



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 749 OF 2013

IN THE MATTER OF THE ESTATE OF JOTHAM AMBAKA GUDAHI (DECEASED)

BETWEEN

AMBAKA AFANDI ELIZABETH.....PETITIONER

VERSUS

PAULINE CHELAGAT KOECH.....PROTESTOR

RULING

1. The protestor, Pauline Chelagat Koech, has filed a protest dated 5th December, 2018 in which she protest against the confirmation of grant of letters of administrated made to the petitioner, Ambaka Afandi Elizabeth on the 4th November, 2014 on the grounds that she is a daughter-in-law to the deceased in these succession proceedings, the late Jotham Ambaka Gudahi by virtue of being a widow to the deceased's late son, **Henry Kagali Ambaka**. The protest was supported by her affidavit sworn on 5th December, 2018. The same was however opposed by the petitioner through her replying affidavit sworn on 11th March, 2020.
2. Directions were taken on 12th March, 2020 that the protest proceeds by way of written submissions. The protestor was represented by the firm of **Mukabane & Kagunza, Advocates** while the petitioner was represented by the firm of **Risper Arunga & Co. Advocates**. None of the parties called any witness in the case.
3. The estate in dispute comprised of land parcel Kakamega/Sergoit/30 measuring 22.5 Ha. The court vide a certificate of confirmation dated 4th November, 2014 distributed the property as follows:-

Joseph Gudahi Ambaka - 6 Acres

Mathew Ambaka Mugatsia - 0.2 Acres

Solomon Chamwada Ambaka - 2 Acres

George Mise Ambaka - 3 Acres

Beatrice Jahenda Chuchu - 0.9 Acres

Zelipher Ambaka Minayo - 0.8 Acres

Ambaka Afandi Elizabeth - 1.6 Acres

Everlyne Midika Ambaka - 0.9 Acres

Evans Vulimu Ambaka - 1.9 Acres

Victor Mise Ambaka - 1.9 Acres

Meshack Changilwa - 1.9 Acres

Erick Akivaga Mugatsia - 2 Acres

Dennis Gudahi - 2 Acres

Nelson Ambaka - 2 Acres

Edwin Changilwa Kagali - 3 Acres

4. The contention of the protestor as captured in her supporting affidavit is that she had two children with him her deceased husband – Edwin Changilwa and Magdalene Kadenyeka. That while her son Edwin Changilwa was catered for in the distribution of the estate, she and her daughter Magdalene were left out. That the petition of letters of administration was filed without her knowledge. That as daughter-in-law to the deceased she is entitled to benefit from his estate. That all beneficiaries entitled to inherit the estate have not consented to its distribution.

5. The protestor further depones that the petitioner has intermeddled with the estate of the deceased by secretly selling it to other people. That the petitioner has not accounted for income received from commercial properties of the estate and therefore that there is no need for accounts to be taken and all assets included. She further depones that after the death of her husband, the petitioner demolished the house where she used to live with her late husband and chased her away together with her children. She accordingly sought for orders that:-

(a) She be heard on the proper distribution of the deceased's assets.

(b) That she be included as a beneficiary to the estate of the deceased.

6. The protestor annexed some documents in support of her motion including a funeral programme for her late husband indicating that she was named in the programme as the widow to her late husband, photographs of her attendance, a letter from the chief indicating that she was a widow to the deceased and copies of birth certificates for Edwin and Magdalene indicating that they were children of her deceased husband.

7. The petitioner on her part stated in her replying affidavit that the protestor was not a wife to the late Henry Kagali Ambaka and that she is married elsewhere where she lives. That the protestor had only one child with the late Henry Kagali, namely Edwin Changilwa. That after the death of Henry their clan deliberated and agreed to adopt Magdalene Kadenyeka and take care of her education and upkeep. That on 13th October, 2012, a traditional dowry was paid for the two children. A copy of an agreement to prove the same was annexed to the replying affidavit.

8. The petitioner denied that she has intermeddled with the estate of the deceased. She denied that she has received any income from any commercial properties of the estate. She urged the court to dismiss the protest.

