



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC P&A NO. 66 OF 2017

IN THE MATTER OF THE ESTATE OF ONESMUS MATHEKA (DECEASED)

JOSEPHINE YULA ONESMUS.....PETITIONER

VERSUS

NZUVE MATHEKA.....1ST OBJECTOR

MAUNDU MATHEKA.....2ND OBJECTOR

MUOKI MATHEKA.....3RD OBJECTOR

RULING

INTRODUCTION

1. The Petitioner herein is a wife of the deceased Onesmus Matheka Malili (hereinafter referred to as “the deceased” and she was issued with a grant of letters of administration with respect to the estate of the Deceased on 8th March 2016.
2. The Petitioner filed summons for confirmation of grant dated 7th December 2016 seeking confirmation of the grant supported by her affidavit in support of confirmation of grant sworn on 7th December 2016, while the 1st objector Nzuven Matheka filed affidavit in protest on behalf of the other objectors sworn on the 19th April, 2017 and also filed statements on September 2017.
3. This court on 8th June 2017 directed that summons for confirmation of grant and affidavits of protest proceed to hearing by way of viva voce evidence.
4. During the hearing the Objectors and the Petitioner each testified without calling any witness in respective cases as follows:-

THE OBJECTOR’S CASE

5. The Objector, Nzuve Matheka gave evidence on behalf of the others in support of their case. He adopted as his evidence the affidavit of protest that he had sworn on 19th April, 2017 as well as a witness statement he filed in court on 5th September, 2017.
6. The Objector testified that, the deceased herein Onesmus Matheka, was their brother sons to the late Matheka Mbui (deceased) who passed on the 8th November 1979.
7. According to the Objector, their late father was a member No. 596 in Konza Ranching and Farming Co-operative Society as such he was allocated parcel No. MACHAKOS KONZA NORTH 1/1068.
8. He further stated that upon the demise of their father on the 8th November 1979 they all agreed that their late brother Onesmus Matheka who died on 9th January 1997 to replace their deceased father at the society as nominee and to be registered as proprietor in parcel No. MACHAKOS KONZA NORTH 1/1068 to hold in trust for himself and other beneficiaries.
9. The Objector went further to testify that, they have been leaving in peace since everyone was given some piece of land to settle in at Kilala by their late mother who died around 1998 and the land in question was never shared or allocated to anyone.
10. In his testimony he stated that problem started when they found out that the Petitioner herein who is the wife to the deceased Onesmus

Matheka had taken out temporary letters of administration on 8th March 2016 awaiting to confirmation and the piece of land MACHAKOS KONZA NORTH 1/1068 was listed as part of the deceased estate in the summons for confirmation of grant dated MACHAKOS/KONZA BLOCK 1/1068 dated 7th December 2016 and filed in court on 10th April 2017 which is registered in the names of the Onesmus Matheka who was holding in trust for himself and other beneficiaries.

11. In cross examination he confirmed that their late father never distributed the estate before he died in 1979. He confirmed that their mother gave everyone different plots at Kilala to reside in except MACHAKOS/KONZA NORTH 1/1068 before she died around 1998.

12. He also confirms that the land is registered in the name of their late brother reasoning being that his names was in the register of the society as they had decided in the between 1982 -1984. He also confirmed that their late father paid dividend and upon his death their late brother used to take dividend and also upon his demise the 3rd protestor used to take.

THE PETITIONER'S EVIDENCE

13. The Petitioner gave a detailed account of how her deceased husband came to be registered as the sole proprietor of the suit land. I need not reproduce her evidence here verbally but suffice to set in summary a chronological order of events leading up to the said registration as her version.

14. The witness testified how the deceased's and the protestors father was issued with a notice to pay up for a share at the Konza Farming and Ranching Co-operative Society but the protestors could not raise it, leaving only the deceased to struggle and do it.

15. She narrated how both the deceased and herself were giving money for payment of the said shares and the same was channeled through MUOKA MATHEKA, one of the protestors.

16. Upon completion of payment for the share by the deceased, records were altered at the said society to reflect the deceased as the sole shareholder, and even as the registered owner of the suit land.

