



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 627 OF 2008
IN THE MATTER OF THE ESTATE OF KENNEDY NGAIRA AMAHWA – DECEASED
BETWEEN
JUDITH MULUNDI LUMBASI ----- OBJECTOR/APPLICANT
VERSUS
MARY AMAHWA }
ZAKARIA AMAHWA} -----PETITIONERS/RESPONDENTS

RULING

1. According to the Petition dated 3.12.2008, Kennedy Ngaira Amahwa died on 11th October, 2008 in Kitengela, Kajiado District and left behind the following persons surviving him;
 - (i) **Zacharia Amahwa**
 - (ii) **Mary Amahwa**
 - (iii) **Judith Lumbasi**
 - (iv) **Jemima Lusinde**
 - (v) **Morgan Ngaira**
 - (vi) **David Ngaira**
 - (vii) **Emmanuel Ngaira**
 - (viii) **Kenneth Ngaira**
 - (ix) **Ian Ngaira**
2. He also left behind the following properties;
 - (i) **KAJIADO/KITENGELA/8683**
 - (ii) **KAJIADO/KITENGELA/9351**
 - (iii) **KAJIADO/KITENGELA/18493**
 - (iv) **M/V REG. NO. KAM 467 SUBARU**
 - (v) **NATIONAL BANK A/C NO.0103000722500**
 - (vi) **CO-OPERATIVE BANK A/C NO.11099835200**
3. On 10.6.2009, a grant of letters of administration was made to Mary Amahwa and Zachary Amahwa jointly. I gather that Mary was the deceased's mother while Zachary was his father.
4. On 12.8.2009, one Judith Mulundi Lumbasi filed an Application to revoke the grant and in it, she claimed to have married the deceased in February 2004 under Luhya customary law and that part of dowry was paid to her parents and at the time of the deceased's demise, they were living together as husband and wife.
5. It was her case that she had raised the deceased's children from previous relationships together with her own, one Evans Amahwa, and that after the deceased's death, the deceased's father evicted her from the deceased's home in Nairobi and proceeded to petition for a grant of letters of administration without disclosing that she was a wife of the deceased.
6. In a Replying Affidavit sworn on 10.9.2009 the parents of the deceased deponed that by the time the deceased died, he had only been courting Judith Mulundi and had not married her. That during the courtship, an issue was sired and that the children from the deceased's other relationships were in the custody of their grandparents and that Judith was staying and working at her parents' home.
7. Further, that the deceased had no home in Nairobi and that the said Judith never contributed to the acquisition of any of the deceased's properties. In any event, the relationship between her and the deceased was on a rocky patch at the time of his death because the deceased had discovered that Judith had been married to one Laurence Were and had sired a son, Wyne Were with the said Laurence. That in

any event, she was presently cohabiting with another man and was in the threshold of marriage to him, and cannot therefore benefit from the deceased's estate.

8. On 15.3.2010, parties reached a consent in the following terms;

“By Consent:

i. The Summons for Revocation dated 11.8.2009 is allowed to the extent that Judith Mulindi Lumbasi and Zakaria Evasia Amahwa to be joint administrators.

ii. Each of them to file Affidavits of Distribution within 60 days.

iii. Directions on 10.5.2010.”

9. In compliance with order No.2 above, parties filed two separate proposals for distribution and according to Judith, the deceased's estate should be distributed as follows;

(a) To Judith M. Lumbasi –

(1) The land and house comprised in Title No.

KAJIADO/KITENGELA/8690.

(2) Motor Vehicle Reg. No. KAM 467X.

(3) Half share in Ubora Sacco.

(b) To Evans Amahwa –

(1) The land and house comprised in Title No.

KAJIADO.KITENGELA/18493. Same to be held in trust for him by JUDITH M. LUMBASI.

(c) To Morgan Aduku, Emmanuel Khakasila Ngaira, David Livasia and Keith Amahwa –

(1) The land and house comprised in Title No.

