



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO. OF 286 OF 2007
IN THE MATTER OF THE ESTATE OF AMBUNDO MBANDA (DECEASED)

JUDGMENT

1. The protestors filed an affidavit of protest on 5th November 2009 against confirmation of the grant of letters of administration intestate made to Wilson Mbayi Ambundo, the administrator and administrator/respondent herein.

2. The protestors raised various grounds for the protest *inter alia*: -

a) *THAT land title number Marama/Inaya/619, the only asset in the estate was left for the family of one Japheth Amukanga and Wellington Peti Ambundo;*

b) *THAT the said Japheth Amukanga was a son of the deceased but has since died leaving behind a widow and some children and that the said land title number Marama/Inaya/619 should be divided between the family of Japheth Amukanga and Wellington Peti Ambundo;*

c) *THAT the proposal of distribution by the Administrator/Respondent is not in good faith as the administrator's only interest is to unfairly get a share of the estate and dispose the same to 3rd parties;*

d) *THAT the Administrator/Respondent has never resided on or used the said piece of land at all;*

e) *THAT the mother to Patrick Abuko Amukanga is alive but engaging in schemes with the Administrator to dispose of the entitlement of the family of Japheth Amukanga; and*

f) *THAT half of land title number Marama/Inaya/619 should be given to Japheth Amukanga's children with the mother of Japheth Amukanga getting a life interest.*

3. In the pleadings by the 1st protestor it is stated that the deceased had two wives and children. The first house is said to have had two children, with Wellington Peti Ambundo, 1st protestor, the only one alive. The second house had four children with Wilson Mbayi Ambundo, administrator, being the only surviving child.

4. The administrator stated in his pleadings that the deceased, his father, was polygamous and agreed with the Samuel Mukabana Beti in respect of the surviving children of the deceased. The administrator further stated that the deceased distributed all his properties during his lifetime and that the only property that had not been distributed was Marama/Inaya/619. That all his siblings, who have since passed on were given

various properties and have since obtained titles for them. The administrator stated that it is only him and the 1st protestor Wellington Peti Ambundo who are surviving as children of the deceased from both houses and has proposed that Marama/Inaya/619 be divided among themselves equally with the 1st protestor taking half for the first house and the administrator taking the other half for the second house. The administrator added that Patrick Abuko Amukanga, the 2nd protestor was living in his father's, Japheth Amukanga, land which was given to him by the father before his demise.

5. In his testimony, Wellington Peti Ambundo stated that land title number Marama/Inaya/619 was given to him and Japheth Amukanga, who has since died and wanted the share of the said Japheth Amukanga given to his children who include Patrick Amukanga. Wellington opposed the proposed mode of distribution stating that the same would likely disinherit Japheth Amukanga's children and that in any case, the administrator was given land title number Marama/Inaya/881 by the deceased and he(Wellington) gave another parcel, title number Marama/Inaya/562 to the administrator.

6. According to the testimony of Hannington Okwomi Omwirima, the area Assistant Chief, the deceased had allocated land to his children but not land title number Marama/Inaya/619. Hannington stated that the deceased used to settle his children in areas that had the title documents in the names of the children. Hannington adds that Japheth Amukanga's wife and children live on land title number Marama/Inaya/606 which was allocated to Japheth by the deceased and is covered under the Administrator/Respondent for the 2nd house. Marama/Inaya/619 has not been distributed officially and it is demarcated by a road between the two houses of the deceased's wives. Hannington stated that it would not be right to disturb the status quo of the current possession of title number Marama/Inaya/619 since the occupants have been living there for quite some time. On re-examination, Hannington stated that by the time he was writing the letter to confirm the beneficiaries of the estate, the other sons of the deceased were alive and he was aware Japheth Amukanga left behind a wife and children. Hannington stated that there have been threats against the wife of Japheth Amukanga, (Agneta) by Wellington Peti where he chaired a conciliation meeting with the family and it was agreed that Agneta moves from parcel number Marama/Inaya/606 to Marama/Inaya/619. Hannington concluded by stating that there was no land officially given to Japheth Amukanga although the deceased may have earmarked Marama/Inaya/606 for him. While being cross-examined, Samuel Mukabana Beti stated that the deceased had given out land to his children and that Wellington was given parcel number Marama/Inaya/619 and the Administrator/Respondent was given parcel number Marama/Inaya/861. He stated that Japheth's widow is occupying parcel number Marama/Inaya/606 which is registered in the name of Wellington Peti and that Peti got the said parcel from his maternal uncles.

