



REPUBLIC OF KENYA

High Court at Kakamega

Succession Cause 339 of 2000

IN THE MATTER OF THE ESTATE OF F.K.A DECEASED

J.K1ST APPLICANT

H.K.K 2ND APPLICANT

H.K..... 3RD APPLICANT

V E R S U S

B.K.K RESPONDENT

R U L I N G

The late **F.K.A** died on the 17th of November 1997. His widow, **E.M.K** applied for letters of administration intestate and was issued with a grant on 16th May 2001. The widow filed an application dated 6th September 2002 seeking to have the grant rectified so as to include account number **01501 – 572605 – 00** Standard Chartered Bank, Kisumu and an amended grant was issued on 3rd May 2004.

E.M.K filed an application for the confirmation of the grant dated 20th February 2001. The application was not heard and this can be attributed to the fact that the unconfirmed grant issued to the petitioner had indicated the deceased's estate. Some petitioners have used such grants to distribute estates of the deceased. Unfortunately, the petitioner died on the 24th of November 2007, ten years after the death of her husband. The respondent herein, **B.K.K** filed an application dated 27.01.2011 seeking to be substituted in place of the deceased petitioner. The respondent is the last born son of **F.K.A** and **E.K**. He was issued with a grant on 12th April 2011.

The grant issued to the respondent triggered his brothers to file the application dated 25th August 2011 seeking to revoke the grant. The application is grounded on the fact that the respondent does not reside in Kenya and cannot be relied upon to administer the estate and that the administrator had managed the estate in a wanton and reckless manner thereby rendering himself unfit to remain as the administrator. Parties agreed to have the applicants to apply for confirmation of the grant and they did file an application dated 2.11.2011 while the respondent filed his affidavit of protest sworn on 8th November 2011.

The matter proceeded by way of oral evidence. **H.K** testified on behalf of the applicants. His evidence is that he would like to have the estate distributed as per his affidavit in support of the application for confirmation of the grant sworn on 2nd November 2011. He is also relying on his

supplementary affidavit sworn on 13th February 2012 which affidavit contains 150 paragraphs. H's position is supported by his brother, H.K whose position is contained in the affidavit of his wife, U.P.K sworn on 18th February 2012. The first applicant, **J.K** swore an affidavit on 13th February 2012 and is in agreement with the proposed mode of distribution by Henry. Further, **E.L.M**, wife to **D.M.K** (deceased) swore an affidavit on 13th February 2012 and is in agreement with the proposed mode of distribution by his brother in-law, H.

H's further evidence is that when B applied to be made the administrator, he did it secretly and did not involve the other beneficiaries. B has not called any meeting or consulted the other beneficiaries. He has harassed tenants occupying the income generating properties and has evicted some of the tenants. It is H's evidence that their deceased father had given some properties to his sons and applications for consent and transfer were made to the relevant authorities. At one time plot numbers **KAKAMEGA MUNICIPALITY/BLOCK I/68** was advertised to be auctioned and it was salvaged by H.K.

On his part, the respondent, **B.K.K**, testified that he lives in Norway. He opted to apply to substitute his deceased mother as the administrator since the estate was being wasted and no one was administering it. The Kakamega three storey commercial building was derelict. Its roof was leaking and the walls had no paint. Plot number 626, Mudete had broken windows and was in bad condition. B's further evidence is that he called meetings of the beneficiaries but his brothers refused to attend. His mode of distribution is as contained in his affidavit of protest herein referred to. B does not wish to benefit from the income generating properties located at Mudete and Kakamega Town. He is also not interested in benefiting from the movable assets. His wish is to get plot numbers **KAKAMEGA/MUDETE/724** and **725**. He is ready to share those two plots with his sisters.

T.A is the deceased's first born daughter. She is the first born in the family and testified as DW2. Her evidence is that at one time B called for a meeting but it did not take place. She would like to inherit her father's estate. She further testified that her other sisters, **M** and **Z** should also inherit the estate. It is her evidence that under the Maragoli customs, the last born takes the plot where the parents' homestead is located. She would like B to take that plot.

Parties agreed to file written submissions but only counsel for the respondent did so. In her submissions, counsel submits that the properties given to the beneficiaries during the deceased's lifetime should be taken into account. Counsel would like B to administer the estate as it was getting into waste. The proposed mode of distribution is as per the respondent's affidavit of protest.

From the pleadings and evidence on record, it is evident that the deceased's children who by law form the list of beneficiaries are known. Parties are in agreement as to the list of the deceased's children. Although the applicants contend that the daughters have not sought to inherit their father's estate, it is up to each child to swear an affidavit and notify the court that he or she does not wish to inherit the estate.

It is also clear from the evidence on record as to the list of the deceased's estate. The only property worth mentioning which is in dispute is plot number **NORTH MARAGOLI/GAVUDIA/1030**. The applicants contend that they were not aware of the property. On his part, the respondent testified that the plot is part of the estate and it is planted with tea. The respondent produced an extract from the Vihiga Land Registry which shows that the property was transferred to the late F.K.A on the 28th of February 1995. The plot is about 0.8 Hectares.

