



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 82 OF 2011

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH MUGWANG'A AHALWA alias
CHARLES MUNGWANG'A AHALWA.....(DECEASED)**

AND

SIMON KITOTO MUNGWANG'S.....PETITIONER

AND

ESINASI KAIZA AZERE.....OBJECTOR

JUDGMENT

Introduction

1. The deceased herein Joseph Mugwang'a Ahalwa alias Charles Mugwang'a Ahalwa died intestate on the 8.12.2004 at Maganga Sub-Location, Vihiga County. His son Simon Kitoto Mugwang'a petitioned this court for a grant for letters of Administration Intestate and the same was gazetted vide Gazette Notice No. 59 in the issue dated the 01.07. 2011 giving a period of thirty (30) days for anyone to raise objection to the said petition.

The Objection

2. The objector Esinasi Kaiza Azere filed her objection to making of the grant to the petitioner on 10.08.2011 and an answer to petition for grant dated 29.09.2011 supported by her own affidavit sworn on the same date.

3. Her interest in the deceased's estate herein is that she should be included as a liability. Her claim is based on the grounds set on the face of the objection and more specifically that her husband one CHRISTOPHER AZERE (now deceased) had a claim on part of the deceased Estate/land herein being parcel No. S/ Maragoli/Muhanga/304 measuring approximately 3.705 acres. Her claim came about after her husband was allegedly successful in Kisumu High Court Case No. 172 of 1989 where she claims that the court awarded him a portion of land Parcel S/Maragoli/Muhanga/304.

4. She further claims that the petitioner herein filed the petition herein after she had issued a citation to the wife of the deceased to accept or refuse to take out grant of Letters of Administration to the estate of Joseph Mungwang'a alias Charles Mugwang'a Ahalwa vide Vihiga SRM Succession Cause No. 16 of 2011. Her main concern is that the Petitioner herein deliberately omitted her as a bonafide/lawful beneficiary to the deceased's estate.

5. She states that the petitioner failed to disclose to the Court a true account of all beneficiaries to the

deceased's estate and that the statements made by the Petitioner in the petition papers are not true but misleading.

6. She has made a cross application for grant of Letters of Administration to the deceased's estate herein which application is dated 29.09.2011.

7. In her affidavit in support she explains how the deceased herein sued her and her husband in Kisumu Civil Appeal No. 172 of 1989 where they were granted a share of the land parcel herein and how she cited the wife of the deceased herein to file succession proceedings but instead she let her grandson go ahead with the application. By reasons of the grounds raised in her objection, the objector wants the petitioner's petition dismissed, so that she becomes the Petitioner instead.

8. In her answer to the petition, she gives a history of land Parcel S. Maragoli/Mahanga/304 and how the Court of Appeal awarded her and her husband a portion thereof. She claims to have stayed on this parcel of land for over 70 years and that the said parcel of land was erroneously registered in the names of the petitioner's father. She prays that she be allowed to petition for grant of Letters of Administration to the deceased's estate.

Petitioner's Response

9. In opposing the objection, the petitioner herein Simon Kitoto Mugwang'a filed his replying Affidavit on the 01.12.2011 in which he denies the objector's allegations. He contends that since the objector's husband died in 1970 before the deceased herein, there is no way the deceased could have sued them in 1989.

10. He further claims that even after the death of the deceased no one claimed anything from his estate. He adds that the objector does not stay on the deceased's land herein and that she is not related to them in anyway or at all. He maintains that he was the one chosen by his family to petition the court for grant of letters of administration to the deceased's estate.

Submissions and Determinations

11. The matter was canvassed orally and the parties filed their written submissions and authorities thereafter. Briefly the Objector's case was that her later husband bought a portion of land parcel No. S/Maragoli/Muganga/304 from the deceased herein. She claims that her late husband was sued by the deceased in Kakamega HCCC. No. 23/71 and her husband won the case and was awarded a portion of the land. That the deceased appealed against the decision of the High Court but did not succeed. That thereafter the court order from the High Court Kisumu was taken to the lands office and her husband name now appears in the easement Section giving her a right of occupation of the said land. This has been shown by exhibits 1(a) and (b) and Exhibit (2) and the ruling of the Court Exhibit (3). On cross examination she stated that she is the one now in occupation of the portion of land she is claiming though there is no blood relation between her and the deceased. PW2 her son confirmed her testimony and stated that the suit land is occupied by the family of JOSEPH MUGWANG'A (the deceased) but nobody had built on their portion. He also testified that the deceased herein and his father came from the same clan and are also related by blood.

