



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 7 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE TANGITANGI LOKWAWI - (DECEASED)

LELE EWORON.....PETITIONER/ RESPONDENT

VERSES

SUSANA EKIRU LOKWAWI.....APPLICANT

JUDGEMENT

1. By her chamber summons application dated 5th November, 2018, the Applicant prays that the grant of Letters of Administration issued to the Respondent herein **Lele Eworon** and confirmed on 16th March, 2017 be annulled. Her argument basically is that she was the daughter to the deceased and not the Respondent.
2. It was her argument also that she had already applied for succession proceedings in the lower court **vide Succession Cause No. 30 of 2017** and that court had issued the grant and confirmed in her favour. That at the time she went to the land office to have the land transferred to her she discovered that the Respondent had also applied and he was in the process of having it transferred to himself. She therefore sought that the proceedings be nullified.
3. The Respondent on the other hand vide his replying affidavit dated 20th January, 2019 deponed that the Applicant was not a daughter to the deceased and that her late mother was not the deceased wife. He urges this court to dismiss the same.
4. This court gave direction that the objection proceedings be heard by way of oral evidence as the issues were so intricate that the same could not be determined by way of affidavit evidence.
5. When the applicant took the stand she said that she was the only daughter to the deceased and the Respondent was a nephew to the deceased. She said that her mother who died in the year 2017 was married to the deceased and that the suit Land Parcel number 197 belonged to him.
6. She further said that the Respondent moved on the land after the death of her parents and that he had leased out the land to other 3rd parties. She said that her parents are buried next to each other on the said land. She produced her baptismal card as well as a sell agreement in which her father had sold part of the land and both her and her late mother as well as the Respondent had signed as witnesses.
7. On cross examination she denied that she participated in the preparation of the burial programme in respect to the burial of her mother.
8. **PW2 Catherine Mutenyo** testified on behalf of the applicant and said that she knew her to be the only child to the deceased. She said that the Applicants' mother would even work for her. She said that the Respondent came to build on the said land after deceased's death.
9. **PW3 Matayo Khaninga** said that the deceased was his neighbour and had only one child with his also deceased wife and that was the applicant. He said that the respondent was a nephew to the deceased and at some point he was chased away by the deceased.
10. The Respondent then took the witness stand and stated that the deceased was his father and his mother was one **Nawar Lakwawi** who predeceased him. He said that the Applicants' father was one **Akule Lakwawi** and her mother **Kinyang Akule Lakwawi** and both have since died.
11. He further said that her mother is buried in his father's land. He said that he did not know if the Applicant's mother was married to the deceased. He said that he was the only child to the deceased and the land which measures 5 acres has been sold to many people. He

produced the burial programme which showed the persons left behind by the mother to the Applicant.

12. **DW2 Charles Naker Rukeria** testified that he knew the respondent to be the child to the deceased and that her mother was buried on the suit land as she had nowhere else to be buried since she had sold her land.

13. **DW3 Dismas Chonze** testified that he was a retired police officer and he bought ½ acre out of the suit land for his cousin from the applicant and her late mother. He produced the agreement dated 8th April 2005. During cross examination he admitted that the applicant had even served as a maid or house help for him. That he knew her deceased mother very well.

ANALYSIS AND DETERMINATION

14. The court has heard the parties and their witnesses and perused extensively the proceedings and the pleadings on record. The issue in dispute is whether in light of what was availed the Applicant is the only daughter of the deceased herein or whether the Respondent is the only son to the deceased as he claims to be. The applicant all along was unrepresented as opposed to the Respondent.

15. From what is on record the Respondent stated that his mother predeceased his father. There was no formal record produced to show direct relationship and thus this court shall rely on the oral evidence as well as other secondary evidence.

16. The witnesses called by both sides apparently did not deny that they did not know the contenting parties. They each however took different tangent depending on who called them. What was not in dispute is that both the deceased and the mother to the applicant are buried on the suit land.

17. It is not disputed further that the parties have sold a portion of the said land to different persons on diverse dates and times.

