



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 480 OF 2011
IN THE MATTER OF THE ESTATE OF M'MWITHIMBU
ALAJA MUKOTHO (DECEASED)
HENRY MWORIA.....PETITIONER/RESPONDENT
VERSUS
EUNICE MWARONJA.....OBJECTOR/APPLICANT

J U D G M E N T

1. **M'MWITHIMBU ALAJA MUKOTHO (“the deceased”)** died at Naari on 16th December, 1994. He left behind five sons and three daughters. He also left behind Land Parcel No. Kiirua/Naari/140 as his only asset. On 7th September, 2011, **Henry Mworja Mwithimbu (“the petitioner”)** petitioned for letters of administration intestate. These were issued to him on 14th February, 2013.

2. On 25th April, 2014, the petitioner applied for the confirmation of that grant which was allowed on 29th September, 2014 and the estate distributed as follow:-

- a) Anne Kigetu - 1 acre
- b) Henry Mworja - 1.75 acres
- c) Isaac Kinyua - 1.75 acres
- d) Mary Karimi Marangu
& Perpetual Kendi - 1.75 acres
- e) Andrew Kirimi - 1.75 acres

3. On 23rd February, 2015, **Eunice Mwaronja (“the objector”)** applied for the revocation of the said grant on the ground that, although she was a daughter of the deceased, she had not been provided for. That she had been persuaded to sign the consent to confirmation and distribution without knowing that she was being disinherited and that all the members of the family did not give their consent to the distribution.

4. The petitioner opposed the application vide a Replying Affidavit sworn on 3rd June, 2015. He contended that the said application was an afterthought meant to get back at him because he had demanded back his cow from the objector; that he had given the objector and her husband some land where they had been living for 8 years and in exchange, the objector had agreed not to claim anything from the estate and that the objector had voluntarily signed all the consents.

5. The application was ordered to be determined by way of viva voce evidence with the parties and their witnesses filing affidavit evidence.

6. **OW1 Eunice Mwaronja**, the objector testified that she was a daughter of the deceased still making use of the deceased's land. That apart from her and her sister Rael Karamtu, none of the beneficiaries signed the consent to distribution; that one of her sisters who is mentally challenged was made to sign the documents yet she could not understand what she was doing. She further claimed that she signed the documents for confirmation without a clear mind.

7. She maintained that the property she was occupying, Kiirua/Naari/695, had been sold to her by the petitioner and there was only a balance of KShs.20,000/- remaining thereon. She admitted in cross-examination that she willingly signed the consent to distribution; that she attended confirmation but did not hear when the court asked for any objection to distribution. She admitted that the petitioner had given her a cow but he had come for it.

8. **OW2 was Stanley Kimathi Mwithimbu**. He is the eldest son of the deceased. He told the court that he was neither consulted nor involved with the Succession Cause Nevertheless, he did not want any share from the estate. He admitted that he had been provided for by the deceased during his lifetime.

9. **OW3 Nkunja M'Tuerandu** told the court that he had sold to the petitioner parcel no. Kiirua/Naari/695 over 25 year ago. That the objector had been in occupation thereof for over 7 years now.

10. **PW1 Henry Mworja**, the petitioner, told the court that after the objector's husband had sold his portion of inheritance, the objector migrated to Maitei whereby the petitioner gave them his own land, Kiirua/Naari/2961 measuring one acre. That at the time of giving the petitioner the said land, it was agreed between themselves that in return the objector will not get a share from the estate of the deceased. That because the property is adjacent to the estate property, the objector agreed to the arrangement.

11. The petitioner further testified that the objector is a deputy head-teacher and she signed the documents voluntarily. He alleged that the present application was a revenge by the objector against him for having recalled a cow he had previously given to her family. He denied having sold any land to the husband of the objector. He stated that the meeting referred to in the minutes of a meeting that took place on 3rd March, 2015 at the chief's office concerned a debt he owed the objector's husband and not any land he had allegedly sold to him.

12. **PW2 Rael Karamuta** told the court that the distribution of the estate was in accordance with the family agreement. That she and the objector had agreed not to claim any share from the estate. That the objector had two portions from the petitioner, one purchased and another given freely. **PW3 Isaac Kinyua** testified that the family had agreed as to the mode of distribution. That the objector was given some land by the petitioner whereby she disclaimed her right to any share in the estate.

13. **PW4 was Andrew Kirimi**. He told the court that he was a son of the deceased. He reiterated the evidence of **PW3**. In cross-examination, he told the court that the objector was not given any share because she has another land at Kaaga. That the objector continues to live on the portion of land belonging to the petitioner.

14. At the close of the case, the parties were ordered to file and serve their written submissions but they did not. This judgment was therefore made without the benefit of the parties submissions. Having considered the record and the testimonies of witnesses, the issues for determination are; ***whether the objector is a beneficiary of the estate of the deceased; is she entitled to a share in the estate and if so,***

should the grant be revoked?

