



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
PROBATE AND ADMINISTRATION CAUSE NO. 13 OF 2009
IN THE MATTER OF THE ESTATE OF THE LATE
FRANCIS KHAEMBA LUKHALE

RASOA KHASOA KHAEMBA PETITIONER

VERSUS

AGNES NEKESA KHAEMBA OBJECTOR

JUDGMENT

Background

The deceased herein one Francis Khaemba Lukhale died on the 20th of April 2006 leaving behind two widows and several children. He was interred at Malaba in his 2nd widows home after a protracted case between the 2 widows Agnes Nekesa Khaemba and Raso Khasoa Khaemba.

It is the contention of the petitioner (Raso) that her husband left a will distributing his estate in accordance with his wish. The Objector on the other hand contends that her husband was too ill at the alleged time of making of the will and had no capacity to make one, in the alternative the distribution was uneven as her co-wife got the bigger chunk of the estate and has continued to collect rent now being Kshs. 30,000/= and asked the court to equally distribute the estate.

In the contested will the properties referred to are,

1. Ndivisi/Khalumuli/337 to Agnes and her children
2. Bokoli/Kituni/246 to Raso and her children
3. Plot no. 76 Webuye Municipality to Raso absolutely

The objector contends that the deceased also owned a property whereon a school Motherland was built and a motor vehicle KJN 395. She disputed that her late husband owned Ndivisi/Khalumuli/337 as the same is Government land.

The petitioner on the other hand contends that she owned property as Ndivisi/Khalumuli/2671 which housed Mother land and vehicle number KJN 395 was her daughter's availed to her husband only for his

use. She further contended that there was a typographical error and the land bequeathed to the objector was Ndivisi/Khalumuli/737 measuring 1 -2 ha, (2.964 acres).

Determination

Having considered the evidence, documents adduced and submissions made by counsel the issues before the court are

1. Whether or not the deceased had the capacity to make a will and if he left behind a valid will at the time of death.
2. Whether there are any grounds for the court in the circumstances of this case to disregard the will.
3. If so what would be the redistribution of the estate of the deceased.
4. Whether other assets forming part of the estate were left out.

The objector named two assets as having been left out of the will namely plot on which Motherland Academy was built being Ndivisi/Khalumuli/2671 and motor vehicle registration number KJN 395.

From the facts placed before court by the petitioner which facts were not challenged by the objector property L.R. no. Ndivisi/Khalumuli/2671 was registered in the name of the petitioner and the vehicle registration No. KJN 395 was purchased by one Abraham K.L. Mirimo and given to the deceased for his use as he was ailing.

For the said reason I find and hold that the two assets did not belong to the deceased and cannot therefore form part of the estate.

Did the deceased have capacity to write the will?

The issue of the deceased capacity due to his illness was only raised by the objector in cross examination. It was not seriously canvassed.

Under Section 5 (3) of the Law of Succession Act (Cap 160) of the Laws of Kenya, there is a rebuttable presumption that a maker of a will is of sound mind and the will is duly executed. Under section 5 (4), the initial burden of proof lies with one who alleges lack of capacity, once this is established that the testator was not of sound mind, then the burden now shifts to the one propounding the will to prove that the testator had mental capacity.

See Halisbury's Laws of England 4th edition vol. 17 at page 903 – 904.

The objector did not establish that indeed the testator (deceased) of the will herein had no capacity. On that score her allegation must fail.

Is there reason in the circumstances of this case to interfere with the will?

The deceased left behind two widows and 17 children. His first widow Agnes Nekesa Khaemba with 8 children and Rasoa Khasoa Khaemba with 9.

Agnes resides in her father in-laws land L.R. No. Ndivisi/Khalumuli/737 with her children. The same measures 1.2 ha, (2.9 acres) on the other hand Rasoa and her children reside on Bokoli/Kituni/240 measuring 21.5 acres. Rasoa also has to her exclusive use L.R. No. Ndivisi/Muchi/7996/110 in Webuye town which has rental income.

