



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO.6 OF 2005

IN THE MATTER OF THE ESTATE OF THE LATE LUKA MUYUMBU
(DECEASED)

AND

ELIJAH WEKESA MUYUMBUPETITIONER

AND

MUHAVINI CLEOPHAS WAWIRE.....OBJECTOR

J U D G M E N T

Introduction

1. Grant of Letters of Administration intestate for the Estate of LUKA MUYUMBU (Deceased) who died on the 9th April 1998 was issued to ELIJAH WEKESA MUYUMBU on the 27th May 2005. On the 30th of May 2013 the applicant/objector CLEOPHAS MUHAVINI WERE filed Summons for revocation of the grant under Section 76(a) and (b) of the Law of Succession Act Cap 160 Laws of Kenya (The Act) and Rules 44 and 73 of the Probate Administration Rules (The Rules) and at the same time sought for injunctive orders to restrain the Petitioner from transferring, charging and/or in any manner dealing with the deceased properties known as L.R. No.BUNYALA/SIDIKHO/419. The application is based on the grounds set out on the face thereof and supported by the annexed affidavit of the objector sworn on the 10th May 2013.

2. In his affidavit the objector claims that he was not aware that the petitioner had applied for grant of probate until when he learnt that the Petitioner was subdividing the deceased's estate. He listed the children of the deceased as:

- a. Japheth Wechuli
- b. Jackson Wakhanu
- c. Yonah Muyumbu
- d. James Wanyama
- e. Elijah Wekesa
- f. Peter Wawire Muyumbu (Deceased)
- g. Norah Nawoba

3. He depones that prior to the deceased's death, the deceased had partitioned his land parcel No. L.R. Bunyala/Sidikho/419 into two parts with seven acres to Peter Wawire's sons and two acres to Norah

Nawoba. He claims that the Petitioner being a fraudulent person should not be made an administrator as he even used a false Chief's letter to support the Petition. The Objector prays that the Grant of Letters of Administration be issued to him instead of the Petitioner.

4. The Petitioner in response to the application filed a replying affidavit on the 02/10/2013. He deponed that the deceased was survived by himself and Norah Nawoba. He explains that the objector is the son of PETER WAWIRE (Deceased) who was given parcel No.Bunyala/Sidikho/417. He adds that parcel no.Bunyala/Sidikho/419 was to be transferred to him and to Norah Nawoba and that the other sons of the deceased were not to benefit therefrom.

5. The application was heard by way of oral evidence Objector being the Plaintiff and petitioner the Defendant.

Plaintiffs Case

6. The Plaintiff called two (2) witnesses. In his testimony the Plaintiff (PW1) MUHAVIN CLEOPHAS WAWIRE who is a grandson to the deceased herein and a nephew to the Petitioner told the trial Court that his grandfather owned land in 4 blocks:-

- Bunyala/Sidikho/416 given to Yona Luka
- Bunyala/Sidikho/417 given to Peter Wawire Muyumbu
- Bunyala/Sidikho/418 given to Elijah Wekesa (Petitioner)
- Bunyala/Sidikho/419 which remained in his grandfathers name.

He produced searches for the respective land parcel No's 417 – 419 being PExhibit 1 (a) – (c). He stated that his father had established a house on plot no.419 where he was buried together with his wife Gladys Makokha who died in 1989. He added that his brother Kennedy Wawire lived on the said parcel before his fathers homestead was demolished by the Petitioner.

He raised the issue of his late grandfathers will which he claimed was written on 05/09/1997 wherein he gave seven (7) acres of plot No.419 to Peter Wawire Muyumbu and two (2) acres to the Plaintiff's only paternal aunt Norah Nawoba.

7. The Plaintiff also stated that plot 417 was to be transferred to the Petitioner, though the actual situation on the ground is that the Petitioner has taken over the two plots being No's 417 and 419 thereby denying the family of Peter Wawire any access to the said parcels of land despite efforts to have the issues of plot 419 dealt with by the elders as directed by the District Officer at Navakholo, the Petitioner refused to comply and proceeded to file the Petition for the grant without involving the family. It is the Plaintiff's case that since other family members were not represented in the filing of the succession cause, he does not want the grant to be issued to the Petitioner because the Petitioner is not a straightforward person.

8. PW2 NORAH NAWOBA testified that when the Petitioner brought this case to Court she was not aware of it because he did not tell her about it. She explained that plot 419 was shared between her and her brother PETER WAWIRE where she was to get two (2) acres while her brother Peter Wawire was to get seven (7) acres but to date she does not have her portion because the Petitioner has refused to give her, her share. She wants plot 419 shared out according to the deceased's will.

9. PW3 JOHN MASINDE MUGANDA confirmed that on 05/09/1992, the deceased herein called him to his home where he went together with some clan elders that on that day there were members of the Friends church, Administration (village elder Sakwa) and the deceased's children. The issue at the meeting was distribution of 3 of the deceased's 4 parcels of land.

10. PW3 stated that Luka directed that plot 417 be combined with plot 418 and be registered in the Petitioners name. Plot 419 was to be divided between Norah Nawoba and Peter Wawire. That the deceased also directed Peter's family to take out succession for plot 417 after which they would pass it on to the Petitioner. They signed the documents (PExhibit 2 (a)). The Plaintiffs closed their case at this

junction. This is the document which the plaintiff and PW2 have referred to as the deceased's will.

