



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 487 OF 2007

ZABLON SHIMBALIA KULAVI.....DECEASED

AND

SALOME ADEMA.....1ST PETITIONER

ROSE .M. KUTIALO.(DECEASED).....2ND PETITIONER

AND

ELIZABETH TERBRA OCHIENG.....PROTESTOR

JUDGMENT

1. The petitioner herein Salome Adema has filed summons for confirmation of grant dated 1st November, 2018. The same is supported by her affidavit in which she proposes that land parcel No. **Kakamega/Savane/90** devolves to her being the only surviving widow and beneficiary of the estate of her late husband Zablun Shimbalia Kulavi (herein referred to as the deceased).
2. Elizabeth Tebra Ochieng (herein referred to as the protestor) has on the other hand filed an affidavit of protest to the confirmation of the said grant on the grounds that she is a biological daughter of the deceased. That her late father had two wives – her mother called Tebra Amakove and Salome Adema, the petitioner. That her mother had 8 children with the deceased but the others are now all deceased. That Rose Kutialo who was a co-petitioner in this case with the current petitioner was her biological sister but is since deceased.
3. The protestor further states in her affidavit of protest that prior to the demise of her father in 1985 he had sold a portion of his land to one Amos Giduki Gadamba who currently resides on that portion of the land. The protestor proposes that the land be sub-divided into two portions, one to go to Amos Giduki Gadamba and the other portion to go to her and Salome Adema.
4. The parties in the case proceeded by way of viva voce evidence where the protestor testified as the plaintiff and the petitioner as the defendant. The protestor called one witness, Amos Giduki, PW 2 while the petitioner called 3 witnesses – a neighbour to the deceased Elly Simwa DW 2, a relative to the deceased George Shivachi Alusiola DW 3 and a former chief of the area Kennedy Amwayi Simwa DW4.
5. It was the evidence of the protestor that she was born at her father's village at Shivege village in Kakamega County but that she left the village when she was 10 years old. Though she stated that her father sold part of the land to Amos Giduki, she said in cross examination that she was not present when the sale was made.
6. Amos Giduki PW 2 testified that the deceased sold him part of his land in 1985. They signed a sale agreement. That he has now lived on the land for a period of 33 years. That he lives on the land with Salome Adema. That the deceased had two children- Rose Kutialo and Elizabeth Ochieng (the protestor).
7. The petitioner, testified that she married the deceased in 1980. That they did not get children. That her husband did not have any other wife. That she does not know the protestor and her mother nor did she know Rose Kutialo who was a co-petitioner in this succession cause. That she only learnt in the course of the proceedings that there was a person by that name who was a party to the case.
8. The petitioner further stated that she and her late husband had sold part of the land in issue to Amos Giduki. However that later on the said person was refunded his purchase price of Kshs. 40,000.00. That the said person is thereby not entitled to the parcel of the land.
9. Elly Simwa DW 2 stated that the deceased was his neighbour. That he only knew the petitioner as the only wife of the deceased. That he does not know the objector nor Tebra Amakobe.

10. George Alusiola DW 3 testified that the deceased was a cousin to his father. That the petitioner is a wife to the deceased. That the deceased did not have any other wife neither did he have children. That he only came to know of the protestor when this case came up.

11. The former chief of the area DW 4 testified that he had known the deceased for over 20 years. That the petitioner herein was the only wife to the deceased. She did not have children. That he does not know the protestor herein. That sometimes in the year 1997 while in office as the chief he presided over a land dispute between the petitioner and Amos Giduki. That the elders resolved for Amos to be refunded his money. That he was refunded Kshs. 40,000.00. That Amos thereby has no claim over the land as he was refunded him money. That on 9th June ,2014 he wrote an introductory letter to the petitioner indicating that the purchase price to Amos Giduki had been refunded.

Submissions

12. The advocates for the protestor, **Amasakha & Co. Advocates**, submitted that the protestor has proved that the deceased had two houses. That the petition was filed by the petitioner and the late Rose M. Kutialo. That the grant of letters of administration was issued in the name of the two petitioners. The advocates wondered the basis on which the current petitioner allowed Rose Kutialo to be a petitioner in the case if she, the petitioner, was the only surviving beneficiary to the estate of the deceased. The advocates submitted that Rose Kutialo was in the petition representing the interests of the house of her mother. That the protestor herein was a sister to the late Rose Kutialo. That the protestor is entitled to inherit the share of the estate that belongs to her mother.

