



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

SUCCESSION CAUSE NO. 22 OF 2014

IN THE MATTER OF THE ESTATE OF

EZEKIEL MABEYA KEGORO (DECEASED)

BETWEEN

ISAYA NYAMIRIMBA MABEYA.....APPLICANT

AND

NYABUTI MOMATIA MABEYA.....PETITIONER/RESPONDENT

RULING

1. The deceased, Ezekiel Mabeya Kegoro died on 8th September 2013. He left behind a will date 10th May 2010 which is the subject of this litigation. The deceased's son, Nyabuti Momatia Mabeya ("Nyabuti"), executor of the will, filed the petition for grant of probate. In due course, another son of the deceased, Isaiah Nyamirimba Mabeya ("Isaiah") filed an Answer to Petition in which he denied that the petition was signed by Nyabuti and alleged that the will was a forgery and was not valid as it excluded his daughters and did not include all his properties. In addition, Isaiah filed a Protest Affidavit sworn on 24th October 2017 reiterating the grounds for challenging the will.

2. Isaiah abandoned the contest to the will and proceeded to prosecute the summons dated 21st June 2018 seeking, "*a provision for dependants not provided at all and others not adequately provided for.*" The grounds set out in the deposition in support of the summons is that the deceased's will did not include his daughters, that the family of deceased's son who predeceased him was not provided and certain properties of the deceased were not included in the will.

3. Before I deal with the issues raised in this matter, it is important to set out uncontested facts. The parties agreed that the deceased had five children as follows:

1. Rael Moraa Mabeya – Daughter
2. Samuel Magara Mabeya (deceased) – Son
3. Nyabuti Momatia Mabeya – Son
4. Isaiah Nyamarimba Mabeya – Son
5. Truphen Mokeiraa Mabeya - Son

4. The late Samuel Magara Mabeya ("Samuel") had two wives; Kerebi Minda and Priscah Magara who is also deceased. The children from his first house were Richard Omariba, Musa Nyandusi Magara, Eucabeth Magara, Beatrice Magara, Vincent Ogao Magara, Barongo Magara and Ntabo Magara. The second house had one child; Eucabeth Bosibori Magara.

5. I directed that the summons dated 21st June 2018 be disposed of by oral testimony. On the applicant side, I heard the testimonies of Isaya (PW 1), Truphena (PW 2) and Duke Nyarasi Nyakondo (PW 3). On the petitioner's side I heard the testimony of Kennedy Bosire Gichana (DW 1) and Nyabuti (DW 2).

6. Kennedy Bosire Gichana (DW 1), an advocate of the High Court, testified that he prepared the deceased will and was present when it was

executed. He confirmed that the deceased gave him instructions to prepare the will and duly attended its execution together with two witnesses. There was no suggestion in cross-examination that the deceased did not have capacity to instruct his advocate and execute the will. PW 1 also recalled that when he asked the deceased about provision for his daughters, the deceased told him that he had already educated their children.

7. In the will dated 10th May 2012, the deceased appointed Nyabuti as the executor and trustee. In the body of the will he made the following bequests;

- EAST KITUTU/BOTABARO I/420 measuring 0.9 Hectare to SAMWEL MAGARA MABEYA.
- WEST MUGIRANGO/BOSAMARO/1340 measuring 0.9 Hectare to Nyabuto Momata Mabeya and Isaiah Nyamirimba.
- North Kisii Farm at Cherengany share of land measuring approximately 2 acres to NYABUTI MOMATO absolutely.
- Nyakoigwana Farm share of land measuring approximately 3 1/2 acres to be shared equally between NYABUTI MOMATA MABEYA and ISIAH NYAMIRIMBA MABEYA.
- Shares at Kenya Commercial Bank Limited, share account No. M00192198 to pass to NYABUTI MOMATA MABEYA.
- Share at Ting'a Trading Company Limited to pass to NYABUTI MOMATA and MUSA N. MAGARA jointly.

8. Isaiah testified that the deceased could not have left out his daughters, Rael and Truphena, from his will. He noted that the deceased did not bequeath anything to his deceased brother, Samuel and that the deceased's bank account at National Bank of Kenya was not included in the will. He expressed the view that the court should make provision for those who were left out. Trupena supported Isaiah case and urged the court to divide the property amongst all the deceased's survivors. PW 3 testified that he deceased could not have written a will as he had not informed his children and the elders and the fact was not disclosed at the funeral.