18. The court has perused two exhibits produced by the applicant namely the baptismal card dated 4th June 2002, (exhibit pw1). The same shows the applicants name and the father as **Tang'tang Lokwawi** and the mother to be **Kinyang Agule** and that she was born in the year 1984.

19. The second exhibit PW2 is a sale agreement dated 12th March, 1999 between **Tangitangi Lokwawi** and **Bernard Lumumba Sedi** in which the deceased sold 1 and ½ acre of Land Parcel number 197 for kshs. 50,000 and was paid kshs. 47,000 leaving a balance of kshs, 3000. In the said agreement the Respondent has signed as a witness and the Applicant who has been described as "**mtoto wa mwenye shamba Susan .A. Tangitangi**". The other witness **Kinyang Akule** has signed as "**Mama mwenye shamba**".

20. The Respondent simply signed as a witness with one other person called **Dismas Bulemi** whom I believe must be DW3.

21. These are the two documents produced by the Applicant which showed her nexus with the deceased. If then this was the case why would the deceased permit the Applicant's mother to sign as a witness and clearly indicated as the wife assuming that "**mama mwenye shamba**" is understood to be his wife in the ordinary sense? Why would the drafters indicate the Applicant as the child to the seller and not the Respondent? What was difficult in indicating the Respondent as the deceased child as opposed to the Applicant?

22. In my view and in the absence of any other documentary evidence to the contrary, I find that the Applicant was and is the child to the deceased.

23. The court has not been furnished with any oral otherwise evidence showing that the Respondent was indeed the child to the deceased. All that he claimed was that he stayed on the land, but as the evidence was led by the Applicant there was every reason to suggest that he came on the suit land after the deceased had died. I find that the Respondent could be related to the deceased by being a nephew and not a biological child like the Applicant.

24. The burial permit produced may not help much as the same was not prepared by the Applicant. A perusal of the same shows that the Applicant's deceased mother had other children who have since died except **Joseph Lomaidi, Agnes Angnatanyel** and the Applicant. The rest of the two were nowhere to be seen. The maker of the programme was not called to state where the details of those names were obtained from.

25. It is always necessary to note that burial programmes are not necessarily factual and sometimes misleading especially in situations where the makers are not called and where the family members may have not been involved. In some known instances someone may include some details unknown to the deceased immediate family or relatives. Consequently they may not be of much probative value as in the case herein. I therefore proceed to reject the same.

26. The court has stated much to show that the objection proceedings must succeed. There is sufficient evidence that the applicant was the child to the deceased. In fact I find that the respondent did file this proceeding even before the deceased wife passed on. I read mischief in light of the sale agreement, PW exhibit 2, which he was aware of. He did not deny that the Applicant's mother stayed and was buried on the land.

27. Dw3, though a retired police officer and served by the applicant as a maid for some years was not very truthful in my view. He did not appear truthful especially on cross examination. The Respondent on his part is a cheat so to speak. I state so because as it is he has already sold a substantial portion of the deceased land by taking full advantage of the Applicant. He sold the same without first obtaining the consent from this court. The sale transaction may therefore be considered voidable.

28. For the foregoing reason the objection proceedings are hereby allowed as follows.

- a). The joint grant issued jointly to the Applicant and the Respondent on 2nd April, 2019 is set aside with all the attendant consequences.
- b). The applicant SUSANA EKIRU LOKWAWI is hereby appointed sole administrator of the estate of the late TANGITANGI LOKWAWI, the deceased herein.
- c). The said above administrator shall proceed to apply for the distribution of the estate appropriately.
- d). The proceedings in Kitale CMC Succession Cause No. 30 of 2017 are hereby quashed for all intent and purposes.
- e). Being a family cause each party shall bear its own costs.

Dated, signed and delivered in open Court at Kitale this 24th day of June, 2019.

H K CHEMITEI

JUDGE

24/6/19

In the presence of:-

mr Teti for the Petitioner

Objector in person present

Court Assistant – Kirong

Court – Judgment read in open court.