



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
PROBATE AND ADMINISTRATION
SUCCESSION CAUSE NO. 01 OF 1984

IN THE MATTER OF: THE ESTATE OF MICHAEL MAHIGA KHAMAKANGA (Deceased)

RULING

The late Michael Mahiga died in May 1974. A grant of Letters of Administration Intestate was issued to John Mwashu, Barnabas Keya and Thomas Makumba on 11th June, 1986. An application for confirmation of the grant was made and filed on 24th February, 2004. John Mwashu filed an affidavit in protest. The matter proceeded by way of oral evidence.

John Mwashu Mahiga, the Objector testified that he is the deceased's first born son. He was born in 1938. It is his evidence that his late father had two wives. The first wife, Damarus Echechi had five children namely:

1. John Mwashu Mahiga
2. Barnabas Keya
3. Thomas Mahiga
4. Philip Miheso Mahiga
5. Mary Mahiga.

It is his further evidence that the second wife, Fenike, had no children. According to him, Peter and Hezron are not the deceased's biological children. The deceased had two plots namely KAKAMEGA/CHEKALINI/388 and KAKAMEGA/TIRIKI/239. The Objector's position is that the CHEKALINI plot is his as he is the one who gave his late father Kshs. 102/= to obtain the plot. At that time one had to be married and have an identity card for him to be allocated land. The Objector had no identity card and was also not married. Their mother died in 1950 and their father brought in the second wife so that he could get the plot. He would like his brother to go back to Tiriki. He gave the money to his father in 1963. At that time he was working at a white settler's coffee farm. He worked for the settler for four years from 1961 and later joined the army. He was being paid by the settler Kshs. 12/- monthly. He did not sign any document acknowledging payment of the money to his father.

PW2 SAMUEL MUGALO testified that he is a retired preacher. He knew the deceased and his family. According to him, the deceased told him that it was the Objector, John Mwashu, who had given out the money to get the plot at Chekalini Settlement Scheme. He also lives in Chekalini on Plot Number 388. He was the chairman of the Tiriki Community in Chekalini. The deceased was a Tiriki.

RAFAEL WANYAMA testified as DW1. He has been living in Chekalini since 1964. He used to work at Lugari Secondary School but he retired. He knew the deceased and lived with him in 1962 and 1963.

It is his evidence that the deceased was a mason and used to live at Laboreti Estate in Uasin Gishu. In 1964 the deceased's children were still in school at St. Columbus School at Turbo. John Mwashu, then went, Sigalagala Technical while Barnabas Keya went to Eldoret for Intermediate studies.

According to DW1, in 1963 the Uasin Gishu District Officer told all Luhya men living in Uasin Gishu that they would be taken to Lugari for settlement. Uasin Gishu was to be left for the Nandis. They boarded a vehicle on 6th January, 1964 and went to Chekalini. Each person was supposed to pay Kshs. 102/= so that he could pick a plot number. They were to carry food and sleeping items but not go with their families. The deceased was with them and he paid Kshs. 102/-. The deceased got his plot but went back to Uasin Gishu to complete the construction of four class rooms for a school. In 1964, the deceased took Barnabas Keya to the land. He lived with the deceased and his children in his house as he was not married. It is his evidence that Peter was about three (3) years old that time and he is the deceased's child.

DW2, INDZOKA OMURUNDO MUKACHI, testified that he went to Chekalini Settlement Scheme with the deceased in 1964. The deceased got plot number 388 while he got plot number 390. They picked the plot numbers the same day. The deceased was a mason and had means to pay the amount of Kshs. 102/-. DW2 knows the deceased's children. The Objector was learning to be a tailor in 1964 when the deceased entered Chekalini.