17. The Petitioner was emphatic that the protestors not only knew the goings-on at the society to make the deceased the shareholder at the society and the registered owner of the suit land.

18. The Petitioner also gave an account of how the protestors began troubling her by demanding that she leave her home because dowry had not been for her, and demanding the suit land, just a month after the burial of her husband.

19. They also caused her to be summoned to other offices of the provincial administration over the same dispute but she emerged the winner in all of them.

ISSUES FOR DETERMINATION BY OBJECTORS

20. As survivors and properties of the deceased Matheka Mbui are not in dispute, there are two issues for determination arising from the evidence and arguments made by the objectors and petitioners.

i) Whether parcel no. MACHAKOS/KONZA NORTH 1/2086 form part of the Estate of the deceased herein.

ii) Whether the objector are entitled to equal shares in the property in question.

21. On the 1st issue the Petitioner alleges that the summons of confirmation of grant that the Land Parcel No. MACHAKOS/KONZA/1/1086 form part of the estate of Onesmus Matheka and that the said property be registered in her name as the administrator of the estate of the deceased not taking into account the interest of the Objector wherein she averred that the deceased acquired this property from the society.

22. The Objectors herein are beneficiaries of the estate of the deceased in respect to the property in dispute as the said property was never allocated to anyone by their late father Matheka Mbui or even by their mother. The petitioner is the only one who disputes the above fact.

23. Section 42 of the Law of Succession Act provides as follows in this regards.

“Where-

a) An interstate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house;

b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account In determining the share of the net intestate finally accruing to the child, grandchild or house.”

24. The Petitioner did not bring any collaborating evidence as to how or to whom the land was allocated to. The Petitioner did not provide any written consent by the objectors so settled or given land, confirming that indeed the land in question was to be given to her late husband Onesmus Matheka as she alleged therefore the land in question does not form party of the deceased Estate solely.

25. According to section 38 of the Law of Succession Act which provides as follows:-

“Where an interstate has left a surviving child or children but no spouse, the net intestate estate shall, subject to provision of section 41 and 42, devolve upon the surviving child if there be only one, or shall be equally divided among the surviving children.”

26. In effect of this section requires equal distribution among all the children while taking into account any gifts or settlement that may have been made by the deceased during his lifetime.

27. In the present cause the both objector, namely Nzuve Matheka brother to the deceased and the Petitioner admitted that they were given land at Kilala and they have no problem with the mode of distribution by the late mother wife to Matheka Mbui deceased and therefore they are entitled to equal shares in land parcel no. MACHAKOS/KONZA NORTH, 1/1086.

SUBMISSIONS BY THE PETITIONER

28. It is submitted that, there are only 3 issues for determination in this matter and they are as follows:-

a. If the suit land was a “free property” of the deceased at the time he met his demise.

b. If the beneficiaries of the deceased’s estate are the Petitioner and her children as disclosed in the court documents.

c. Whether or not the Protestors are entitled to a share of the suit land or any other of the deceased’s estate as beneficiaries.

29. It is contended that, the evidence on record sufficiently addresses these issues hereunder shown.

30. The deceased died intestate, and the only free property he left behind, for purposes of the Law of Succession Act is the suit land.

31. The beneficiaries of the deceased are only the Petitioner as the deceased’s sole wife and her children disclosed in the pleadings.

32. The Protestors have not established that they are beneficiaries of the deceased’s estate, and are not entitled to a share of the suit land or any other property of the deceased as such.

33. The Protestors had the opportunity to summon the management of Konza Farming and Ranching Cooperative Society to testify on their behalf and lay bare the documentation regarding their father’s and/or the deceased’s shareholding and registration of the suit land before the court, but they wasted it.

34. The fact that the Protestors never summoned the management of the said society, as the custodians of the said records, can only mean one of two things; that either they would prove the protestors wrong on their unproven allegations or they actually participated in causing the deceased to be recorded as a shareholder at the society and his eventual registration as the proprietor of the suit land.

35. The evidence that the mother of the Protestors and the deceased demanded refund of contributions her husband had paid to the society towards the purchase of the share, which was done by the deceased herein, remain uncontroverted.