KAJIADO/KITENGELA/1250 and 9351 together with a Kitengela plot without a Title yet, and a Kisumu plot without Title, and Mr. ZAKARIA AMAHWA to hold the said properties in trust for each of the four minor children of the deceased from other relationships.

10. Zacharia on the other hand in an affidavit sworn on 14.5.2010 proposed as follows;

1. That Motor Vehicle Registration No. KAM 467X be given to Judith Mulundi Lumbasi and the same to be sold and proceeds therefrom be used for the maintenance of Ivan Ngaira.

2. That the land and house comprised in Title No. Kajiado/Kitengela/8690 be held by himself in trust for Morgan Ngaira and David Ngaira. (This is due to the fact that the children should be allowed to occupy the house erected on this plot while attending higher education in Nairobi).

3. That land and houses comprised in Title No. Kajiado/Kitengela/1250 be held by Judith Lumbasi in trust for Ivan Ngaira.

4. That the undeveloped plot comprised in Title No. Kajiado/Kitengela/18493 be held by himself in trust for Keith Ngaira.

5. That the existence of a plot in Kisumu without a title be established upon which title should be pursued and registered in his name to be held in trust for the children of the late Kennedy Ngaira Amahwa excluding Ivan Amahwa.

6. That the existence of an unregistered plot in Kitengela be established and the same be registered in the name of Judith Lumbasi to be held in trust for Ivan Ngaira.

7. That the land comprised in Title No. Kajiado/Kitengela/9351 be registered in his name to be held in trust for Jemima Lusinde.

8. That the land comprised in Kajiado/Kitengela/8683 be registered in his name in trust for Emmanuel Ngaira.

11. Before determining on the proper mode of distribution of the deceased's estate, I deem it fit to determine the status of Judith Mulundi Lumbasi *vis-à-vis* the deceased. She has claimed to be a wife of the deceased and all that I have as evidence in that regard is the statement at paragraph 3 of her Affidavit sworn on 11.8.2009 which is;

“That during February, 2004, I married Kennedy Amahwa Ngaira under Luhya customary law and part dowry was paid to my parents.”

12. Is the above evidence sufficient to show that indeed a marriage existed between the deceased and Judith? Ordinarily, further evidence should have been called to fortify the above contention but parties agreed to go with the evidence contained in their respective affidavits and no submissions were made on this crucial point.

13. Marriage is a matter of fact but the law, so far as I know, is that presumption of marriage can be made because of long cohabitation or circumstances that would show an intention to live and act together as husband and wife – see **M. W. G. vs E.W.K [2010] e KLR**. In that case, the Court of Appeal also referred to **S.119** of the Evidence Act, Cap80 Laws of Kenya to justify its finding that presumption of marriage or the existence or otherwise of a marriage is a question of fact, even if there were no formalities to actualize the marriage in the statutory sense.

14. The above being the law, I am bound to agree with Zacharia that whatever relationship there was between the deceased and Judith a conclusion that they were married or even presumed to be married cannot be drawn. I say so because in her Affidavit aforesaid, Judith makes certain statements that clearly show that she never cohabited with the deceased as she alleged and they are as follows;

“i) she claimed at paragraph 6 that her “husband died on the 11/10/2008 at Nairobi, and [she] had been staying and living with him until his death”. In fact, according to the death certificate dated 14.11.2008, the deceased died on 11.10.2008 at “Kitengela Sub-location” and his residence was “Kajiado”. Any Kenyan would know that close to Nairobi as they may be, Kitengela and Kajiado are not in Nairobi and are in fact in the expansive RiftValleyProvince.

ii) she claimed at paragraph 9 that Zacharia locked her out of her “matrimonial home in Nairobi” which she had built jointly with the deceased. I have elsewhere reproduced the list of assets which were disclosed in the Petition and also in her Affidavit of distribution. None is in Nairobi and the reasoning in (i) above also applies to this aspect of her claim.

