



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 149 OF 2002**

**IN THE MATTER OF THE ESTATE OF JOSEPH SHIKALI.....DECEASED**

**AND**

**MOSES SHIKALI ATSIANJI.....PETITIONER**

**AND**

**AGGREY SAKWA SHIKALI.....APPLICANT**

**RULING**

1. The applicant herein, Aggrey Sakwa Shikali, has filed an application dated 20<sup>th</sup> April 2009 seeking that the grant of letters of administration issued to the petitioner Moses Shikali Atsianji on 7<sup>th</sup> August 2002 and confirmed on the 6<sup>th</sup> October 2004 be revoked. The grounds in support of the application are that the applicant is a son to the deceased Joseph Shikali and that he was not included in the list of the beneficiaries of the deceased's estate. Further that the petitioner in his affidavit in support of petition of letters of administration stated that he is the sole beneficiary of the estate of the deceased yet the deceased had other beneficiaries including the applicant and a widow by name Esther Shirievo who is the mother to the applicant. That the grant was issued in the name of the petitioner who proceeded to transfer the deceased's estate land parcel No. Tiriki/Shamakhokho/58 into his own name thus disinheriting the other beneficiaries of the estate. Therefore that the petitioner obtained the grant fraudulently by failing to disclose some material facts in the succession cause and that the grant should be revoked.

2. The application was opposed by the petitioner through his replying affidavit dated the 20<sup>th</sup> April 2010 in which the petitioner says that he does not know the applicant. He denied in the affidavit that the applicant is a son to the deceased. The petitioner says that though he is named as the sole beneficiary to the deceased's land in the petition for grant of letters of administration, this was not meant to disinherit the other beneficiaries. That this was done pursuant to a collective family agreement for him to hold the property in trust for the rest of the family. That as a testament to that the deceased's children continue to live on their share of land save for those living away from the home. That the petitioner does not know the deceased's widow by name Esther Shirievo who even does not have a house on the deceased's homestead and has never lived in the said homestead.

3. The matter was heard by way of viva voce evidence. The applicant testified and called three witnesses who testified that the applicant is a son to the deceased. The petitioner testified and called one witness, his brother Alexander Shuma DW2. The two denied that the applicant is a son to the deceased.

**Evidence for the applicant:**

4. The evidence for the applicant is that he is a teacher at Olessos Technical Institute. That he was born in 1961. His mother is Esther Shirievo. That his father was the deceased in this succession cause. That the deceased had 4 wives including his mother. That the petitioner did not include him as a beneficiary in the succession cause as he indicated in the petition that he was the sole beneficiary.

5. In cross-examination the applicant stated that his name as appears in his identity card is Aggrey Sakwa Mwashu. That he does not know who Mwashu is. That he brought up this application in the name of Aggrey Sakwa Shikali which he said was an error. The witness stated that he has no document to show that he is a son to the deceased neither does he have any document to show that his mother was married to the deceased. The witness stated that he did not grow up in the homestead of the deceased. That his mother did not have a house there neither has he built a house there. He said that his mother has no interest in the estate of the deceased.

6. The witnesses that that applicant called in the case were Peter Kiraka Khasianyi PW2 who was a brother to the deceased, Rael Shidenye, a sister to the deceased and Robai Khalusa, a widow to the deceased. The evidence of Peter PW2 was that the deceased had 3 wives – Dorcas, Esteri and Robai. That Dorcas had 9 children among them the petitioner herein. That Esteri was the mother to the applicant while Robai had one child. That the deceased's estate should be shared by all the sons of the deceased including the applicant. In cross examination the witness stated that the mother to the applicant was living with the deceased in Nairobi. That she did not have a 'boma' at the

homestead of the deceased as she was not properly married to him. That the applicant was born in Nairobi. That he went home and he was taken through a traditional ceremony. That the applicant never lived at the home of the deceased but attended the deceased's funeral.

7. The deceased's sister PW 3 (Rael) testified that the applicant's mother was only a friend to the deceased and that they never lived together. That her deceased brother had told her that the applicant was his son and that he should get a share of his land. That the applicant used to live with his mother in Nandi. That when the applicant was young, there was a ceremony where he removed the hair to the deceased as a sign that he was the deceased's son.

8. Robai PW 4 testified that the deceased had 4 wives including the mother to the applicant, Esther Imali. That she, Robai lives on the deceased's land. That when she was married, the applicant had been born and was working in Nandi but that he used to visit on weekends. That the petitioner did not involve her when he filed the succession cause. That the deceased's land should be shared by all the beneficiaries including herself and the applicant.

