



SUCCESSION

- Distribution

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 309 of 2002

IN THE MATTER OF THE ESTATE OF LAWRENCE DOUGLAS

MAGAMBO (DECEASED)

JENERUSA PETITIONER

- VERSUS -

AYUB KITHARA MAGAMBI OBJECTOR

JUDGMENT

The wife of the deceased is Jenerusa Chenge. She has petitioned for grant of letters of administration intestate in respect of this estate. She listed those who survived the deceased as herself and her two daughter Felisita Mwendwa, Delphina Rima and deceased's brother called Ayub Kithara. It is clear that Ayub's consent to filing the petition was not obtained. On the grant being issued to Jenerusa on 14th January, 2003 Jenerusa sought its confirmation. The application for confirmation is dated 18th July, 2003. The mode of distribution that she suggested in that application was that she was to get 4 acres of parcel No. ABOTHUGUCHI/U-KAONGO/709. Ayub according to her distribution was to get the balance. The grant was confirmed on 29th November, 2004 as prayed. Ayub sought and obtained interim orders of inhibition by his chamber summons dated 31st May, 2005. In that application Ayub alleged that the petitioner did not inform him when she petitioned for grant. Further that 5 acres of that suit property were held by the deceased in trust for him. Contrary to that trust Ayub alleged that the petitioner was getting a larger portion of the land. The petitioner in response stated that the mutation form dated 17th October, 2005 indicated that her portion was only 2 points extra to that of Ayub. The 2 points she pointed out was to compensate her for the expense she had incurred in filing this succession cause and in obtaining the services of a surveyor. In response to the claim that the petitioner filed the cause without informing Ayub the petitioner responded by saying that Ayub was severally summoned by the chief over the issue of this succession. He however failed to attend. The petitioner then deposed in her affidavit as follows:

“That the objector (Ayub) is just after taking (sic) a larger share from this estate since he thinks that by virtue of me having two daughters only and he has two sons and three daughters he is entitled to 5 acres (sic) and I get (sic) 3 acres which is a big discrimination (sic) to widows. “

Ayub in a further affidavit dated 19th August, 2008 again repeated that the registered owner of the suit property that is the deceased was registered as a transfer for himself and Ayub. Ayub annexed a document from the lands office which he said showed that the deceased sold in his lifetime 5 acres of that land to 2 people. He referred to those alleged sales to justify his claim to a larger portion of the deceased property. The petitioner responded by her affidavit dated 25th March, 2009. In that affidavit she stated as follows:-

1. **That if at all the objector is genuine he should have claimed his share during the lifetime of the late husband.**

2. **That the objector is after getting(sic) a bigger share because I have two daughters and he thinks that I am not entitled to equal share as him.**
3. **That the objector has given me problems all through when I started processing this succession.”**

When the matter came before court on 3rd June, 2010 the parties were ordered to file further affidavits and submissions on the issue of distribution.

Ayub alleged that the deceased held the suit property in trust for himself and Ayub. That issue has not been denied by the petitioner. The dispute is on the acreage, which Ayub is entitled to. I will begin by commenting on the allegation that the deceased sold 3 acres of that land in his lifetime. I have looked at the documents annexed to the affidavit of Ayub dated 19th August, 2008. It is clear that the 2 acres and 1 acre were reduced from the suit property before the land was adjudicated. The date those acres were removed is not reflected in those documents. It is however clear that those acres were removed following two different objections that is objection No. 1024 and No. 1025. There is no basis that I can see for holding that those acres were sold by the deceased. It is also rather strange that Ayub first filed papers in this case on 2nd June, 2005 but waited until when he filed his affidavit dated 19th August, 2008 to raise the issue of sale. I am tempted to state that the allegation of sale is an after thought. More over Ayub in that affidavit stated that the fact that those sales took place could be confirmed by his uncle M’Itonga M’Muthuri. Surprisingly, despite the leave granted to each party on 3rd June, 2010 to file further affidavits in support of their claim Ayub did not take advantage of that leave to have his said uncle swear an affidavit to confirm the sale of land by the deceased. Nor did Ayub respond to the petitioners allegation that he wanted her to have a smaller portion because she is a widow with only daughters. Since Ayub has failed to respond to that allegation which the petitioner first raised by her affidavit dated 17th February, 2006, I am inclined to accept that that is the basis of Ayub requesting to have a larger portion of the deceased property. Such discrimination on the basis of sex is forbidden by Article 27(4) of the constitution which provides that no one shall discriminate another on any ground including race, sex, pregnancy, marital status, health status and ethnic amongst others. Article 60(1) (f) also forbids discrimination on the basis of sex. It provides:

“60 (1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles-

- (a)
- (b)
- (c)
- (d)
- (e)
- (f) **elimination of gender discrimination in law, customs and practices related to land and property in land.”**

The petitioner contention that she has been put to an expense in filing this succession and in hiring the land surveyor has not received a response from Ayub. The suit property has indeed been surveyed and subdivided into No. 1654 measuring 1.62 ha. and No. 1655 measuring 1.58 ha. Justice will best be served by ordering that those numbers be retained and the petitioner be award the larger portion whilst the objector gets the slightly smaller portion. I therefore grant the following orders in this judgment:

1. **I order that the confirmed grant issued on 29th November, 2004 to Jenerusa Ncenge Marangu be and is hereby set aside.**
2. **I order that the grant issued to Jenerusa Ncenge Marangu on 14th January, 2003 be confirmed to the effect that Land Parcel No. ABOTHUGUCHI/U-KAONGO/709 to be distributed as follows;**
 - (a) **Jenerusa Ncenge Marangu to get parcel marked as No. 1654 on the mutation form dated 17th October, 2005.**
 - (b) **Ayub Kithara Marangu to get parcel No. 1655 on the mutation form dated 17th October, 2005.**
3. **There shall be no orders as to costs.**

Dated at Meru this 22nd October, 2010.

**MARY KASANGO
JUDGE**