



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

SUCCESSION CAUSE NO 171 OF 2015

IN THE MATTER OF THE ESTATE OF BOMBO KATAMBO (DECEASED)

MERCELENE K BULUMA.....PETITIONER

VERSUS

PRISTONE MWAKIO JUMBE.....OBJECTOR

RULING

INTRODUCTION

1. On 10th July 2017, the Objector herein filed a Notice of Motion application dated 6th July 2017 pursuant to the provisions of Section 76 of the Law of Succession Act and Rule 44 the Probate and Administration Rules. He sought the following orders:-

- 1. THAT the proceedings to obtain the grant be declared defective in substance.**
- 2. THAT the grant was obtained by the concealment from the court of facts material to the cause, more specifically all the beneficiaries were not included.**
- 3. THAT the grant was obtained by means of fraud and untrue allegation of a fact essential by point of law to justify the true.**

OBJECTOR'S CASE

2. In addition to the Supporting Affidavit that was sworn by the Objector herein on 6th July 2017, Agriper Wakio Mwasi swore a Supplementary Affidavit on 27th July 2017 in support of the said application. The same was filed on 31st July 2017. The Objector's Written Submissions were dated and filed on 23rd October 2017.

3. In his Supporting Affidavit, the Objector averred that the Petitioner herein obtained the Grant of Letters of Administration Intestate by concealment and fraud as she failed to include other beneficiaries in particular step siblings and maternal cousins.

4. He contended that she failed to disclose that the deceased's property namely Chawia/Kishamba/948 (hereinafter referred to as "the subject property") initially belonged to his maternal grandparents and that because his maternal grandmother had no sons and he was born out of an extra martial affair, he became the sole beneficiary to the deceased's estate. He said that his father, Said Jumbe (deceased) was a Muslim and because he divorced his mother due to her infidelity, he could not inherit his properties. He was emphatic that not even his step siblings and maternal cousins could inherit the deceased's property.

5. He added that the Petitioner and her brother, Adam Said Jumbe (deceased) filed **ELC Case No 1306 of 2015 Adam Said Jumbe & Merceline Buluma vs Priston Mwakio Jumbe** against him claiming division of his parcel of land known as Chawia/Wusi-Kaya/240.

6. On his part, Agriper Wakio Mwasi stated that he was a maternal cousin to the Objector herein and hence they were the deceased's grandchildren. He reiterated the Objector's assertions that because the Objector's father was a Muslim and he had divorced the Objector's mother on account of her infidelity, the Objector was entitled to inherit the deceased's property to the exclusion of all other grandchildren. He was categorical that because their maternal grandmother did not have sons, her properties were rightly inherited by the Objector who was already in actual possession of the subject parcel of land herein.

7. Both the Objector and the said Agriper Wakio Mwasi therefore urged this court to annul the Grant of Letters of Administration Intestate that was issued to the Petitioner herein and instead grant the same to the Objector herein.

THE PETITIONER'S CASE

8. In opposition to the said application, on 24th July 2017, the Petitioner filed a Replying Affidavit that she swore on 21st July 2017. Her Written Submissions were dated 2nd October 2017 and filed on 6th October 2017.

9. She denied ever having obtained the Grant of Letters of Administration Intestate through fraud and averred that she had listed all the beneficiaries to the deceased's estate who were Adam Said Jumbe (deceased), the Objector and herself and that as the Objector had confirmed, there were no other persons who were claiming the deceased's estate. She added that if there were other beneficiaries, they would have petitioned the court to be included as the deceased's beneficiaries.

10. She further denied that the deceased's parcel of land was bequeathed to the Objector herein and that if the same was true, then the Objector had failed to provide proof of the same. She added that since her father was Muslim, the Objector herein was not entitled to his estate by virtue of him having been born out of an extra martial affair which led to her father divorcing their mother.

11. She asked this court not to allow the Objector's application because he transferred Chawia/Wusi-Kaya/240 into his name before the Grant of Letters of Administration Intestate was confirmed and his hands were therefore unclean.

LEGAL ANALYSIS

12. Section 76 of the Law of Succession Act Cap 160 (Laws of Kenya) stipulates as follows:-

“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.”

13. As was rightly pointed out by the Objector herein, Section 2(2) of the Law of Succession contemplates that the deceased's estate was subject to written laws and the customs applying at the time of his death. It was also true that under Section 31 of the Law of Succession, a gift is lawful irrespective of the fact that no transfer was done by the donor prior to his or her death.

