



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 951 OF 2014

**IN THE MATTER OF THE ESTATE OF JAMENI MUHAVI alias MUHAVI KIBIHI ---
DECEASED**

BETWEEN

MAXWELL ISAYA KIVIHYA.....PETITIONER

VERSUS

KETA MUHONJA SALOME.....OBJECTOR

J U D G M E N T

Introduction

1. According to the papers filed in this cause, the deceased herein, Jameni Muhavi alias Muhavi Kabihi died on 22.06.1979 at the age of 63 years. For reasons that are not quite clear to the court there are two different Certificates of Death namely No. 0237911 issued on 22.08.2014 and No. 77797 dated 28.12.1979. I suspect that the certificate issued on 22.08.2014 was taken out by one of the parties for purposes of this cause

2. At the time of death, the deceased owned 2 parcels of land, namely Kakamega/Mudete/52 measuring 0.40Ha and Kakamega/Mudete/186 measuring 0.28 Ha. There are Certificates of official searches to that effect. From the evidence, the deceased sired 8 children 4 sons and 4 daughters, but from the records, 2 of the daughters died although neither the objector nor the Petitioner gave the dates of death for the 2 daughters. The chief's letter dated 16/05/2014, shows the following persons survived the deceased;

- a) Maxwel Kivihya Isaiah
- b) Gedeon Amani Muhavi
- c) Ellam Ojango Muhavi
- d) Enock Onzere

3. From the chief's letter (chief of North Maragoli Location), Ellam Ojango Muhavi holder of ID Number 1874846 was to inherit land parcel Kakamega/Mudete/52 while Enock Onzere, holder of Id No. 3433924 was to inherit land parcel Kakamega/Mudete/186.

4. Upon the death of the deceased Maxwell Kivihya Isaiah filed petition for Grant of Letters of Administration Intestate to the estate of Jameni Muhavi alias Muhavi Kibihi alias Jamin Muhavi. This

was on 11.11.2014, but before he got the grant, Keta Muhonja Salome, one of the 4 daughters of the deceased, filed an objection to the issuance of the Grant to the Petitioner and filed a cross petition for the grant.

The Objection

5. The objection is premised on grounds that:-

- a) The Petitioner did not state all the beneficiaries of the estate
- b) The Petitioner has already intermeddled with the property of the deceased without any legal authority.
- c) The beneficiaries did not consent to him taking the letters of administration
- d) The Petition was [filed] in bad faith.

6. In her cross Petition, the Objector prays that the grant of representation to the estate of the deceased be made to her. In form P&A 5 to the cross Petition the Objector lists herself and Priscilla Kamonye who testified as DW2, as the 2 daughters of the deceased and also lists all her 4 brothers as indicated by the Chief's letter dated 16/05/2014. The objector also lists the 2 parcels of land that are in dispute in this matter.

The Objector's Case

7. The objector testified as PW1. She also called her brother's Ellam Ojango Muhavi as PW2 and Gideon Amani Muhavi as PW3 respectively.

In brief the objector says she was left out of the distribution of the deceased's estate. That the deceased had not shared out his estate among his children except for the Petitioner who had been given land parcel Kakamega/Mudete/124 for which he obtained a title before the deceased died. It was her contention that she is entitled to land parcel Kakamega/Mudete/186. She also complained that the Petitioner has intermeddled with the deceased's estate by transferring the disputed parcels of land into his own name.

8. Both PW2 and PW3 supported the objector's case and contended that the Petitioner had not involved them in the succession proceedings, although they agreed that they had gone to see the Petitioner at the latter's home in Nandi in connection with the succession proceedings.

The Petitioner's case

9. The petitioner, testified as DW1 and called his sister, Priscilla Ligaya Kamonya as Dw2 his brother Enock Onzere as DW3 and Aggrey Gazemba Keiza, Assistant Chief of Digura sub-location as DW4. The Petitioner's case is that as a married daughter of the deceased, the objector is not entitled to a share of the deceased's estate and further that the constitution of Kenya 2010 does not allow daughters to inherit from their parents. It was Dw3 who when being examined by Court stated that he would not object to his 2 living sisters, being given a share of their father's estate.

Analysis and Determination

10. After carefully analysing all the evidence that was placed before me by both parties, the issue that arises for determination is whether the plaintiff/Objector's case falls within the ambit of the provisions of Section 76 of the law of Succession Act cap 160 of the laws of Kenya (the Act). Section 76 of the Act provides as follows;

“76- Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false

statement or by the concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to

justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due

notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from

the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate;

or

(iii) to produce to the court, within the time prescribed, any

such inventory or account of administration as is

required by the provisions of paragraphs (e) and (g) of

Section 83 or has produced any such inventory or

account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

11. The above Section thus gives power to the Court to revoke or annul a grant of representation whether or not the grant is confirmed, either on its own notion or on the application by any interested party, for any of the five grounds set out herein above. In the instant case, the objector has alleged that the Petitioner did not state all the beneficiaries of the estate in the petition for grant of Letters of Administration. It is clear from the chief's letter dated 16.05.2014 that only the male survivors of the deceased's estate were named as beneficiaries. The objector and her sister were not named as beneficiaries. Form P&A 5 also contains only the names of the 4 sons of the deceased and makes no mention of the daughters of the deceased. Form 38 filled together with the petition, also shows that Gideon Amani Muhavi, Ellam Ojango Muhavi and Enock Onzere are the only ones who gave consent to the Petitioner to apply for Letters of Administration Intestate to the estate of the deceased.

