



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 240 of 1995

IN THE MATTER OF THE ESTATE OF SALIMA BINTI MALIJANI

MANGA SAMUEL BIRICHIA..... 1ST PETITIONER

DEREFINA CHUMBO RINTARI..... 2nd PETITIONER

JUDGEMENT

The 1st Petitioner **Manga Samuel Birichia** petitioned this honorable court in Succession Cause No. 240 of 1995 for grant of letters of administration intestate in respect of the estate of Salima Binti Malijani. He filed the petition on 6th September 1995, in his capacity as the grandson of the deceased.

Subsequent thereto and there having been no objection, he filled a chamber summons application on 30th September 1995, seeking a confirmation of the said grant. The Grant was confirmed on 9th September 1996 and a certificate of confirmation of grant issued distributing the only asset of the estate namely plot number C 20 Majengo Nanyuki in equal shares between the Petitioner and one Manyara Kiranthia.

Manyara Kiranthia had prior to the confirmation of the Grant, sworn an affidavit deposing that he and one Hawa Kaguri now deceased and an aunt to the Petitioner, were the registered owners of the said plot and that the said Hawa Kaguri had no issue at the time of her death and that she had adopted one Manga Samuel Mbirichia, her brothers son and the co-Petitioner herein, and that further he had no objection to the plot being registered in the 1st Petitioners name.

The 2nd Petitioner herein one, Derefina Chomba, petitioned this Honorable court on 5th March 1999 in Succession Cause No. 105 of 1999 for a grant of letters of administration intestate in respect of the estate of the deceased in her capacity as the granddaughter. Her petition was opposed by the 1st Petitioner on the grounds inter alia that he was the only grandson of the deceased and that he had already been issued with grant of letters of administration intestate and a certificate of confirmation of grant vide HCCC succession cause No. 240 of 1995. Following that objection, both Succession Causes were consolidated under HCCC Succession Cause No. 240 of 1995. Manga Samuel Mbirichia became the 1st Petitioner and Derefina became the 2nd Petitioner/Objector.

On 9th August 1999 Derefina Chomba, the 2nd Petitioner filed a chamber summons application seeking inter alia that the grant of letters of administration intestate issued to Manga Samuel Mbirichia on 9th September 1999 vide HCCC succession cause No. 240 of 1999 be revoked on the grounds inter alia that the proceedings to obtain the grant were defective and that she was not aware of the instant cause (HCCC No. 240 of 1995), and that she honestly and verily believed that representation in respect of the estate of the deceased had not been raised and further that Manga Samuel Mbirichia was not a grandson

of the deceased and that they had no blood relationship.

Manga Samuel Mbirichia on the other hand opposed the application for revocation of grant on the grounds that the applicant was guilty of inordinate delay in filling the application and that the same was incompetent and vexatious and an abuse of the court process. He further swore an affidavit deponing inter alia that the applicant (Derefina) was not a granddaughter of the deceased but rather to one M'Nchebere, a step bother to the deceased and that at the time of applying for letters of administration, he shared plot No. C/20 Nanyuki Majengo with Manyara Kirianthi, a step brother to the applicant.

When the matter came up for hearing before the Honorable court on 20th November 2008, Emukule J directed that both parties be made joint administrators of the estate. Consequently joint letters of administration intestate were issued to the parties on 1st December 2008.

What is now pending before this court is an application for confirmation of grant dated 2nd December 2010, filled by one of the joint administrators Manga Samuel Mbirichia in which he proposes that they both get half a share of Plot No. C/20 Nanyuki Majengo which is the only asset of the estate. The application is not opposed, however her co administrator, Derefina Chomba proposes that she gets the entire share of aforementioned plot wholly.

Both parties have relied on quite a number of documents in trying to proof their relationship to the deceased. In both of their affidavits in support for summons for confirmation of grant, they depose that they are grandson and granddaughter of the deceased respectively.

Derefina Chomba has testified to the effect that the deceased, prior to her demise, had left a written will in which she bequeathed Plot No. C/20 Nanyuki Majengo to her. Derefina has produced a copy of the will. She explained that the original will was burnt in a fire in the housw. Manga did not oppose the production of the copy of the will and neither did he contest it. Derefina has also produced an affidavit sworn by one Gitobu Imanyara. It is dated 3rd May, 2009. In it the deponent swears that he drafted a will for an old lady, one Salima Binti Malijani in 1982. He stated that in the will Salima bequeathed her whole estate Plot LR Majengo C 20 TOL to her granddaughter DEREFINA CHOMBA. The deponent stated that he was unable to get his copy of the will for reason he had since shifted his office and base from Nanyuki to Nairobi.

I have perused the record of Succession Cause No. 105 of 1999 filed by Derefina. I noted that Derefina swore that the deceased died intestate. She did not rely on the will adduced in evidence for her petition. In any event, Derefina was very clear that the original will got burnt and that therefore she could not produce it.

The LSA does not provide the procedure to be followed when a will is lost. However Rule 55(3) of the Probate and Administration Rules provides as follows:

“where there is doubt as to the date on which a written or oral will was executed or made the court may require such evidence as it thinks necessary to establish the date...”

The issue before the court is not the date of the will and the provision is not of assistance to the case.

The relationship between the deceased and each of the Co-Administrators was hotly contested. Each of the Administrators tried to establish their respective relationship to the deceased. It was clear that there had been attempts to resolve the issue of who should inherit the suit property. However unfortunately, all the elders who participated in the dispute resolution are all deceased.

