. The protestor in her affidavit of protest annexed copies of sale of land agreements between her and the deceased and the late Evans Karani.

13. The sale agreement with the deceased shows that the deceased sold her that parcel of land in 1990. The sale agreement with Evans Karani shows that the petitioner bought that parcel in 1998 which was after the death of the deceased. PW3 in his evidence stated that he fenced the land that the protestor had bought during the lifetime of the deceased. The deceased died in 1995. If PW3 fenced the land during the lifetime of the deceased it means that what he fenced did not include what was bought from Evans Karani as that parcel was purchased after the death of the deceased.

14. That notwithstanding, the evidence of the protestor that she bought land from the estate of the deceased was not challenged. The protestor came into occupation of the land during the lifetime of the deceased. That means that the deceased had sold her land. The petitioner's witness, DW2 confirmed that the deceased had sold land to Evans Karani which land the protestor purchased from Evans Karani. That shows that the protestor bought two parcels – from the deceased and from Evans Karani.

15. All what the petitioner could say is that she does not know the circumstances under which the protestor came into occupation of the land. She never offered any evidence to challenge the evidence of the protestor that she bought the two parcels of land. I find that the protestor purchased the land in issue.

16. The petitioner contended that what the protestor was occupying on the ground was 0.08 Ha. The surveyor's report indicates that the protestor is occupying 0.35 ha. That being the case I have no hesitation to hold that what the protestor bought from the estate of the deceased measured 0.35 Ha. It is clear that there has never been any dispute over the size of land that the protestor bought until when the petitioner filed the summons for confirmation of grant herein on the 1st April, 2016. The petitioner has not proved that the protestor bought only 0.08 Ha.

17. In the foregoing, I find the protestor's entitlement in the estate of the deceased is 0.35 Ha. The protest is allowed and the estate of the deceased distributed as follows:-

Bernadette Mmbwani Mutongoi - 0.35 Ha

Florence Makutsa Masine - The Rest

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Petitioner

Petitioner - absent

Protestor - absent

Court Assistant - Polycap

30 days right of appeal.