12. The Petitioner's case is that, there is no blood relationship between the deceased and the objector. They maintained that land parcel No. South Maragoli/Mahanga/304 measuring 1.5 Ha is registered in the name of Joseph Mungwang'a the deceased herein. DW1 the petitioner told the court that when the deceased went to look for work he left the petitioner's husband and others to till his land but when he came back the objector's husband refused to vacate the land. He maintained that PW1's husband did not purchase the said land. He produced a copy of the original title "EXH 1" showing the name of Joseph Mungwang'a as the owner of the said parcel. DW2 confirmed that the land in question belonged to the deceased herein and that it was registered in the deceased's name after adjudication and demarcation.

13. DW3 Lenah Kadi Mugwang'a the widow to the deceased herein also confirmed that the land in

question belonged to her late husband. She also confirmed that Christopher Azere had requested her husband to allow him to plough the land since it was lying fallow. This court has carefully considered the pleadings and affidavits by both parties and their counsel's written submissions. The issues for determination are

(i) Whether the objector is a beneficiary or dependant of the deceased estate herein

(ii) If the answer to the above is in the positive then whether she had demonstrated to this court her claim for the revocation of grant and/or objection.

14. A dependant is defined by Section 29 of the Law of Succession Act as follows;- "for the purpose 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, grandparents grandchildren, step children , children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death and

15. From the above definition the objector does not fit to be the definition of dependant to the deceased estate. There are claims by PW2 that the deceased had blood relations with her father Christopher but this contradicts the testimony of PW1 who has stated that there was no blood relation between the two families. This is also confirmed by the testimony of DW1 who stated that Christopher, husband to the objector is not a relative of the deceased's family. On the other hand a beneficiary is defined in the black's laws dictionary as "a person who is designated to benefit from an appointment, disposition or assignment (as in a will, insurance policy etc); - One designated to receive something as a result of a legal arrangement or instrument." The Law of Succession Act does not defined a beneficiary DW1 claims that her husband bought the parcel of land from the deceased's estate herein, but she has not shown any agreement to that effect. This is therefore not satisfied that the objector is a beneficiary of the deceased's estate.

16. Secondly, the objector did not produce the proceedings and judgment in the High Court Civil Case No. 23 of 1971. These proceeding and the judgment therein would have given proper guidance to this court in appreciating how the objector's husband got easement rights of occupation on the above land. I see PEX 1(a) and (b) which show that Christopher Azere Ambege has rights of occupation. It has been proved by the defence that he objector is not in physical occupation of the land Parcel herein, but has only planted trees on the portion she is claiming. She has also not demonstrated to the court the acreage that she purports to occupy. It is therefore difficult to ascertain what exactly the objector wants from the deceased estate.

17. Having found that the objector is neither a beneficiary nor dependant to the deceased estate her liability therefore cannot stand. She is not a purchaser of the land nor does she occupy the same as from the evidence which shows that it is somebody else who tills and/or ploughs the same.

18. It also appears to this court that the objector's claim in this matter would best be handled by the Environment and Land Court which is clothed with appropriate jurisdiction to hear and determine disputed relating to the environments and the use and occupation of and title to land as provided under Article 162(2)(b) of the Constitution of Kenya, 2010, and Section 13 of the Environment and Land Court Act, Cap 12A of the Laws of Kenya, which provides that the Environment and Land Court "shall have Original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land."

Conclusion

19. Having come to the above conclusion, I find that the objector has not demonstrated why the petitioner should not administer the estate of the deceased herein. This court is a court of law and relies on evidence as presented by parties and no other evidence..

20. It was crucial for the objector to have produced the judgment in High Court Civil Case No. 23 of 1971 to shed light on how the court gave the objector the right to occupy a portion of the deceased estate. Otherwise the Court remains in the dark. The objection is therefore found to have no merit and the same is dismissed with costs to the petitioner.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 28th day of October, 2016

RUTH N. SITATI

JUDGE

In the presence of;-

M/S Nyanga (absent) petitioner

Mr. Shivega for Kahi objector

Mr. Polycarp Court Assistant