



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 750 of 2015

IN THE MATTER OF THE ESTATE OF PIUS WERE OGADA (DECEASED)

EVALINE ATIENO WERE.....1ST PETITIONER

LINET ACHIENG WERE.....2ND PETITIONER

VERSUS

DOMNIC NYAMEMA GOR.....CROSS-PETITIONER

JUDGEMENT

Introduction

Pius Ogada Were (Deceased) died sometimes in April 1989. The deceased was survived by EverlineAtieno Were (widow), LinetAchieng Were (daughter), Philip Odhiambo Were (son), Sharon Atieno Were (daughter), PhancyAkinyi Were (daughter) DomnicGor Were (son). By a court order issued on 26th October 2016, letters of administration were issued on the same date in favour of Everline Atieno Were (widow), Linet Achieng Were (daughter) and Domnic Nyamema Gor. The estate of the deceased comprises of:

1. Land parcel number Kisumu/Pandipieri/1108
2. Land parcel number Kisumu/ Nyalenda B/391
3. Land parcel number Kisumu/Nyalenda B/828

On 25.9.17, DomnicNyamemaGor filed a notice of motion for confirmation of the grant in which he proposed distribution in the following terms:

1. Land parcel number Kisumu/Nyalenda B/828 to EverlineAtieno Were (widow), LinetAchieng Were
2. Land parcel number Kisumu/Pandipieri/1108 to DomnicNyamemaGor
3. Land parcel number Kisumu/ Nyalenda B/391 to DomnicNyamemaGor

When the matter came up for confirmation of the grant on 24th July, 2017, EverlineAtieno Were (widow), LinetAchieng Were (daughter) objected to the mode of distribution proposed by DomnicNyamemaGor on the ground that the latter had no legal right to share in the deceased's estate.

I directed that the dispute be resolved by way of viva voce evidence.

Cross-Petitioner's Case

DomnicNyamemaGor stated that his father and deceased's father were step-brothers. He further told court that during land adjudication, he was living in Tanzania. It was his testimony that Land parcel number Kisumu/ Nyalenda B/391 and Land parcel number Kisumu/Nyalenda B/828 belonged to his grandfather NjerAdero and that they were registered in the name of the deceased to hold in trust for him because he was living in Tanzania during land adjudication period. The co-petitioner further stated that he had inherited the deceased's wife but that that was not the basis for which he was claiming the deceased's land.

SospeterOnyangoOnditistated that DomnicNyamema Gor had inherited EverlineAtieno Were. He confirmed that he was not present when Land parcel number Kisumu/Pandipieri/1108 and Land parcel number Kisumu/ Nyalenda B/391 were registered in the name of the deceased.

Petitioners' Case

EverlineAtieno Were stated that she was the wife of the deceased and that deceased's estate comprised of Land parcel number Kisumu/Pandipieri/1108, Land parcel number Kisumu/ Nyalenda B/391 and Land parcel number Kisumu/Nyalenda B/828. She stated that she and her 5 children live on Land parcel number Kisumu/ Nyalenda B/391 where her late husband was buried. She denied that the cross-petitioner is entitled to inherit her late husband's estate.

Determination

The evidence on record has disclosed that the deceased was survived by a wife and 4 children and that the cross-petitioner is his cousin. The issue for determination is whether the cross-petitioner is entitled to share in the deceased's estate.

Section 66 of the Law of Succession Act provides as follows:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;***
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***
- (c) the Public Trustee; and***
- (d) creditors:***

On the other hand, Section 39 of the Law of Succession Act which is in Part V of the Act provides as follows:

(1) Where an intestate has left no surviving spouse or children, then intestate estate shall devolve upon the kindred of the intestate in the following order of priority

- (a) father; or if dead***
- (b) mother; or if dead***

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity upto and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

The deceased was survived by a wife and children, who are in order of priority under Section 39 of the Law of Succession Act, the rightful persons to inherit the deceased's estate.

The search certificates for Land parcel number Kisumu/Pandipieri/1108, Land parcel number Kisumu/Nyalenda B/391 and Land parcel number Kisumu/Nyalenda B/828 show that the first registration was in the name of the deceased. The cross-petitioner's contention that the parcels of land were his and that the deceased was registered as a trustee is not supported by any concrete evidence. Cross-petitioner's witness, one Sospeter Onyango Onditi, was of no assistance to court since what he knew about the registration of the land parcels in issue is what he was informed by the cross-petitioner.

The fact that the cross-petitioner has since inherited the deceased's wife does not in law entitle him to also inherit the deceased's estate.

Decision

1. The cross-petitioner's claim over the deceased's estate is unmerited and it is accordingly dismissed

2. The grant is confirmed in the following terms.

a. Everline Atieno Were shall have a life interest in the whole of:

- Land parcel number Kisumu/Pandipieri/1108

- Land parcel number Kisumu/ Nyalenda B/391

- Land parcel number Kisumu/Nyalenda B/828

b. Thereafter, the 3 land parcels, named hereinabove, shall devolve in equal shares to the deceased's children

i. Linnet Achieng Were (daughter)

ii. Philip Odhiambo Were (son)

iii. Sharon Atieno Were (daughter)

iv. Phancy Akinyi Were (daughter)

v. Dornic Gor Were (son).

3. Each party shall bear its own costs

DATED AND DELIVERED THIS 14TH DAY OF DECEMBER 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioners - In person

Cross-petitioner - In Person