



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO.613 OF 2009**

**IN THE MATTER OF THE ESTATE OF THOMAS WAMULUNJI – DECEASED**

**ERNEST JUMA MAKOKHA .....PETITIONER/RESPONDENT**

**VERSUS**

**PHILIP SHEUNDA AMULUNJI .....OBJECTOR/APPLICANT**

**J U D G M E N T**

**Introduction**

1. The deceased herein THOMASI WAMULUNJI SHIBWABO died on the 9/09/1981 at Kakamega. His son PHILIP SHEUNDA petitioned for grant of Letters of Administration vide Mumias S.R.M.C. Succession Cause No.6 of 2006 and was issued with the same on the 17.7.2006.

2. At the same time the deceased's grandson ERNEST JUMA MAKOKHA also petitioned for grant of Letters of Administration vide Kakamega SRMCC Succession No.47 of 2005 and the same was issued to him on the 7<sup>th</sup> July 2006. Both grants were contested. Whereas Philip Sheunda filed an AFFIDAVIT IN PROTEST on 14<sup>th</sup> January 2008 protesting the issuance of the grant to ERNEST JUMA MAKOKHA in Kakamega Succession cause 47 of 2005, ERNEST on the other hand filed an application dated 21<sup>st</sup> March 2008 for revocation of the grant issued to PHILIP in Succession Cause No.6 of 2006 at Mumias. Parties in this cause agreed by consent that this matter be referred to the High Court for purposes of consolidation and determination hence the cause herein.

3. By an application dated 12<sup>th</sup> November 2014 ERNEST JUMA MAKOKHA sought for interim orders pending the hearing and determination of this cause which were granted on the 4<sup>th</sup> December 2014. This cause proceed by way of oral evidence where the Plaintiff was Philip and the defendant Ernest.

**Plaintiffs Case**

4. PW1 PHILIP SHEUNDA THOMAS AMULUNJI the son to the deceased told the Court that he is the third born of the deceased and that he commenced succession proceedings of his father's estate as he had been given the requisite letters by the local administration. He claims to have listed all beneficiaries to the deceased's estate.

5. While he was in the process Ernest Juma Makokha a son to one of his brother's wives also commenced the Succession proceedings. He (PW1) wants this Court to allow him proceed with the Succession as he knows that Ernest will get a share of the deceased's estate from his mother.

6. PW2 CHRISTOPHER SONGOI FARANJA told the Court that Philip Sheunda was a son to his uncle and that they were in Court because of the land which belongs to the deceased. He explained that Ernest Juma was the son of Philip's brother and that he (Philip) was the one to distribute the deceased's shamba. He explained further how the land was shared by the clan and how thereafter disagreements arose which led to the parties coming to Court. On cross-examination by Ernest PW2 was categorical that the grandsons of the deceased were given land though he did not know the acreage. He also did not know who owned plot no.1130.

7. PW3, Charles Masimba Taraja told the Court that Philip was his brother and Ernest his nephew. He explained that the deceased left three (3) sons Philip Sheunda, John Makokha (deceased) and Peter Rapando (deceased). He explained what happened after the deceased died. Being the Likuru (village elder) at the time he sought assistance of the Assistant Chief of the area since there was a problem in the sharing of the deceased's estate. When they could not find a solution they advised Philip to take out proceedings which Philip did.

8. He added that the children of John Makokha refused to recognize Philip as son to the deceased which is the reason why the two are in Court. On cross examination he explained the ownership of land parcel 1130 and maintained that it had not been sold.

9. PW4 WILLIAM OTINA MAKOKHA testified that Ernest was his step-brother and Philip his uncle. According to him the issue between the two was distribution of the deceased's land. He explained that he was given land outside the home but the mother to Ernest and another remained behind to share land with Philip. He is of the view that the problem of sharing land should be taken back to the family. On cross examination he explained that LPII30 belonged to the deceased and had not been sold.

