



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCC NO. 572 OF 2003

IN THE MATTER OF THE ESTATE OF KAITANO ATENYA YAUMA

AND

RUTH ANDALO OMINDE.....PETITIONER

VERSUS

JOEL ODHIAMBO DOLAOBJECTOR

J U D G M E N T

1. This succession cause relates to the estate of the late Kaitano Atenya Yauma (herein referred to as the deceased). The deceased died in the year 2002 and left behind parcel of land No. Butso/Esimeyia/2080. He was survived by a widow, the petitioner herein and two daughters, Mercyline and Faith.

2. The objector herein has filed an application dated 1st April, 2011 seeking for orders that the grant of letters of administration issued to the petitioner on the 21st September, 2004 be revoked. The application is premised on the grounds that the aforesaid grant was obtained fraudulently by concealment of material facts by omitting the objector, who is a son to the deceased, from the list of beneficiaries.

3. The application was opposed by the petitioner who contends that the objector is a total stranger to the estate of the deceased and is not a son to the deceased.

4. The objection was disposed of by way of viva voce evidence wherein the objector testified as the plaintiff and called two witnesses his - mother PW 2 and a brother to the deceased PW 3. The petitioner testified as the defendant and called one witness, a neighbour to the deceased DW2.

5. It was the evidence of the objector/plaintiff that his mother one Beatrice Apondi Olera was married to the deceased. He was born when the couple was living in Nairobi. His parents then separated. He was brought up by his mother. When he was in class 5 he was moved to Kisumu town. That in Kisumu the home to the deceased was near the maternal home of his mother. His father used to visit the maternal home of his mother. He was then told that the deceased was his father. That later on when he was in form 2 he was informed that his father had died. He said that his father was paying his school fees until when he died. During his evidence he produced a baptismal card issued to him on 7/11/1986 that indicated his father as Gaitano Atenya. He also produced a photograph showing him with his grandmother.

6. The objector's mother PW2 testified that she used to live with the deceased as husband and wife in Nairobi. That they married in 1982. That the deceased had a daughter by name mercyline when he married her. The mother to mercyline left. She sired a child, the objector, with the deceased. When the boy was 5 years old she took him to his father's home. She was married by another man. She said that the deceased used to pay school fees for the objector through a brother who is now deceased.

7. Francis Bushuru PW3 said that he is a half-brother to the deceased. That the objector is a son to the deceased. That he used to live with the deceased and the objector's mother PW2 in Nairobi. That the objector was named after his grandfather who was called Joel. He said that it is his deceased brother who was paying school fees for objector.

8. The petitioner DW1 testified that she married the deceased in 1976. That at the time of marriage the deceased had a daughter by name Mercyline Atenya whose mother had died. She got one child with the deceased, Faith. That in 1996 she and the deceased wedded in church and were issued with a marriage certificate. That after the deceased died she was chased out of the deceased's shamba by Francis Bushuru. She said that it is mercyline and Faith, who are the lawful heirs of the deceased's estate. She does not know the objector. The deceased never told her that he had another child. The objector did not even attend the burial of the deceased.

9. A neighbour to the petitioner, DW2 testified that the deceased was his neighbour at Esumeyia village. That the petitioner is a wife to the deceased. That when the petitioner married the deceased, he found him with one child, Mercyline . He had a child Faith, with the petitioner. They brought up the two children. The witness said that he does not know a child of the deceased by name Joel Odhiambo as he never saw him during the lifetime of the deceased.

Determination

10. The question before the court is whether the objector is a son to the deceased. The objector says that he is a son to the deceased. He produced a baptism card that records his father as Gaitano Atenya. He also produced some two photographs with a woman purported to be his grandmother. However the baptism card does not prove that the Gaidano Atenya named therein is the same deceased person in this case. The photographs with a woman said to be his grandmother does not prove his association with the deceased. Whereas the advocate for the objector had requested for a DNA to be done they later dispensed with it.

11. The objector stated that it is his father who was paying his school fees. There was nothing produced in court to prove so. The objector admitted that he did not attend the burial of the deceased. In fact he learnt of the death of the deceased after he closed school. Why was he not informed of the death if he was actually a son to the deceased?

12. The evidence of the objector’s mother and PW3 that the objector is a son to the deceased is not credible. There is nothing to indicate that the objector was named after the deceased’s father. The name Joel that appears on the objectors name is a common name .There is no reason to associate it with the deceased. Even the objectors surname has no association with the deceased. There is then virtually nothing to prove the assertions that the objector is a son to the deceased.

13. The practice where people come up to claim property of deceased persons after their death on grounds of paternity is something to be abhorred .In re- estate of Patrick Mwangi Wathiga – deceased, Nyeri H.C. Succ cause No. 343 of 2005 (2015) Mativo J. had the following to say on the practice:

“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 of 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....”

14. In this case the objector filed the objection 7 years later after the filing of the succession cause. He has not given an explanation as to why he stayed that long in staking his claim on the estate if his claim was a genuine one.

15. As stated above, the deceased did not recognize the objector as his son during his lifetime. There is no evidence that he ever paid his school fees. There was no DNA test done to authenticate the objector’s claims. The objector did not even attend the deceased’s burial. After the death of the deceased the deceased’s half- brother PW3 kicked out the deceased’s wife out of the deceased’s shamba. It appears that there is a conspiracy between the objector, his mother and PW3 to disinherit the petitioner and her children of the deceased’s estate. That is the more reason why the evidence of the three witnesses should be taken with a lot of caution.

16. In the foregoing I find no evidence that the objector is a son to the deceased. There is no evidence that the petitioner made any misrepresentation when she applied for a grant of representation. The objection is accordingly dismissed with costs to the petitioner.

Delivered, dated and signed in open court at Kakamega this 25th day of October, 2018.

J. NJAGI

JUDGE

In the presence of:

Miss Akinyi.....for petitioner

.....Petitioner

George.....Court Assistance