7. Samuel Mukabana stated that Japheth Amukanga and Wellington Ambundo never received any land from the deceased and that parcel number Marama/Inaya/619 should be inherited by Wellington and Japheth and not Wellington and Wilson. However, Samuel doesn't have any evidence that the deceased gave land to the Administrator/Respondent. On cross-examination, Samuel stated that one Mary Shikokoti has proprietary interests in the property as she had bought a portion of the parcel number Marama/Inaya/619. Japheth's children stay on parcel number Marama/Inaya/606 and that the Administrator/Respondent has never lived on parcel number Marama/Inaya/619.

8. The protestors framed the following issues for determination -

- a) Whether parcel number Marama/Inaya/619 belongs to the deceased Ambundo Mbanda;
- b) Whether the 2nd protestor is a beneficiary of the estate of the deceased Ambundo Mbanda and whether grandchildren are entitled to inherit a deceased's estate; and
- c) Whether the administrator/Respondent and/or the Protestors/Protestors are entitled to any claim over the land and if so, to what extent.

9. On whether Marama/Inaya/619 belongs to the deceased Ambundo Mbanda, it was the submission of the protestors that the deceased had already distributed his estate amongst his children including

Marama/Inaya/619 and that the parcel of land belonged to the deceased and therefore subject to this succession proceeding. The administrator filed a Certificate of Official Search dated 2nd April 2007 which was signed off by the Land Registrar. In the said Certificate of Official Search, the deceased, Ambundo Mbanda is listed as the proprietor of the property with the Certificate of Land having been issued on 14th January 1966. The aforementioned certificate is *prima facie* proof that the deceased is the proprietor of land title number Marama/Inaya/619 and it is a contradiction for the protestors to state that the same property was distributed amongst the children and at the same time belonged to the deceased. The property registered in the name of a deceased person shall not be transmitted to any person save as provided by sections 61 and 62 of the Land Registration Act, 2012 and subject to the Law of Succession Act. There has been no evidence adduced to show that the deceased relinquished or transferred his proprietary rights to any other person during his lifetime and if at all any such transaction on the land was conducted after the demise of the deceased, then the said transaction is a nullity. Such transaction can be deemed as intermeddling with the free property of the deceased and contrary to section 45 of the Law of Succession Act.

10. In *In Re the Matter of the Estate of David Julius Nturibi M'Ithinji (Deceased)* [2012] eKLR, the court held as follows:

'According to Section 45 of The Law of Succession Act, Cap.160 anyone who has no authority under this Act, or by any other written law, or has grant of representation under this Act takes possession or dispose of or otherwise intermeddle with any free property of a deceased person for any purpose is guilty of an offence under the said Section.

In the case of Gitau and 2 others vs. Wandai & 5 others (1989) KLR 23, Tanui J, as he then was stated as follows: -

"According to Section 45 of The Law of Succession Act, Cap.160 intermeddling with the property of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property."

11. In *In re Estate of M'Ngarithi M'Miriti* [2017] eKLR, the court cites the case of *Benson Mutuma Muriungi Vs. C.E.O. Kenya Police Sacco & Another* [2016] eKLR where the court observed that:

'Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.

See also the case of Machakos High Court Civil Case No. 95 Of 2001 John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Another it was held that doing anything affecting the estate of a deceased person amounts to intermeddling. In the case cited, the court considered commencing a suit on behalf of the estate before obtaining a grant of representation to be an act of intermeddling with the estate. Again, consider the case of Gitau and Two Others vs. Wandai and Five Others (1989) KLR 231 where it was held that entering into an agreement to sell estate property before getting a grantor without such a grant is an act of intermeddling.'

12. It is clear to my mind that the subject property title number Marama/Inaya/619 belonged to the deceased at the time of his death and at the time of filing of both the instant petition and affidavit of protest and thus subject to the intestate succession proceedings herein.

13. On whether the 2nd protestor is a beneficiary of the estate of the deceased, Ambundo Mbanda, and whether grandchildren are entitled to inherit a deceased's estate, the protestors have submitted that the 2nd protestor, is a grandchild of the deceased and thus entitled to the estate of the deceased as a beneficiary. The administrator/Respondent submitted that the 2nd protestor did not provide evidence that he is a grandchild and that in any event, the estate of his late father is available to him.

