



IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

SUCCESSION CAUSE NO. 139 OF 2009

CONSOLIDATED WITH SUCCESSION CAUSE NO. 299 OF 2011

IN THE MATTER OF THE ESTATE OF MARISINA KERUBO GESIMBA (DECEASED)

BETWEEN

BENARD OMWENGA ARISA.....PETITIONER

AND

JACKLINE BONARERI OGETO.....OBJECTOR

JUDGMENT

1. Two petitions were filed in respect of the estate of **MARISINA KERUBO GESIMBA** (“the deceased”). The first, **Succession Cause No. 139 of 2009** was filed by the grandsons of the deceased, Benard Owenga Arisa (“Bernard”) and Andrew Magara Arisa (“Andrew”). They claimed that the deceased’s property, **CENTRAL KITUTU/MONYORERO/142** (“Plot 142”) was held by the deceased in trust for the departed father, Haron Arisa Gesimba (“Haron”). The grant was issued to Benard on 17th December 2009 and the same was confirmed with the two petitioners sharing Plot 142. That grant was challenged by Jackline Bonareri Ogeto (“Jackline”) who filed the summons for revocation of grant dated 26th September 2016 on the ground that Benard did not disclose her mother, Agnes Kemunto Arisa (“Agnes”) and her siblings; Janet Nyaboke Arisa and Jared Nyamweya Arisa are beneficiaries of the deceased’s estate.

2. **Succession Cause No. 299 of 2011** was presented by the deceased’s son Jackson Oriosi Gesimba (“Jackson”). A grant was issued to him on 18th July 2012 and was duly confirmed on 28th March 2014. In that case, Plot 142 devolved to Michael Mauti Gesimba (“Michael”). In due course Benard filed a summons for revocation of grant dated 1st December 2014 on the ground that the interest of his father, Haron, was not disclosed and that he had in fact taken out the grant of letters of administration in the earlier case and that the grant ought to be revoked.

3. The court consolidated both matters and directed that the parties lead oral testimony in support of their respective positions. The objector testified and called Haron brother, Michael (PW 2) while the petitioner called Haron’s step-brothers as witnesses; Nelson Ochengo Gesimba (DW 1) and Samuel Okinyi Gesimba (DW 2) in support of his case. The parties also filed written submissions.

4. From the testimony, depositions and written submissions, the deceased had four children during her lifetime; Michael, Jackson, Haron and a daughter, Pauline Mongina. Haron died in 1999. It was not disputed that during land adjudication, Michael and Jackson were provided for as their land was registered in their own names but since Haron was away, Plot 142 was registered in the deceased’s name in trust for him. Likewise, it is not in dispute that Haron married Agnes Kemunto (“Agnes”) in 1973. They divorced in 1979 and then he married Mary Moraa Arisa. Haron and Mary Moraa had two sons; Benard and Andrew.

5. The dispute in this case is whether Jackline and her siblings are children of the deceased from his first wife, Agnes Kemunto (“Agnes”) and if so whether, they are beneficiaries of the deceased’s estate.

6. Jackline testified that she is the daughter of Haron and Agnes. She told the court that her parents were married in 1972 and apart from her they were blessed with two other children; Janet Nyaboke and Jared Nyamweya before they got divorced in 1979. Thereafter Agnes got married to Oyugi Kiyieta and begot other children. She further testified that her mother had part of the deceased’s property which she was cultivating and had in fact built a house but Benard demolished it.

7. PW 2 testified that the family agreed that Jackson would file the petition for grant of letters of administration for their mother and he did file **Succession Cause 299 of 2011**. He agreed that Plot 142, though registered in the name of the deceased, belonged to Haron. He told the

court that in 2004, the family divided that land for the two houses of the deceased. He had no problem with the court revoking the grant issued to him as he only applied for the grant in order to administer the estate on behalf of the family of his late brother. In cross-examination, he stated that Haron had told the family how to divide the land between the two families and that Benard destroyed the house built by Jackline.

8. DW 1 accepted that Plot 142 was held in trust by the deceased for Haron. He testified that Haron married Agnes in 1979 but she later divorced him and dowry was refunded. He testified that by the time they divorced, Agnes had one daughter, Jackline. He further testified that according to Kisii customary law, the return of dowry signifies a complete separation and as such the children of the marriage were also excluded from inheritance. He told the court that Jackline never attended any family functions and when she got married her dowry was paid to Oyugi Kiyieta who had adopted her.

9. DW 2 reiterated that Agnes obtained a divorce from Haron at Manga Law Courts and both later remarried. He testified that Jackline had been adopted by Oyugi Kiyieta whose eulogy he produced to show that she had been listed as his child including her siblings Janet and Jared. He reiterated that since Jackline left, she had never appeared in any family functions including the deceased's funeral or that of her father Haron. He urged the court to let the orphans of Haron, Bernard and Andrew live in the land since the Jackline had married and had never demanded land when her father was alive.

