



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO.695 OF 2010
IN THE MATTER OF THE ESTATE OF KWASILA LUHARO - DEEASED
AND
ADELAIDE WILEKA MUTERWA.....PETITIONER/RESPONDENT
VERSUS
FREDRICK LIGARE OTUNGA.....OBJECTOR/APPLICANT

RULING

1. The objector herein, *Fredrick Ligare Otunga*, has filed an application for summons for revocation and/or annulment of grant dated 27th April 2012 seeking for orders that:-

- (1) The grant of letters of administration herein issued to Adelaide Wileka Muterwa on the 24th May 2011 be revoked and/or annulled.
- (2) All subsequent activities based on the said grant be declared null and void.

The application is based on the grounds that the grant was obtained fraudulently by making of false statements by the petitioner/respondent.

2. The application was supported by the affidavit of the objector in which he deponed that:-

- (1) His late grandfather one Kwasira Luharo was the proprietor of L.R No.Isukha/Shiswa/908 which is the subject matter in issue in this succession cause.
- (2) His said grand-father had two sons namely – the late John Muterwa and the late Maurice Otunga Kwasila.
- (3) His late uncle John Muterwa died without having any child.
- (4) He is the child of the late Maurice Otunga Kwasira..
- (5) The petitioner/respondent herein is just an imposter and used fraudulent means to obtain the grant.

(6) He is the rightful heir to the estate of the late Kwasira Luhaso Lusaka in his capacity as his grandson.

3. The background to the current application is that sometimes in October 2010, the respondent/petitioner filed this succession cause claiming to be a grand-daughter to the late **Kwasila Luhero** (the deceased herein), being the daughter of the deceased's son **John Muterwa Kwasila**. The deceased was the registered proprietor of **Land Parcel No. Kakamega/Shiswa/908**. A grant of letters of administration was issued to her on 24th May 2011. The same grant was later confirmed and a certificate of confirmation of grant issued to her on 27th July 2011 that transmitted to her the whole of land **Parcel No. Kakamega/Shiswa/908**. She tried to register the land into her name at the Lands office but found that the objector/applicant herein had entered a caution on the land. She filed an application to have the caution removed. The application was served on the objector who then thereupon filed the current application seeking for revocation and/or annulment of the grant issued to the petitioner/respondent. The matter then went to full hearing. The objector testified as PW1 and called one witness **Elishia Shitamba Akweya** PW2. The respondent/petitioner testified as DW1 and called two witnesses – Richard Shipwoni Muhati DW2 and her sister **Fridah Muterwa Kwasira** DW3.

4. In his evidence the objector reiterated what was contained in his supporting affidavit and added that his uncle John Muterwa had one son. He said that he has no relationship with the respondent. He denied that she is a grand-daughter to the deceased. He said in cross-examination that he did not know her nor did he know her mother.

5. Elishia Shitamba Akweya (PW2) testified that the deceased herein was his clansmate. That the deceased had two daughters and two sons. The sons were Yohana and Maurice Otunga. He said that he did not know the respondent. He denied that she is a grand-child to the deceased. He said that she was not born at the deceased's home.

6. In her evidence, the respondent stated that she is a daughter to the late John Muterwa. That both of her parents are dead. That she came to know the objector upon the death of his grand-father in the year 1986. That the father to the objector was a brother to her father.

The evidence of Richard Shipwono Muhati DW2 was not relevant in the case as he did not know anything about the family of the deceased herein.

7. Fridah Muterwa Kwasila DW2 testified that the petitioner is her sister. That her mother was married to John Muterwa. That she, the respondent and two other siblings were born of John Muterwa Kwasila. That after their father died, their mother took them to her maternal parent's home. They grew up there. Later their mother, their elder brother called Harambee and a sister called Dorah died. That when she and the respondent were of marriagable age, they were required by custom to return to their father's home. They went to the home of Kwasila. They found the mother of the objector who said that she did not know them. They sought for assistance before the Assistant Chief and the D.O. They were not given a share of their father's land. They filed this succession cause. The objector, whose father was a brother to their father, then filed an objection.

8. Fridah further testified that her mother was buried at her parents' home. That her brother Alex Harambee was buried at Kakamega Public Cemetery. She denied in cross examination that after the death of her father, her mother was married elsewhere. She denied that the four of them were born where her mother re-married.

