



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.812 OF 2014

(Formerly Nakuru HC Succ Cause No.605 of 1995)

IN THE MATTER OF THE ESTATE OF MERIDINA BUSHURU MASINJILA (DECEASED)

AND

IN THE MATTER OF

ANDREW MWISUNJI MASINJILA.....OBJECTOR/APPLICANT

AND

LABAN MASINJILAPETITIONER/RESPONDENT

R U L I N G

Introduction

1. According to the petition papers filed herein the deceased Meridina Bushuru Masinjila died on 17/06/1992 at the age of 92 years. Her husband predeceased her in 1965. At the time of her death, she was survived by 10 sons and 1 daughter. The Petitioner/Respondent is the eldest child while the Objector/Applicant was the deceased's 6th child. At her death, the deceased owned 2 parcels of land, namely L.R. Idakho/Shikulu/735 measuring approximately 8 acres and L.R No.Idakho/Shikulu/108 measuring approximately 6 acres. Apparently plot 735 was not developed as at the time of the deceased's death.

The Petition

2. On the 21/12/1995 the Petitioner filed Nakuru High Court Succession Cause No.605 of 1995. The Petition was advertised vide Kenya Gazette Notice No.1996 of 04/04/1996 after which the Grant of Letters of Administration Intestate was issued to him on 02/08/1996. By an application dated 18/09/1997, the Petitioner moved the Court for confirmation of Grant. The Certificate of Confirmation of Grant was issued on 19/09/1997. Except for the deceased's daughter Lorna Isutsa Masinjila who was said to be married and settled in her own matrimonial home, all the 10 sons of the deceased received their respective shares of the deceased's estate.

The Objection

3. Being dissatisfied with the distribution of the deceased's estate, the Objector filed Summons under Rule 59 of the Probate and Administration Rules, Section 3A of the Civil Procedure Act and Rules 47 and 6 of the Civil Procedure Rules seeking among other orders, revocation of the Grant of Letters of

Administration issued to the Petitioner herein on 19/09/1997. The Objector alleged that the grant was issued and confirmed without the knowledge of the Petitioner's siblings. The Summons also sought transfer of the cause from Nakuru High Court to this honourable Court, hence these proceedings.

4. The objection is opposed vide the replying affidavit sworn by the Petitioner on 23/05/2014. The Petitioner disputed the objector's allegation that the Petition was filed without the knowledge of the rest of the beneficiaries of the deceased's estate. The Petitioner also deponed that the Objector got the biggest share out of L.R. No. Idakho/Shikulu/808. The Petitioner wants the objection dismissed. The objection proceeded by way of viva voce evidence as per directions taken on 26/11/2014.

The Objector's Case

5. On the day of the hearing, both the Objector and his Counsel did not appear before Court at the appointed time. This was after the Objector had been granted a last adjournment after several attempts not to proceed with the case. The case had however been confirmed for hearing in the presence of Counsel for the Objector.

The Petitioner's Case

6. The Petitioner testified as DW1 and also called Timeo Shihemi Mwisunji Masinjila. Both of them testified that the Objector lives on plot 808 where he was given 2 acres and further that the Objector has been so hostile that he has prevented his siblings who were given portions of land in the said parcel of land from taking up possession of their respective parcels though they are duly registered as proprietors of the same. Both witnesses testified that the Objector occupies and lives in the deceased's house. They want the objection dismissed so that the Certificate of Confirmation is confirmed by this Honourable Court.

Analysis and Determination

7. I have now carefully considered the evidence on record and the documents filed herein. I have in particular read the Petitioner's affidavit dated 18/09/1997 setting out particulars of the beneficiaries of the deceased's estate and their respective shares. In the explanatory notes to the application dated 10/09/1997, the Petitioner stated that ½ acre out of L.R. No. 808 (though in the notes it is referred to as 108) was set aside as graveyard while the Objector who was said to be living in the deceased's house and using the bananas was allocated 2 acres. Timeo Shihemi Masinjila, Lazarus Shivachi Masinjila and Franklin Libondo (late) got 1 ½ acres each. L.R. No. 735 was shared amongst the following: Petitioner – 3 acres, Clement Masinjila 2 acres, Gadi Mwisunji Masinjila 2 acres, Dr. Hezron Daniel Masinjila, 2 acres. Those who had already been allocated land elsewhere by their late father were Gideon Shikanda Masinjila, Barnabas Ambutsi Masinjila and Joshua Andala Masinjila.

8. I now go back to the issue of whether the Objector has proved his case against the Petitioner on a balance of probabilities. In my considered view, he has not done so. He claims in his papers that the Petitioner took out the grant and had it confirmed without the knowledge of his siblings. The Objector did not come to Court to adduce evidence to support those claims. The law requires that he who alleges must prove his/her allegations. Furthermore, I do not think that the provisions of the Civil Procedure Act under which the Objector's application is expressed to be brought are applicable in this Case since they have not been imported into the Law of Succession Act which is a self contained piece of legislation containing both substantive and procedural Succession Law.

9. It is trite that probate proceedings are special proceeding and unless otherwise provided the Law of Succession Act constitutes the entire law pertaining to both estate and intestate succession, save for strangers who should have recourse to provisions outside the Act. See **Francis Kamau Mbugua & another –vs- James Kinyanjui Mbugua – Nairobi High Court Civil Case No.111 of 2004 (OS)** for the above proposition. What this means is that unless the Law of Succession Act has imported any of the provisions of the Civil Procedure Act into itself, no such provisions will apply. Rule 63 (1) of the Probate and Administration Rules did not and has not imported Section 3A and Order 47 Rule 6 of the Civil

Procedure Rules into itself. For the above reason, the Objector's Summons fails.

10. Finally, a close look at the distribution made by the petitioner reveals a balanced and well thought out consideration of the interests of all the beneficiaries of the deceased's estate. Though I have not seen either the consent or denunciation of her interest, the Petitioner's only sister has not raised her voice against the distribution as done by the petitioner. If the Objector was speaking on behalf of other beneficiaries he should have availed persons such as Lornah to come to Court and prove that indeed the Petitioner did things behind the backs of his siblings.

Conclusion

11. In the circumstances of this case, I find and hold that the objection is lacking in merit. The same is hereby dismissed. The Certificate of Confirmation dated 19/09/1997 is confirmed. As for costs, I am of the considered view that since the parties are children of one father and one mother they should each bear their own costs.

12. It is so ordered.

Ruling delivered, dated and signed in open Court at Kakamega this 31st day of May 2016.

RUTH N. SITATI

J U D G E

In the presence of:

M/s Wesutsa & Co. (absent) for Objector/Applicant

Mr. Machafu (present) for Petitioner/Respondent

Mr. Lagat - Court Assistant