Defence Case

11. The Petitioner testified as DW1 and called only one witness in this case who was Benard Wechuli Wawire. DW1 testified that he was the 5th son to the deceased herein Luka Muyumbu Sikhumbili and Mama Dinah Nafula Muyumbu. He explained that his father signed transfer forms in respect of Bunyala/Sidikho/419 which he took to the Chief of his area to enable him commence succession. He claimed to have exhibited all the requisite documents for the succession.

12. He testified that the Objector has no basis for filing the objection because the alleged will presented by the Plaintiff to Court is not a will as the same was not witnessed by the Plaintiff's brothers. He also denied all the allegations made by the Objector/Plaintiff especially that he gave the Objector ancestral land being plot No.419 which was retained by the deceased.

13. He further claimed that he was given land parcel 419 by the deceased whereas the objector's father was given plot no.417. He explained that on 05/09/1997 there was a meeting where issues were discussed and recorded which record the objector has now presented as the will of the deceased in this case. The Petitioner prayed that the applicants objection be dismissed to enable him proceed to conclude the succession proceedings.

14. On cross examination by Mr. Athung'a the Petitioner stated that the Objector's father was given land parcel 417 whereas he himself was given land parcel 418. He further stated that plot no.419 remained in Lukas name. He added that Luka had directed that L.P 419 would go to the family of Peter Wawire together with Norah Wawire. He agreed that Peter Wawire had his home on land parcel 419 where he was buried.

15. The Petitioner also testified that Luka later changed his mind about giving plot 419 to Peter's family when objector refused to take out succession proceedings for land parcel 417.

16. DzW2 Benard Wechuli Wawire testified that he was the second born of Peter Wawire Muyumbu's 3 sons who were sired from different mothers. He explained that he came home formally when his father died on 27/08/1994 though he was born out of wedlock. That he was settled on L.P 417 by the Petitioner herein. His desire was that all the sons of Peter Wawire be included in the distribution of the deceased's estate.

Issues for Determination

17. From the evidence by both the Plaintiff/Objector and Defendant/Petitioner the following are the pertinent issues for determination:

1. Whether the Plaintiff/Objector had a basis for filing the objection herein.
2. Whether the grounds upon which a grant may be revoked or annulled have been demonstrated by the applicant.

18. On the first issue the basis upon which the application for revocation/annulment of grant dated 30th May 2013 were set out in the application as follows:-

1. Grant herein was obtained fraudulently through making false statement and without the knowledge of the applicant.
2. The petitioner did not include all the beneficiaries.
3. The Petitioner intends to dispose the land.
4. The Petitioner is fraudulent person.

19. The Plaintiff/Objector has raised the issue that there was a will by the deceased herein LUKA MUYUMBU (Deceased) which the Defendant/Petitioner has disputed and has maintained that those were

minutes of a meeting and not a will. The Objector claims that what was discussed in the meeting of 5th September 1997 was not included in the application for grant of letters of administration by the Petitioner.

20. From the evidence by the Objector herein and especially the documents produced and marked "PExhibit 2 A" which the Objector refers to as the will, this Court finds that though the document does not meet the threshold of a will as set out in Section II of the Act, the document provides useful information on how the deceased wanted his estate distributed upon his death. Although the Objector was not the one to be directly named in the Petition for the grant of Letters of Administration intestate to the deceased's estate, there is clear evidence that the Petitioner's only sister and only surviving sibling was not made aware of this cause when the Petitioner filed the Petition.

21. The law requires that all beneficiaries to a deceased's estate must give their consent to the filing of the Petition. The fact that the Petitioner did not inform his sister Norah that he was going to apply for the grant of Letters of Administration intestate to their father's estate clearly brings the Objector's complaint within the ambit of Section 76 of the Act which provides for revocation or annulment of grant if the Court decides, either on application by any interested party or of its own motion. The Objector herein is such an interested party as stated under Section 76 (supra). It is also clear from the conduct of the Petitioner that he did not reveal to the Court Norah had no knowledge that he was petitioning the Court for the grant. It is also clear from the evidence of both the Objector and Norah that the Petitioner has failed to proceed diligently with the administration of the deceased's estate. For all these reasons, the Objector had a good basis for filing the Objection application.

22. On the second issue the Objector had to prove the grounds upon which a grant may be revoked or annulled as contained in Section 76 of the Law of Succession Act. He claimed that the grant was obtained fraudulently through making a false statement and without his knowledge. PW1 in his testimony testified to the fact that the deceased herein shared/distributed his property among his children before the deceased died. He contested the transfer forms produced by the Petitioner/Defendant. The said transfer forms are undated.

23. The said transfer forms did not transfer the parcels as indicated. This shows therefore that there was an element of fraud by the Petitioner who claimed that part of land parcel 419 was given as a gift to Norah (PW2) when Norah herself was not even aware of the transfer forms.

24. For the above reasons, I am satisfied that the Objector has made out a case for the revocation of the Grant of Letters of Administration intestate issued to the Petitioner herein on 27th May 2005 be and are hereby revoked. The same shall now be issued in the joint names of the Petitioner, Elijah Wekesa Muyumbu, Norah Nawoba Muyumbu and the Objector Muhavini Cleophas Wawire to facilitate proper administration and distribution of the deceased's estate. The costs of the Objection shall be in the cause since the parties herein are family.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 23rd day of June 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Osango for Athung'a (present) For Objector/Plaintiff

Present in Person For Petitioner/Defendant

Mr. Okoit Court Assistant