12. I am satisfied that indeed the Petitioner did not name all the beneficiaries of the deceased's estate. The objector gave evidence in support of this first ground of the objection. The Petitioner himself stated during his own testimony that the objector could not be named as a beneficiary because she is married with a husband, children and shambas. It is imperative to note that the law does not discriminate against daughters of a deceased person when it comes to administration and distribution of a deceased's estate. Section 38 of the Act provides that where intestate leaves behind surviving children, the net intestate estate shall subject to the provisions of Sections 41 and 42 devolve upon the surviving child if there be

only one or shall be equally divided among the surviving children.” It is admitted that the objector is one of the children of the deceased, and even if for the sake of argument she would not get a share of the deceased’s estate, she was entitled to be named as a beneficiary of the estate of the deceased. If, at the time of distribution of the estate of the deceased the objector says she does not wish to benefit from the estate of the deceased, then she can be left out. In any event, Article 60(1)(f) of the Constitution 2010 outlaws any form of discrimination in Law, customs and practices related to land and property in land.

13. In the second ground of objection, the objector complained that the Petitioner had intermeddled with the property of the deceased. In her testimony the objector stated that the Petitioner had sold part of the deceased’s estate to third parties. However, the objector did not adduce evidence in support of that allegation and of course the Petitioner denied selling any of the deceased’s estate to third parties. The second ground of the objection is therefore lacking in merit.

14. In the third ground, the objector alleges that not all the beneficiaries consented to the Petitioner taking out the letters of Administration to the deceased’s estate. I have already referred to form P&A 38 filed pursuant to Rule 26(2) of the Probate and Administration Rules (the P&A Rules) which clearly shows that the objector as a child of the deceased did not give her consent to the Petitioner to take out the Grant of Letters of Administration intestate to the estate of the deceased. Rule 26 of the P& A Rules provides that; “26 Grants of Letters of Administration.

(1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person, shall, in default of renunciation, or written consent in form 38 or 39 by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person, who would, if living, have been entitled in the same degree and to a person not under disability in preference to an infant entitled in the same degree.”

15. The above stated Rule 26 is important in the following material particulars;-

a. that every person entitled in the same degree as or in priority to the applicant shall receive notice from the applicant as to the application for grant of Letters of Administration intestate;-

b. that every such person stated in (a) above shall renounce his entitlement to the estate of the deceased if he/she does not wish to benefit and in the absence of such renunciation, such a person MUST give consent to the applicant to proceed with the application.

16. The evidence in the instant case shows that the objector neither renounced her interest in the estate of the deceased nor gave her consent to the Petitioner to take out letters of administration to the deceased’s estate. The Petitioner’s opinion on the marital status of the objector and how that status affects the objector’s interest in the estate of the deceased is immaterial and runs counter to clear provisions of the Act and the Constitution of Kenya 2010 (see above). Ground 3 of the objection is therefore valid and is allowed.

17. In ground 4, the objector alleges that the Petition was [filed] in bad faith. In my considered view this, ground is valid for the reasons that the Petitioner working in cahoots with the area chief and his sister Priscilla Ligaya Kamonya, who testified as Dw2, his brother, Enock Onzere, DW3 and Aggrey Gazemba Keiza Assistant Chief of Digura Sub-location who was DW4, purposed to keep the objector out of the whole process of applying for letters of administration intestate to the estate of the deceased and the estate’s subsequent distribution. Both DW2 and DW3 supported the Petitioners allegation that the objector was involved about everything that was going on, but during cross examination, it became clear

that the objector was left out of the whole process in a very subtle manner. There is no doubt in my mind therefore that the whole process undertaken by the Petitioner in applying for the grant of Letters of Administration intestate to the estate of the deceased was done in bad faith and was aimed of depriving the objector of an opportunity to participate in the same.

The objector’s prayers for Grant of representation to her

18. The objector filed her cross petition for grant of Letters of Administration intestate to the estate of the deceased in place of the petitioner. She avers that she will faithfully administer the estate of the deceased according to the law and will render a just and true account of such estate whenever required by law to do so and will, when required by this court, deliver up thereto the said grant.

19. Upon consideration of all the evidence on record, it is clear to me that the children of the deceased belong to 2 distinct camps; one camp supporting the Petitioner and the other supporting the objector. This means that the petitioner acting alone or the objector acting alone in this matter will still cause friction in the family.

Conclusion

20. For the reasons given in the body of this judgment concerning the objection and the cross petition for grant of letters of administration of the estate of the deceased by the objector, I make the following orders;-

- a. The Objector’s objection dated 16.06.2015 be and is hereby allowed.
- b. The grant of letters of administration intestate to the estate of Jameni Muhavi alias Muhavi Kibihi shall be made jointly to Maxwell Isaiah Kivihya and Keta Muhonja Salome.
- c. Once the grant is issued, the Petitioner and the Objector (who are deemed as joint petitioners in this cause) shall within sixty (60) days of issue of the grant apply for confirmation of grant.
- d. The costs of the Objection proceedings shall be costs in the cause

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 20th .day of September,2016

RUTH N. SITATI

JUDGE

In the presence of

.....Present in person.....for Objector/Applicant

.....Absent.....for Petitioner/Respondent

.....Mr. Okoiti.....Court Assistant