36. If the suit land formed part of the estate of the Protestors and the deceased’s father as they would have the court believe, there is no way it would not have been shared out amongst them during the lifetime of their mother, just like the Kalama land.

37. The court should take judicial notice of the fact that ordinarily, a parent (in this case the mother of the Protestors and the deceased) would not be biased against some of her children in favour of one, and the fact that she did not share out the suit land amongst the children can only mean it was not their father’s property, but the deceased’s.

38. Whereas the Protestors could not back up their allegations with anything written, the Petitioner produced books dated as far back as 1981, backing her evidence as to how she and the deceased gave out money for payment of the share at Konza Society, initially belonging to the deceased’s father.

39. Due process was followed to have the ownership of the shares changed from the Protestors’ and deceased’s father into the deceased’s name, and the registration of the suit land as the sole proprietor was no different.

40. The claim to the deceased’s estate by the protestor’s is partial in the sense that they are only claiming a share of the said land and leaving out their share of dividends paid by Konza Society to the deceased and the Petitioner after him, and that makes it clear that their claim of the suit land is an afterthought made to grab the land from the Petitioner. If it was true the share of their father was to be held by the deceased in trust for him and themselves, they should be demanding their share of dividends as well.

41. The Protestors never laid claim to the suit land during the lifetime of their mother and/or the deceased. The Petitioner’s evidence that they started it all soon after her husband’s burial clearly shows vulture behavior on their part, in the sense that they wanted to take advantage of her weakness and vulnerability.

42. Since the suit land was the free property of the deceased as at the time of his demise, with no caution or caveat on it, there is only one

route for the court to take, cause it to be transferred into the Petitioner's name as it is and, if they so choose, the Protestors can pursue their claim over it in an ordinary suit. To us, it was a gross misconception to lay their claim in these proceedings.

ISSUES ANALYSIS AND DETERMINATION

43. After going through material before the court, I find the core issues are;

i. Whether the suit land was held in trust for protestors and the entire family of deceased's father?

ii. If in negative, what are the appropriate orders to make?

iii. What is the order as to costs?

44. The dispute is not per se revolving on distribution or administration of the deceased estate but ownership of the suitland. In the **MATTER OF ESTATE OF GACHURU KABOGO NAI SUCC NO 2830 OF 2001** the court held that, during confirmation of grant hearing, if ownership of a property of an estate is contested, the property not contested is confirmed and the contested is heard under **Order XXXV1 (36) CPR** as separate.

45. In another matter **CHARLES MURITHI KUNGU VS ANN NJOKI NJENGA NAI HCCC 19 OF 2004** the court ordered that a dispute as to whether a particular asset formed part of the estate of deceased or belonged to the applicant be dealt with through an originating summons brought under **ORDER XXXVI RULE 1**.

46. Section 107 of the Evidence Act, Cap 80 Laws of Kenya is worded as follows:-

1. "107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof has on that person."

47. Section 109 of the Evidence Act, Cap 80 Laws of Kenya also provides thus:-

a. "109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on my particular person."

48. The claim by the protester did not meet the threshold set out in the above provisions of Evidence Act.

49. The fact that the Protestors never summoned the management of the society which sold land, as the custodians of the said records, can only mean one of two things; that either they would prove the protestors wrong on their unproven allegations or they actually participated in causing the deceased to be recorded as a shareholder at the society and his eventual registration as the proprietor of the suit land.

50. As of now the suit land is a free property of the deceased just as at the time of his demise, with no caution or caveat on it, thus there is only one route for the court to take, cause it to be transferred into the Petitioner's name as it is and, if they so choose, the Protestors can pursue their claim over it in an ordinary suit.

51. Thus court makes the following orders;

i. The grants are confirmed and the Suitland to be registered in Petitioner's name.

ii. The Protesters have 3 months to lodge their claim in ELC court if any.

iii. The Petitioner shall not distribute or transfer or charge suit land within 3 months.

iv. No orders as to Costs.

SIGNED, DATED AND DELIVERED THIS 19TH DAY OF APRIL, 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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