



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 12 OF 2014

IN THE MATTER OF THE ESTATE OF MESHACK KHATECHI(DECEASED)

AND

GILBERT AGIWANA KHADEJI...PETITIONER/RESPONDENT

AND

PHEOBE LUVEMBE WITABAOBJECTOR/APPLICANT

J U D G M E N T

Introduction

1. The deceased herein Meshack Khatechi died at Mukachi on 19.05.1980 and a grant of letters of Administration intestate issued to the petitioner herein Gilbert Aguwana Khadeji by the Principal Magistrate's Court at Hamisi on 15.11.2011 and confirmed on 15.05.2012. By a summons for revocation of grant dated 09.01.2014 brought pursuant to section 76 of the Law of Succession Act Cap 160 of the Laws of Kenya and Rule 44 of the Probate and Administration Rules the Objector Phoebe Luvembe Witaba sought for Orders that:-

- a) The grant made on 15.11 2011 and confirmed on 15.05.2012 to Gilbert Aguwana Khadeji vide Hamisi Law Courts Succession Cause Number 51 of 2011 be revoked and/ or annulled
- b) This Honourable Court do issue orders for restriction against any dealings on land Parcel No. Kakamega/Bumbo/577 pending the hearing and determination of this application interparties and thereafter pending the determination of this cause.
- c)The petitioners be stopped from intermeddling with the deceased's estate

2. Her application is based on grounds that the proceedings to obtain the said grant and confirmation thereof were defective in substance and were obtained by making a false statement and/or concealment from the court of material facts. She further claims that the petitioner misled the court on the facts relating to the estate of the deceased.

3. The application is further supported by the applicants own affidavit sworn at Mbale on 08.01.2014 where she put more emphasis on the grounds herein-above stated.

4. The application is further supported by the affidavit of Wycliffee Nandwa the interested party. The

Interested Party totally agrees with the application for revocation. He is the grandson to the deceased herein and has deponed at length on the deceased's estate including the children who survived him. He also explains the relationship of the objector applicant to the deceased herein. He admits the fact that none of the deceased's grandchildren, have a superior right nor do they rank higher than the objector to succeed the deceased herein and /or administer his estate.

5. He opines that the petitioner is not fit to administer the estate of the deceased because of his acts of concealing material information from the court. He has particularized the elements of fraud by the petitioner and maintains that the grant was obtained by means of untrue allegation of facts essential in point of law to justify the grant of letter of administration of the estate of the deceased herein. The Interested Party also swore a supplementary affidavit pursuant to the Honourable Court's order issued on 16.03.2015. The deponent depones on the value of the deceaseds parcel of land known as Kakamega/Bumbo/577 and also questions the jurisdiction of Hamisi Senior Resident Magistrate's Court to issue the grant herein.

Response

6. The application is opposed. There are two replying affidavits by the petitioner Gilbert Aguwana Khadeji one dated 20.01.2014 and the other dated 30.03.2015. He depones that he is the grandchild to the deceased herein and states that the objector has her own permanent residence with her husband children and grandchildren. He maintains that the affidavits sworn by Wycliffe Nandwa dated 16.03.2015 are misleading and that he (Wycliffe)has a share in the estate of the deceased as confirmed by the court at Hamisi.

7. He adds that the deceased's parcel of land should remain on inheritance of the deceased's grandchildren as beneficiaries since the deceased had only one son who is now deceased.

8. The cause proceeded orally. Phoebe Luvembe Witaba was the plaintiff while Gilbert Aguwana Khadeji the defendant. The Interested Party also testified in support of the applicant's case.

The Plaintiff's Case

9. The plaintiff and the interested party were the only ones who testified. Phoebe Luvembe Witaba told the court that the deceased herein was her father and that he owned parcel No. Kakamega/Bumbo/577 which measures approximately 5 acres.

10. Her father had 5 children 4 daughters and one son, all of whom are dead except herself. She is married with children and grandchildren and has settled at Khayega with her husband.

11. She further testified that the said portion of land is now valued at kshs.1.5 million and that the petitioner who is her nephew did not disclose the value of the said portion of land to the court at Hamisi. She adds that the petitioner described himself as a son of the deceased herein whereas he is a grandson. She opines that she is entitled to a share of her father's estate even though she is a woman and that she is capable of administering the same. She adds that she has never seen the grant issued by the Hamisi Court although she is aware that the deceased's estate has been distributed by the petitioner who called her to give her the information. She also testified that all the people mentioned in the certificate of confirmation are grandchildren of the deceased.

12. PW2 Wycliffe Nandwa confirmed to the court that he is the grand child to the deceased who died in 1980 and was buried on land parcel Kakamega/Bumbo/577. He also testified that the petitioner is his half-brother as they share one father though their mothers are different. He stated that his father was the only son to the deceased herein. He also made mention of his other siblings.

13. He claims that he was never involved in the filing of the petition which led to the deceased's estate being registered in the petitioner's name. He also testified to the fact that the value of the estate was not kshs.100,000/= as stated by the petitioner.

14. He opines that grant of letters of administration should be issued to the applicant who is a closer blood relative to the deceased than either the Petitioner or himself.