14. Whereas he was categorical that his maternal siblings were alive to the fact that their maternal grandparents had bequeathed him all their real properties, the Petitioner argued correctly that anyone who asserts a fact must prove the same.

15. There was no evidence on the court record to suggest that the deceased's parcel of land passed to the Objector's maternal grandmother because it was evident from the Certificate of Official Search that the Title No of Chawia/Kishamba/948, the subject property herein, was still registered in the name of Bombo Katambo, the Objector's maternal grandfather to the Objector and the Petitioner herein, a fact that was confirmed by the Petitioner herein.

16. Most important, the Objector did not adduce any written will showing that his maternal grandmother gifted him the deceased's parcel of land as he had contended. He was also silent as to whether his maternal grandmother gifted him the said parcel of land through an oral will. If he was gifted through an oral will, he did not demonstrate that the said will was made before two (2) or more competent witnesses and that his maternal grandmother died within three (3) months of making the will.

17. Indeed, Section 9 (1) of the Law of Succession provides as follows:-

“No oral will shall be valid unless—

a. it is made before two or more competent witnesses; and

b. the testator dies within a period of three months from the date of making the will.”

18. Having said so, in the absence of any evidence of the applicable customary law that was applicable herein, by virtue of Section 29 of the Law of Succession, all the deceased's grandchildren were entitled to a share of his property in their capacity as his dependents. The said Section 29 (b) of the Law of Succession Act stipulates that:-

“For the purposes of this Part, "dependant" means—

such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death...”

19. Notably, this court noted the assertions by both the Objector and Agriper Wakio Mwasi that none of the other grandchildren were laying claim to the deceased's parcel of land. However, none of the other deceased's dependants were parties to the proceedings herein making it difficult for this court to come to confirm the veracity of their assertions.

20. Going further, a perusal of the letter of Chief Prestone Mwambele dated 25th July 2006 that was annexed to the Petitioner's Petition for a

Grant of Letters of Administration Intestate and the Petition herein for the said Grant showed that the Objector had been recognised as a beneficiary to the deceased's estate.

21. Whereas the Objector declined to sign the requisite consents when the Petitioner herein sought to have the said Grant of Letters of Administration Intestate confirmed, his objection to the confirmation of the Grant of the Letters of Administration Intestate came almost after twelve (12) years from the date the said Petition for the Grant of Letters of Administration Intestate was advertised in the Kenya Gazette.

22. Notably, the Succession Cause was advertised in the Gazette Notice No 9668 dated 16th November 2004 and he did not object to the same within the stipulated thirty (30) days from the date of the notice whereupon the Grant of Letters of Administration Intestate was issued to the Petitioner herein on 9th December 2016. He was clearly guilty of laches and as the Petitioner correctly pointed out, his hands were not clean thus disentitling him to an equitable relief.

23. Accordingly, having considered the Affidavit evidence, the Written Submissions and the case law that was relied upon by the parties herein, it was apparent to this court that the Objector did not demonstrate how the proceedings by the Petitioner herein to obtain the Grant of Letters of Administration were defective or that the Petitioner obtained the Grant of Letters of Administration Intestate that was issued to her on 9th September 2016 fraudulently or after concealing material facts which would have been sufficient grounds for this court to have annulled and/or revoked of the said Grant of Letters of Administration Intestate.

24. He did not also adduce any evidence to demonstrate that the deceased's parcel of land was bequeathed to him by his maternal grandmother. He also failed to provide any evidence to show that the customs of his community bequeathed him the deceased's estate as a matter of right, to the exclusion of the Petitioner herein.

25. That notwithstanding, this court took the considered view that any customary law disinheriting a woman contravenes the Constitution of Kenya, 2010 and is repugnant to justice and morality and/or results in outcomes that are repugnant to justice or morality.

26. Appreciably, Article 27 of the Constitution of Kenya protects each person's right to equality and freedom from discrimination. The same provides as follows:-

- 1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.**
- 2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**
- 3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**
- 4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**
- 5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

27. Consequently, this court was not persuaded by the Objector's submissions that the deceased's estate should not be distributed as contemplated under Section 29 of the Law of Succession as aforesaid to the exclusion of the Petitioner herein.

DISPOSITION

28. The upshot of this court's decision was that the Objector's Notice of Motion application that was dated 6th July 2017 and filed on 16th July 2017 was not merited and the same is dismissed. This being a family matter, each party bear shall bear its own costs.

29. It is so ordered.

DATED and DELIVERED at VOI this 27th day of February 2018.

J. KAMAU

JUDGE