



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO.556 OF 2004

LYDIA KHAMALISHIDECEASED
REUBEN BURUDI SATIACITOR/PETITIONER

VERSUS

AYUB CHEMANGA
EDWARD MAHANGA
MARK MMASI
JAIRUS M. WACHIYA
DAVID MUSWAHI.CITEE/RESPONDENTS

R U L I N G

Background

1. REUBEN BURUDI SATIA, the Citor herein, took out citation proceedings on the 11th November 2014 in which he cited AYUB CHEMANGA, EDWARD MUHANGA MARK MMASI, JAIRUS M. WACHIYA and DAVID MUSWACHI. The Citor invited the citees to indicate whether or not they were willing to apply for a grant of Letters of Administration in respect of the estate of LUDIA KHAMALISHI the deceased herein. Together with the citation the citor filed a supporting affidavit in which he explained his reasons for filing the citation. The citation was served upon the citees and as the Court record indicates there were affidavits of service filed to prove the same.
2. The citees did not object to the said citation and the Court on the 24th May 2007 gave the applicant/citor 15 days to file for Letters of Administration which he did. The cause was fixed for confirmation of the grant on 1st June 2012 and all the beneficiaries were to be served with the hearing notices. When the citees were finally granted fourteen (14) days to respond to the proposed confirmation of grant and mode of distribution they filed their Responses by way of affidavit. This case was thereafter canvassed orally.

PETITIONERS/CITORS CASE

3. It was the Petitioners (PW1) case that he bought land from Jairus M Wachiya sometime in July 2000 being part of land parcel number E. Kabras/Chemuche/391. The land was in the name of Ludia (deceased) herein who was the mother of Jairus. They signed an agreement before the Malava D.O but

Jairus later went and took the said agreement from the D.O's office claiming that he was going to photocopy the same but he did not return it. The petitioner then reported the loss at the CID offices and Jairus was charged in Court in Cr. Case No.2007 of 2001 where he was convicted and sentenced. The petitioner claims he has not been refunded his money and is already cultivating the said parcel.

4. The petitioner called one (1) witness (PW2) JOMO LISERO MUCHERE. PW2 told the Court that Jairus was his uncle and the petitioner his friend. He confirmed that Jairus sold 2 acres of land for kshs.116,000/= and that he was a witness to the said sale agreement which was done at the D.O's office. PW2 further confirmed that Jairus took the sale agreement and never returned it. He explained that the children of Lucia Khamoni (deceased herein) had divided their land and Jairus had his own portion. PW2 confirmed that Jairus was reported to the Police and charged. Jairus was convicted and sentenced.

OBJECTOR/CITEES CASE

5. The objector JAIRUS MICHAEL WACHIYA (DW1) told the Court that the Petitioner/Citor was a stranger to him and to his brothers and that he was not entitled to administer the estate of their late mother. He claimed that the said petitioner had tried to grab their mother's land through fraudulent means and wants his (petitioners) claim dismissed. He told the Court that the genuine beneficiaries of the deceased's estate are:

- 1) Jairus Michael Wachiya (DW1)
- 2) Simon Munandi Wachiya
- 3) David Muswachi Saulo
- 4) Laban Saulo Muswachi

His sisters were:

- 1) Rodah Mukasia (deceased)
- 2) Ezna Khavali (deceased)

6. On cross examination he confirmed that he was convicted and sentenced to two (2) years imprisonment and that he did not appeal the court's decision. He denied that the conviction was because he had taken citor's money and failed to sell land to him. He also denied having been served with any citation and that he was not aware that Reuben Satia was allowed to take out the grant. He also denied selling land to Reuben Satia and added that he does not want him to get land because he is not a family member and also he was not a purchaser.

7. DW2 SIMEON MUNANDI WACHIYA told the Court that he was served with the citation. He claimed that he did not know who the petitioner was and had to establish who he was. That he has not established who the petitioner is and he keeps wondering how a stranger can purport to administer his mothers estate. He wants the Court to dismiss the petitioner's case with costs.

ISSUES FOR DETERMINATION

8. This Court has considered the affidavits by both the citor/petitioner and those of the citee. The Court has also considered the oral evidence. In a nutshell the following are the issues for determination.

1. whether the respondent/citees sold a part of land parcel No.E. Kabras/Chemuche/391 to the petitioner/citor.
2. whether the citor qualifies as a dependant under both the Constitution and the Law of Succession Act.
3. whether in view of the above the grant for letters of administration should be confirmed.

Determination

9. On the first issue the citor in his affidavit claimed to have purchased two (2) acres out of the parcel of land known E. Kabras/Chemuche/391 from JAIRUS MICAHA WACHIYA (DW1). The purchase was confirmed by PW2 who witnessed the sale agreement at the D.O's office. Since the transaction did not go as planned the citor reported to the Police that Jairus had obtained money from him by falsely pretending that he was going to sell to him land. The matter was tried and JAIRUS MICAHA WACHIYA was found guilty, convicted and sentenced to two (2) years imprisonment.

10. From the proceedings in the lower Court it is correct to say that JAIRUS sold the land to the citor. JAIRUS never appealed against the conviction and sentence. On their part the citees in their affidavits and from their evidence deny knowing the citor herein. These are mere denials as they (citees) must have known of the case in the lower Court where the citor was the complainant against their kin, Jairus.

11. It is therefore clear that the citee took money from the citor with the understanding that he would sell to the citor two (2) acres out of L.P E/Kabras/Chemuche/39. However, after the agreement, the citor unilaterally took away the sale agreement from the lawyers office and never returned it.

12. Having come to the above conclusion the second issue is whether the citor qualifies as a dependant. Under Rule 22 (1) of the Probate and Administration Rules "A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right."

13. Section 29 of Cap 160 gives the meaning of a dependant as: "29 for purposes of this part "dependant" means:-

- a. The wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.
- b. Such of the deceased's parents step-parents, grand-parents, grand-children, step-children, children whom the deceased had taken into his family and his own brothers and sisters and half brothers and half sisters as were being maintained by the deceased immediately prior to his death and
- c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

14. It comes out clearly that the citor herein is not a dependant within the definition above stated. Since he bought a piece of the deceased's land he remains a liability to the deceased's estate and should be included in the distribution of the deceased's estate.

15. Having stated the above this Court cannot confirm the grant issued to the citor as the citees have not renounced their rights under the Act. It is therefore ordered that the citees take out letters of administration for the deceased's estate herein and include the citor as a liability to the said estate. This should be done within the next thirty (30) days and thereafter the same to be confirmed as required by law.

16. The citor is also at liberty to move the civil Court to recover the money he paid to the citees. Costs are awarded to the citor.

17. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 17th day of March 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Mukavale for Citor/Petitioner

N/A for Citees/Respondents

Mr. Lagat - Court Assistant