**Evidence for the Petitioner:**

9. The petitioner DW 1 testified that his father had two wives – his late mother Dorcas and the late Tepla Shikali. That his father did not have a wife by the name Esther Shirevo. That his father had not told the family members that he had a son by name Aggrey. That before their father died he had showed all his siblings where to settle on the land in issue and gave each one of them a portion of the land. That after the death of his father, he and his siblings held a meeting and he was given permission to file a succession cause on behalf of the other family members. That he did so and was issued with a grant of letters of administration. He transferred the land into his name to hold it in trust of the other family members.

10. The petitioner's brother DW 2 testified that his late father had two wives – his late mother Dorcas and the late Tepla. That Tepla had no children. That he has never seen the alleged mother of the applicant Beatrice. That he does not know the applicant. That he never heard that his late father had a son by name Aggrey. That Aggrey never went to their home to introduce himself as his late father's son. That after the death of their father he and his siblings gave authority to the petitioner to apply for grant of letters of administration. That all the siblings are satisfied with that. That he only came to hear of the applicant when he filed this objection.

**Submissions by advocates for applicant:**

11. The advocates submitted that the petitioner in his petition for grant of letters of administration presented himself as the sole survivor and beneficiary of the estate of the deceased and proceeded to transfer the estate land into his own name thereby disinheriting the other beneficiaries of the estate. That the petitioner in his evidence admitted that there are other beneficiaries of the state. The grant was therefore obtained by concealment of a material fact. That the Land Register has the petitioner's name as the sole proprietor hence the other siblings stand disinherited displaced from the land. That it is evident that the deceased had 4 wives including the mother of the applicant. That the estate should be distributed to the 4 wives of the deceased.

**Submissions by the advocates for the petitioner:**

12. The advocates submitted that the only issue for determination is whether the applicant is a son to the deceased. That it transpired during the hearing that the applicant's true name as appears in his identity card is Aggrey Sakwa Mwashu. That in court the applicant introduced himself as Aggrey Sakwa Mwashu. That he did not explain who the Mwashu who appears as the surname in his identity card is. The advocate submitted that the said Mwashu is the true father of the applicant. That the applicant brought up these proceedings in the name of Aggrey Sakwa Shikali in an attempt to hijack the deceased's estate. That the applicant registered a restriction against the land of the deceased in the name of Aggrey Sakwa Mwashu as appears in his affidavit annexure AS 4.

13. Further that the applicant admitted in his evidence that neither him nor his mother have a house in the home of the deceased. That the two did not attend the funeral of the deceased. That the applicant has failed to show a connection with the deceased.

14. Further that the beneficiaries of the estate of the deceased are comfortable with the arrangement where the petitioner was registered as proprietor of the deceased's estate. That all the siblings are living on their portions of land apportioned to them by the deceased. That allegations that beneficiaries have been disinherited from the land does not hold water.

**DETERMINATION:**

15. The application for revocation of grant was made under section 76 of the **Law of Succession Act** Cap 160 Laws of Kenya that states that:

**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;*
- b) *that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
- c) .....
- d) .....

e).....

16. The applicant says that he has brought up the application in his capacity as a son to the deceased and that the grant was obtained fraudulently by making a false statement that the petitioner was the sole beneficiary to the estate.

The questions for determination are whether:

- 1) ***The applicant is a son to the deceased;***
- 2) ***Whether the petitioner has disinherited the other beneficiaries of the estate of the deceased and***
- 3) ***What orders should the court make in the case.***

17. The applicant's claim that he is the son of the deceased was supported by three witnesses, a brother to the deceased Peter, PW2, a sister to the deceased, Rael PW3 and a wife to the deceased, Robai, PW4. The three witnesses said that they know the applicant as a son to the deceased. Peter said that the applicant's mother was not properly married to the deceased. Rael said that the applicant's mother was just a friend to the deceased and that the deceased had told her that the applicant was his son. Robai said that though the applicant was not living at the deceased's home, he used to visit on weekends.

18. It is clear from the evidence of the applicant's witnesses that his mother was not married to the deceased. His mother could only have been a woman friend to the deceased. The evidence of the applicant that his mother was a wife to the deceased is not borne out by the evidence adduced in court. The evidence to that effect is therefore dismissed.

19. Rael, PW2 said in her evidence that the deceased had told her that the applicant was his son. Both Rael PW3 and Peter PW2 stated that the applicant had been taken through a traditional ceremony that recognized the applicant as a son to the deceased.

20. The petitioner and his brother DW2 on the other hand stated that they did not know the applicant as a son to the deceased. The petitioner stated that if the applicant was a son to the deceased, he would have been circumcised at the home of his late father. DW 2 stated that the applicant did not attend the funeral of his late father. That the applicant never went to their home for introduction as a son to the deceased. That if he was a son to the deceased, he would have been given his piece of land.

