



NO. 466/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 54 OF 2010

IN THE MATTER OF THE ESTATE OF KAKUA KIOKO (DECEASED)

KANINI KAKUA.....PETITIONER

VERSUS

LOKO KAKUA.....OBJECTOR

RULING

1. **Kakua Kioko** (deceased) died on the **16th** day of **December 1996**. His wife **Kanini Kakua** petitioned for letters of administration intestate on the **7th April 2010**. A grant of letters of administration intestate was issued to the Petitioner. On the **9th** day of **December 2010** the Petitioner filed summons for confirmation of the grant. In support of the application is an affidavit which she deposed proposing the mode of distribution of assets forming the estate of the deceased.
2. On the **15th December 2010**, **Loko Kakua**, a daughter to the deceased filed an objection to making of a grant pursuant to the provisions of **Section 68(1)** of the **Law of Succession Act** and **Rule 17(1)** of the **Probate and Administration Rules**. Grounds stated were that as a daughter to the deceased she was excluded from the list of beneficiaries; some assets of the estate of the deceased are excluded and she is likely to loose her justifiable shares as she was only allocated **15 acres** being part of land parcel **No. Donyo Sabuk/Komarock/1/365**.
3. **Loko Kakua** also deposed an affidavit stating that the Petitioner omitted her from the list of beneficiaries deliberately and assets excluded include: **Kamulu shares, Kayatta shares, Kwa Mating'i shares** and a parcel for land at **Kyanzavi** measuring **ten (10) acres**.
4. In response the Petitioner deposed an affidavit. She stated that: the objection was filed out of time and is incompetent; no protest has been filed to the application for confirmation of grant; the Objector is included as a beneficiary and she has been allocated **15 acres** of **Donyo Sabuk/Komarock Block 1/356**; she proposed that Land Title **No. Kangundo/Isinga/1746** be transmitted to the Objector and shares held by the deceased at **Kyanzavi Farmers Society Limited** be transmitted to all beneficiaries in equal shares. Shares alleged to have been omitted are registered in her (Petitioner) names, therefore, not part of the deceased's estate.
5. The objection was indeed filed out of time. It was incompetent. At this stage the court's duty was to confirm the grant in order to empower the administratrix of the estate to distribute it. To satisfy itself as to whether the Petitioner had so far acted in accordance with the law, the court decided to hear the parties.
6. In her testimony the Objector reiterated that the Petitioner had omitted some assets and allocated to herself most of them. She had no objection to **KCB shares** and **Standard Bank shares** being in the name of the Petitioner but wanted the rest of the property to be divided equally among all

- the beneficiaries.
7. The Petitioner stated that the Objector is married and she has given her what she is entitled to which is **15 acres** of land which she disposed off as she squanders everything.
 8. This is a case where the Objector is aggrieved because the proposed distribution of property favours the Petitioner, her mother for it purports to give her excessive property. She contends that her married sisters have not been considered.
 9. The Petitioner on the other hand does not dispute that the Objector's name was omitted from the list of beneficiaries but argues that the **15 acres** of land allocated to her is sufficient. She nevertheless states that she has no problem allocating the Objector more land. Further, she states that property omitted are assets registered in her own name.
 10. **Joseph Nthenge Kakua** the son of the Petitioner and brother of the Objector stated that his sisters were not given any property as they had no claim over the deceased's property. To his knowledge the Objector disposed off the **15 acres** of land and had sold part of the **Kangundo land**. She has further leased the **Tala** property where she collects rent.
 11. At the time of petitioning for letters of administration, the Petitioner listed herself and her **three (3) sons** – **Athanas Nzioka Kakua, Mutuku Kakua** and **Joseph Nthenge Kakua** as beneficiaries of the deceased. She, therefore, left out **seven (7)** of her children whether deceased or not as she has admitted.
 12. **Section 35** of the **Law of Succession Act** calls for equal division of the property. In order for what is provided in law to be achieved all beneficiaries of the estate must be enlisted. This includes children of the deceased irrespective of their sex, whether or not they are married, deceased or alive. The Petitioner erred by failing to list the deceased's daughters whether it was as a result of ignorance or deliberate act is a matter this court cannot tell since it was not in issue.
 13. Looking at what is provided by **Section 35(5)** of the **Law of Succession Act**, the surviving spouse of an intestate holds the estate in trust for the children. This means that children are entitled to the property absolutely. Therefore, if the Petitioner wishes to distribute the property amongst herself and the children it would call upon her to do so equally amongst the children. Unless parties are in agreement as to the nature of distribution; or others renounce their rights, it would be unjust for her to purport to allocate more property to her sons leaving out her daughters on the grounds that they are married.
 14. It is obvious that the Petitioner herein holds life interest in the estate of the deceased which means that any property allocated to her will eventually revert to her children in equal shares upon her demise.
 15. Reverting to the contention herein both the Petitioner and Objector aver that **Kyanzavi land, Kamulu** and **Kayatta shares** are in the Petitioner's name. The **Mating'i shares** have been allocated to **Joseph** by the Petitioner though they belong to the estate of the deceased and **Kyanzavi** has not been included.
 16. The Petitioner on the other hand avers that **Kamulu** and **Kayatta shares** are in her name. **Mating'i shares** were transferred to **Joseph** and the **ten (10) acres** at **Kyanzavi** are the deceased's. Other than the allegation by word of mouth no evidence was adduced to prove that the said omitted shares were in the name of the deceased.
 17. In her replying affidavit, the Petitioner proposes that shares held at **Kyanzavi Farmers Co-operative Society Limited** be transmitted to all beneficiaries in equal shares. This is evidence that shares at **Kyanzavi** form part of the estate of the deceased.
 18. A party who alleges has a duty of establishing the allegation. The Objector was under a duty to prove that other than the shares at **Kyanzavi**, the other properties alluded to belong to the estate of the deceased.
 19. In the result I find that the objection which was filed out of time is unmeritorious. The same is dismissed.
 20. However, pursuant to the inherent jurisdiction of this court, as provided by **Rule 73** of the **Probate and Administration Rules**, in the interest of justice I will direct that a further affidavit be sworn by the Petitioner in support of the application for confirmation of grant whereby she should include all names of beneficiaries of the deceased; all assets forming capital assets of the deceased and the proposed mode of distribution bearing in mind that the estate of the deceased ought to be distributed equitably taking into account all relevant factors.
 21. For the beneficiaries who are not interested in the property, they will be required to swear

affidavits renouncing their rights.
22.This being a dispute between a mother and child, each party will bear their own costs.
23.It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 18TH day of DECEMBER, 2014.

L.N. MUTENDE

JUDGE