



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 304 OF 2009

IN THE MATTER OF THE ESTATE OF MUBANGO LINYONYI (DECEASED)

JUDGMENT

1. The deceased herein died on 7th January 1981. According to the letter dated 15th May 2009, from the Chief of Kabras South Location, he was survived by two sons, Festus Mutaliani and Wilson Nyanje Mbango. He was also said to have died possessed of a property described as S. Kabras/Shamberere/208. Representation to the estate was sought in a petition lodged herein on 2nd June 2009, by Wilson Nyanje Mbango, in his capacity as son of the deceased. He expressed the deceased to have had been survived by the two sons named in the Chief's letter referred to above, and to have died possessed of S. Kabras/Shamberere/208. A grant was made to the petitioner on 26th November 2009, and for that reason I shall refer to him hereafter as the administrator.

2. On 2nd October 2015, the administrator filed an application dated 29th November 2015 (2nd October 2015 as per the court's date stamp), Seeking confirmation of his grant. he proposed that the property be shared out between the two sons, so that Festus Mutaliani took 5.2 hectares while he, the administrator, Wilson Nyanje Mbango, took 4.3 hectares of S. Kabras/Shamberere/208.

3. That application attracted the filing, on 13th January 2016, of an affidavit by Titus Makamu Mbango, sworn on 12th January 2016. He averred that the deceased had other sons, apart from the two disclosed in the petition, that is Festus Mutaliani and Wilson Nyanje Mbango. The other sons are said to be James Lisero, Daudi Musitia and Titus Makamu Mbango. He was also said to have had died possessed of other property apart from S. Kabras/Shamberere/208, the only asset disclosed in the petition. The other assets are said to be S. Kabras/Shamberere/206, 207 and 289. It is disclosed that these other three had been distributed during the deceased's lifetime to James Lusero, Titus Makamu Mbango and David Musitia, respectively. The only property that remained in the name of the deceased was S. Kabras/Shamberere/208. Titus Makamu Mbango avers that the deceased had given him one acre out of S. Kabras/Shamberere/208. He adds that he had been using the said one acre to date, which he says is separated from the portions of the same parcel of land used by Festus Mutaliani and Wilson Nyanje Mbango by a feeder road. He complains that the proposals in the confirmation application deny him his one acre in S. Kabras/Shamberere/208. The affidavit of Titus Makamu Mbango is, therefore, a protest to the confirmation application, and I shall, therefore, refer to him as the protestor for the purpose of these proceedings.

4. On 22nd March 2016, directions were given for survey work to be done on S. Kabras/Shamberere/208 to ascertain the acreages occupied by the three sons of the deceased who were claiming a share in that property. The survey work was done and A report thereon, dated 9th March 2017 was placed on record, and it was ordered on 20th July 2017 that the same was to be treated as evidence for the purpose of the confirmation proceedings. There is another survey report on record dated 22nd June 2018. The two reports relate only to the portion allegedly occupied by Titus Makamu Mbango. According to one report Titus Makamu Mbango occupies 0.28 of a hectare while the other says he occupies 0.20 of a hectare.

5. Directions on the disposal of the application were given on 27th June 2018, that the hearing be by way of *viva voce* evidence.

6. The oral hearing commenced on 13th November 2018, with Titus Makamu Mbango on the witness stand. He averred that the deceased had distributed his property before he died, and transferred the property to the beneficiaries and title numbers were given. He said that the property that was given to him was S. Kabras/Shamberere/207, which measured 2.4 acres in 1965. He averred that the deceased retained S. Kabras/Shamberere/208 under his name. The deceased allegedly added him a portion of S. Kabras/Shamberere/208, being one acre. This was allegedly done in 1965. The same was not excised and therefore he was not allocated a number out of S. Kabras/Shamberere/208. He stated that he had brought the protest seeking to have the portion, measuring 0.2 hectare excised to him, after which the balance could be shared out between Festus Mutaliani and Wilson Nyanje Mbango.

