

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.296 OF 2005

IN THE MATTER OF THE ESTATE OF MUHONJIA MATUKU... DECEASED

AND

JACKSON MUHONJERA MATUKU PETITIONER

VERSUS

ANNA KHAVIRANGA MUHONJA 1ST APPLICANT

JOSHUA MUHONJIA 2ND APPLICANT

R U L I N G

The application dated 17.5.2012 seeks a review and setting aside of the orders of the court made on the 23.4.2012. The application is supported by the affidavit of Jackson Mukhonjera Matuku sworn on the 17.5.2012. The respondent filed a replying affidavit sworn on the 25.6.2012. Parties filed written submissions in relation to the application. The main root of the application is that the court distributed the estate on the basis of the decision of the Kabras Land Disputes tribunal yet that tribunal had no jurisdiction to distribute the estate. It is also contended that the court did not follow the provisions of Section 71 of the Law of Succession Act in distributing the estate. The beneficiaries were not heard and there was need for them to adduce evidence. The confirmed grant is in violation of the applicant's constitutional right. The deceased was polygamous and the distribution ought to have taken that into account. It is also contended that the sharing of the estate as per the confirmed grant will lead to arithmetic problems.

The respondents opposed the application and maintain that the application is an afterthought. The applicant was represented by counsel during the hearing of the suit and there was no need for oral evidence.

The record shows that on the 29.3.2010 counsels for both parties namely Mrs. Muleshe advocate for the 1st petitioner and Mr. Ombaye for the 2nd petitioner recorded a consent whereby the matter was to be heard by way of oral evidence. On the 13.10.2010 parties appeared before Justice Lenaola and the same counsels recorded consent in the following terms:

“A ruling on distribution be made on the basis of the affidavits on record”.

The court fixed the ruling for the 2.12.2010. Justice Lenaola made his ruling but did not distribute the estate. The Judge requested for the proceedings of the Kabras Land Disputes Tribunal and also called for more affidavits for purposes of clarifying the status of some of the beneficiaries. On the 7.12.2011 counsels for all the parties appeared before me and I was informed that the court was to make a finding on distribution after the proceedings of the Kabras Land Disputes Tribunal had been filed. The court was informed that those proceedings had been filed. I proceeded and gave a ruling date of 21.3.2012. The ruling was delivered on that date.

The applicants contend that the Kabras Land Disputes Tribunal had no jurisdiction to distribute the

estate. In my ruling I did consider the decision of that tribunal which was adopted by the court. According to the tribunal the deceased had already distributed his estate and parties were living in their respective shares even during the lifetime of the deceased. The decision of the tribunal was adopted by the Chief Magistrate's Court as an order of the court. That decision was merely persuasive and the court did not distribute the estate because it was bound to follow that ruling. Indeed the court was asked to make a ruling on distribution as there was no dispute on the rightful beneficiaries of the estate. The court was urged to make its ruling on the basis of the affidavits on record. The distribution was made and whether or not it is in line with the distribution of the tribunal it does not matter. The distribution was made by this court and not by the tribunal.

It is alleged that section 71 of the Law of Succession Act was not followed. That section provides for the confirmation of the grant. The parties urged the court to confirm the grant and distribute the estate and there is no violation of that section. The grant herein was issued on the 29.10.2009. An application for confirmation of the grant was made dated 28.9.2009 and filed on the 12.11.2009. Indeed it is the current applicant who filed that application for the confirmation of the grant and he made his proposed mode of distribution. The allegation that the mode of distribution as per the confirmed grant will lead to arithmetic problems is not supported by any information. It is clear to me that the deceased had distributed his estate amongst his three wives. The children were to benefit from their mothers. The first house was given plot number S/KABRAS/BUSHU/380 measuring 8.8 Ha. There is no problem with the distribution for that family. The second and third house were to share plot number S/KABRAS/BUSHU/365 measuring 9.0 Ha. It is clear that the deceased distributed plot number 365 equally despite the fact that one of the wives had only one son. That was the wishes of the deceased and the parties have been living like that. I am certain that the applicant who is from the second house is not happy with the fact that Joshua Muhonjia, his step brother is getting a bigger portion than him. He did not question that arrangement during his father's lifetime. It is clear that even some of the children in the first house are getting smaller shares than the ones of the applicant and his brothers. The court noted the fact that the deceased was polygamous and there is no error apparent on the record. I do find that the application is an afterthought and merely intended to delay the distribution of the estate. The application dated 17.5.2012 lacks merit and the same is dismissed with costs.

Delivered, dated and signed at Kakamega this 19th day of May 2014

SAID J. CHITEMBWE

J U D G E