13. The advocates further submitted that the petitioner has admitted that there was a sale agreement between the deceased and Amos Giduki. That there was no evidence that the said agreement was revoked or that it was rescinded. That the purchaser took possession of the land in the lifetime of the deceased and that it is only after the demise of the deceased that the petitioner wants the purchaser out of the land. That it is only parties to an agreement who can revoke and or rescind it.

14. The advocates for the petitioner, **K.N Wesutsa & Co. Advocates**, on the other hand submitted that the objector did not provide cogent evidence to establish that she was a daughter to the deceased. That though the protestor stated that some of her siblings were buried on the subject land there was no credible evidence to support that. Further that the petitioner has proved that the purchaser to the parcel of land was refunded his purchase price and cannot be deemed as a creditor to the estate of the deceased

Analysis and Determination

15. The protestor contends that she is a daughter to the deceased herein and that her mother Tebla Amakove was the first wife of the deceased while the petitioner was the second wife to the deceased. That her mother had 8 children with the deceased but the others are now all deceased. That she is a sister to the late Rose Mmboga Kutialo who was a co- petitioner in this case before she died.

The protestor further stated that she left the deceased's home when she was 10 years old. That she was living at Kitale but she used to visit her father She says that she is entitled to inherit the share of her mother in the estate of the deceased.

16. Section 107 (1) of the Evidence Act Provides that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 provides that :-

“The burden of proof in a suit of proceedings lies on that person who would fail if no evidence at all were given on either side.”

17. I have carefully analyzed the evidence placed before the court. The deceased herein has surviving relatives. The protestor in her evidence stated that the brothers to the deceased are all dead but that the deceased has married sisters. It is surprising that the protestor did not call anybody on the side of her alleged father's relatives who knows her as the daughter of the deceased. If the protestor was born at the home of the deceased it cannot turn out that nobody in that family recognizes her as the daughter of the deceased. It is also surprising that nobody in that family knows that her mother was married by the deceased. The deceased cannot have had 8 children with her mother yet nobody in the family recognized her as the wife of the deceased. It is clear to me that the protestor does not know anybody on the side of the man she alleges to be her father. That explains why she could not get anybody from that side to be her witness in the case.

18. Amos Pw2 stated in his evidence that the protestor is a daughter to the deceased and that he saw her when her father sold the land to him. The protestor however stated in her evidence that she was not present when the land was sold. The contradiction in the evidence is a clear indication that the two witnesses are not telling the truth on the relationship between the deceased and the protestor.

19. The petitioner called 3 witnesses who knew the deceased – Dw2, DW3 and DW4. DW2 was a neighbour to the deceased while DW3 was a relative to the deceased. DW4 is a former chief of the area the deceased hailed from. All testified that the petitioner was the only wife of the deceased and that they never knew any children of the deceased. I find the evidence of the petitioner and her witnesses to be more credible than the evidence of the protestor. I find no credible evidence that the protestor was a daughter to the deceased and a sister to Rose Mmboga. Similarly I find no credible evidence that the protestor's mother was a wife to the deceased.

20. The petitioner has admitted that her husband sold a portion of his land to Amos Giduki. The agreement was in writing. Though the petitioner and the former chief DW 4 stated that Amos was refunded his money, there was no agreement made by the parties to that effect. The document relied on by the petitioner to claim that the purchase price was refunded was not signed by Amos. It was just a letter addressed to “ To whom it may concern” indicating that Amos was refunded his money. This was not an agreement between the parties. There is no

evidence that Amos was refunded his purchase price. It is clear that the deceased was long dead when the money was allegedly refunded. The petitioner was not a party to the sale agreement. She could not revoke the sale agreement between her late husband and the purchaser.

21. The burden of proof was on the protestor to prove that she is a daughter to the deceased. She has failed to prove so. The protest has no merits. The same is dismissed save that the petitioner is obliged to recognize the sale of land made by the deceased to Amos Giduki Gadamba.

Each party to bear its own costs to the protest.

Delivered, dated and signed in open court at Kakamega this 28th day of March,2019.

J. NJAGI

JUDGE

In the presence of:

Mr.Obwayo Holding Brief Kundu for petitioner

Mr. Shivega Holding Brief Amasakha for protestor

Parties:

Petitioner.....present

Protestor.....absent

Court Assistant.....George