



NO.2071

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 512 OF 2001

In the matter of the Estate of the late *OMUSULA EMALI (Deceased)*

OMWOMI MUKOMA HELLENAH.....PETITIONER/RESPONDENT

VERSUS

ELIJAH MATHIAH AKASIMAH.....OBJECTOR/APPLICANT

JUDGMENT

1. **OMUSULA EMALI** the deceased herein to whose estate these proceedings relate died on the 5th November 1970. On the 22nd October 2001 the petitioner applied for grant of letters of administration intestate in respect of the estate of the deceased. In the Petition the Petitioner described herself as the sister of the deceased. She listed the children of the deceased in the list of the Dependants. She listed one property as belonging to the estate of the deceased. The property is registered as **KISA/ESHIBINGA/60** (the suit property) which measures 8.8 Acres. The grant was issued to the Petitioner on 4th of February 2002.
2. On 4th of September 2002, the Petitioner applied to the court to have the said grant confirmed. In the affidavit in support of the application, the Petitioner proposed that the suit property be distributed as follows 3.8 Acres be held by her in trust for the three children namely **FLOICE AMBIA EMALI, ANDREW OMUSULA EMALI** and **DORCAS EYAMA EMALI**, 1 acre be given to Dorcas Emily Wamere (a purchaser), 2 acres be given to Wilgister Beatrice Okututi (a purchaser), 1 acre to Wycliffe Okutoyi Oyolo (a purchaser) and another 1 Acre to Amos Nanzai Okaalo (a purchaser). The application for confirmation of grant was not opposed and the same was granted on the 29th November 2004.
3. On the 28th February 2005 the objector/applicant herein by way of chamber summons brought pursuant to **section 76 (b) and (c) of the Succession Act Cap 160 Laws of Kenya** and **Rule 44** of the Probate and Administration Rules, sought for the revocation/annulment of the letters of administration and the certificate of confirmation of grant so issued on the 4th February 2002 and 29th November 2004 respectively. It is on record that on the 9th November 2009 this court revoked the grant issued to the petitioner and ordered that the case do proceed to hearing by way of viva voce evidence with objector being a co-administrator and he be given 1 acre of plot No. **KISA/ESHIBINGA/60** and a fresh confirmed grant be issued. This order was not challenged by the petitioner and therefore the same remains.
4. Parties canvassed the matter herein orally.
5. The objector on his part called four (4) witnesses whereas the petitioner called two (2) witnesses.

PW1 Elijah Mathia Akasima told the court that the petitioner was his sister from a different mother. That the deceased had four (4) children namely

- a. *Catherine Kativi*
- b. *Hellen Omwomi*
- c. *Emali Daughter (Deceased)*
- d. *John Emali (Deceased)*