9. Nyabuti testified that the deceased had made provision for Samwel's family. He told the court that while he was alive, the deceased had subdivided EAST KITUTU/BOTABARO 1/420 into Plots 696, 697, 698, 699, 700 and 701. He had given him Plot 701 in 2001, Plots 699 and 700 to Eucabeth Bosibori Magara, his granddaughter, and the rest he retained his name. The deceased told him that the entire property was to be given to Samwel's family and he was in the process of executing the transfer before these proceedings. As regards the account at National Bank, he told the court the account was no longer operational and that it was where the proceeds of tea were paid. He also recalled that the deceased had told him and his sisters that he would not make provision for them as he had educated their children.

10. Since the deceased's will is valid, the issue for determination is whether the applicant and his sisters are dependants and whether I should make reasonable provisions for them out of the deceased's estate. **Section 26, 27 and 28** of the **Law of Succession Act (Chapter 26 of the Laws of Kenya)** provides for application for adequate provision for dependants not adequately provided for by will or on intestacy as follows:

26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.

28. In considering whether any order should be made under this part, and if so what order, the court shall have regard to -

- (a) The nature and amount of the deceased's property;*
- (b) Any past, present or future capital or income from any source of the dependant;*
- (c) The existing and future means and needs of the dependant;*
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;*
- (e) The conduct of the dependant in relation to the deceased;*
- (f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;*
- (g) The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant.*

26. **Section 29** of the **LSA** is set out the meaning of the term 'dependant' as follows:

For the purposes of this Part, "dependant" means—

- (a) 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:

(b) 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

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
[Emphasis mine]

27. The net effect of the aforesaid provision, it that the deceased's daughters cannot be disinherited. Where the testator excludes them from the will, they are entitled to apply for reasonable provision from the estate without proof of maintenance or dependency. The nature of these provisions were summarized in **Elizabeth Kamene Ndolo v George Matata Ndolo NRB CA Civil Appeal No. 128 of 1995 [1996]eKLR** as follows:

This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. Or if a man at the point of his death gives to his mistress the family's only home and makes no reasonable provision for his children who were dependent on him during his lifetime, the court may well follow the mistress, under section 26, and make reasonable provision for the dependent children out of the house given to the mistress. So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for.

28. In determining the nature and extent of the order to make, having regard to the factors set out in **section 28** of the **LSA**, Akiwumi JA, in **John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 Others NBI CA Civil Appeal No. 213 of 1997 [1999] eKLR**, observed that:

In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependant has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs. Without this, the court will not be able to make any sensible order. Whether the deceased has made any advancement to the dependant and the circumstances of the deceased's other dependants are also factors to be considered. The general circumstances of the case including the deceased's ascertainable reasons for not providing for the dependant must also be considered. Which of these factors will play a vital role in their combined effect, depends on each particular case.

29. Since the Rael Mokeira Monene and Truphena Moraa Mabeya are children of the deceased and therefore dependants within the meaning of **section 29** of the **LSA**, the next question is what reasonable provision should be made for them from the estate. Since the grant has not been confirmed, I will reserve the issue and determine it at the time of confirmation of the grant. I have noted that the court issued a grant of letters of administration intestate dated 8th February 2017 instead of a grant of probate.

30. For the reasons I have set out, I allow the Chamber Summons dated 21st June 2018 and order as follows:

(a) I declare **TRUPHENA MOKEIRA MONENE** and **RAEL MORAA MABEYA** dependants of the deceased under **section 26** of the **Law of Succession Act** and are entitled to reasonable provision from the deceased's estate.

(b) The issue for reasonable provision shall be determined at the time of confirmation of the grant of probate and the parties are granted leave to file any further affidavits.

(c) The grant of letters of administration dated 8th February 2017 is hereby revoked.

(d) A grant of probate is hereby issued to **NYABUTI MOMATA MABEYA**.

(e) The executor shall apply for confirmation of the grant within **thirty (30) days** from the date hereof.

DATED and DELIVERED at KISII this 21st day of FEBRUARY 2019.

D. S. MAJANJA

JUDGE

Mr Nyangwencha instructed by Nyangwencha and Company Advocates for the applicant.

Mr Momanyi instructed by Momanyi Aunga and Company Advocates for the petitioner.