The main issue for determination is how the estate should be distributed and who should be the administrator. The deceased's children are:-

1. *T.A*
2. *H.K*

3. *M.I.H*
4. *H.K.K*
5. *Z.A.(Z)*
6. *A.K*
7. *J.K*
8. *D.M.K*
9. *B.K.K*
10. *R.I.K*
11. *G.M.K*

The following children are since deceased, A, D, R and G. The grant issued to the late E.M.K listed the following properties as forming the deceased's estate:

Plot number - (1) *N.MARAGOLI/MUDETE/626*

(2) *N.MARAGOLI/MUDETE/724*

(3) *N.MARAGOLI/MUDETE/735*

(4) *M/V REG. KPZ 706 PEUGEOT 404 P/UP*

(5) *M/V REG. KSU 169 BEDFORD LORRY*

(6) *CONCRETE MIXER TYPE WINGET*

(7) *CONCRETE MIXER TYPE LISTER ENGINE*

(8) *POKER VIBRATOR/CENTRAL FUNGAL WATER
PUMP AND CANVAS*

(9) *A/C WITH STANDARD CHARTERED BANK*

*NO.***** ** KISUMU BRANCH*

It is clear from the above grant that some properties were not included. This involves the properties given to some of the beneficiaries by the deceased. As indicated herein above, apart from plot number **North Maragoli/Gavudia/1030**, parties are in agreement as to the rest of the estate. I will tabulate the deceased's net intestate estate to be the following.

1. *Kakamega/Mudete/626* - *0.7 Ha.*
2. *Kakamega/Mudete/724* - *1.0 Ha.*
3. *Kakamega/Mudete/725* - *0.9 Ha.*
4. *Kakamega/Mudete/735* - *0.9 Ha.*
5. *N.Maragoli/Gavudia/1030* - *0.8 Ha.*
6. *Kakamega/Mudete/739* - *0.8 Ha.*
7. *Kakamega/Mudete/742* - *0.5 Ha.*
8. *Kakamega/Mudete/913* - *1.1 Ha.*
9. *Mudete/Vihiga Municipality/Plot 15*

10. Mudete/Vihiga Municipality/Plot 16

11. Mudete/Vihiga Municipality/Plot 17

12. Kakamega Municipality/Block I/68

I do further hold that the movable estate is as per the grant issued to the deceased's widow. There is evidence in form of a sale agreement to the effect that the concrete mixer was sold by the deceased himself on 3rd September 1996 to one D.M.M for KShs.100,000/=.

Section 42 of the Law of Succession Act provides that previous benefits made during a deceased's lifetime shall be taken into account. It is clear that some of the beneficiaries were given land during the deceased's lifetime. The extracts from the Vihiga Land Registry for plot number Kakamega/Mudete/654 (0.8 Ha.) and North Maragoli/1226 were registered in the names of Hesbon G.A. Kidula. The deceased's name does not appear in the registry as a previous proprietor. Similarly plot numbers N. Maragoli/Mudete/1227 (0.35 Ha.) belonged to H.K but were transferred to K.T.D.A as well as plot number Kakamega/Mudete/6565 (0.7 Ha.) that belonged to the deceased. Parties testified that the two plots were compulsorily acquired by the Government – this is in line with the evidence of H.K. Plot number Kakamega Municipality/Block I/68 is registered in the joint names of the deceased F.K.A and his son H.A.K. In her affidavit sworn on 18th February 2012, U.P.K stated that her husband is in agreement that the property forms part of the deceased's estate (paragraphs 41, 42 and 43 of the said affidavit).

The main dispute involves the distribution of plot number 724, the original homestead of the deceased. The respondent and his sister, T contend that, the last born takes that property. The respondent would also wish to get plot number 724. According to the applicants, the respondent was given plot number 725 by the deceased. The applicants have no objection in having the plot given to the respondent. According to U.K, the respondent was to build his house on plot number 725. On his part, the respondent testified that he wanted to build his house elsewhere but he is bound by the Maragoli custom to settle where his parent's homestead is located. According to him, the homestead got burnt in 1993 and he rebuilt it.

Since the respondent is not interested in the other properties, I will follow the proposal by the applicants in the distribution of the estate. Other than plot numbers **Kakamega/Mudete/724 and 725** subject to the daughters getting part of the estate, the deceased's estate shall be distributed as follows:-

1. MUDETE/VIHIGA MUNICIPALITY 16 - H.K &

H.K

2. MUDETE/VIHIGA MUNICIPALITY 17 - J.K and the

late D.K's

family

3. MUDETE/VIHIGA MUNICIPALITY 15 - A.K,

M.K and Z.K (M and Z are at liberty to relinquish their shares)

4. MUDETE/742 - A.K's family

5. MUDETE/626 - H.K

6. MUDETE/739 - D.M.K

7. MUDETE/913 - J.A.K

8. NORTH MARAGOLI/1030 - T.K, M

and Z.A

9. MUDETE/725 - B.K.K
10. MUDETE/724 - B.K.K, T.K,

M.K and Z.K

11. MUDETE/735 - H.K
KAKAMEGA MUNICIPALITY/BLOCK I/68

· All the deceased's children except B.K.K to share equally.

The respondent herein applied to substitute his late mother on the 27th of January 2011. A grant was issued to him on 12th April, 2011. The application to revoke the grant followed soon thereafter on 25th August, 2011. I do find that there is no evidence that the respondent mismanaged the deceased's estate so as to render him unfit to be the administrator. He had not managed the estate for more than four months when the application for revocation was made. Indeed, the respondent had started to take some steps to repair some of the properties and the applicants seem not to appreciate his effort simply because he is the last born. The party's mother died on 24.11.2007. By the time the respondent made his application to be enjoined in January 2011, three years had elapsed and none of the applicants had moved to court to take over the administration of the estate.

I do find that there is no good reason to disqualify the respondent from being the administrator. However, since the respondent is not getting some of the properties, I do hereby order that H.K and T.K be made joint administrators. The deceased's estate shall be distributed as hereinabove stated. A confirmed grant shall be issued to **T.A, B.K.K** and **H.K** jointly. Parties are at liberty to make any further applications. Parties Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 29th day of May 2013

SAID J. CHITEMBWE

J U D G E