



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

PROBATE & ADMINISTRATION CAUSE NO.69 OF 2004

IN THE MATTER OF THE ESTATE OF NATHAN BISAHO LUVITA (THE DECEASED)

WYCLIFF LUVITA BISAHOPETITIONER

MIRIAM WANGARE VISAHO.....OBJECTOR

RULING

1. These Succession proceedings pit a son against his mother-in-law. Not entirely strange! The dispute is in respect to the Estate of Nathan Bisaho Luvita (**the Deceased**). This matter was consolidated with Vihiga SRM'S Succession cause no.10 of 2006 also in respect to the Deceased's estate. I refer to those proceedings as the Vihiga proceedings.
2. In the Vihiga proceedings, the Objector herein had presented a Petition for the Grant of Letters of Administration Intestate to the estate of the Deceased to herself. From the record, the grant of letters were issued to her on 14th of June 2006 and confirmed on 13th of February 2007. It would seem that following that confirmation, the Objector had land parcel Kakamega/Bugina/414 (hereinafter **plot 414**) transferred to her. The confirmed letters are the subject of an application for revocation and/or annulment dated 29th June 2011 in which the Petitioner herein sought the following orders:
 1. **“THAT this honourable court be pleased to order the transfer of VIHIGA SRMC SUCCESSION CAUSE NO.10 OF 2007 to BUSIA High Court and the same be consolidated with Busia HC P & A No.69 of 2004.**
 2. **THAT the grant of letters of Administration Intestate issued to Miriam Wangari Bisaho in Vihiga SRM's Succession Cause No.10 of 2007 and the subsequent Certificate of Confirmation of Grant issued and dated on 13/02/2007 be REVOKED and/or ANNULLED.**
 3. **THAT proceedings done in Busia High Court Succession No.69 of 2004 be taken as valid proceedings in respect of the estate of the late NATHAN BISAHO LUVITA.”**
3. On her part, the Objector was displeased with the presentation of this Petition and the Grant that was subsequently issued and confirmed in favour of the Petitioner. So, through a summons dated 15th September 2011, she sought the Revocation and Annulment thereof.
4. When this matter came up before Kimaru J on the 16th of May 2012, the Judge identified it as a dispute over Distribution. The matter was to be disposed of by way of oral evidence.
5. The Petitioner is the son of the Deceased. It was his evidence that the Deceased was married to two wives namely Miriam Wangare Visaho (**the Objector**) and Catherine Bisaho (PW2). PW2 is the mother of the Petitioner. It was the evidence of the Petitioner and PW2 that when PW2 got married to the Deceased, she moved to stay with the Deceased on plot No.414. Later her children