21. Upon careful consideration of the evidence adduced in court by the parties and their witnesses, I find no credible evidence to prove that the applicant is a son to the deceased. There is no evidence that the deceased recognized the applicant as his son during his life time. Though Peter PW2 and Rael PW3 stated that there was a traditional ceremony performed whereby the deceased recognized the applicant as his son, the applicant himself never referred to any such ceremony. His case was purely based on the grounds that his mother was married to the deceased and not on the basis of recognition by the deceased as his son. Besides, the applicant's official name is Aggrey Sakwa Mwashu. He did not assume the surname of the deceased when he registered as a citizen. He instead assumed the surname of "Mwashu" whom he could not explain to the court who that person is. He did not call his mother as a witness in the case. His mother has not lodged any claim on the estate of the deceased. It is his mother who knows who his father is. In the premises the applicant should find out from his mother who his father is.

22. The petitioner says that the deceased apportioned his parcel of land to his children before he died. Robai DW4 confirmed that she is settled on the land though she only had one child with the deceased.

None of the children of the deceased has complained that they have any dispute over the land.

23. If the applicant was a son to the deceased, it has not been shown why the deceased did not give him his share of the land like he did to his other children. The applicant did not claim his share of land from the deceased before the deceased died. Why did he wait until the deceased passed away for him to lodge his stake on the land? It is something to be abhorred for a claimant to keep silent during the lifetime of a person only to raise claim over the person's property after the death of the person. This practice has been disapproved by Mativo J. **In re-Estate of Patrick Mwangi Wathiga – deceased, Nyeri H.C. Succ Cause No.343 of 2005 (2015) eKLR** where the Learned Judge said that:

***“In my view, the practice of person emerging after the demise of a dead person purely to claim a share of properties of the dead person should be discouraged unless the alleged claimant can demonstrate that there were attempts to have him or her recognized as a beneficiary member of the family during the deceased's lifetime or the deceased left clear instructions to that effect, or his claim can be reasonably inferred from the express or implied circumstances of the case including the conduct of the deceased or from such reasonable or probable circumstances that can be proved by way of evidence. Alternatively, such a claim can also be admitted if the claimant demonstrates that he was prevented from associating with the deceased during the deceased's lifetime by either infirmity of body or mind or both or any other reasonable circumstances. In my view, where someone remains delinked from a family or the person he claims to be a parent for 24 years and only emerges after his/her death, the burden lies on him/her to establish his claim to the deceased's estate and to tender such evidence as may be necessary to establish his claim.....”***

The applicant herein was aged 38 at the time when the deceased died. He has not explained why he did not file the claim of land against the

deceased. In the whole, I find no evidence that the applicant is a son to the deceased. He has no locus standi to file the current application in respect to the estate of the deceased. His application for revocation of grant has no basis and is accordingly dismissed with costs to the petitioner.

24. The other question is whether the petitioner has disinherited the other beneficiaries of the estate of the deceased. It is evident that the petitioner sought for grant of letters of administration under the guise that he was the sole beneficiary to the estate of the deceased. He admits that it was an error for him to state in the application for grant of letters of administration that he was the only beneficiary to the estate. He says that he transferred the estate of the deceased into his own name to keep it in trust of the other family members. However, the title deed that was issued to him records him as the sole proprietor to the land.

25. A personal representative may be registered as a proprietor of the land of a deceased person but only as administrator of the estate of the deceased as provided by **section 61(1)** of the **Land Registration Act CAP 300** which states that;

*(1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of (deceased)" or "as administrator of the estate of (deceased)" as the case may be.*

**Section 79 of the Law of Succession Act** states that:

*The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and . subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.*

26. In this case the petitioner was registered as the sole proprietor of the land in issue and not as the administrator of the estate of the deceased or personal representative. It was an error on the part of the Land Registrar to have registered the land in that manner. This might lead to the other beneficiaries being disinherited by the petitioner. **Rule 73** of the **Probate and Administration Rules** grants inherent powers to a court handling succession matters to make such orders as may be necessary for the ends of justice. Considering the interests of all the beneficiaries of the estate of the deceased herein, the court on its own motion, do cancel the title deed issued in the name of the petitioner as a sole proprietor and order the Land Registrar Kakamega to issue a fresh title deed in the name of the petitioner, Moses Shikali Atsianji as administrator of the estate of the late Joseph Shikali. If the petitioner does not make the necessary application to the Registrar within one month from the date of the delivery of this ruling, the title deed stands cancelled and the land registrar is ordered to act accordingly and revert the name of the proprietor of the land to the name of the deceased herein.

Orders accordingly.

**Delivered, dated and signed in open court at Kakamega this 12<sup>th</sup> day of April, 2018.**

**J. NJAGI**

**JUDGE**

In the Presence of:

Mr Arwamba for Applicant

Olel Onyango for Petitioner absent

Applicant absent

Petitioner absent

Court Assistant George