10. The Plaintiff then closed his case after PW4 testified.

### **Defence Case**

11. DW1 Ernest Juma Makokha told the Court that PW1 was not a son of Amulunji. He claims that PW1 secretly agreed with village elders to divide their land but they refused to sign the subdivision. He adds that Philip took out succession proceedings while he (DW 1) was authorized to also petition for the grant. He claims that PW1 was not satisfied that he DW1 was given the grant letter of administration, hence their being in Court now. He wants the deceased's estate distributed among his grand children including Philip.

12. DW2 PETER SHIBWABO MAKOKHA testified that he is the eldest grandson to the deceased herein. He explained how he took Philip (PW1) to Court in 2004 after he (PW1) colluded with elders to subdivide the land without informing them. He was advised to carry out succession and they chose Ernest to pursue the same. He claims that Philip (PW1) also did succession through misrepresentation. Because of the two parallel succession causes Philip brought this matter to this Court. He wants this Court to order the distribution of the deceased estate and the surveyors to mark out boundaries as PW1 is also a beneficiary.

13. DW3 PATRICK OSORE MAKOKHA told the Court that Philip was his uncle while Ernest was his brother. He explained that the dispute between the two was over land. He claims to have allowed Ernest to pursue the succession of the deceased's estate. At the same time Philip (PW1) also commenced his own cause and also referred the case to this Court. He wants the Court to help in the distribution of the deceased estate amongst the grand children including Philip.

### **Determination**

14. In determining the issues in this cause this Court will in the first instance deal with the application for revocation of grant and the protest in the lower Court for revocation and/or annulment of grant as prayed by Ernest in Succession cause no.6/2006. The Court has to be satisfied that the provisions under Section 76 of the Law of Succession Act Cap 160 Laws of Kenya have been demonstrated. The grounds raised

by Ernest, applicant in cause no.6/2006 are that the Petitioner (Philip) did not disclose that there was another succession Cause vide Mumias SRM Succession cause no.47 of 2005 in which Ernest had been issued with grant pending confirmation.

15. It is clear that there are two grants in this matter, the same having been issued by different Courts which touch on the deceased's estate. Both grants were made to beneficiaries of the deceased estate. None of the Petitioners in both Succession Cause no.47 of 2005 disclosed this fact to either of the Courts. If this fact had been disclosed the respective Courts would probably have come to a different conclusion.

16. Of greater importance in resolving the issue herein this Court has to decide who ranks higher in order of preference to be issued with or to apply for grant of Letters of Administration in a case such as the present one. It is clear from the testimonies by the witnesses on both sides that Ernest is the grandson to the deceased whereas Philip is a son to the deceased. Looking at Section 66 of the Law of Succession Act, Cap 160 which Section provides inter alia that "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 interest as provided by Part V.
- c. ....
- d. ....

17. Witnesses mentioned that the spouses of the deceased are still alive, but the letters from the Assistant Chief do not reveal this fact. In the face of doubt as to whether or not a spouse of the deceased is the person next in line as provided under Section 39 of the Act, the person next in line is Philip, who is son to the deceased. I carefully watched Ernest and his witness testify and formed the opinion that they were lying to the Court when they maintained that Philip is not son to the deceased.

18. Accordingly, and as per the provisions of the Act, the proper person to administer the estate of the deceased is Philip Sheunda Amulunji. This therefore leads me to the conclusion that the Grant of Letters of Administration intestate issued to Ernest Juma Makokha cannot stand. The same be and are hereby revoked, to enable Philip Sheunda Amulunji complete the remaining part of the estate of the deceased, namely filing Summons for confirmation of Grant. Philip shall proceed and file the Summons for confirmation within the next sixty (60) days from the date hereof. Parties who may be dissatisfied with the proposed mode of distribution by Philip shall be at liberty to file their affidavits of protest upon service of the Summons.

19. Costs of these proceedings shall be in the cause.

Judgment delivered, dated and signed in open Court this

28<sup>th</sup> day June 2016.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Present in Person For Plaintiff (Philip Sheunda Amulunji)

Present in Person For Defendant (Ernest J. Makokha)

Mr. Okoiti - Court Assistant