



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 33 OF 1995

IN THE MATTER OF THE ESTATE OF M O K.....DECEASED

AND

S C O.....PETITIONER/RESPONDENT

VERSUS

M N K.....OBJECTOR/APPLICANT

JUDGMENT

Introduction

1. The deceased herein, M O K died on 20/05/1989 and was survived by S C O, A K , M M and A O who was by then only 10 years old A and M were 18 and 17 years old respectively. S C O succeeded the deceased and was issued with Grant of Letters of Administration intestate to administer. The estate of the deceased comprised in LR. No. S./Wanga/Ekero/[particulars withheld] measuring 2.2Ha of which the deceased became the registered proprietor on 21/04/1967. On succession, the parcel was devolved to the deceased's widow.

The application

2. By the summons dated 12/07/2004, the objector herein M N K prayed for an order to revoke and/or amend the Grant herein for two reasons;- that the grant was obtained fraudulently by the making of a false statement and by the concealment from the court of something material to the cause and secondly that the grant was obtained by means of an untrue allegation of fact in point of law. The other grounds in support of the summons are set out in the applicant's affidavit sworn on 08/07/2004.

3. When the said summons came up before Lenaola- Judge on 18/02/2010, the learned Judge ordered the applicant to file an affidavit of protest in readiness for directions on 21/07/2010. The applicant filed the affidavit of protest dated 29/06/2010 on the 19/07/2010. In the affidavit, the applicant laid claim to 1½ acres of land from LR No.S/Wanga/Ekero/498 (the suit land). She also wanted a caution placed on the suit land pending determination of the Succession Cause. On the 21/07/2010, the Court ordered the protest to proceed by way of oral evidence, hence these instant proceedings.

The evidence

4. M N K testified as PW1 and told the Court the deceased had 2 wives; M O (Protestor's Mother) and

M. That protestor's mother had her own plot where she had settled, out of which she sold 1½ acres and left a portion thereof which the protestor was now claiming. She also stated that because her father died before adjudication, the suit land was registered in the name of OK, the deceased herein. The protestor is a step sister to the deceased herein. She also testified that her father had divided his land between his 2 wives.

5. The petitioner testified as DW1. She stated that after the deceased died, she filed for Grant of letters of Administration and thereafter subdivided the suit land into 2 portions; S.Wanga/Ekero/[particulars withheld]. She sold plot No.[particulars withheld] to James Aseri while she retained Plot 1707. The same measures 4.0 acres. She also testified that the protestor's mother was using part of the suit land though she sold one acre.

6. The Petitioner called James Aseri Ongae as DW2. He stated that his father bought a one (1) acre of the suit land from one M O, the mother of the protestor, and that he eventually got title deed for the portion of land known as S. Wanga/Ekero/[particulars withheld]. He produced sale agreement as proof of the transaction.

Submissions.

7. In addition to the evidence, the parties filed and exchanged their written submissions. The objector reiterated her evidence to the effect that she was claiming only that share of the land left behind after her mother (protestor's) sold part of the land to DW2.

8. On the other hand, the Petitioner contends that there is no entry in the register showing that the deceased herein held the suit land in trust for the step mother M O. The Petitioner also concentrated on the provisions of sections 66,35,36,37,38,39 and 40 of the Law of Succession Act, Cap 160 Laws of Kenya which provide generally for the persons who can apply for and be granted letters of Administration Intestate and for the view that priority in this area should be given to the surviving spouse, who in the instant case, in the Petitioner.

9. Secondly, the Petitioner argues that the Protestor can only claim under her father, K O who did not leave any estate behind for his family to inherit. For the above reasons, the Petitioner submitted that the Protestor's case lacks merit and should therefore be dismissed. Reliance was placed on the following cases:-

- a) Re Estate of Stanley Franklin Habwe(deceased) Milimani Succession Cause No. 2747 of 2002
- b) Paul Tono Pymto & Another – vrs – Giles Tarpin Lyonnet- Eldoret Succession cause No. 57 of 2010
- c) Re-Estate of Leah Wanjiru Wamira (deceased) Succession cause No. 284 of 2012
- d) Re the Estate of Aggrey Makanda Wamira (deceased) Mombasa Succession cause No. 89 of 1996.

Determination

10. I have considered the oral evidence by the Plaintiff and Defendant herein, the affidavits on record and the submissions by both counsel for the parties herein. The main issue for determination is whether this court should allow the Defendant to have a portion of 1 ½ acres of land Parcel no. S/Wanga/Ekero/[particulars withheld] which she claims her mother was entitled to.

11. From the evidence on record, land Parcel No.S/Wanga/Ekero/[particulars withheld] was registered in the name of the deceased (See DEXH1). The deceased was the absolute owner of the said parcel as from the 21/04/1967. It is only after the death of the deceased that the Petitioner/Defendant obtained confirmation of grant of letters of Administration for the deceased estate on the 26 /02/ 1996, that she transferred the same to her name. Nowhere in the evidence has it been shown that the deceased herein held the suit land in trust for the plaintiff herein or for her mother who is now deceased. The deceased

was the first registered owner of land Parcel No. South Wanga/Ekero/[particulars withheld] . As provided for by the Law of Succession Act cap 160 of the Laws of Kenya, the Petitioner/defendant having survived the deceased is the right person to administer his estate. Section 66 of the said Act is clear on this particular point as it shows the order of priority in the succession of a deceased's estate. In coming to this decision, this court is guided by the provisions of the Succession Act. There is also no evidence to show that the plaintiff is a beneficiary to the deceased estate. She is a step sister to the deceased and therefore she can only claim to administer the estate of her deceased father K O and/or her husband's estate.

12. This court is also not satisfied that the plaintiff demonstrated her claim for revocation of the grant as provided for by section 76 of the Act. There is therefore no merit in the application for revocation of grant dated 12/07/2014 and the same is dismissed. The protest accordingly also fails. There will be no orders as to costs. The confirmation of grant dated 06/02/1996 stands.

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;-

.....Mr. Namatsi (absent).....Plaintiff/Protester

.....Mr. Anziya holding brief for Bulimo.....Defendant/Petitioner

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