



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 874 OF 2013

**IN THE MATTER OF THE ESTATE OF STEPHEN LUKHANYA NZAYO ALIAS LUKHANYA
NZAYA (DECEASED)**

AND

ROSA TEMBESIPETITIONER

VERSUS

MAURICE LUKHANYAPROTESTOR

RULING

1. This succession cause relates to the estate of the late Stephen Lukhanya Nzayo (deceased) who was husband to the petitioner herein Rosa Tembesi and father to the protestor, Maurice Lukhanya. The deceased left behind land parcel Isukha/Shirere/109.

2. The protestor has filed an affidavit of protest to summons for confirmation of grant filed by his mother, the petitioner.

3. The protestor opposes the mode of distribution of the estate proposed by the petitioner on two grounds: First that the petitioner has not provided for the share of the brother to the deceased, one Charles Inzayo Ivenda to whom the deceased held the portion for the said person in trust for him and secondly that the protestor does not recognize sale of part of the land to Maurice Ogweni and Victor M. Lubembe. The protestor says that the said persons did not buy any land from the deceased and therefore that they are not beneficiaries to the estate. He proposes that the estate be shared out equally between the beneficiaries as follows:

- (a) Vincent Litonde - Son
- (b) Evaline Atolwa - Daughter-in-law
- (c) Charles L. Mukunzi - Son
- (d) Maurice Otunga Lukhanya - Son
- (e) Mathew Tom Lukhanya - Son
- (f) Nicholas Munyovi Lukhanya - Son
- (g) Charles Inzaya Ivenda - Brother

4. The petitioner on her part contends that she has sold her share of the estate to one Victor Lubembe Muhito while her co-wife's daughter-in-law Evaline Atolwa has sold her share of the estate to one Mourice Ogweno. The petitioner further contends that her late husband did not have a brother by name of Charles Inzayo Ivenda. She proposes that the estate be distributed as follows:-

- (i) Vincent Litonde - 0.19 Ha
- (ii) Mourice Ogweno - 0.12 Ha - Purchaser
- (iii) Victor Lubembe Muhito - 0.05 Ha - Purchaser
- (iv) Evaline Atolwa - 0.20 Ha
- (v) Charles L. Mukunzi - 0.34 Ha
- (vi) Maurice Otunga Lukhanya - 0.16 Ha
- (vii) Mathew Tom Lukhanya - 1.3 Ha
- (viii) Nicholas Munyavi Lukhanya - 0.17 Ha

5. Directions were taken that the matter proceeds by way of *viva voce* evidence. The protestor testified and did not call any witness. The petitioner testified and similarly did not call any witness.

6. It was the evidence of the protestor that **Charles Inzayo Ivenda** is his uncle, brother to his father (deceased). That he lives with his said uncle on the suitland. That the deceased herein had inherited the land from his father. That his uncle is entitled to a share of the land. The witness said that all the beneficiaries herein live on the suitland.

7. The witness stated that the alleged purchasers are strangers to the estate. That the land should be shared equally among the 7 beneficiaries as indicated in his proposal above. He stated in cross-examination that the land is registered in the name of the deceased herein. He stated that he has not included the petitioner in his mode of distribution because he proposes to stay with her on his awarded portion of land.

8. The petitioner on her part stated that her late husband did not have any brother. That her husband was the only son to his father. That she does not know the alleged brother by name of Charles Inzayo Ivenda. That after her husband died she sold her portion of her share to the land to Victor Lubembe and therefore that her portion should go to him. That her late co-wife's daughter-in-law Evaline Atolwa sold a portion of her share to the land to Mourice Ogweno. She admitted in cross-examination that her late husband had inherited the land from his father.

Submissions

9. The advocates for the protestor **Matete Maleshe & Co. Advocates** submitted that it was proved that Charles Inzayo Ivenda lives on the estate of the deceased. That he is therefore a beneficiary to the estate. Further that there were no agreements produced to prove that the alleged purchasers bought the land. That if any person bought land he should claim from the share of the seller and not from the whole estate. That the proposal by the protestor for equal distribution of the estate is fair to everyone.

10. The advocates for the petitioner, **Amasakha & Co. Advocates** submitted that there was no explanation why Charles Inzayo Ivenda has not come forward to claim his share. That the estate is registered in the name of the deceased herein. That though the protestor claimed that the deceased was holding the land in trust of the said Charles Inzayo, there was no evidence to prove so. The protestor did not prove that the said person was a dependent on the deceased prior to the death of the deceased. Therefore that the person has no right to claim the estate of the deceased.

11. The advocates submitted that the purchasers bought portions of shares that the petitioner and her co-wife were entitled to. That a beneficiary has a right under the Law of Succession Act to relinquish his share of inheritance of the estate and transfer it to a bonafide purchaser as a beneficiary. Therefore that the mode of distribution proposed by the petitioner is just and accommodative of all the beneficiaries including the protestor. The advocate urged the court to dismiss the protest.

Analysis and Determination

12. The protest is on the grounds that the protestor's uncle was left out in the mode of distribution of the estate and that the protestor does not recognize the purchasers. The questions for determination are therefore:

- (1) Whether the protestor's uncle should be included in the list of beneficiaries;
- (2) Whether the purchasers should be included in the list of beneficiaries;
- (3) Whether the petitioner is entitled to part of the estate; and
- (4) How should the estate be distributed.

