



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 417 OF 2015

IN THE MATTER OF THE ESTATE OF ALFAYO AMBALWA MUSUNGU (DECEASED)

JUDGMENT

1. This matter relates to the estate of Alfayo Ambalwa Musungu, who died on 12th July 1980, going by the certificate of death lodged herein, serial number 119001, dated 12th January 1984. According to the letter from the Chief of Kambiri Location, dated 27th May 2015, the deceased had been survived by a widow, an in-law, an uncle and six sons. The widow was said to be Ridah Imeli Ambalwa, while the in-law was said to be Enes Khavayo Shejembekho, and the uncle was named as Jason Asibwa Musungu. The sons were listed as Jared Musungu Ambalwa, Mathesula Shiembekho Ambalwa, Manoah Achesa Ambalwa, Livestone Shikhovolo Ambalwa, Joseph Shokhovolo and Titus Ambani Ambalwa. He was said have had died possessed of a property known as Isukha/Lubao/451, also referred to as Kakamega/Lubao/451.

2. Representation to his estate was sought vide a petition lodged herein on 13th July 2015, by Rida Imeli Ambalwa, in her capacity as widow of the deceased. In the affidavit sworn in support of the petition, the deceased is expressed to have had been survived by the widow, the in-law, the uncle and the six sons listed in the Chief's letter. He is also expressed to have had died possessed of Isukha/Lubao/451.

3. Before the filing of the cause could be publicized through the *Kenya Gazette*, an application was filed herein, dated 10th December 2015, by Enesi Khavayo Shejembekho, a sister-in-law of the deceased. She averred that Isukha/Lubao/451 was family land held by the deceased on behalf of the family including of hers. She stated that she was in occupation of the land with her children. She further stated that the deceased died a polygamist, having had married the petitoenr and the late Sofia Mutondo Ambalwa. She averred that the late Sofia Mutondo Ambalwa, had six children with the deceased. She contended that her family and that of the late Sofia Mutondo Ambalwa had been left out of the process. She sought that she be appointed administratrix jointly with the petitioner.

4. Eventually, a grant was made in the matter on 8th August 2016, to the petitioner, Ridah Imeli Ambalwa, who I shall refer hereafter as the administratrix.

5. The administratrix then lodged herein a summons for confirmation of her grant. The application is dated 4th January 2018. She identifies the survivors of the deceased as the persons listed in her petition, and proposes distribution of Isukha/Lubao/451 in defined proportions.

6. An affidavit of protest was lodged on 19th February 2018 to the said application, by Enesi Khavayo Shajembekho, who I shall refer hereafter as the first protestor. She avers that her late husband, Zakaria Shembekho, was a brother of the deceased, and the property in question had been held by the deceased in trust for her late husband. She also avers that the administratrix had a co-wife, who had children. She argues that the proposed distribution was unfair on the ground. She states that the administratrix and her children stay on one section of the land, while she, the first protestor, and her children were residing on another portion. She states that the distribution proposed by the administratrix could mean that some of the occupants of the land would be evicted or existing boundaries destroyed. She proposes a distribution that caters for the in-law and uncle, and the administratrix and the sons of the deceased.

7. There is another affidavit of protest on record, sworn by Joseph Shikhovolo, who I shall refer to hereafter as the second protestor, on 5th November 2019. He avers that he, the first protestor, the administratrix and her children were all in occupation of Isukha/Lubao/451. He states that the deceased was a polygamist, having married twice, first to the administratrix, and secondly to his mother, the late Sophia Matondo Ambalwa. He avers that his late father held the property, Isukha/Lubao/451, in trust for the late husband of the first protestor, Zacharia Shembekho. He avers that the administratrix and her children lived on the land, while he and the first protestor occupied a separate parcel of land whose details are not disclosed. He states that there are clear boundaries marked on the ground. He proposes that the property be shared out between himself, the first protestor and the administratrix on behalf of their respective families. He proposes that the boundaries should remain uninterrupted and that a surveyor should first confirm measurements of the land as occupied by the respective parties.

8. Directions were taken on 13th March 2018 and 16th July 2018, that the said summons for confirmation of grant be canvassed by way of oral evidence, based on witness statements to be filed and exchanged.