6. He further told the court that his father left land being plot number 60/Ishibinga/Kisa measuring 8.8 acres wherein he claims one (1) acre which they had agreed with the petitioner in April 1999 before the succession cause was filed. He further testified that he just heard that the petitioner had filed for the letters of administration and sold the land.
7. On cross examination by the Petitioner he told the court that the deceased was not his biological father but his uncle and the petitioner's father. That it was his (objector's/applicant's) father who cultivated one (1) acre of the said land and it was not true that his father sold the said one (1) acre.
8. PW2 Josephat Okuyi Mbatia from Kisa location Eshibinga sub-location testified that Elijah's plot is on the land sold by Hellena. On cross examination by the petitioner he told the court that Omusala (the deceased) and Elijah's father were brothers and that the petitioner sold the land.
9. PW3 Simon Mutuli a farmer from Eshibinga sub-location told the court that the portion claimed by Elijah is on plot 60 which was being sold by Hellena and that Hellena has sold the entire land.
10. On cross-examination by the Petitioner PW3 denied that his father Eliakim sold the land.
11. PW4 Aggrey Otwerro also from Kisa South, Eshibinga sub-location told the court that the plot claimed by Elijah is on the plot sold by Hellena. That when Hellena started selling Elijah complained and they told the buyer to pay the money to Elijah and that Hellena should pay Elijah for the portion. On cross-examination by the Petitioner he told the court that Elijah did not sell the land and that he was not the secretary for any sale transaction and that the Petitioner was given Kshs.10,000/=.
12. On the 5th November 2014 the matter proceeded with the petitioners case. The petitioner testified as DW1 and requested the court to allow her to call the surveyor to subdivide the land so that she can give out the shares to all who deserve to be given. She further testified that the people who have taken her to court have learnt that that was part of their land and that the Objector can take his portion before the survey. She claimed that the Objector had delayed the matter. On cross-examination by the Objector/Applicant she denied ever having held a meeting with the Objector/Applicant in April 1999 over the suit land but agreed that the surveyor would measure the Objectors portion before it is curved out for him.
13. DW2 Dorcas Emily Wamere a farmer from Eshibinga village told the court that she knew the Petitioner and that her husband bought a shamba from petitioner's brother in 1990 before he died in 1993. That by the time her husband died they had completed the payment for 2 and half acres. She testified further that the surveyor had not been brought to the land to survey and curve out the respective portions but that she had all the documents. She added that she came to know the objector recently after he claimed the land. She requested for her portion of the land from Hellena who she said had no problem in giving it to her.
14. On cross-examination by the objector she told the court that she was not informed that there was somebody else's land within the suit land. That the suit land is family land and there were two portions hers and Hellena's which she came to know only recently. On being re-examined by Hellena DW2 confirmed that she had documents to show that they bought two and a half acres and not one and a half acres and that she would be satisfied if Hellena gave her her share even if it is less than two and a half acres because she has paid for the land.
15. The evidence on record shows that the deceased died intestate and only left plot number **KISA/ESHIBINGA/60** (the suit property) which measures 8.8 acres. The issue in dispute is whether the objector should benefit from the one (1) acre he claims. The petitioner had proposed distribution of the deceased estate as follows:- 3.8 acres be held by her in trust for her three children namely **FLOICE AMBIA EMALI, ANDREW OMUSULA EMALI** and **DORCAS EYAMA EMALI**, **1 acre** to Dorcas Emily Wamere (a purchaser), **2 Acres** to Wilgister Beatrice Okututi (a purchaser), **1 Acre** to Wycliffe Okutoyi Oyolo (a purchaser) and another **1 acre** to

Amos Nanzai Okaalo(a purchaser). It is not clear whether the Objector was given his share of **one (1) acre** as ordered by the court on the 9th November 2009.It is also not clear whether a fresh confirmed grant has been issued.

- 16.From the evidence on record the witnesses pointed out that the objector has been utilizing **one (1) acre** of the suit land herein which the witnesses claim the petitioner sold. This has not been disputed and the petitioner has even agreed to give that portion to the objector herein. This court finds that there is nothing on record and/or in evidence to show that the deceased land was actually sold as alleged by the witnesses. One therefore wonders why the Petitioner herein went ahead to distribute the deceased land to other beneficiaries who she claims are purchasers when there is no sale agreement or any form of evidence to show that they purchased the said portions. DW2 told the court in her evidence that her husband bought land from the deceased. She claimed to have documents to that effect but she did not produce those in evidence. It is therefore difficult for this court to order the distribution of the deceased property as proposed by the petitioner. Be that as it may the deceased children are now of the age of majority and they should be given their respective portions by the petitioner. Further if the petitioner and her children agree that the purchasers are entitled to any share of the suit property, so be it.
- 17.This court therefore orders that a surveyor be appointed by the objector and the petitioner to visit the suit land namely **KISA/ESHIBINGA/60** and curve out the respective portions to be distributed afresh bearing in mind the one (1) acre claimed by the objector. The two administrators should come up with a fresh distribution list of the 8.8 acres for this court to consider which should include the children of the deceased and the objector. The fresh summons for confirmation shall be filed within sixty (60) days from today's date. Costs for this objection shall be in the cause.
- 18.Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 17th day of December 2014.

RUTH N. SITATI

J U D G E

In the presence of

Present in person - Petitioner

Present in person - Objector

Florence Lusimba - Court Assistant