(iii) At paragraph 12 thereof, she stated that she is a “teacher by profession and currently teaching at LutaliPrimary School in Malava”. She has failed to state what she was doing when cohabiting with the deceased in Nairobi and she has failed to respond to the claim that in fact she was always working at her parents’ home area and I accept that argument because it is infact backed by her deposition reproduced above.

(iv) She has failed to respond to the claim that the deceased was not happy when he discovered her prior relationship with one Laurence Were and so I take that fact as true. I have nothing to say about her alleged present relationship as the facts laid out are scanty.

(v) She claimed at paragraph 5 that the deceased’s children from previous relationships were under her care and custody, presumably in Nairobi, but she has failed to respond to annexures “MZI” attached to Zacharia’s Affidavit which indicate that Morgan, Keith, David and Emmanuel were all students of Moses Mudavadi Primary School (Mululu) in Chamakanga, Vihiga District and not in any school in Nairobi.”

15. It is therefore clear to me that whereas Evans Amahwa is a child of the deceased, there is no evidence whatsoever that his mother, Judith was married in February, 2004 to the deceased or that they cohabited with him for any period at all and no presumption of marriage can be drawn from their relationship.

16. The above being the case, **S.38** of the Law of Succession Act applies to the deceased’s estate. It provides as follows;

“S.38 – where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 41, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

17. The deceased’s children to whom the estate should therefore devolve are;

- a) **Morgan Aduku**
- b) **Emmanuel Khakasila Ngaira**
- c) **David Livasia**
- d) **Keith Amahwa**
- e) **Evans Amahwa**

18. Turning back to the two proposals for distribution before me, it is clear that the proposal by Judith cannot be sustained, once I have held that she was not a wife of the deceased.

19. The proposal by Zacharia is on the other hand reasonable and within the law since the children are all minors and require trustees as he has proposed. The shares in Ubora Sacco Society shall however be added to the estate as proposed by Judith and should be shared equally amongst the five children.

20. In the event, the estate shall be distributed as follows;

- i) **M/V Reg. No. Kam 467X be given to Judith Mulundi Lumbasi and the same be sold and proceeds therefrom be used for the maintenance of Evan Ngaira.**

- ii) ***L.R. No. Kajiado/Kitengela/8690 be held by Zakaria Amahwa in trust for Morgan Ngaira and David Ngaira.***
- iii) ***Land and houses comprised in L.R. No. Kajiado/Kitengela/1250 be held by Judith Lumbasi in trust for Ivan Ngaira.***
- iv) ***L.R. Kajiado/Kitengela/18493 be held by Zakaria Amahwa in trust for Keith Ngaira.***
- v) ***Kisumu plot be pursued and registered in the name of Zakaria Amahwa in trust of the children of the late Kennedy Ngaira Amahwa excluding Ivan Amahwa.***
- vi) ***The existence of an unregistered plot in Kitengela be established and registered in the name of Judith Lumbasi to be held in trust for Ivan Ngaira.***
- vii) ***L.R. NO. Kajiado/Kitengela/9351 be registered in the name of Zakaria Amahwa to be held in trust for all the children of the deceased excluding Ivan Amahwa.***
- viii) ***L.R. No. Kajiado/Kitengela/8683 be registered in the name of Zakaria Amahwa to hold in trust for Emmanuel Ngaira.***
- ix) ***Shares in Uhora Sacco Society shall be shared equally amongst the five children of the deceased namely; Morgan Aduku, Emmanuel Khakasila Ngaira, David Ngaira, Keith Amahwa and Evans Amahwa.***

21. Having now made the above orders, I see no reason to order parties to file any application to confirm the grant and the grant issued on 15.3.2010 is confirmed in those terms. I make this orders under Rule 73 of the Probate and Administration Rules and to bring this matter to a close.

22. Let each party bear its own costs and are at liberty to apply.

23. Orders accordingly.

Delivered, Dated and Signed at Kakamega this 29th day of September, 2010.

**ISAAC LENAOLA
J U D G E**