7. The protestor called Festus Mutaliani as his witness. He stated that he lived on S. Kabras/Shamberere/208 with his brothers, Titus Nyanje Mbango and Titus Makamu Mbango. He explained that Titus Makamu Mbango utilized a portion of S. Kabras/Shamberere/208 which had been given to him by the deceased. He said a boundary existed on the ground, which had been fixed by the deceased. He testified that it was Wilson Nyanje Mbango who had been raising issues with what the deceased had given Titus Makamu Mbango out of S. Kabras/Shamberere/208. He said the boundary was still intact.

8. The administrator testified on 4th March 2019. He stated that the persons entitled to inherit S. Kabras/Shamberere/208 were Festus Mutaliani and himself, but he conceded that the deceased had given Titus Makamu Mbango a portion thereof. He said that Titus Makamu Mbango was entitled to 0.1 hectare out of S. Kabras/Shamberere/208, saying he would be content if the same was excised to him and he and Festus Mutaliani left to share the rest of the property. He confirmed that the deceased had fixed a boundary to mark the portion that he was excising in favour of Titus Makamu Mbango out of S. Kabras/Shamberere/208. He accused the protestor of interfering with the boundary.

9. What I am called upon to determine is a confirmation application. Confirmation of grants is provided for under section 71 of the Law of succession Act, Cap 160, Laws of Kenya. Under that provision, the court is required to determine two things: first is confirmation of the administrators and second is distribution of the estate.

10. In the application before me, the matter of the confirmation of the administrators does not appear to be an issue. The protest on record turns only on the question of the proposed distribution. There are no claims that the administrator on record had not been properly appointed, nor that he had gone about his duties as an administrator in a manner that was wanting. It would appear, therefore, that no one is opposed to his being confirmed as such.

11. On distribution, it would appear that only one property is available, the rest having been distributed *inter vivos*. I am enjoined by section 42 of the Law of Succession Act to take into account the *inter vivos* transfers during distribution so as to achieve equity. In this case the deceased had five sons. Three benefitted from the *inter vivos* distributions of the three assets. One asset remained in the name of the deceased. It is this one, S. Kabras/Shamberere/208, that is available for distribution, and naturally it should go to the sons of the deceased who did not benefit from the *inter vivos* transfers. The sons who did not benefit were Festus Mutaliani and Wilson Nyanje Mbango.

12. It would appear, superficially, that the matter is that straightforward. However, one of the sons who benefitted from the *inter vivos* transfers aforesaid claims that he had been given a portion of the remaining property by the deceased, and he has staked a claim to the estate in that respect. I was minded to shut him out, and to dismiss him as greedy, for if the deceased had intended to benefit him out of S. Kabras/Shamberere/208 he would have surely caused the excision of that portion and its registration in his name between 1965, when the gift was allegedly made, and 1980, when he died. However, the two sons who are naturally entitled to S. Kabras/Shamberere/208, Festus Mutaliani and Wilson Nyanje Mbango, have both acknowledged that the deceased had given a portion out of S. Kabras/Shamberere/208 to the said protestor. He had taken possession and utilized the same. The administrator has confirmed that he did not oppose the same being excised and given to Titus Makamu Mbango.

13. The parties have not been clear on the exact acreage of what Titus Makamu Mbango is entitled to. The administrator says that he had only been given 0.1 hectare, while Titus Makamu Mbango himself puts it at 0.2 hectare. The protestor talks of one acre and also of 0.2 hectare. His witness, Festus Mutaliani, put the entitlement at 0.1 hectare. I am persuaded that the protestor is entitled to no more than 0.1 hectare out of S. Kabras/Shamberere/208.

14. In the end, the orders that I shall make in the circumstances are:

(a) That I hereby confirm Wilson Nyanje Mbango as the administrator of the estate of the deceased herein;

(b) That 0.1 hectare of S. Kabras/Shamberere/208 shall be excised and transferred to Titus Makamu Mbango on the side that he currently occupies;

(c) That whatever remains of S. Kabras/Shamberere/208, after the excision referred to in (b) above, shall be shared out equally between Festus Mutaliani and Wilson Nyanje Mbango;

(d) That the grant herein shall be confirmed on those terms and a certificate of confirmation of grant shall issue, accordingly;

(e) That each party shall bear their own costs; and

(f) That any party aggrieved by these orders shall be at liberty move the Court of Appeal appropriately within twenty-eight days.

15. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF July 2019

W. MUSYOKA

JUDGE