



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.1263 OF 2012

**IN THE MATTER OF THE ESTATE OF ZAKARIA LITWAJI MUHATI ALIAS ZAKARIA
LITWAJI MUHATI (DECEASED)**

R U L I N G

Introduction

1. The deceased herein, Zakaria Litwaji Muhati alias Zakaria Litwali Muhati was 86 years old when he died on 05/04/2010 at his home in Mulundu village of Mulundu sub location. From the Certificate of Death No.001015 dated 30/04/2010, the cause of the deceased's death was cancer.

2. On 24/01/2011, Jane Vihenda Litwaji the deceased's widow commenced succession proceedings before the Resident Magistrate's Court at Hamisi, naming the following as the deceased's survivors:-

- a) Jane Vihenda Litwaji
- b) Henry Namunyanyi Litwaji
- c) Isaiah Musungu
- d) Charles Inyanje
- e) Fred Muhadi
- f) Patrick Wisitsa and
- g) Hardson Alulu

3. The Grant of Letters of Administration Intestate was issued and subsequently confirmed to the Petitioner with the whole of L.P No Kakamega/Bumbo/1024 devolving to the Petitioner. The matter was subsequently transferred to the High Court by Isaiah Musungu vide the Chamber Summons dated 26/11/2012 seeking revocation and/or annulment of the Grant of Letters of Administration Intestate issued to the Petitioner by the SRM Court at Hamisi in Succession Cause No.5 of 2011. On 23/07/2013, that Grant was revoked by this Honourable Court and parties given time to try and amicably resolve the matter. The Objector Isaiah was also given an opportunity to file an affidavit showing how he proposed to distribute the deceased's estate. Since no agreement was reached, the case went to full hearing.

The Site visit

4. Both Isaiah and the Petitioner testified for their respective sides. Court also visited the land on 04/03/2015 in the presence of all the parties except Henry Lidwaji. The meeting was also attended by the

village elder one Haron Isiji Gitahi and 3 brothers to the deceased, namely Solomon Konzolo, Daudi Ihaji and Kamugwa Muhadi. The purpose of the visit was to establish whether the deceased had divided his estate into 6 or 7 portions and for whom each portion was meant.

5. During the visit to the land, it was established that one of the deceased's children one Patrick Wisitsa Lidwaji had died during the pendency of these proceedings. Patrick left neither spouse nor children. According to the Objector Isaiah, the deceased had divided his estate into 6 portions, while according to the Petitioner the deceased had divided his estate into 7 portions, with the portion thereof being earmarked for the Petitioner alone.

6. The visit to the site established that the deceased's land No.Kakamega/Bumbo/1024 was subdivided into 7 portions as follows:-

- i. Portion No.1 – according to the Petitioner this is the portion tht was set aside for her. The house in which she was stands thereon.
- ii. Portion No.2 – which roughly measures a third of Portion No.1. According to the Petitioner this portion was set aside for Hardson Alulu but the Objector said this particular plot was meant for Patrick Lidwaji (deceased).
- iii. Portion No. 3 – It was pointed out this plot was set aside for Patrick Lidwaji (now deceased). The plot is undeveloped and has no buildings on it.
- iv. Portion No.4 – The portion has a home on it and is occupied by Fred Muhadi Lidwaji. Fred agreed the house standing on the plot was his.
- v. Portion No.5 – It was indicated this portion of land belongs to Henry Lidwaji who lives in Nakuru. He was not present during the site visit.
- vi. Portion No.6 – There are 2 houses on this portion of land. Admittedly the houses belong to Chalres Inyanje Lidwaji who was present during the visit.
- vii. Portion No.7 – is occupied by Isaiah Musungu Lidwaji, the Objector herein. There is a home on it.

From the above information, the Petitioner and the Objector occupy the extreme ends of the deceased's estate with the other parties spread out there in between.

The Submissions

7. After the visit, the parties filed and exchanged their written submissions. From the submissions and the evidence the only issue for determination is distribution of the deceased's estate. The Objector/Applicant proposes distribution as follows:-

1. Hudson Alulu Lidwaii and Jane Vihenda - 0.94HA
2. Alfred Muhati Lidwaji - 0.57HA
3. Isaiah Musungu Lidwaji - 0.45HA
4. Patrick Lisitsa Lidwaji (deceased now) - 0.54HA
5. Charles Inyanje Lidwaji - 0.46HA
6. Henry Namunyanyi Lidwaji - 0.44HA

9. The Objector avers that since the Petitioner's share is included in the share for Hudson Alulu Lidwaji. She does not deserve to be given her own share; and that she should be jointly registered for ownership of 0.94Ha with the said Alulu Lidwaji. He also suggests that the portion which had been set aside for Patrick Lidwaji should remain untouched pending succession proceedings.

10. The Petitioner on the other hand submits that she is entitled to her portion as demarcated on the ground by the deceased herein. She also proposes that the share that was meant for Patrick be added to the share for Hudson since Hudson's share on the ground was admittedly much smaller than the rest. She finally proposes that apart from the share of Hudson being smaller, than the rest, the shares for the other beneficiaries should remain as they are.

Analysis and Findings

11. After a careful analysis of the evidence on record, the real issue in focus is whether the Petitioner should get her own distinct share of the deceased's estate or whether she should be content with having a life interest in Hudson Alulu's share. No explanation is given by the Objector as to why he thinks the Petitioner should be registered jointly with Hudson Alulu. Under the Law of Succession Act Cap 160 Laws of Kenya, the Petitioner in this case as widow of the deceased is considered an extremely important person as far as the inheritance of the deceased's property is concerned, for reasons that she is the one who would need the property most and because the deceased must have acquired the property with her help. See **Law of Succession by W.M. Musyoka, Law Africa Publishing (K) Ltd 2006.** It is the widow of a deceased person who would apply the deceased's estate for the best interests of the deceased's heirs and dependants.

12. Under Sections 35 and 37 of the Act the Petitioner in this case would be entitled to a life interest in supporting and holds the same in trust for the deceased's children. It was established in this case that all the children of the deceased (read sons) have their respective shares. The Petitioner has stated that the portion she currently occupies was carved out for her by the deceased just like the other portions were carved out for the children. The Objector has not disapproved the Petitioner's testimony that the said portion was set apart for her by the deceased, apart from stating that the Petitioner should be registered as joint owner/proprietor with Hudson Alulu for 0.94Ha. I therefore dismiss the Objector's testimony.

Conclusion

13. What then do the above findings mean? The findings mean that Isaiah's objection does not have any merit and the same is accordingly dismissed. The findings also mean that the Petitioner is entitled to her share of the deceased's estate carved out by the deceased before he died. The findings also mean that the share earlier earmarked for Patrick who is since deceased leaving neither spouse nor child is available for distribution among the surviving beneficiaries of the deceased. It is to be noted that Patrick's share was yet to devolve to him from the deceased, and therefore there could be no need. In my considered view, for succession proceedings in Patrick's case. Effectively therefore, the deceased's estate shall be shared out as determined by the deceased, save that Patrick's share shall now be added onto the shares of the remaining children and shared out equally among them. The Petitioner's share shall remain the way it was carved out for her by the deceased.

14. As to costs, I order each party to these proceedings to bear their own costs.

Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this

23RD day of SEPTEMBER 2015.

RUTH N. SITATI

JUDGE

In the presence of:-

Present in person for Objector/Applicant

M/s Rauto (present) for Petitioner/Respondent

Mr. Solomon Lagat - Court Assistant