The Defence case

15. DW1 the petitioner testified that he is the deceased's grandson and that the deceased owned land Parcel Kakamega/Tiriki/Bumbo/577 which he estimates to have been valued at Kshs.20,000/= an acre in 2011 when he petitioned to be issued with letters of administration. In his testimony he confirms that he did not involve the Applicant or the Interested Party and that in the forms filed in Court at Hamisi Law Courts, he referred to himself as the son to the deceased and not a grandson. He maintains that since the objector is married elsewhere and has children and grandchildren she cannot be an administrator of the deceased's estate. He states that "the gender is a consideration for administration estates."

16. He also maintains that as grandson to the deceased he is closer to his grandfather than Phoebe who is his aunt. He wants the application for revocation of grant dismissed.

Submissions.

17. Parties filed their written submissions which this court has carefully considered. In her submissions the applicant maintains that her testimony remained unchallenged and that she is the only daughter and remaining child of the deceased. She further submits that she had demonstrated that the Petitioner had fraudulently registered himself as proprietor of the deceased's land vide the Hamisi case. She adds that though the Petitioner knew of her relationship to the deceased and her entitlement to the deceased estate he went ahead and failed to make a full and honest disclosure of all facts known to him and against the said estate including and not limited to the applicant's interest herein. She wants a fresh grant issued in her name.

18. *In his submission the interested party stated that neither himself nor the applicant were involved in nor made aware of the proceedings in the Hamisi Court.* He adds that the Petitioner misrepresented himself as a son to the deceased yet he is a grandson to the deceased and went ahead and registered himself as the proprietor of the deceased land pursuant to the fraudulent grant. He further submits the Petitioner also failed to disclose the other children of the deceased and all the dependants who survived him. Finally, the Interested Party submits that the Hamisi Court lacked the jurisdiction to undertake succession proceedings. On his part the petitioner/Defendant holds that the deceased left the land parcel Kakamega/Tiriki/Bumbo/577 in his name for the benefit of his grandchildren. He maintains that the plaintiff/objector is married with a home, land, and children, and that she should therefore not get a share of the deceased's estate.

Determination

19. Having carefully considered the pleadings, submissions and authorities by all the parties herein the following are the pertinent issues for determination.

(i) Whether the subordinate court at Hamisi had the jurisdiction to hear and determine succession cause no. 35 of 2011

(ii) Whether the applicants have established sufficient grounds under Sections 76 of the law of Succession Act to warrant revocation of grant.

20. On the first issue courts have said time and again that jurisdiction is everything and if a court finds that it has no jurisdiction in any matter then it down its tools.

21. At the time of the filing of the proceedings at Hamisi Law Courts, subordinate Courts had jurisdiction to hear and determine succession causes as prescribed under Section 48(1) of the Law of Succession Act which provides;-

“48 Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under Section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings. Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate’s Court are available the High Court shall have exclusive Jurisdiction to make all grants of representation and determine all disputes under this Act”

22. The value of the estate in this case has been estimated to be more than Ksh.100,000/= by both the objector and the interested party. The petitioner estimated the value of the said parcel to be approximately Kshs.100,000/=which he quoted in form P&A 5. Neither party however, gave a valuation report from a qualified valuer and or surveyor as to the value of the property and for this reasons, this court cannot independently know the exact value of the said parcel. Due to this lack of documentary information on the value of the estate of the deceased, this court gives the Petitioner the benefit of the doubt and accepts that the value given by the Petitioner is the correct value. This therefore means that the Hamisi Court had Jurisdiction to hear and determine the succession case No. 35 of 2011, and I so find.

23. On the second issue, I find that the applicant and interested party have demonstrated that the grant herein and the confirmation thereof were defective in substance and that the same were obtained fraudulently by the making of a false statement and concealment of material facts from the court.

The petitioner did not disclose that he was a grandchild to the deceased herein nor did he bring it to the court’s attention that the deceased had a daughter who still survived him. He also did not make effort of issuing a citation to the objector so that she could petition or renounce to petition for the grant of letters of administration for the estate of her father. The law of intestate succession makes the children the ultimate destination of their parent’s property, and where there is a surviving spouse, he or she will be entitled to a life interest. This is the position under Section 35 of the Law of Succession Act. Section 40 clearly provides that all children of the deceased person ,whether male or female are beneficiaries and should have an equal share in the deceased’s estate unless any one of them opts not to take a share in the father’s estate. The objector/applicant has not renounced her interest in her father’s estate.

24. The Sections herein above cited do not mention grandchildren nor do they discriminate the gender for purposes of determining who should or should not be a beneficiary. The petitioner is therefore wrong in alleging that gender is a consideration for administering the estate of the deceased herein.

25. The Petitioner submitted that gender is a consideration for administration of the deceased’s estate. Article 60(1)(f) of the Constitution provides as follows;-

“60(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable , and in accordance with the following principles;-

a

b

c

d

e.....

f. elimination of gender discrimination in law, customs and practices related to land and property in land; and

g

26. It is my considered view that the petitioner's submissions in this regard are baseless and uninformed. What matters is that as long as one shows or demonstrates that he or she is a child of a deceased whether married or unmarried, whether with children or no children, such a person is entitled to an equal share of the parent's estate unless the interest has been renounced.

Conclusion

27. The upshot of the above is that the application herein is allowed in its entirety with no orders as to costs. A fresh grant shall be issued to the applicant so that the due process of distribution can follow.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 13th day of October,2016

RUTH N. SITATI

JUDGE

In the presence of:-

.....Absent.....Applicant

.....Mr. Nyikuli for Shifwoka.....Respondent

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