- moved to land at Iliva. In 1990, PW2 and her family moved to Nambale on land designated as Bukhayo/Kisoko/3599. It was the Petitioner's evidence that the farm at Nambale was purchased through the joint effort of the Deceased and his two sons. That is Bramwel (who is now dead) and the Petitioner. It was the Petitioner's further evidence that he built a house for his mother at Nambale. That land however is registered in the name of the Deceased.
6. Job Kaleka (PW3) is a brother-in-law to the Deceased. It was his evidence that his nephew Bramwel asked him to scout around for land at Nambale. He did so. That is how the Nambale property was purchased. It was his further evidence that the Deceased was a care-taker of that property as Bramwel was continuously moving from one place to another in the nature of his work. He also stated that PW2 was invited by her husband to reside at Nambale as his health was failing. However the Deceased would frequently visit Vihiga as would the Objector visit the Deceased at Nambale.
 7. Robina Kahenza Bisaho (PW4) is a daughter of the Deceased and PW2. She remembers that prior to moving to Iliva, they had a small house on plot 414. It was her testimony that even after moving to Iliva, her mother continued to work on part of plot 414. It was her testimony that she contributed to the cost of building a house for her mother at Nambale when she eventually moved there.
 8. Both PW4 and the Petitioner stated that the Deceased sold the land at Iliva to enable him (the Deceased) pay school fees for his children and to bury the Objector's mother. They both testified that the Deceased left a letter dated the 22nd of February 2000 (PExhibit 1) in which he stated his wishes on the distribution of his property. The Petitioner further testified that the letter was discussed during the burial arrangements of the Deceased held on 25th of February 2000 (the minutes were produced as PExhibit 2).
 9. The Objector is the first wife of the Deceased. It was her testimony that because she was only blessed with one child, the Deceased was prevailed upon by family members to marry a second wife. Bowing to that pressure, the Deceased married PW2. PW2 joined her on plot 414 but only for a short time. The Deceased was later to settle his second wife at Iliva. The Iliva land was sold and proceeds therefrom were applied towards the purchase of the Nambale land. The Deceased built a house for PW2 on that plot and due to bad health, the Deceased moved to stay at Nambale because of the proximity of a Doctor there. Upon his Death, the Deceased was laid to rest at Nambale. The Objector disputes that it was the wish of the Deceased that she shares plot 414 with the house of his co-wife. RW2 Festo Idara who is blood brother of the Deceased confirmed the line of evidence of the Objector.
 10. Herman Amuyunzu (RW3) while supporting the evidence of RW 2 and the Objector stated that the Deceased who had two farms gave one farm each to his respective wives. That the Deceased gave his ancestral land (plot 414) to Mirriam and the Nambale one to PW2. RW3 stood surety for the Objector in the Vihiga proceedings. Also in support of the Objector was Peter Kidavi Kivairu (RW4). He is the cousin of the Deceased. It was his testimony that when the Deceased sold the Iliva farm he applied the money towards the purchase of Bukhayo/Kisoko/3599. He however stated that he did not attend the family meeting of 25th of February 2000.
 11. The Court identifies the following issues as requiring its determination:-
 - a. Should the Grant made to the Objector in the Vihiga proceedings be revoked or annulled?
 - b. Should the Grant made to the Petitioner herein suffer the same fate?
 - c. If (a) and/or (b) above are in the affirmative, who should be appointed the Administrator of the Deceased's Estate?
 - d. Is Bukhayo/Kisoko/3599 (also referred to herein as the **Nambale Land**) an asset of the Estate of the Deceased?
 - e. What is the appropriate order on distribution?

This Court proceeds to answer these questions in seriatim.

12. It is common ground that the Deceased, like many African men of his time, was polygamous. He was married to Miriam Wangare (the Deceased) and Catherine Maziga (PW2). The Deceased died before his two wives and so they survived him. Both would be entitled in the same degree to the Grant of Letters of Administration to his Estate. When the Objector took out the Vihiga

- proceedings she failed to mention that the Deceased was also survived by her co-wife Catherine. In fact she only named her daughter-in-law and herself as the survivors to the Deceased. She had also concealed the existence of the Deceased's other children. If the Objector desired to apply for Grant alone then Rule 26 of The Probate and Administration Rules required that she notify her co-wife on her intention. There is no evidence that such Notification was given to Catherine (PW2).
13. On the basis of this suppressed or concealed information, the Objector obtained Grant on 14th June 2006 and confirmation thereof on 13th February 2007. On the strength of the confirmation she had herself registered as the owner of plot No.414 by way of transmission. It is my finding that the Grant was obtained by the concealment of material facts and cannot be allowed to stand. For this reason I do hereby revoke the Grant of letters made to the Objector on 14th June 2006 and confirmed on 13th February 2007. The consequence of the order is that every act or transaction done under the hand of the revoked Grant must give way. For this reason the Court makes a further order cancelling any changes made in the register to plot No.414. The ownership reverts to the pre-grant position.
14. For similar reasons, the Grant to The Petitioner must suffer the same fate. The Petitioner is the son of the Deceased. Both his step mother (**the Objector**) and his mother (PW2) would have priority to the taking of Grant. And his siblings would have equal priority. Although his own mother (PW2) supports his bid for Grant, there is no evidence that the Objector or his siblings were given the notice required by Rule 26 to enable them give their consent to the making of Grant to The Petitioner. While the Petitioner can receive some credit for including the Objector in the list of survivors in his Petition, that would not exempt him from requiring the Objectors consent to making of the Grant.
15. There is yet another defect with the Petitioner's Petition. It emerged from the evidence of his own witness Job Kaleka (PW3) that the Petitioner's mother had, in addition to the four sons, four daughters surviving the Deceased. This was confirmed by the evidence of Herman Amuyunzu (RW3). In his Petition, the Petitioner completely excludes his sisters as survivors to the Deceased. This would be contrary to Section 29 of the Law of Succession Act which does not discriminate against daughters of a Deceased be they married or unmarried. The Court shall give further emphasis to this in the latter part of this decision. For now, the Court holds that by excluding his sisters from the list of survivors and beneficiaries, the Petitioner was guilty of concealing something material to the proceedings. For this and the earlier reason, The Court does hereby revoke the Grant made to the Petitioner on 15th November 2004 and confirmed on 9th May 2011. All Acts, transactions or transfers done on the basis of the revoked granted are hereby cancelled and reversed.
16. Having reached that result, this Court must then consider who should be appointed as Administrator to the Estate. The persons with first and equal priority are the Objector and Catherine (PW2). Catherine has in her oral testimony, consented to her son (the Petitioner) taking out letters. But the Petitioner is but just one of her children. Save for Robina (PW4), there is no consent or renunciation from the other children who would have the same degree of entitlement. Quite obviously, the Objector will be one of the Administrators and she would be representing her house. What about the house of Catherine? I have pondered over this. Given that the Petitioner has come forward and offered himself as an Administrator, and also because this Court shall eventually make orders on Distribution that shall safeguard the interests of all of the children of the Deceased, this Court appoints the Petitioner to be the co-administrator to the Objector. Rule 27 of The Probate & Administration Rules helps this Court in reaching this decision. It provides:-

