



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENTA AT KISII

SUCCESSION NO. 322 OF 2013

IN THE MATTER OF BIKERI ARERI (DECEASED)

SAMWEL ATIKA BIKERI.....PETITIONER

VERSUS

PIUS AKARA BIKERI.....OBJECTOR

JUDGMENT

1. This succession cause concerns the estate of Bikeri Areri (“the deceased”) who died on 13th November 1980. The petition for letters of administration intestate was filed by his son Samwel Atika Bikeri (“Atika”). The deceased’s only asset was land parcel number Central Kitutu/Mwabundusi/147 (“parcel 147”). The petition was gazetted on 22nd December 2017 and grant of letters of representation issued to the Atika and the objector Pius Akara Bikeri (“Akara”) on 5th February 2018. Subsequently on 30th August 2018 Atika filed an application seeking rectification grant of letters of administration as the name of the deceased read BEKERI instead of BIKERI; and also sought that the grant be confirmed to Atika and Akara in equal shares.

2. This caused Akara to file an objection to the grant of letters of administration issued claiming that Atika had misrepresented and concealed material facts before court. In his supporting affidavit Akara deposed that the parcel 147 was subdivided in 1969 and the application for confirmed grant by Atika was a ploy to transfer entire estate solely to Atika. In his affidavit Akara made a proposal for distribution and urged the court to consider the subdivision done by the deceased prior to his death.

3. Essentially the main issue before the court was one on distribution of the deceased estate as the parties could not agree on the mode of distribution. The court directed the Chief of Getare location to visit parcel 147, confirm if there were existing boundaries and file his report in court. Cosmas Mocha Chief of Getare recalled that on 31st October 2018 he went to parcel 147 and found that there was a boundary dividing the land into two. He told court that Akara occupied the lower part next to the river while the upper part was occupied by Atika. He testified that there were about 20 family members present on that day and upon carrying out investigations it was revealed that the land was subdivided sometime in 1971. He testified that Atika was not present despite having been informed of the meeting.

4. The County Surveyor, Kisii County, also visited the parcel 147 and filed his report in court. In his report he concludes that Atika’s portion measured 0.56 Ha while Akara’s portion 0.74 Ha, the total acreage is 1.3 Ha which tallies with the ground acreage.

5. When the matter proceeded to hearing, Atika (Pw1) and Akara (Dw1) both gave evidence.

6. Pw1 testified that his home was built by his father while Akara has his home near the water which is far away. He told court that the deceased did not place any boundaries on the land. He asked the court if the property can be divided into equal shares.

7. Dw1 testified that his land goes up to the river. He told court that his parents and clan divided the land. He testified that under the Kisii customs an older son would be given land and then divides it to the other sons. He told court that when their parents were alive they were each given their portions. Dw1 further testified that whilst their mother was alive, Pw1 had attempted to subdivide the land and invited the chief but the subdivision was rejected by their mother who maintained that the land had already been subdivided. Dw1 told court that he built his home on his portion and has lived on the land for a long time.

Determination

8. The issues to be considered by this court are as follows:

a) Whether the grant of letters of representation should be rectified.

b) Whether the court should confirm the grant of letters of administration as proposed by the Petitioner.

9. It is not in dispute that the name of the deceased is BIKERI ARERI. Under section 74 of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* ("the LSA") grants of representation may be rectified by the court in the following terms:

74. Errors in names and descriptions or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court; and the grant of representation whether before or after confirmation, may be altered and amended accordingly.

10. The Grant of Letters of Administration intestate issued to Samuel Atika Bikeri and Pius Akara Bikeri shall be rectified to read the correct name of the deceased BIKERI ARERI.

11. I now turn to the issue of distribution, in this case Atika has proposed that the estate to be divided equally. On the other hand Akara's proposal is that the deceased had already divided the estate to his sons prior to his death and that his wishes should therefore be respected. In dealing with wishes of the deceased made prior to his death, the court in the case of *Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi (2009) Eklr* noted as follows:-

"Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased's was biased, unfair and or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out on his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him."

12. It should be understood that Section 42 of the LSA provides that:

42. Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

13. There is a clear boundary on parcel 147 that was put up by the deceased apportioning the estate to each of his sons. The chief's testimony and report confirmed that there existed boundary separating the homes of the two administrators. He testified that his investigations revealed that the land was subdivided in 1971 by the deceased. In the case of *Martha Wanjiku Waweru vs Mary Wambui Waweru (2007) eKLR* the court held that;

"In this case the deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not protest or change his mode of distribution which they had opportunity to do during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after his death. In my view his wishes should have been respected."

14. It was not challenged that Atika lived on the upper portion of the estate while Akara on the lower portion. The two administrators had lived as such and had continued to do so for 33 years before Atika filed the current suit which he is now challenging the apportionments made by the deceased. The chief testified that the two portions of land held by the two administrators look equal while Counsel for the Petitioner submitted that the Petitioner was only claiming 0.09 Ha from Akara's portion to achieve equality in the distribution of the estate. It is clear that the deceased did not engage services of a surveyor and in the circumstances tried to have his estate distributed amongst his sons in 'equal' shares. Since the acreage claimed to achieve equality is negligible, I find no reason warranting interference of the deceased wishes and distribution of his estate to his two sons prior to his death.

15. I therefore grant the following orders:

i. The Grant of Letters of Administration intestate issued to Samwel Atika Bikeri and Pius Akara Bikeri shall be rectified to read the correct name of the deceased BIKERI ARERI.

ii. I accordingly direct that estate should be distributed in accordance to the wishes of the deceased prior to his death as follows:

iii. Samwel Atika Bikeri – 0.56 Ha

iv. Pius Akara Bikeri – 0.74 Ha

v. This being a family matter there will be no order as to costs.

Signed, Dated and Delivered at Kisii this 25th day of April 2019.

R. E. OUGO

JUDGE

In the presence of;

Mr. Nyagwencha For the Petitioner

Respondent In person

Rael Court clerk