9. The oral hearing happened on 26th June 2019. The first protestor, Enesi Khavayo Shejembekho, national identity card number 5678227,

was the first to take the witness stand. She stated that she just wanted her share of the farm, saying that the land was shared out, and that she just wanted her number. She said her share was two acres, which she should share jointly with Jason Asibwa Musungu. She said that the deceased was her brother-in-law, her husband having been a brother of the deceased. She asserted that the land she occupied was what her late husband was entitled to. She denied that her husband had been given land elsewhere which he sold. She denied that she was occupying Isukha/Lubao/451 as a matter of charity on the part of the administratrix. She stated that the land at Rosterman was sold by the deceased, and not by her late husband. She stated that she had daughters, and so did the administratrix. She also stated that her co-wife had her own children. She said that she did not know the administratrix's children. She insisted that the administratrix should not be the one to distribute the estate, and that it should be her, the first protestor, to share out the property. She asserted that the property did not belong to the deceased, and that the only thing connecting him to it is that he was just buried there, and he was buried there awaiting distribution of the estate. She said that the deceased was merely taking care of the property, otherwise the property did not belong to him. She stated that she did not agree with the distribution proposed by the administratrix and begged the court to assist in getting the parties to have a fair distribution. She insisted that it was the village elders who had shared out the land.

10. The first protestor called Athanas Mutobo Lisutsa, national identity card number 1172667, as her witness. He identified the administratrix as the first wife of the deceased, while the first protestor was a sister-in-law of the deceased. He said that from what he knew it was the widow and not the sister-in-law who should dictate how the estate of her late husband is to be shared out. He further said that he did not agree with the distribution proposed by the administratrix, explaining that the land formerly belonged to the father of the deceased, and, therefore, the land ought to be shared out equally between the family of the deceased and that of the first protestor. When shown a copy of the official search certificate of the land, dated 27th February 2017, he confirmed that the land was first registered on 16th July 1974, in the name of the deceased.

11. The case of the administratrix opened on 12th November 2019, with the administrator, Ridah Imeli Ambalwa, national identity card number 5677691, being the first to take the stand. She described herself as the widow of the deceased, while the first protestor was a widow of a late brother of the deceased. She described the second protestor, Joseph Shikhovolo, as a son of the deceased, his late mother having been a wife of the deceased. She confirmed that she and the two protestors all used the land. She explained that not all of her children used the land, since some had bought land elsewhere, but she insisted that she wanted all of them to get a share in the land. She stated that the boundaries on the ground had been fixed by the parties after the deceased died. She said she wanted the property shared equally. She said the two protestors had been allocated land in her proposal, including Jason, a son of the first protestor. She explained that she was allocated a larger share because she had daughters. She insisted that the land belonged to the deceased, and asserted that she was only allocating a share to the first protestor's family because it has lived on the land for a long time. During cross-examination, she said that the first protestor was the first person to be married into the family. She asserted that the first protestor had land at Rosterman, whose reference she could not recall. She stated that the first protestor sold the land at Rosterman and then came to claim a share of Isukha/Lubao/451. She said that the first protestor lived on Isukha/Lubao/451, but explained that the two of them did not live in peace. She said that the land had not been shared out, and that there were no boundaries between the three sides. She said that Sophia was her co-wife, and that she had put all the children together. She said that she had eight daughters, while her co-wife, Sophia, had five daughters. She asserted that it would be wrong to share out the land between the two houses, hers and Sophia's, taking into account the number of children in each house. At re-examination, she said that the first protestor was not on Isukha/Lubao/451, but at Rosterman. She insisted that the land had not been shared out, and that that was the reason why she was in court. She insisted that the first protestor had her own land, which she sold. Regarding the second protestor's case, she said that Sophia's children did not live on the land, and that all of Sophia's daughters were married.

12. The second protestor testified last. He stated that the deceased was his father, the administratrix was his stepmother, while the first protestor was the widow of his late uncle. He stated that he had never heard that the first protestor ever lived at Rosterman. He said that when his late uncle was brought to their home at Isukha/Lubao/451, while sick, he, the second protestor, had not yet been born. He said that the first protestor lived in a grass thatched house, which collapsed, forcing her to move and occupy his late grandmother's house. He said that both his uncle and the deceased were buried on Isukha/Lubao/451. He explained that the house belonging to the first protestor was not near or next to where her husband was married, but the house of the administratrix was close to the grave of the deceased. He explained further that he was opposed to the distribution proposed because some of his sisters were not married, yet they had not been provided for. He said that the land had been shared out between the three families, and that it was after that that they came to court for endorsement. He said that he was not aware that it was wrong to share the land out before confirmation of the grant. He said the demarcation was done on 20th November 2004, after the deceased had died. He confirmed that they had not obtained leave of court to do so. He said that the deceased had a total of fourteen children. He said he would accept equal distribution amongst the children.