DW3, BARNABAS KEYA MAHIGA, is the deceased's second born. It is his evidence that they are six (6) sons of the deceased namely, John, Barnabas, Thomas (deceased), Philip, Hezron (deceased) and Peter Mugaga. Thomas and Hezron are deceased but they left families. Their father left plot number 388 and he would like to have it divided equally among the six children. It is his evidence that they started school with the Objector in 1957. Their father was a mason and he built four classes at St. Patrick Iten School. He was the first child to go to the land. The family appointed Philip to be the administrator. The land was transferred to Philip and he is willing to sub-divide the land when adjudication was done, he was allocated their ancestral land, plot number 239 at Tiriki. The Objector is only five years older than him. The Objector never paid Kshs. 102/- to the deceased. He is ready to distribute plot number 239 to his brothers.

PHILIP JOSEPHAT LUVAYO (DW4) is the deceased's son. He concurs with the evidence of his brother Barnabas Keya. He is the registered owner of the Chekalini plot and is ready to distribute it equally to the six sons.

From the evidence herein, the main issues for determination are whether Hezron and Peter Musasia are the deceased's biological children. Under the Law of Succession Act, Chapter 160 Laws of Kenya. There is no requirement that a beneficiary must be a biological child of the deceased. It is clear that the two were brought up by the deceased. It is the evidence of DW1 and DW2 that Peter and Hezron are the deceased's children but from a different mother. The Objector did not adduce enough evidence to prove that the two are not the deceased's children or Dependants. I do find that the two are the deceased's children and are entitled to get their share of the deceased's estate.

The evidence shows that there are two plots to be inherited namely:-

1. Kakamega/Bumbo/239 (Tiriki Plot) - 1.7Ha.
2. Kakamega/Chekalini/388 1.5Ha.

The Tiriki Plot is registered in the joint names of Barnabas Keya, Philip Miheso Mahiga, Thomas Makumba, Peter Musasu and Hezron Mwashu Mahiga. The Objector's name is not included. It is established that this is ancestral land. The registration was done in 1976. I do hold that the Objector is entitled to an equal share of plot number 239.

The Defendants propose to share the Chekalini plot equally amongst the six sons. This is in line with the application for confirmation of the grant filed on 24-2-2004.

The Objector contends that he is the one who gave his father kshs. 102/- to get the plot. It is clear that

Chekalini was a settlement scheme. If the Objector was already an adult in 1964 he could have obtained an identity card and take a wife so that he could have been allocated land in his own capacity. The deceased was a mason. Indeed the Objector testified that his father worked in the army and left. He was able to pay the sum of Kshs. 102/- and actually paid. The Objector's allegation that he paid the amount of kshs. 102/- to his father is an afterthought. Why didn't the Objector claim the land before his father's death.

I do find that plot number 388 belonged to the deceased. The evidence of DW1 and DW2 shows how the land was obtained. In the end, I do hold that the deceased's estate comprises of two plots, Tiriki 239 and Chekalini 388. The deceased's estate shall be distributed as follows:-

A. PLOT NO. KAKAMEGA/BUMBO/239

1. John Mwashu Mahiga
2. Barnabas Keya
3. Philip Miheso Mahiga
4. Thomas Makumba Mahiga *To share equally*
5. Peter Musasia Mahiga
6. Hezron Mwashu Mahiga

B. PLOT NUMBER KAKAMEGA/CHEKALINI/388

1. John Mwashu Mahiga
2. Barnabas Keya
3. Philip Miheso Mahiga
4. Thomas Makumba Mahiga *To share equally*
5. Peter Musasia Mahiga
6. Hezron Mwashu Mahiga

I do further direct that the five sons registered on plot number Kakamega/Bumbo/239 should subdivide the land and give an equal share to the Objector. Similarly, Philip.

Josephat should distribute plot number KAKAMEGA/CHEKALINI/388 to his other brothers as hereinabove. Each party to share the costs of the sub-division and transfer. Parties to bear their own costs of this suit.

Dated and signed this **25th** day of **February, 2015**

Said J. Chitembwe

JUDGE

Delivered and countersigned on this **19th** day of **March, 2015**

Ruth Sitati

JUDGE