The objector argues that properties given to her in the will do not belong to the estate of the deceased and

ought not to have been included in the will namely Ndivisi/Khalumuli/337 as the same belong to the Government of Kenya and cannot be wished away as being a typographical error and that even though she occupies Ndivisi/Khalumuli/737 the same belongs to Khaemba Lukhale her father-in-law and is much smaller than what her co-wife got.

It is true that the deceased ought not to have given what is not his Ndivisi/Khalumuli/337 is Government land. Ndivisi/Khalumuli/337 belongs to another person or estate.

Should the court in view of the above and the proportions in the will interfere with the same.

Under Section 5 of the Law of Succession Act one is given the freedom of testation. However the said freedom may be interfered with by virtue of Section 26 of the Act.

The section provides,

“where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provision of this Act, then on the application by or on behalf of a dependant the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for the dependency order that such reasonable provision as the court thinks for shall be made for the dependant out of the deceased’s net estate.”

Section 27

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”

Section 28 gives circumstances to be taken into account by the court.

The deceased had two wives. The first wife Agnes with 8 children, the second widow Rasoia had 9. Both widows must have expected together with their children to have been provided for reasonably and equitably upon their dear husband and father’s demise. This is the normal expectation of families of deceased persons.

In considering this issue and addressing the needs of the dependants I will invoke the wide discretion donated to the court by Section 47 of the Act and Rule 73 of Probate and Administration rules to make such orders as will ensure the ends of justice are met.

In *John Kinuthia Githinji vs. Githua Kiarie & others, Court of Appeal Case No. 79 of 1998* referred to in the matter of the estate of *James Ngugi Mungai Succession Case No. 523 of 1995* Gicheru JA quoted Cockburn CJ in *Banks vs. Good Fellow 1870 L.R.* as follows;

“The law of civilized people concedes to the owner of property the right of determination by the last will, either in whole or part to whom the effects which he leaves behind him will pass

A moral responsibility of no ordinary importance attaches to the exercise of the right given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provisions for those who are nearest to them in kindred and who, in life have been the object of their affection...

The same motive will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of a man’s kindred surviving him, that on his death effect shall become theirs, instead of mere strangers. To mock the common sentiments of mankind and violate what all man ... deeming an obligation is moral law.”

Agnes has children and was left with a Government land (not capable of being bequeathed) or as argued by the petitioner, if one may allow the argument that the deceased meant his father land which is 2.9 acres whereas Rasoa with the children got 21.5 acres and a commercial property with income.

It is too obvious therefore to say if indeed the deceased left a will he did not adequately and reasonably provide for the first family, he failed to exercise a moral responsibility to all his dependants in exercising his right, thus inviting the attention of this court.

In this regard the court finds that the will left and exposed some dependants and is not capable of being relied upon in distributing the estate of the deceased. In this regard the court finds the faulty said to the extent that it has distributed land not belonging to the estate and it has grossly violated Section 5 as read with 26,27 and 28 of the Law of Succession Act. For the reasons above

1. This court appoints the two widows Agnes Khaemba and Rasoa Khaemba to be the administrators of the estate for purposes of distribution.
2. The court further directs that should property Ndivisi/Khalumuli/737 be given to the estate of the deceased herein by the deceased father by the same be given to Agnes Khaemba and her children.
3. That 7 acres out of Bokoli/Kituni/246 go to Agnes Khaemba and her children.
4. That 1 acre of Bokoli/Kituni/246 goes to Ferdinand Wafula Khamba.
5. 13.5 acres of Bokoli/Kituni/246 goes to Rasoa Khaemba and her children
6. Property Ndivisi/Muchi/7996/110 be shared equally between the 2 widows namely Agnes Khaemba and Rasoa Khaemba.
7. Each party to bear her own costs.

Dated and Delivered in Bungoma this 28th day of January 2016

ALI-ARONI

JUDGE