15. The evidence on record is overwhelming as to who the beneficiaries of the deceased are. The letter of introduction by the Chief of Naari Location dated 2nd June, 2011, sets out the names of 8 persons as the ones who survived the deceased. These are, Stanley Muriuki, Ann Kigetu, Henry Mworja Mwithimbu, Mary Karimi, Rael Karamuta Mwithimbu, Eunice Mwaronja Isaac Kinyua and Andrew Kirimi.

16. Apart from the foregoing, all the witnesses who testified were in agreement that the objector was a daughter of the deceased. That being the case, I hold that the objector is a beneficiary of the estate of the deceased.

17. The second issue is whether the objector is entitled to a share in the estate. Her testimony was that she hurriedly signed the consent to distribution when it was brought to her place of work at Muutionhunguri Primary School when she was busy working in class and that the petitioner informed her that other things would be sorted out later. That she did not sign the documents relating to distribution with a clear mind. That on the day she attended court for confirmation, she did not hear the court ask if there was anyone with any objection. She denied that she had been given any land by the petitioner in exchange for her renouncing her right to inherit. She further denied that her application was a revenge against the petitioner for taking away a cow he had given to her family.

18. On the petitioner's part, he contended that the objector signed the consent to distribution voluntarily. That he had given the objector his half acre adjacent to the estate property to the objector whereby she agreed not to lay any claim to a share in the estate. That all was well until he took away from the objector a cow he had given to her.

19. One thing that struck this court was that both parties were not candid with the court. The objector stated in her depositions that she was lured to sign the consent to distribution by the promise that the matter would be clarified in court. That the petitioner had obtained the confirmation of grant without the consent of all the beneficiaries of the deceased. One wonders, if what the objector was stating is the truth, why did she not raise the issue of "*clarifying the matters*" when she attended Court for confirmation? Further, why did she not tell the court on that day that although she had signed the consent to distribution, all the other beneficiaries hadn't?

20. On the other hand, the petitioner deposed that he had given the Objector and her family, parcel no. **Kiirua/Naari/2961** measuring 1acre; that he had bought that property from one Nkunjia N'Tuerandu and that it is at the time of giving the petitioner that land that it was agreed that the objector will not get anything from the deceased's estate. However, failed to produce a title for that property. He again changed his version and stated that the property he had bought from Nkunjia N'Tuerandu was parcel no. **Kiirua/Naari/117** and not **Kiirua/Naari/2961**.

21. One fact however that remained unchallenged is that, the objector signed both the consent to lodge the Succession Cause as well as distribution volutarily. She was at the forefront in pushing for the Cause to be filed and finalized while the other beneficiaries were dragging their feet. Although she started that she signed the consent to distribution with an unclear mind she offered no evidence to prove that fact. The consent to distribution was signed on 9th April, 2013. The parties then appeared before Makau J five months later on 29th September, 2014. In this court's opinion, five months was an adequate period for the mind of the objector to have cleared. She was perfectly entitled to raise the matter before Makau J, but she chose not to.

22. Indeed, before confirming the grant on 29th September, 2014, Makau J had on 16th June, 2014 directed that since not all beneficiaries had signed the consent, they should be served before the grant could be confirmed. This shows that this matter cannot be said to have been rushed through to have not given the objector enough time to reflect on her actions.

23. The objector was personally in attendance at confirmation but raised no objection. Her answer was that she did not hear when the judge called for any objection. She produced a medical report from the

Meru Teaching and Referral Hospital to show that she had been treated for an ear problem and was suffering from an ear loss.

24. The letter in question is dated 2nd July, 2015 and the assessment and examination was conducted on 30th June, 2015. That was slightly over five months after the present application had been presented and ten months after the date she appeared in court for confirmation. There is nothing to show that on the date she appeared in court on 29th September, 2014, she had any ear problem. That Medical Report may have been procured purportedly for the present application and is of no use as far as this Court is concerned in relation to what transpired in Court on 29th September, 2014.

25. The evidence of **PW2** was preferable. She is a daughter of the deceased, married like the objector. She also was not provided for in the distribution because according to her, the family had agreed that the daughters were to get nothing except Ann Kigetu who is mentally challenged and has children.

26. To my mind, the consent that is signed by the parties for distribution is not for the sake of it. It is a solemn serious act that persuades a court of law to act at the instance of the parties and dispose off property in a particular manner proposed by them. It is binding on the court as it does on the parties. It is not a joke easily reversible at the whims of any party. In my view, unless there is compelling evidence that either the consent was obtained in circumstances that can vitiate a contract or is inherently unfair, the consent is binding and no party is to be allowed to rescile from it at will. Lest there be no end to litigation.

27. To my mind, all the other issues regarding there having been another property that was given in exchange for the estate is not a matter for this court. That is an issue of contract to be thrashed out in the realm of civil litigation before a civil court.

28. In the circumstances, I find that the application lacks merit and I dismiss the same. I will not make any order as to costs this being a family matter.

DATED and DELIVERED at Meru this 12th day of April, 2018.

A. MABEYA

JUDGE