9. The advocates for the objector, D.S.G. Mango & Co. Advocates, filed submissions in the matter. The advocates stated in their submissions that the objector's case was that the mother to the petitioner was once married to John Muterwa, one of the sons of the deceased. That upon the demise of John Muterwa, the petitioner's mother left the deceased's homestead and re-married. That she left behind a son, one Harambee (a step brother to the petitioner sharing the same mother but different fathers). That then in her subsequent re-marriage she sired the petitioner and several other children.

10. However there was no witness on the side of the objector who stated that the petitioner's mother remarried after the death of her husband. None of the witnesses mentioned the son called Harammbee. If anything the objector and his witness said that they did not know the petitioner and her mother. The said submissions are therefore statements by an advocate not supported by evidence on record.

The advocate did however ask the court to ask itself as to why the petitioner's mother and her son Harambee were not buried on the land in issue.

The question before the court is whether the respondent is the daughter of the late John Muterwa Kwasila and consequently grand daughter to the deceased.

I have to state from the outset that the burden of proof was on the petitioner to prove that she is a grand daughter to the deceased. **Section 108** of the Evidence Act provides that:-

“the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

11. In this case the petitioner did not raise the issue of her paternity when her mother was alive. Who knows better the father of a child than the mother? Similarly the petitioner did not raise the issue when her alleged father and grand-father were alive. It is only after the three mentioned people had died that she came up with the allegations. Even then she waited for 14 years after the death of the deceased to file the succession cause. Why was this so?

12. It is worthy to note that the petitioner's elder brother was not buried on the land in issue and had to be buried in a public cemetery. As posed by the objector's advocate, why would the brother have been buried in a public cemetery, if he was a grandson to the deceased and the deceased had a parcel of land where the grandson could be buried?

13. If indeed the petitioner is a grand-daughter to the deceased, it is surprising that there is nobody in the deceased's family who recognizes her as such. It is the practice that when one is filing a succession cause, the petition is accompanied by an introductory letter from the chief that enumerates the members of the family. The petitioner's petition did not have such a letter. The cumulative effect of all of the above issues is that there is serious doubt whether the petitioner is a grand-daughter to the deceased. I am thereby not convinced that the petitioner is a grand-daughter to the deceased.

14. In *re Estate of Patrick Mwangi Wathiga – deceased, Nyeri H.C.Succ.Cause No.343 of 2005* (2015) eKLR where the claimant emerged after the death of the deceased to make a claim on the estate, **Justice J.M. Mativo** made the following remarks:-

“In my view, the practice of persons 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 life time 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 life time 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 ...”

15. I entirely agree with the sentiments expressed by the honourale judge and his opinion on the matter. In this case the respondent did not make attempts for both her alleged father and grandfather to recognize her as a member of their family when the two were alive. She never established any links with them when they were alive. She completely disassociated herself with them when they were alive. There was

no independent witness to prove her allegations. Her sister PW2 had an interest in the matter and cannot thereby be said to be an independent witness. There was no medical evidence to support the case. The petitioner's allegations can only be described as spurious. The allegations are thereby dismissed.

16. A grant of representation, whether or not confirmed may be revoked or annulled under **section 76** of the law of Succession Act if the court decides:

(a) ...

(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) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

(d) ...

17. The grant in this case was obtained fraudulently by making of a false statement that the petitioner was a grand-daughter to the deceased. The objector/applicant herein is the lawful heir to the estate of the deceased herein. There are thereby sufficient grounds for this court to annul the grant that was issued to the petitioner. I thereby make the following orders:

(1) The grant of letters of administration issued to the petitioner/respondent Adelaide Wileka Muterwa on the 24th May 2011 is hereby revoked and annulled..

(2) All subsequent activities done on the basis of the said grant are hereby declared null and void.

(3) A fresh grant be issued in the name of the objector Fredrick Ligare Otunga.

Costs in the application are awarded to the objector.

Orders accordingly.

Delivered, dated and signed at Kakamega this 24th day of May, 2017.

J. NJAGI

JUDGE

In the presence of:

Mango for objector absent

Petitioner/Respondent ----- present

Objector/Applicant ----- absent