13. At the end of the oral hearings, the parties agreed to file written submissions. In the end, all the parties lodged their respective written submissions in court.

14. The administratrix's written submissions are dated 20th January 2020, and were filed herein on even date. The main legal point made in the submissions is that the first protestor was not an heir of the deceased. Her case was founded on trust, that the deceased held Isukha/Lubao/451 in trust for her late husband, and on the basis that she had lived on the land for a long time, with her son Jason. It is submitted that the High Court had no jurisdiction to determine issues relating to trusts and adverse possession. It is further submitted that the protest was misplaced, and that the first protestor was better off before the Environment and Land Court. Regarding the protest by the second protestor, it is submitted that he is a son of the deceased and he had been provided for. It is asserted that the deceased held a first registration with respect to Isukha/Lubao/451, and there was no trust noted in the register.

15. The administratrix has cited the decisions in *In re Estate of the Late Jonathan Kinyua Waititu – (Deceased)* [2017] eKLR, *In Re Estate of Murobi Kamucheru (Deceased)* [2010] eKLR and *Bernard Kamau Ngacha vs. Hannah Wairimu Gatembu* [1998] eKLR, to support her case. The court in *In re Estate of the Late Jonathan Kinyua Waititu – (Deceased)*(supra), found that a claim founded on trust was not one for determination by a probate court in succession proceedings. It was held similarly in *In Re Estate of Murobi Kamucheru (Deceased)* (supra), with the rider that where such a claim arises in probate proceedings, the fair order to make would be to suspend confirmation of the grant pending determination of the claim based on trust by virtue of Rule 41(2)(3) of the Probate and Administration Rules.

16. The first protestor's written submissions are dated 6th July 2020, and were filed in court on 29th September 2020. It is submitted that the family of the first protestor had been in occupation and had used the land in question. It is further submitted that the land was registered in

the name of the deceased but in trust for his younger brother, the late husband of the first protestor. It is further submitted that there is jurisdiction, through section 47 of the Law of Succession Act, Cap 160, Laws of Kenya, for the High Court to decide on the matter. It is asserted that Isukha/Lubao/451 was ancestral land, and that during land adjudication and consolidation it was registered in the name of the deceased to hold in trust for his late brother. The decision in *Alice Wairimu Macharia vs. Kirigo Philip Macharia* [2019] eKLR in support of that contention.

17. I will start by addressing the first protest. It is not disputed that Isukha/Lubao/451 is registered in the name of the deceased, and the first protestor was neither a child nor widow of the deceased. She claims a stake on the basis of trust that the land registered in the name of the deceased was so registered in trust for his brother, her late husband. The immediate survivors and heirs of the deceased are his immediate family, his wife and children. His brother and his family are in a secondary tier, and can only claim against the estate in special circumstances, such as in the instant case, where a trust is alleged. The alleged trust is denied by the administratrix. If it had not been challenged there would have been no issue, and I would have just gone ahead to distribute the estate. However, the said alleged trust is contested, and the first protestor has to establish it before the court can honour it.

18. Do I have jurisdiction to declare the trust? I do not think so. In the first place, the claim by the first protestor is founded on the alleged trust, as well as use and occupation of the land. The trust goes to the heart of title to property. The state of the law now is such that the High Court has no jurisdiction to hear and determine disputes that turn on the questions of title to land, and the use and occupation of land. This is by virtue of Articles 162(2) and 165(5) of the Constitution. That jurisdiction now lies with the court established under the Environment and Land Court Act, No. 19 of 2011, known as the Environment and Land Court. The legislation that has been passed, after the promulgation of the Constitution of Kenya, 2010, to govern land, that is to say the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012, recognize, at sections 2 and 101 of the Land Registration Act, and sections 2 and 150 of the Land Act, the Environment and Land Court as the court for the purposes of the two statutes. As it is, therefore, I have no jurisdiction to determine questions that turn around title to land or its use and occupation. Whether the instant property was held in trust by the deceased, and what its use and occupation by the first protestor, portended, are matters that are way out of the jurisdiction of the High Court.

