



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CAUSE NO. 26 OF 2018

IN THE MATTER OF THE ESTATE OF MARY SIANOI JAMES ALIAS MARY SIANOI ZAKAYO

RULING

Introduction

1. In his summons dated 29/8/2018 the applicant (Edwin Turere Mapelu) seeks the following orders from this court.

1. All rental income in respect of plot No. Narok Township/12 and any other income related to the estate of the deceased be deposited in the account held by the deceased at Equity bank, pending the grant of letters of administration in respect of the estate.
2. The last will of the late Mary Siano James alias Mary Siano Zakayo be declared invalid.
3. An order that the estate of the deceased be administered intestate.
4. Costs of the application be ordered to be costs in cause.

2. The respondents have opposed the application.

The case for the applicant

3. The applicant has deponed to a 12 paragraphs supporting affidavit. The major averments are as follows. The applicant has deponed that the deceased was his mother, who died in a road accident leaving behind 6 daughters and sons. He has also deponed that the deceased left behind a document which she purported to be a will. That document left out some beneficiaries of the estate and some beneficiaries were treated unfairly in the distribution of the estate. He has further averred that the will was unlawfully biased towards the lawful dependants of the deceased.

4. Furthermore, he has averred that the deceased bequeathed property which was not part of the estate. Additionally, he has averred that some members of the deceased are intermeddling with the property of the estate in particular plot No. 12 Narok township, which generates income.

5. He has also averred that the second executor in addition to the applicant is an outside and his appointment is unlawful and discriminatory. Finally, he has averred that the deceased lacked the capacity to make a will. The applicant has also filed a supplementary affidavit dated 15/11/2018, which I have perused.

6. Counsel for the applicant Mr. Meingati filed written submission in which he cited a number of authorities.

The case for the respondents

7. The respondents through Irene Seeme Naeku filed a six paragraphs replying affidavit in opposition to the application. She has deponed to the following major matters. She has averred that their deceased mother left behind a valid will in which she provided for all her children. In that will the applicant being their eldest brother was appointed as the executor along with Emmanuel Masikonde. She has further deponed that the applicant and one of their sisters who are challenging the validity of the will have been given shares in the estate.

8. Furthermore, she has deponed that the applicant is only seeking orders in respect of one property namely plot No. Narok township/12 which was bequeathed to Irene Seeme, Joyce Lanoi, Alexander Lenkai and Timothy Oloimutie Mapelu.

9. Furthermore, she has deponed that the applicant was bequeathed plot No. 100 in Narok Town, which is a commercial plot in respect of which he collects rent. She has further averred that the applicant is being selective in seeking preservation of only one parcel of land and that the application has been brought in bad faith.

10. Counsel for the respondents has filed written submissions in opposition to the application. She has submitted that the deceased left behind a valid will in which she provided for all the beneficiaries. She has further submitted that the deceased before her death had transferred some of her properties to some beneficiaries. She has further submitted that under section 11 (c) of the law of Succession Act a valid will has to be attested by two or more competent witnesses. She has also further cited section 5(4) of the Law of Succession Act (Cap 160) Laws of Kenya that the burden of proving the invalidity of a will lies on the person challenging it. Finally, she has urged the court to dismiss the application on account of being premature.

11. I have considered the affidavit evidence of the parties and the submissions of their counsel in the light of the applicable law and I find the following to be the issues for determination.

1. Whether or not the applicant is entitled to the orders sought.
2. Whether or not the will of the deceased is valid or not.
3. Who bears the costs of this application?

Issue 1

12. The applicant seeks a preservative order in respect of plot No. Narok Township/12 in which the respondents are named as its beneficiaries in the will. The respondents in turn, in their replying affidavit have deponed that the applicant in addition to being the executor of that will is also a beneficiary of plot No. 100 in Narok township. The main issue for consideration is whether the will is valid or not. If it is valid, the respondents who are named as beneficiaries of plot No. Narok Township/12 cannot be said to be intermeddling in the estate. It therefore follows that the issue of the validity of the will has to be resolved first by way of oral evidence. The validity of the will has not been determined. In the circumstances, I find that the application by the applicant is premature.

Issue 2

13. I have already pronounced myself as regards the validity or otherwise of the will. It therefore follows that this issue is moot.

Issue 3

14. The applicant and the respondents are all the children of the deceased. And for that reason, there will be no order as to costs.

15. The upshot of the foregoing is that the application fails and it is hereby dismissed in its entirety with no order as to costs.

Ruling signed, dated and delivered in open court at Narok this 21st day of February 2019 in the presence of the petitioner and the respondents and in the absence of their advocates.

J. M. Bwonwonga

Judge

21/2/2019