10. The petitioner's case is that him and his brother were lawfully entitled to apply for grant as the only heirs of the deceased. The petitioner's counsel submitted that Agnes divorced Haron and got married to Oyugi Kiyieta who adopted Jackline and that in Abagusii culture, the refund of dowry meant a total severance with the divorced wife and her children. He contended that the belong to the mother's parents and if the divorced wife remarried her children were adopted by the new husband. He maintained that Jackline had nothing to do with Haron or his property as she was not a dependant and was a stranger to the estate of the deceased.

11. Counsel for the objector submitted that the evidence was clear that Haron had two houses. He rejected the petitioner's contention that Agnes had been divorced and argued that even if that was the case, the law recognizes former wives for purposes of succession and that the children of the deceased were, in any case, entitled to inherit the deceased's property.

12. Since it was agreed that Plot 142 was held by the deceased in trust for Haron. For all intents and purposes, the issue concerns the estate of Haron who pre-deceased the deceased. Since the deceased and Haron died in 1989 and 1990 respectively, the administration and devolution of the deceased's estate is governed by the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the **LSA**").

13. Having reviewed the entirety of the evidence, I am satisfied that PW 1 and PW 2 established that Haron married Agnes and that they had three children; Jackline, Janet and Jared. The irrefutable evidence from all the witnesses is also that Agnes subsequently left the deceased and married one Oyugi Ayieta and they had children of their own. I am also satisfied that the deceased married Mary Moraa and they had two children; Benard and Andrew. I therefore find and hold that the deceased had two houses for purposes of the law of succession.

14. I reject the petitioner's contention that where the parents' divorce, their children lose their rights of inheritance under the **LSA, Section 2(1)** of the **LSA** excludes the application of customary law in respect of estates of persons dying after the commencement of **Act** and nothing in the **Act** supports the petitioner's position. In fact, such position would be inimical to the best interests of the child. There is also no evidence that Haron's children from the 1st house renounced their right to inherit his property.

15. As I stated elsewhere, although it is the deceased estate under administration, it is conceded that in fact the only property in issue was held in trust for Haron and that for all intents and purposes this matter must be determined as Haron's estate as a practical matter. Since Haron was polygamous man, the deceased's estate is to be divided in accordance with **section 40(1)** of the **LSA** which deals with the estate of a polygamous intestate and provides:

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.

16. I would also point out that since Agnes remarried, she lost her life interest under **section 35(1)(b)** of the **LSA**. The property would devolve to all of Haron's children in equal shares. The findings I have set out mean that the grant issued in both causes cannot survive since neither of the applicants in both causes disclosed that Haron had two houses. Further, Michael agreed that Jackson applied for the grant of letters of administration in order for him to administer his brother's estate. Since Haron's children were alive and available, he had no greater right than them to apply for administration.

17. For the reasons I have set out, both the petitioner and objector have made out a case for revocation of the respective grants under **section 76** of the **LSA** which provides that the court may on application by any interested party or on its own motion revoke a grant on the ground that the proceedings to obtain the grant were defective in substance; or that the grant was obtained fraudulently by making of a false statement; or by concealment of something material to the case; or that the grant was obtained by means of untrue allegations of facts essential in point of law. The children of Haron's 1st house were not disclosed. They were entitled to the inherit his property.

18. Having so found that there was material non-disclosure in both causes, I shall revoke both grants and give the beneficiaries an opportunity to agree on distribution otherwise the court shall confirm it in terms of **section 40(1)** of the **LSA**. I therefore make the following orders;

a. The grant issued to **Benard Omwenga Arisa** on 9th December 2009 in **Succession Cause No. 139 of 2009** and confirmed on 25th March, 2012 is hereby revoked;

b. The grant issued to **Jackson Oriosa Gesimba** on 18th July, 2012 in **Succession Cause No. 299 of 2011** and confirmed on 28th

March 2014 is hereby revoked;

c. The Kisii County Land Registrar is directed to cancel the registration of the title for land parcel no. **CENTRAL/KITUTU/MONYERERO/142** in the name of **MICHAEL MAUTI GISEMBA** shall revert it to the name of the deceased, **MARISINA KERUBO GESIMBA**;

d. A fresh grant of letters of administration intestate for the deceased's estate shall issue forthwith to **BENARD OMWENGA ARISA** and **JACKLINE BONARERI OGETO**;

e. The administrators or any of them shall thereafter present an application for confirmation of grant within 30 days from the date hereof;

f. There shall be no order as to costs.

DATED and DELIVERED at KISII this 17th day of December 2018.

D. S. MAJANJA

JUDGE

Mr Momanyi instructed by Momanyi Aunga and Company Advocates for the petitioner.

Mr Ombachi instructed by Ombachi and Company Advocates for the objector.