“Nothing in Rule 26 shall operate to prevent a Grant being made to any person to whom a Grant may be made or may be required to be made under the Act.”

17. I turn to the question of the Nambale land. The evidence of the Petitioner is that the land was purchased jointly by the Deceased, his Brother Bramwel and himself. Although the land was registered in the name of the Deceased, his shares and that of his brother were held in trust by the Deceased. This evidence received the support of his mother (PW2) and PW3. But the evidence of PW3 was somewhat different. In his evidence it was only Bramwel who purchased the land. He told Court that Bramwel requested him to scout for the land which he eventually purchased.
18. The agreement (RExhibit 2) in respect to the sale of the land shows the purchaser to be the

Deceased. Bramwel and the Petitioner were present at the making of the agreement and were named therein as witnesses. It was not satisfactorily explained to this Court why they would not appear as the co-purchasers yet they were present and available at the time of making of the contract. This, and the contradictory nature of the evidence of PW3 who played an active role in scouting for the land, sways me to believe that the land was solely purchased by the Deceased. In addition, that land was registered in the name of the Deceased as the sole proprietor under the provisions of The Registered Law Act (now repealed). By dint of Section 27 of The Repealed Statute, that registration vested in the Deceased absolute ownership of that land. The Petitioner was unable to marshal sufficient evidence to prove the alleged trust. The Court reaches a decision that Bukhayo/Kisoko/3599 is an asset of the Estate of the Deceased.

19. The more controversial matter and the heart of these proceedings is the question of Distribution. Let me start by stating some uncontested facts. The Deceased was married to two wives; Miriam Wangare and Catherine Maziga. With Miriam, the Deceased was blessed with one child namely Joseph Makaya. Joseph Makaya died and left behind his wife Tafroza and his children. The union of the Deceased with Catherine was blessed with more children than that with his first wife. According to the evidence of PW3 and RW3 the union had 4 sons and 4 daughters. The 4 sons would be Wycliffe (the Petitioner), Bramwel (now Dead), Methusella Makaya and Nimrod Kidaya. This Court has also found that the Estate of the Deceased comprised of two land parcels namely Bukhayo/Kisoko/3599 measuring 0.8 hectares and Kakamega/Bugina/414 measuring 0.6 hectares. The latter was the Deceased's ancestral land.
20. There was no contention that after Catherine (PW2) was married to the Deceased she resided for a short time on plot no.414 where the Objector had already settled. Although there was no unanimity between the protagonists as to whether Catherine ever moved to Iliva, there was agreement that she relocated to Nambale in 1990. There, on plot no.3599, a house was built for her. She resided there with her husband until his death. She continues to reside and use a portion of the land. It seems to me that prior to his death the Deceased had settled the Objector and her house on plot no.414 and Catherine and her house on plot no.3599. Nevertheless, something significant happened in his last days!
21. Only two days to his death, on 22nd of February 2000, the Deceased wrote a letter (PExhibit 1) to his brothers. The English translation of that letter, in part, reads as follows:

“First I know you are aware that am having two homes that is my two wives and their children. You are also aware that am having two lands, one at home Bugina Sub-location parcel No.KK/BUG/414 (Chekombero) and the other one is at Nambale Reg. No.BUKHAYO/KISOKO/3599. I have seen it better to notify you that the land in Nambale, I have given it to my four sons, and the one which is at Chekombero am handing it to my two wives and their grand children. Meaning Miriam and her grand children inherit a half of the land and the remaining half be inherited by Catherine and her grand children. Be it known that I do not have any other assets; cows that are in Maragoli belongs to Miriam. In case you find me alive, I will clarify the same, if not possible, let it be the way I have instructed.”

This letter was in fact shown to the Burial Committee meeting of the Deceased which sat on 25th February 2000, a day after his death. That meeting was attended by, amongst others, the Objector. Minutes of that meeting were produced as PExhibit 2. Neither at that meeting nor in these proceedings did the Objector question the authenticity of the letter of 22nd February 2000. This Court has to believe that the Deceased authored the letter. There was no evidence that the Deceased was not fully aware of what he was doing or that he was manipulated into writing it. It seems to me that the letter showed that the Deceased had a change of heart as to how he wished his property to be dealt with upon his death.

22. This Court bears in mind the circumstances discussed above as it proceeds to make its decision on distribution. First it needs to be remembered that the Deceased died intestate and being polygamous, it can be argued in favour of the Petitioner that the provisions of Section 40 (1) of the Law of Succession Act should be applied in the Distribution of his net intestate Estate. The provisions of that Section are:

“40.(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

Since the house of Catherine had eight children as against one child of the Objector’s house, the house of Catherine would be entitled to a much bigger share of the Deceased’s Estate. Applying the Statutory guideline given by Section 40(1) each child and wife of the Deceased will be entitled to 0.127 hectares or thereabouts.

23. That said the Petitioner is only insisting that his mother’s (Catherine) House takes half of plot no.414, i.e. 0.3 hectares. That would mean that the Objector and her house would be left with a bigger portion than in fact contemplated by the provisions of Section 40 (1). Looked at from this angle, the Petitioner is being generous to the Objector. This Court endorses that apparent generosity because up to the last two days of his life the Deceased had demonstrated a wish that the Objector takes the entire of plot no.414.

24. As this Court comes to the close of this decision, it needs to be made clear to the Petitioner that all his sisters are also beneficiaries to the Deceased’s Estate. They would fall within the meaning of dependants given in Section 29 of the Law of Succession. I make this clarification because in his Petition for letters the Petitioner had named only the sons of the Deceased as beneficiaries. The daughters of the Deceased can only be excluded if they voluntarily and expressly renounce their entitlement.

25. These now are the orders of the Court;

- a. The Grant of letters made to the Obejctor in the Vihiga proceedings on 14th of June 2006 and confirmed on 13th February 2007 is hereby revoked and any changes effected in the Register to Kakamega/Bugina/414 in pursuance of the said Grant is hereby cancelled.
- b. The Grant of letters made herein to The Petitioner on 15th November 2004 and confirmed on 9th May 2011 is hereby revoked and any changes effected in the Register to Bukhayo/Kisoko/3599 in pursuance of the said Grant is hereby cancelled.
- c. The Petitioner and Objector are hereby appointed joint administrators to the Estate of the Deceased.
- d. The house of Catherine Maziga shall be entitled to Bukhayo/Kisoko/3599 and 0.3 hectares in Kakamega/Bugina/414.
- e. The house of Miriam Wangare shall be entitled to 0.3 hectares in Kakamega/Bugina/414.
- f. To minimize the disruption of the long occupation of the house of Miriam Wangare on Kakamega/Bugina/414 her portion to the land shall be curved out as much as possible from where she has built her house.
- g. All the beneficiaries including the daughters of the Deceased shall attend Court on a date convenient to the parties to agree on the final Distribution of the Deceased’s Estate.
- h. As the parties to these proceedings are members of the same family, it shall not be appropriate for this Court to make any order on costs. Each party shall bear its own costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 28TH DAY OF MAY 2014

IN THE PRESENCE OF:

SARAH.....COURT CLERK

PETITIONER PRESENT IN PERSON

OBJECTOR PRESENT IN PERSON