



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE NO: 79 OF 2008

IN THE MATTER OF THE ESTATE OF MUTOBERA IMBAI ALEXANDE alias PUTOBELA
IMBAYIDECEASED

AND

RITA IMBAYI..... 1ST APPLICANT

TERESINA MUSINZI IMBAYI.....2ND APPLICANT

VERSUS

DYIFINA KHATONDE MUTOBELA.....PETITIONER

JUDGEMENT

Mutobera Imbai Alexander died on the 30th May, 1999. The plaintiff, Dyfina Khatonde Mutobela is the deceased's widow while the two defendants Rita Imbayi and Teresina Musinzi are the deceased's step sisters. Dyfina filed succession cause number 511/2003 while the defendants filed this succession cause 79 of f2008. The two suits were consolidated.

The plaintiff's case is that she is the deceased's widow. The defendants are her sister-in law. They are the daughters of Imbayi. According to her, the suit land **ISUKHA/MUKHONJE/336** belonged to her late husband. The deceased was given the land by his father, Imbayi. The defendants are from a different mother. Their mother was called Teresa while Mutobera, the deceased's mother was called Khasungu. The defendants' mother was buried on the suit land.

The plaintiff further testified that her father in law, Imbayi, had two plots. One of the plot was sold to Francis. When the defendants' father died, the defendants were adults. The plaintiff denied that she used to live at Shirere on another plot.

PW 2, GERALD OKANA MUTOBERA is the deceased's son. He was born in 1958. His evidence is that his late father had two wives. His mother is the plaintiff. The second wife is called Rita (not 1st defendant) whose son is Zadock Mutobera who is alive. PW2 is the only one who is alive from his mother's side. The defendants are his aunts. There was another plot being **ISUKHA/MUKHONJE/338** that was sold by his grandfather. The sale proceeds were given to the defendants. His grandfather had only one son who is the deceased herein. The title deed to the land was issued to the deceased in 1973. The suit land was given to the deceased by his father, Imbayi.

PW3, PIUS MUCHELWA is a neighbour. He knows the plaintiff and her children. They live on plot 336. She is the wife of the deceased. The deceased's children live on the suit land.

RITA IMBAYI testified as DW1. Her evidence is that she is the daughter of Imbayi Stevasia. The plaintiff is her sister in law.

The deceased was her step brother. They share the same father, Imbayi but different mothers. The defendants' mother was the second wife while the deceased's mother was the first wife.

The first defendant further testified that her mother used to live at Muraka on the suit land, plot 336 while the deceased and his family used to live on another plot at Shirere. The deceased was registered as the owner of plot number 336 as the defendants were still young. The defendants have been using the entire suit land until when the plaintiff and her son burnt their house and chased them away. She would like to be given the suit land as it belonged to her late mother who was buried thereon.

DW2 is TERESINA MUSINZI. She is sister to 1st defendant and a step sister to the deceased. Her evidence is similar to that of DW1 when their father, Imbayi died; she was only 15 years old. The deceased herein used to live on their Isukha plot but the defendants now want their land back. The defendant's mother's house was on the suit land but Mutobera, the deceased burnt it.

The evidence on record shows that the succession cause relate to the estate of Mutobera Imbayi Alexander. The plaintiff as the deceased's wife while the defendants are the deceased's step sister. The main issue for determination is whether the defendants are entitled to succeed the deceased's estate.

From the plaintiff's evidence, it is clear that the deceased did not buy the suit land. He got it from his father, Imbayi. The plaintiff contends that there was another plot number 338 that was sold to one Francis and the proceeds given to the defendants. On the other hand, the defendants maintain that their late father gave the suit land to their mother while Mutobera was given another plot at Shirere. Mutobera left his plot and went to live on the suit land at Muraka. The defendants' mother was buried on the suit land and she used to live there.

From the evidence on record, I do find that the suit land belonged to Imbayi. The land was registered in the names of the deceased in 1973. Although the deceased was the registered owner, the defendants are entitled to get part of the land as it belonged to their father. Their step brother, Mutobera was registered as the owner but I do find that he held the land in trust for himself and for the benefit of the other children of Imbayi. The contention that plot 338 was sold and the proceeds given to the defendants has not been proved to the satisfaction of the court.

Similarly, the allegations that Mutobera used to live at Shirere on another plot have not been proved to my satisfaction. The parties herein have to share the suit land.

Plot number **ISUKHA/MUKHONJE/336** is 4.2 Hactares. According to PW2, the defendants were using the entire land. Having found that all the parties are entitled to inherit the suit land I do order that a confirmed grant be issued in the names of the plaintiff and the two defendants jointly. The deceased's plot number **ISUKHA/MUKHONJE/336** that was registered in his name in trust as herein stated to be distributed as follows:-

PLOT NUMBER ISUKHA/MUKHONJE/336

- | | | |
|-----------------------------|-------|---------|
| 1. DYFINA KHATONDE MUTOBERA | ----- | 2.7 HA. |
| 2. RITA IMBAYI | | 1.5 HA. |
| 3. TERESINA MUSINZI IMBAYI | | JOINTLY |

There shall be no order as to costs.

Dated, signed and Delivered at Kakamega this 27th day of February 2014.

SAID J. CHITEMBWE

JUDGE