19. I was pointed to section 47 of the Law of Succession Act, on the basis that that provision gives the High Court jurisdiction to determine any disputes that are placed before it with respect to succession to the estate of the deceased. Indeed, section 47 states the jurisdiction of the High Court with respect to the matters that are placed before it founded on the provisions of the Law of Succession Act. Section 47 must be read together with other legislation. It cannot be read in isolation. The mere fact that the issue of trust or use and occupation of land is raised in succession proceedings does not confer jurisdiction on the High Court. when the law, in other statutes, takes away jurisdiction from the High Court with respect to those issues. I derive no jurisdiction at all on the basis of section 47 of the Law of Succession Act to declare a trust in this case or pronounce that the family of the first protestor was entitled to the said property by dint of adverse possession, that is by way of use and occupation. The decisions cited by the administratrix, that is to say *In re Estate of the Late Jonathan Kinyua Waititu – (Deceased)* (supra) and *In Re Estate of Murobi Kamucheru (Deceased)* (supra) are on point. The decision in *Alice Wairimu Macharia vs. Kirigo Philip Macharia* (supra) has no relevance to these proceedings. It turned on a claim by a daughter of a deceased person who had moved the Environment and Land Court to agitate a case of trust in her father's estate, and the court ruled that the said daughter was an heir to her father's estate, and she should have raised that issue in succession proceedings. The first protestor herein is not in the same position with the claimant in that case.

20. The other point, of course, is that, by virtue of Rule 41(3) of the Probate and Administration Rules, probate proceedings are not the proper forum for determination of the question as to whether a trust existed and ought to be declared, or that a party or person became entitled to a property by the doctrine of adverse possession. Even if I had jurisdiction, as High Court, which, unfortunately, I do not have, I would not be able to address or entertain those questions in probate proceedings. The proper thing to do, where such a question arises during confirmation, is that under Rule 41(3) of the Probate and Administration Rules, the disputed property is appropriated and set aside, to allow the claimant to prove their claim in separate and more suitable proceedings. In this case, that would be by commencing action at the Environment and Land Court.

21. The other point is, and I have alluded to it above, that the first protestor is not a child nor spouse of the deceased. She is not an heir of the estate. She does not claim directly as a descendant of the deceased. The only connection between her and the deceased is that she was a widow of the deceased's brother. She is, therefore, asserting a right, which does not accrue to her, but to her late husband's estate. If, indeed, her late husband had a right to Isukha/Lubao/451, on account of a trust or adverse possession, that right accrued to him, and, therefore, to his estate upon his demise, and not to the first protestor directly. She cannot, therefore, intervene in these proceedings without having first of all obtained representation to his estate. She has not demonstrated that she holds a grant of probate to the will of her late husband or a grant of letters of administration of his intestate estate. She can only assert a right to a share of what is due to him through a grant of representation. See generally *Ingall vs. Moran* [1944] KB 160, *Kothari vs. Qureshi and Another* [1967] EA 564, *Lalitaben Kantilal Shah vs. Southern Credit Banking Corporation Ltd* HCCC No. 543 of 2005, *Otieno vs. Ougo and another (number 4)* [1987] KLR 407, *Troustik Union International and another vs. Mrs. Jane Mbeyu and another* [1993] eKLR, *Martin Odera Okumu vs. Edwin Otieno Ombajo* HCSC N9479 of 1996, *Coast Bus Services Limited vs. Samuel Mbuvi Lai* CACA No. 8 of 1996, *Ganinjee Glass Mart Ltd & 2 others vs. First American Bank Ltd* [2007] eKLR, among others. Without such a grant she has no *locus standi* to mount the protest herein, and her protest runs afoul of section 45 of the Law of Succession Act, and amounts to intermeddling with his estate. See *Gitau and Two Others vs. Wandai and Five Others* (1989) KLR 231 and *John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Annah Ndileve Kieti* (2001) eKLR.

22. In view of the above, there cannot be any merit in her protest. At the end of this judgment I shall, however, make orders taking into account Rule 41(3) of the Probate and Administration Rules, to allow her to establish her claim against the estate with respect to Isukha/Lubao/451.

23. I consider next the second protest. The second protestor is a child of the deceased. That is not contested. He is a product of a second marriage of the deceased. That is also not contested. His problem is that the administratrix, who he concedes to be a widow of the deceased, has not disclosed some family members, and had not provided for them in her summons for confirmation of grant. From the oral evidence, it came out clearly that the deceased had daughters, by his two wives, the administratrix and the mother of the second protestor, yet these daughters were not disclosed in the petition as well as the summons for confirmation of grant. The administratrix conceded, at the oral hearing, that there were daughters, but claimed that she had taken care of their interests by allocating herself a share of the estate larger than that of the sons, so as to cater for the daughters.

