



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO.617 OF 1995

IN THE MATTER OF THE ESTATE OF DANIEL MURAMBI AMIANI - DECEASED

AND

ZIPPORAH AMIANI

GLADYS INYANJE.....PETITIONERS/DEFENDANTS

VERSUS

EDWARD AMIAMI.....OBJECTOR/PLAINTIFF

RULING

1. The objector/plaintiff herein, *Edward Amiani*, has filed an application dated 19th August 2013 seeking for orders that:

(1) spent

(2) spent

(3) This honourable court be pleased to order that the certificate of confirmation of grant issued to the petitioners on 5th August 2013 be annulled and or revoked.

(4) A fresh certificate of confirmation of grant be issued disclosing and/or providing for the shares of all beneficiaries as listed.

2. The application is premised on the grounds that the objector has been excluded from the sharing of the estate of his late father, the deceased in this succession cause.

Background to the application:

3. The original petitioners in the matter were *Zipporah Amiani* and *Esther Amiami* who were widows of the deceased. The matter came up for confirmation of grant on the 1st August 2013. The application for confirmation of grant was made by another widow of the deceased *Resper Amiani* though she was not a petitioner in the case. The application was supported by her affidavit and a consent that was signed by the other beneficiaries except Esther Amiani and one other beneficiary (not clear from the consent) . When the matter came up for confirmation the two petitioners, Zipporah and Esther, were not present in court. The following beneficiaries were however present –

- **Henry Amiani**

- **Resper Amiani**

- **John Amiani**

- **Mary Malina**

- **Ephraim Kozerani**

- Susan Amiani and

- Gladys Yalwala

4. All the beneficiaries who were present in court stated that they agreed with the proposed mode of distribution as contained in the supporting affidavit of Resper and the consent filed therein. The court confirmed the grant as per the consent. The estate was distributed as follows:-

- Henry Amiani Murambi	- 1.06 Ha
- Resper Amiani Murambi	- 3.16 Ha
- Esther Khayanja Amiani	- 3.85 Ha
- Mary Malina Khanasi	- 1.88Ha
- Ephraim Kozerani	- 1.41 Ha
- Susan Amiani	- 0.7 Ha
- John Amiani	- 1.31 HA

5. It is upon this confirmation that the objector/plaintiff filed the application seeking to have the grant revoked. Later, Esther Amiani died. Her daughter **Gladys Inyanje**, filed an application to substitute her mother as the 2nd petitioner. The application was allowed on the 25th January 2015. Later on the 7th November 2016, Gladys filed a witness statement supporting the objector to have the grant revoked.

6. The court record does not indicate whether anybody filed an affidavit opposing the application dated 19th August 2013. Directions were taken for the matter to proceed by way of viva voce evidence. Further that the objector was to be deemed as the plaintiff in the case while the petitioners were to be the defendants. Parties testified and called witnesses. The objector/plaintiff called three witnesses who included Gladys, who though was a petitioner in the case. The side of the petitioners/defendants called two witnesses none of whom was a petitioner in the case.

Case for Objector/Plaintiff:-

7. The objector's evidence was that his father had 5 wives. These were

- Zipporah Amiani, Esther Amiani, Resper Amiani, Dorcas Amiani and Susan Amiani.

8. That his father left behind land parcel **No. Tiriki/Serem/1** measuring 13.4 Ha. That he had left a will as to how the property was to be distributed in accordance with the houses. That this was contained in a document prepared by the late Esther Amiani which copy of the document he has attached to the summons (though the document is attached is not marked). According to the said document the land was to be distributed as follows:

- Esther Amiani's house	- 4.2 Ha
- Resper Amiani's house	- 3.8 HA
- Dorcas Amiani's house	- 1.4 Ha
- Susan Amiani's house	- 1.4 Ha
- Zipporah Amiani's house	- 2.6 Ha

9. The objector says that when the matter came up for confirmation the proposal by **Esther Amiani** was not brought to the attention of the court. That the said proposal is the fair one as it serves the wishes of the deceased and the interests of all the beneficiaries. That the confirmed grant left some other beneficiaries including himself and children of his deceased brothers. That since the confirmation of the grant, his mother Susan has passed away and he should get her share of 1.4 Ha. That Esther also died and her share should go to her heirs. That Esther's house is to get a bigger share of the estate as it has 4 deceased sons of the deceased who are survived by children. That Henry Amiani never stayed on the parcel of land in issue as he has his own home at Kaptieni village. That Henry was brought up by Zipporah and therefore that if he wants land he should get it from Zipporah.

10. This mode of distribution was supported by **Gladys Inyanje PW2**. PW2 added that Henry Amiani was not allocated any portion of the said land. That her father had allocated her brother **Wycliffe Amiani** a share. That Henry should get a share from what was allocated to Wycliffe. At the same time the witness said that the share given to Henry should go to her mother and Henry be catered for from the share of Zipporah as he was brought up by Zipporah. The witness said that the land has clear boundaries as shown by the diagram attached to the application of the objector (document not marked).

11. The third witness for the objector **PW3** stated that the deceased was his clansmate. That when the deceased was at his death bed, he summoned him and gave him a book that contained his wishes. He told him to keep the book in safe custody. He did not read it.