Derefina stated that she was a granddaughter of the deceased and that she was named after her. She stated that she lived for many years and cared for her and that before she died, the deceased bequeathed her only property to her wholly. She stated that she has lived on the property even after the deceased died up to date. Derefina called George M'Rintari who said that he was a brother of Derefina; and Julia w/o Jakubu the mother of Derefina and George. George said that the deceased was their grandmother by

virtue of being their father's sister. He talked of a meeting between their father, the deceased and elders in which the deceased said she was bequeathing her property to their father; and that their father at the same meeting said that Derefinia should inherit it by virtue of being named after the deceased. Julia's evidence was in tandem, word for word with that of George except where she said that the deceased was an aunt to Jakubu her husband and father of Derefinia and George. In addition Julia stated that Manga, the 1st Petitioner was a son of her husband's elder uncle. Julia said that the deceased and Kaguri had a dispute over the plot and that when it was resolved in the deceased favour, Kaguri went left the plot.

Manga's evidence was that the deceased was a step-sister of Derefinia's grandfather. He stated that the deceased was related to him by virtue of being a sister of his grandfather. He stated that for that reason, the deceased was more closely related to him than to Derefinia. Manga stated that the deceased called children she had adopted from his grandfather that is Kaguri Suleiman, Felicia M'Mbirichia and Mukiri (all deceased). Manga stated that he wrote on a book to signify that she had bequeathed the plot in issue to them. He produced the book bearing the record of the alleged gift. However on looking at the said book, there was no entry showing that the plot had been given to anyone as alleged. The entry in the book read that on Geoffrey had been given 5 rooms. Manga stated that he inherited the plot to Kaguri who is since deceased.

Manga brought a witness Manyara M'Rintari who produced the book referred to earlier. This witness stated that the plot was given to him and Kaguri and the same entered in the book. When told that the book stated that the plot was given to Geoffrey, Manyara disowned the name and the book. Manyara also said that Kaguri was an aunt of Manga, not his mother. He also said that Derefinia was his steep-sister while Manga was his paternal uncle's son.

Manga called a second witness M'Tuaruchu M'Ichunge. His evidence was that Manga was a brother of Kaguri. He stated that Derefinia was a daughter of his uncle M'Rintari. He said that M'Mirichia gave Kaguri to the deceased to bring her up as a daughter. He stated that when the deceased grew old, she bequeathed the plot to Kaguri and Kiranthia. He said however that he was not present when the plot was bequeathed to the two.

That was the evidence adduced in this case and the summary of the entire proceedings. The issues in this case are:

What is the relationship between the deceased and the two Petitioners?

Who should inherit the deceased's property?

The evidence adduced by the 2nd Petitioner, Derefinia shows that she is related to the deceased by virtue of the deceased being her father's aunt. George who said that the deceased was their father's sister also said that she was their grandmother. It is clear if the deceased was a grandmother of Derefinia, she could not have been a sister of their father. I treat George's description of the deceased as their father's sister as a slip. Regarding Kaguri Derefinia testified that she was an aunt to Manga while Julia said she was a sister of Manga.

The evidence of Manga as to his relationship to the deceased was somehow jumbled up. Manga testified that the deceased was a sister of his grandfather but a step-sister of Derefinia's grandfather. His witness Manyara testified that the Kaguri was the aunt of Manga while M'Ichunge said that Kaguri was the sister of Kaguri.

The evidence adduced before me shows that none of the two Petitioners were spouse, children or sibling of the deceased. They are distant relatives. From Derefinia's evidence, the deceased was her father's paternal aunt and therefore her grandmother. From Manga's evidence the deceased was sister of his grandfather and therefore a grandmother. In terms of section 66 of the LSA both Petitioners had equal right to take out Letters of Administration in terms of priority.

Who should inherit the deceased's property?

The LSA provides other perimeters of determining who should inherit a deceased person. Section 29 of the LSA CAP 160 defines who a dependent is as follows:

“For the purposes of this part “dependant” means-

(a) the wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death

(b) such of the deceased’s parents, step parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half sisters as were being maintained by the deceased immediately prior to his death and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

The Petitioners have to show that they were dependents of the deceased. We have found that the two are grandchildren of the deceased. S. 29 (b) of LSA requires the Petitioners to establish either the deceased had taken them into her family as his own or that they were being maintained by the deceased immediately prior to his death.

The 1st Petitioner’s case was that he lived with Kaguri at the deceased home for some years while in primary school. He said he left thereafter and never returned to live there. He was quite clear in my view that the deceased did not take him into her family as a member of her family. He does not in the circumstances qualify to be regarded as a dependent of the deceased.

The 2nd Petitioner, Derefina said that she went to live with the deceased as her child and that when the deceased grew old the roles changed and she took care of the deceased. In terms of section 29 of the LSA, the 2nd Petitioner, Derefina has sufficiently demonstrated that she lived with the deceased as her family. Derefina has shown that she was a dependent of the deceased having lived with her as an adopted member of her family for many years up to the time of her death.

I find that Derefina is the rightful heir of the deceased based on my findings above. That being the case I make orders as follows:

1.Plot NO.C/20 Nanyuki/Majengo be registered in the name of Derefina Chomba wholly.

2.Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF NOVEMBER, 2012.

LESIIT, J.

JUDGE.