24. The deceased herein died in 1980, before the Law of Succession Act came into force on 1st July 1981. By dint of section 2(2) of the Law of Succession Act, the substantive law to apply to the distribution of his estate should be the law that applied before 1st July 1981, which was largely the applicable African customary law, which favoured distribution amongst sons, to the exclusion of daughters, except where the daughters were unmarried. That could perhaps explain the non-listing or non-disclosure of the daughters.

25. However, section 2(2) of the Law of Succession Act provides that, although the substantive law for the purpose of distribution of the estate of a person dying before 1st July 1981 was not the substantive provisions of the Law of Succession Act, when it came to administration of such estates, the provisions of the Law of Succession Act applied, in particular Part VII of the Law of Succession Act. Part VII governs administration of estates of persons dying both before and after the Law of Succession Act came into force.

26. Section 51 of the Law of Succession Act is located in Part VII. It provides for the process of applying for a grant of representation. Section 51(2)(g) provides for the information that ought to be disclosed in cases where the estate is that of an intestate, like in the instant case. It requires disclosure of all surviving spouses and children of the deceased. Such persons are to be disclosed whether they are entitled to a share in the estate or not. Section 71 of the Law of Succession Act is also located within Part VII of the Act. It provides for confirmation of grants. The process of confirmation is guided by Rules 40 and 41 of the Probate and Administration Rules, being subsidiary legislation made under section 97 of the Law of Succession Act. Under section 71, and Rules 40 and 41, it is expected and required that there be full disclosure of all the survivors of the deceased, that is to say all the surviving spouses and surviving children, and such survivors are expected, by virtue of Rule 40(8), to execute certain consents.

27. From the record before me, it is clear that there was no disclosure of the daughters in both the petition and the application for confirmation. Their existence was concealed, and it only came to the fore upon the raising of the two protests. Sections 51 and 71 of the Law of Succession Act, and Rules 17 and 40 of the Probate and Administration Rules have not been complied with.

28. Under section 71(2)(a) of the Law of Succession Act, the court is tasked with considering whether to confirm the administrators in office and to confirm their proposals on the distribution of the assets, in cases of intestacy, informed by Part V of the Law of Succession Act or customary law where it applies. The proviso to section 71(2) of the Act is critical. It requires to the court not to confirm the grant, in intestacy, until it is satisfied as to the respective identities and shares of all persons beneficially entitled. In view of what I have stated above, the administratrix did not comply with the said proviso for she had disclosed all the children of the deceased, to the extent that the existence of the daughters was concealed from the court. I cannot proceed to consider the proposed distribution before she first complies with the requirements of the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules.

29. In the end, the final orders that I shall make in this matter are as follows:

(a) That I hereby disallow the first protest to the confirmation of the grant herein, and dismiss the same, with no orders as to costs;

(b) That I hereby appropriate and set aside Isukha/Lubao/451, in terms of Rule 41(3) of the Probate and Administration Rules, to enable the first protestor herein initiate, if she is so minded, proceedings at the Environment and Land Court, to prove the entitlement of her late husband to that property, whether by way of trust or adverse possession;

(c) That the effect of (b), above, is to temporarily remove Isukha/Lubao/451 from the schedule of the assets to be distributed, but the said property shall be liable to reinstatement to the schedule of distribution should the first protestor fail to act in terms of (b), above, within one year from the date of this order;

(d) That I hereby postpone confirmation of the grant herein in terms of section 71(2)(d) of the Act, to enable the administratrix comply fully with the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules;

(e) That towards compliance with (d) above, I hereby direct the administratrix to file an affidavit in which she shall disclose all the daughters of the deceased from his two houses;

(f) That the final orders on the confirmation application shall only be made after the administratrix has complied with (e), above, and subject to (b) and (c), above;

(g) That the matter shall be mentioned thereafter for compliance with (e), above, and for further directions;

(h) That each party shall bear their own costs; and

(i) That any party aggrieved by the orders made herein shall be at liberty to appeal against the same at the Court of Appeal within the next twenty-eight days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF November 2020

W. MUSYOKA

JUDGE