



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 133 OF 2010

IN THE MATTER OF THE ESTATE OF LATE BERNARD KARANI AYUGU (DECEASED)

B E T W E E N

MARY GRACE AYUGU PETITIONER/APPLICANT

VERSUS

ALICE SEBII MINAYOOBJECTOR/RESPONDENT

RULING

1. BERNARD KARANI AYUGU died on 12.12.2009 and in the Petition filed on 26.2.2010, MARY GRACE AYUGU sought a Grant of letters of Administration to his estate intestate and named herself as his widow.

2. On 6.4.2010, and before a Grant could be made to Mary Grace Ayungu aforesaid, one Alice Sebie Minayo objected to the making of grant for reasons that she was allegedly the deceased's second wife and had four children with him and so she was entitled to participation in the Succession proceedings.

3. Before the Objection proceedings could be undertaken, Mary Grace Ayungu filed an Application under SS.45 and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules and it is important to reproduce the prayers that she now seeks. They are as follows;

“a) THAT the application herein be certified urgent and heard *ex parte* in the first instance.

b) THAT this Honourable be pleased to nullify and or cancel the transfer of land parcels L.R. NZOIA/MOISBRIDGE/BLOCK 1/652 and L.R. NZOIA/MOISBRIDGE/BLOCK 1/1727 by the Objector into her names on 05.05.2010 and cause the same to revert to the deceased's names.

c) THAT the Respondent or any other person acting on the Respondent's authority be restrained from intermeddling with the estate of the deceased herein and in particular subdividing, demarcating or disposing off or transferring to herself or any other person, Assets forming the estate of the deceased herein and more particularly;

1) Land parcel L.R.

i) NZOIA/MOISBRIDGE/BLOCK 1/652.

ii) NZOIA/MOISBRIDGE/BLOCK 1/1727

iii) NAIROBI/BLOCK 82/1086.

2) MOTOR VEHICLES

- i) Lorry Reg. No. KAG 265F
- ii) P/STATION Reg. No. KAG 734X – Peugeot GR 505
- iii)SUBARU Registration No. KAZ 070Z.
- iv) GRATUITY – Held by the Public Trustee Nairobi.

d) THAT the three Motor Vehicles Registration Number KAG 265F, KAG 734 and KAZ 070Z, currently in the custody and care of the Objector be preserved and kept at a neutral place preferably Kakamega Police Station pending the hearing and determination of the objection proceedings herein.

e) THAT the Honourable court be pleased to make an order placing a restriction on the above three parcels of land.

f) THAT this Honourable court be pleased to make such other necessary orders to protect the estate of the deceased from any further waste or interference.”

4. I have read the Affidavit in support and I gather that the complaint by the Applicant is that she was married to the deceased under the African Christian Marriage and Divorce Act, Cap 151 on 2.8.1980 and that she is therefore the only lawful wife of the deceased and is entitled to solely administer his estate.

5. That the Respondent, while lawfully married to one Elijah Odari Gwiri in a Civil Marriage, contracted on 16.8.2002 at the P.A.G. Church in Eldoret purported to have the legitimacy to intermeddle in the deceased's estate and has allegedly done the following things;

- i) she secretly transferred two parcels of land belonging to the deceased and obtained title in her names;
- ii) cut mature trees in the deceased's matrimonial home and sold them off;
- iii) she destroyed the Applicant's 3 bed-roomed matrimonial home soon after the deceased died.
- iv) She moved away some of the deceased's properties including motor vehicles without awaiting this court's orders on distribution.

6. That it would be in the interests of Justice to secure the deceased's estate and to avoid the risk of it going to waste.

7. In a Replying Affidavit sworn on 13.7.2010, the Respondent's argument is that she obtained title to two of the deceased's properties after following the due process of the law. That the two properties were in any event "given" to her pursuant to S.31 of the Law of Succession Act.

8. Further, that the deceased had sold motor-vehicle registration number No. KAG 734X in September, 2009 and she did not know what happened to it as she did not see the sale Agreement thereof and she was never involved in its sale. She also denied knowledge of M/Vs registration Nos. KAG 265F and KAZ 070Z and she urged the point that the Applicant has failed to demonstrate that they in fact belonged to the deceased.

9. The Respondent at paragraphs 8 of her Replying Affidavit denied cutting any trees from any of the deceased's parcels of land but added that the said parcels of land were in fact her own properties.

10. Interestingly, the Respondent has made the startling claim that she is the second wife of the deceased "and if not" then she should be treated as a dependant under S. 29 of the Law of Succession Act. Further that since no Letters of Administration have been issued to the Applicant, no orders can be made in her

favour.

11. Having read the rival affidavits placed before me, my opinion at this stage of proceedings is as follows;

12. That firstly, there is no doubt that Mary Grace Ayugu is a lawful wife and widow of the deceased. I say so because the copy of the marriage certificate annexed to her Supporting Affidavit and Alice Minayo's admission of that fact would put the matter beyond contest.

13. Secondly, Alice Minayo's claim to be a wife of the deceased is contested and whereas I cannot in an application of the nature of the one before me conclusively determine the issue, prima facie, there is no credible evidence that the deceased ever lawfully married her. He may have well cohabited with her after he and his lawful wife had a disagreement leading to her departure from the matrimonial home, but that fact will also need to be tested upon credible evidence being tendered.

14. Further, Alice Minayo in her Replying Affidavit has refused to respond to the allegation that on 16.8.2002, she got married to one Elijah Odari Gwiri and so had no capacity to contract a marriage with the deceased or anyone else. That issue is very crucial to the present dispute and I noted elsewhere above that Alice was ambivalent about the issue of her marriage to the deceased and has raised the alternative claim that she is a dependant of the estate.

15. Thirdly, I have seen the Search Certificates for land parcels Nos. Nzoia/Moi's Bridge/Block I/652 and 1727. The deceased had been issued with titles in respect thereof on 26.3.1998 and 22.4.1998 respectively and it is not in contest that he died on 12.12.2009. The two land parcels were transferred to Alice Minayo by way of a gift on 5.5.2010 and titles issued on 6.5.2010. How could it be that the transfer is made five months after the deceased's death and how was he able to do so from the grave? Alice Minayo has argued that S.31 of the Law of Succession Act applies to her case and for avoidance of doubt, that Section provides as follows;

"S.31 – A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if –

(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he intended to revert to him should he survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him; provided that –

(i) no gift made in a-contemplation of death shall be valid if the death is caused by suicide;

(ii) the person making the gift may, at any time before his death, lawfully request its return."

16. I have seen no evidence that the deceased contemplated death and decided to transfer the properties to Alice Minayo and she has not produced the transfer forms to show that indeed the deceased had begun the process before he died and in contemplation of death.

17. Fourthly, I have no evidence before me that either motor-vehicles registration numbers KAG 265F, KAZ 070Z or KAG 734X belong to the deceased and I would be in error if I purported to determine that issue with the contested facts before me.

18. Lastly, from what I have said above and reading S.45 of the Act, it would be in the interests of justice to protect the estate herein and therefore prayers (b), (c) (i) and 2 (iv) and (e) are allowed as prayed.

19. Prayer (c) (2) (i – iii) and (d) are struck off but the parties may revive the issues relating to the motor-vehicles once evidence of ownership by the deceased is confirmed. I will otherwise make no order as to costs.

20. Directions should now be taken to expedite the determination of this matter.

21. Orders accordingly.

Delivered, dated and signed at Kakamega this 17th day of November, 2010

**ISAAC
J U D G E**

LENAOLA