Case for Defence/petitioners:

12. The defence called two witnesses, **Resper Amiani DW1**, who is a widow to the deceased and a retired **assistant chief DW2**. In her evidence Resper stated that before her husband died he had stated how the land was to be distributed. That on the 1st August 2013, the family members appeared in court and the grant was confirmed as per the wishes of the deceased. However that Edward, the objector was omitted from the grant. That Edward was raised as son of Susan. That Susan is now deceased and Edward should get the share of Susan. That Henry Amiani's mother was called Sophia. That she left the deceased and got married elsewhere. That in the distribution Henry was given the share of Sophia's house. That the house of Esther got the biggest share as it has bigger number of children.

13. The retired assistant chief **DW2** testified that on the 16th December, 2010 he was called by the deceased's family when they were distributing the family land. That the family proposed that the land be shared as per the houses. That this was done in accordance to where one has developed. Henry was given directly his mother's share. Edward, the objector herein, was to get his share from the house of Susan. That Ephraim and John who are children of Dorcas took the share of their mother.

14. The witness, DW2, further stated that there were no marked boundaries at the time the sharing was done but that they were put during the meeting.

Analysis and Determination:-

15. From the outset the court wishes to make it clear that the deceased did not leave behind any will. No will was placed before the court. The deceased therefore died intestate. He was polygamous. His estate is therefore to be distributed in accordance with **section 40** of the Law of Succession Act which states that:

“40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

16. The retired assistant chief DW2 stated that the land had no boundary marks when they discussed about the distribution of the property in the year 2010. DW2 was an independent witness in this case. I believe his evidence that there were no boundary marks. The deceased had therefore not distributed the land.

17. The proposal that the estate should be distributed in accordance to the document prepared by the late Esther Amiani, has no basis. Esther did not file the said document with the court. She had died by the time this application came up for hearing. She was not there to defend the document. The objector has no basis of saying that the document contained the wishes of the deceased as the document is not a will. The document contained the wishes of Esther. Her wishes are not binding on the court. The submission that the estate should be distributed in accordance with the contents of the said document is therefore dismissed.

18. During the confirmation proceedings on 1st August 2013, the estate of the deceased was distributed in accordance with the houses. At the time of confirmation, there were some spouses still alive. As of now there appears to be one spouse, Resper, surviving. It is not clear whether Zipporah, the 1st petitioner is still alive. All the same the estate should be distributed in accordance with the houses.

19. The grant of 1st August 2013 was confirmed by consent of the parties. Each beneficiary was to inherit through his or her mother. The objector herein Edward was to inherit through his mother Susan. The other beneficiaries were to inherit through their mothers. It is then not true that the objector and other beneficiaries were left out of the distribution of the estate.

20. It has been established that **Henry Amiani** had his own mother called Sophia who had deserted the deceased and got married elsewhere. Nobody has complained that Henry is not a son to the deceased. Though he was said to have built his home outside the land in contention, there was no suggestion that the land he has built on was given to him by the deceased. Henry therefore cannot be denied inheritance of his father's estate. He was given the share of his mother. There is thereby no justification in the contention that Henry should be catered for from the share of Zipporah. He was entitled to inherit the share of his mother.

21. The houses of Resper, Zipporah and Dorcas are not complaining on the mode of distribution done on 1st August, 2013. It is only the houses of Esther represented by **Gladys Inyanje** and Susan represented by **Edward Amiani** who are complaining. I find no substance in the complaint of Gladys Inyanje. The house of Esther was given the largest share of 3.85 Ha because of the number of children who were there. I therefore find that they were well catered for.

22. The objector **Edward Amiani** appears not to be satisfied with the size of land given to his mother. His mother was given 0.7 Ha. He is claiming 1.4 Ha. The question is whether the claim is justified.

23. In a matter of distribution of an estate all the interests of the beneficiaries have to be put into consideration. It is commendable that beneficiaries herein agreed on how to share the property. However the sharing had to be equitable. The mother to the objector was given 0.7

Ha. Comparatively, the house of Dorcas represented by **John Amiani** and **Ephraim Amiani** were given a total of 2.72 Ha, with John getting 1.31 Ha and Ephraim 1.41 Ha. Henry was given 1.06 Ha. Why would Edward's mother have been given 0.7 Ha when the others who were given directly were getting much more? I find that Edward's mother was given a raw deal in the distribution. The house of Esther was given 3.85 Ha because it had 4 deceased sons of the deceased. When their share is divided among the 4 beneficiaries each will end up getting around 0.96 Ha. The mother to the objector should at least have gotten one hectare.

24. In the premises I find that the distribution of the property was not equitable to the mother of Edward. It is prudent for the court to interfere with the confirmation made by the court on 1st August 2013 to increase the share given to the mother of the objector. I am of the considered view that **John** and **Ephraim Amiani** got more than they deserved. I accordingly order for 0.30 Ha be deducted from their respective shares to add to the share given to the objector's mother to make one hectare for **Edward Amiani**. The rest of the distribution to remain as confirmed by the grant issued on 5th August 2013. As some of the widows mentioned herein are now dead there is need to amend the said grant to capture the living beneficiaries. An application is to be made to that effect.

25. In the foregoing the certificate of confirmation of grant issued by the court on 5th August 2015 is revoked and a fresh grant is to be applied for to provide for the distribution of the estate in accordance with this ruling.

As this is a family matter, each party to bear its own costs.

Orders accordingly.

Delivered dated and signed at Kakamega in open court this 27th day of June, 2018.

J. NJAGI

JUDGE

In the presence of:

1st petitioner/defendant ...N/A.....present/absent

2nd petitioner/defendant ...N/A.....present/absent

Objector/plaintiff..... N.A.....present/absent

Munyendo for Andiafor objector/plaintiff

Ruto/George.....court assistant