14. In the case of *In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR, it was held that:

‘...My view is that the children are entitled to inherit the share which their deceased parents would have inherited. In persuasive decision by Musyoka J. in the case of Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR it was stated:

“...grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

15. In the case of *Yunes Kerubo Oruta & another vs. George Kombo Oruta & another* [2015] eKLR, it was stated that: -

‘With regard to the first question on whether or not grandchildren are beneficiaries to the estate of their grandparents, Musyoka J, in the Estate of John Musombayi Katumanga – (deceased) [2014] eKLR rendered himself as follows:

“...I suspect that she is a daughter to the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependant of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased there are two reasons for this. She is not an heir of the deceased for grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependant of her grandparent but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependant on the grandparent immediately before his death.”

16. From the authorities cited above, grandchildren can only directly inherit their grandparent's property in intestacy if their own parents, that is the children of the deceased, were themselves dead. Grandchildren whose parents are still alive can only access the estate through section 26 of the Law of Succession Act, upon obtaining an order declaring them to be defendants and making provision for them.

17. From the evidence on record, the 2nd protestor, Patrick Abuko Amukanga, is a child of Japheth Amukanga, a child of the deceased. Japheth Amukanga has since died but is survived by a widow, one Agnetta, and four children - Patrick Amukanga, Tom Mboya, Stephen Ambundo, Were Amukanga. The widow and all the four surviving children of the deceased's child, Japheth Amukanga, are entitled to a share of the estate. The same can be said of all the surviving widows and children of the other children of the deceased.

18. On whether the administrator and or the protestors are entitled to any claim over the land, and if so, to what extent, it has been established that all grandchildren of the deceased, together with the widows of the deceased's children are entitled to a share of the estate of the deceased. The administrator and the 1st protestor are both entitled to a share in the deceased's estate by virtue of being the deceased's children, taking precedence over the other beneficiaries when it comes to distribution of the estate.

19. It is my finding that Marama/Inaya/619 was free property of the deceased and is subject to these succession proceedings. I further hold that the 2nd protestor, all other grandchildren of the deceased whose parents are dead; all other widows of the children of the deceased are entitled to a share of the estate.

20. The administrator did not disclose all the beneficiaries entitled to benefit from the estate in his petition. As was held in the case of *Lucy Njoki Kamanja v Ezekiel Muenja Ngure* [2017] eKLR: -

'...This was a material non-disclosure and concealment of something material to the case. By stating, that he was the only survivor, the respondent made a false statement. As held in Re: Estate of Philip Kiprono Bett(Deceased [2005] eKLR, non-disclosure of all beneficiaries is therefore a defect that goes to the root of the administration of the estate. Where there is no disclosure, the grant whether or not confirmed cannot stand.'

21. In *In re the estate of Alexander Muchemi Kiago (Deceased)* [2017] eKLR, it was held that: -

'I find that the administrators failure to include the protestors in the succession proceedings is tantamount to non-disclosure of material facts and have satisfied the requirement of Section 76(b) as such this court revokes the Grant of letters of Administration granted by this court...'

22. Section 76 of the Law of Succession Act provides as follows:

'76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

23. I am satisfied that a case has been made for revocation of the grant herein for non-disclosure of some

beneficiaries. I have noted however that the parties hereto are elderly. Section 76 gives me discretion on whether to revoke or not even where a case has been made out for revocation of a grant. I shall exercise that discretion to refrain from revoking the grant given the age of the matter. I am inclined to confirm the administrator as such, but in keeping with section 71 of the Act I shall postpone the confirmation application for the administrator to bring in all those survivors that he had omitted in his petition, and who have been identified in this judgement.

24. For avoidance of doubt, the orders that I make in this matter are as follows-

- (a) That for the reasons give above, in the body of the Judgment, I shall not revoke the grant, instead I shall confirm the administrator as such, but I shall not confirm the distribution proposed;**
- (b) That I hereby postpone the confirmation application on distribution, and I direct the administrator to file a further affidavit in which he shall identify all the children of the deceased who are still alive and all the children of the children of the deceased who are dead, and the list shall include any daughters and granddaughters;**
- (c) That the administrator shall in the same affidavit propose distribution of the deceased estate to all the persons that he shall identify in (b) above to have had survived the deceased;**
- (d) That any party not agreement with the proposals to be made in the further affidavits in (c) above shall be at liberty to file affidavits making counter-proposals;**
- (e) That the affidavits to be filed in (c) and (d) above shall be filed within forty-five (45) days;**
- (f) That the matter shall be mentioned on a date to be given at the delivery of this judgment for compliance;**
- (g) That each party shall bear their own costs; and**
- (h) That any party aggrieved by the orders made in this judgement shall be at liberty to move the Court of Appeal appropriately within the next twenty-eight (28) days of date hereof.**

25. It is hereby ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April, 2019

W MUSYOKA

JUDGE