13. The suitland herein is registered in the name of the deceased. The protestor admitted in cross-examination that his uncle is an adult of sound mind who can speak for himself. His said uncle has not filed anything in claim of the estate of the deceased. The protestor did not file any document to indicate that he was filing the protest in a representative capacity to his uncle. It was not explained why the protestor's uncle has not brought up the claim himself. Though it is admitted that the deceased inherited the land from his father, there is nothing to prove that he was registered as proprietor of the land in trust of his brother Charles Inzayo Ivenda. The claim that the said Charles Inzayo Ivenda is a beneficiary to the estate of the deceased has not been proved. The claim is therefore dismissed.

14. The petitioner says that she has sold her share to the estate to Victor Lubembe while Everlyne Atolwa has sold her share of the estate to Mourice Ogwen. The petitioner was issued with a grant of letters of administration on the 26th February, 2014. This succession cause was filed on the 25th November, 2013. At the time of filing of the succession cause both the purchasers were named in the supporting documents to the petition to be beneficiaries of the estate of the deceased. That means that the petitioner and Evaline sold the land to the purchasers before the petitioner was issued with a grant of letters of administration.

15. Section 45 of the Law of Succession Act makes it an offence for any person without a grant of letters of administration to -

“take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

16. Further to this Section 82 (a) (ii) of the Act provides that:-

“No immovable property shall be sold before confirmation of the grant.”

17. If the petitioner and Evaline sold the land to the two purchasers before being issued with a grant of representation they committed an offence under Section 45 of the Law of Succession Act of intermeddling with the property of a deceased person. Evaline was never at any time issued with a grant of representation. Any sale of land the two may have made to the purchasers was illegal.

18. Besides that Section 3 of the Law of Contract Act provides that:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless-
(a) the contract upon which the suit is founded

(i) is in writing

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

19. The petitioner did not present any agreements before the court to show that she and Evaline indeed sold any parcel of land to the purchasers. The purchasers themselves have signed the consent to the making of grant (form 30) and the consent on distribution of the estate (form 37). That means that they were aware of this succession cause. They did not appear as witnesses in the case neither did they apply to be enjoined as interested parties in the case. I thereby find no evidence that the petitioner and Evaline sold part of the deceased's estate to the purchasers. Even if they had done so the sales, as stated above, were illegal. The objection by the protestor for the purchasers to be included as beneficiaries to the estate of the deceased is upheld. The purported purchasers should instead wait for the estate to be distributed and claim from whoever they bought from, that is, if they did so.

20. The protestor is proposing equal sharing of the property between the beneficiaries. He has however not obtained consent of the other beneficiaries to his proposed mode of distribution. Instead all the other beneficiaries except the protestor and one Mathew Tom Lukhanya have signed the consent filed by the petitioner on her proposed mode of distribution.

21. The petitioner on her part has proposed for the beneficiaries to get various amount ranging from 0.13 Ha to 0.34 Ha.

22. Section 35 (1) of the Law of Succession Act provides as follows:-

“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

23. Section 40 of the Act provides that:-

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

24. All the beneficiaries named in the protestor's proposed mode of distribution except Evaline Atolwa are the children of the petitioner. Evaline Atolwa is a widow to a son of the petitioner's co-wife. The protestor is not opposed to Evaline being given a share of the estate. The estate therefore has basically been distributed in accordance with the provisions of Section 40 of the Law of Succession Act.

25. The claim of the protestor's uncle having been dismissed as stated above the remaining question is whether the petitioner should be included as one of the beneficiaries of the estate. The protestor was of the view that the petitioner should not be given a share of the estate but should instead be given life interest on his (protestor's) share of the land. The petitioner on her part contended that she is entitled to a share of the estate, which share she has already disposed of to Victor Lubembe and left a small portion for herself where she wishes to be buried. The suitland measures 1.5 hectares. The petitioner is claiming

0.05 Ha.

26. This court has inherent powers under rule 73 of the Probate and Administration Rules to make such orders as may be necessary for the ends of justice. In my view a widow is entitled to a share of an estate to go towards her maintenance when the estate is being distributed. It will be an unjust system to send the widow away empty handed during distribution of the estate. I find the protestor's claim of 0.05 Ha to be a fair claim from the estate.

27. If the court were to go by the mode of distribution proposed by the petitioner, Evaline Atolwa and Charles L. Mukunzi will end up with 0.32 Ha and 0.34 Ha respectively while the protestor will get 0.16 Ha. There was no explanation as to why Evaline and Charles L. Mukunzi and are proposed to get twice what the protestor is to get. If Evaline has sold part of her share she should excise what she has sold from what she will be awarded from the estate.

28. I am of the considered view that the petitioner's mode of distribution of the estate is not fair to all the parties. The mode of distribution that commends itself to me is for the beneficiaries to share the estate equally after deducting the share of the petitioner of 0.05 Ha. The court therefore makes an order for the estate to be distributed as follows:-

Rosa Tembisi Lukhanya - 0.05 Ha.

Vincent Litonde

Evaline Atolwa

Charles L. Mukunzi

Mourice Otunga Lukhanya

Mathew Tom Lukhanya

Nicholas Munyobi Lukhanya - To share equally

29. For avoidance of doubt and after distribution of the estate the petitioner and Evaline Atolwa are free to transfer what they purportedly sold to the purchasers, if they so wish.

Orders accordingly. There shall be no order as to costs.

Delivered, dated and signed in open court at Kakamega this 20th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Abok holding brief for Amasakha for Petitioner

Miss Mburu holding brief for Matete for protestor

Parties:

Petitioner - present

Protestor - present

Court Assistant Ruto

Beneficiaries – absent

30 days right of appeal.