Analysis and Determination –

9. The protestor is staking a claim on the estate of the deceased as a daughter-in-law. Section 29 of the Law of Succession Act provides for the persons who can stake a claim on the estate of a deceased person. Such people must be dependants of the deceased before his death. A “dependant” under the Section is defined to mean:-

“The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(a) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(b) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

10. The said section does not name a daughter-in-law as a dependant. In that case a daughter-in-law can only claim the estate as a dependant of her husband. In **Re Estate of Catherine Nduku Malinda (Deceased) (2020) eKLR** it was opined that:-

“In my view, a daughter-in-law may lay a claim as a beneficiary not in her own right but as a legal representative of a deceased son. In other words, the legal representatives of a deceased's dependants may properly stake a claim to the estate of a deceased person on behalf of legally recognized dependants.”

11. A similar view was held in **Re Estate of Muniyua Mbeke (Deceased)** where it was held that:-

“The clear wording of Section 29 of the Act does not include daughters in law of the deceased. Daughters-in-law are not children of the deceased, and therefore they do not fall within the category of the children of the deceased. They therefore cannot mount an application under Section 26 of the Act as the applicant has done in this case.”

12. The protestor then can only claim a stake in the estate of the deceased herein if she proves that she is a widow to the late Henry Kagali Ambaka, who was a son to the deceased herein. The question is whether the protestor adduced sufficient evidence to prove this.

13. The evidence that the protestor placed before the court to prove that she was married to the late son of the deceased, Henry Kagali Ambaka were the Chief's letter, funeral programme of the late Henry Ambaka and photographs taken during the funeral showing her

attendance of the funeral. The Chief's letter and the funeral programme indicated that the protestor was a widow to the deceased.

14. The petitioner contends that the protestor was not married to Henry Kagali. She stated that after the death of the said person a traditional dowry had to be paid for the children sired between Henry Kagali and the protestor so as to recognize the children of the said deceased. The petitioner annexed a document that shows that dowry was paid for the two children. The protestor did not challenge the said document as she never made a reply to it. The court therefore has no reason to doubt the truthfulness of the contents thereof. If then the protestor was married to the late Henry Kagali before his death, why would there have been need to pay dowry for the children after his demise?

15. The marriages that are recognized by the law include customary, Christian and civil marriages. The protestor has not shown that she was married to Henry Kagali in either of these marriages or any other marriage recognized by the law. Neither a Chief's letter nor mere attendance of a funeral or being named in a funeral programme can by themselves prove marriage.

16. The son to the protestor, Edwin Changilwa, was provided for during the distribution of property whereby he was given 3 acres. The birth certificate for Magdalene Kadenyeka shows that she was born in the year 1999. She is thereby above the age of 18 years. She has not made any claim on the estate. The protestor has not filed any document from her to show that she has her authority to make a claim of the estate on her behalf. The protestor cannot thereby purport to have filed the protest on behalf of her daughter when there is no such authority to do so. In the same vein the protestor cannot purport to have filed the claim on behalf of her son Edwin who is also above the age of 18 years and has not made any further claim on the estate. Edwin did sign the consent form agreeing to the distribution. The consent indicated that he was aged 20 years in 2013. He has not given any authority to the protestor to file the protest on his behalf.

17. The distribution of the estate was done in 2014. The protestor cannot pretend that she has not been aware of the distribution all this time when in fact her son was one of the beneficiaries. I can only conclude that the protest was filed as an afterthought. It is clear that the protestor only got children with Henry Kagali out of wedlock. She is not his widow. Neither is she a daughter-in-law to the deceased herein. She has no entitlement to the estate of the deceased.

18. The upshot is that the protestor has not established that she is a daughter-in-law to the deceased. The protest has no merit. The same is dismissed in its entirety.

Orders accordingly. Each party to bear its own costs.

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

J. NYAGA NJAGI

JUDGE

In the presence of:

No appearance for Protestor

No appearance for Petitioner

Parties: Absent

Court Assistant - Polycap