



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Succession Cause 181 of 2005

IN THE MATTER OF THE ESTATE OF JONATHAN KAMAU MBUGUA

JUDGMENT

The late Jonathan Kamau Mbugua passed away on 30th November 2003. His widow Joyce Wanjiku Kamau petitioned for the letters of administration. According to the affidavit in support of the petition for letters of administration, the deceased died intestate and was survived by the following:-

- a) Joyce Wanjiku Kamau – widow
- b) Benson Mbugua Kamau – son
- c) Eorge Muchai Kamau – son
- d) Jane Wamaitha kamau – daughter
- e) Peter Karanja Kamau – son
- f) Keziah Nyambura Kamau – son
- g) Catherine Kabura Kamau - daughter

The list of the deceased's heirs is also confirmed by the letter written by the area chief dated 14th October 2004. There seems to have been no problem when the grant of letters of administration of the estate was issued to the petitioner on 25th July 2005 and was subsequently confirmed on 15th December 2008.

When the matter came up for confirmation, the children of the deceased were represented by Miss Omwenyo who indicated to the Court that the children were all in agreement that the deceased estate should be distributed as per the consent agreement. The consent agreement has set out the entitlement of each beneficiary. The grant was confirmed and the deceased estate was ordered to be distributed as per paragraph 5 of the supporting affidavit by the petitioner.

The children of the deceased seem to have undergone a change of mind, and filed the summons for revocation of grant dated 6th January 2009. This application is supported by the affidavit of Jane W. Kamau. It is also supported by the other children of the deceased. They filed a joint affidavit and proposed their own mode of distribution which they contend is fair to all the beneficiaries. The joint affidavit is sworn by Jane Wamaitha Kamau, George Muchai Kamau and Benson Mbugua Kamau.

A further affidavit was sworn by Jane Kamau alleging that a co-administrator should be appointed for reasons that the petitioner is unable to administer the deceased's estate according to the law. It is alleged that the petitioner has been trying to sell the deceased parcel of land to a group of internally displaced (IDPs) people in Molo who have invaded the land and settled there. It is further alleged that the petitioner has also excluded the deceased's children from occupying and deriving a livelihood from the deceased's parcel of land and businesses. George Muchai Kamau a child of the deceased filed an affidavit supporting the revocation of the grant and has annexed copies of the purported sale agreement to Tuinuane Molo Saw Mill I.D.P.s dated 29th January 2009.

Directions were given that this matter is determined by way of submissions for reasons the only dispute is on how the distribution of the deceased estate between the widow and her children should be effected. Counsel for the applicants filed written submissions and urged the court to revoke the grant issued to the petitioner for reasons that she has been unable to administer the estate in accordance to the law. The court should appoint one of the children as a co-administrator and the estate of the deceased should be distributed according to the proposal annexed to the affidavit of the beneficiaries sworn on 11th May 2007.

The petitioners did not file written submissions or even if they were filed, they were not in the court file as of the time of writing this judgment. As it is determinable from the facts, this is a dispute between the deceased widow and her children over how the estate of the deceased should be distributed. The deceased died intestate. He is survived by a widow and children. His estate should be distributed according to the provisions of section 35 of the Law of Succession. The provisions of section 35 are as follows:-

- (a) The person and household effects of the deceased absolutely; and**
- (b) A life interest in the whole residue of the net intestate estate:**
 - (2) A surviving spouse shall, during the continuation of life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate byway of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will not in such matter as to take effect at any future date.**
 - (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.**
 - (4) Where an application is made under subsection (3) the court may award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to.**

In this case the petitioner and the applicants had agreed on the mode of distribution, consequently the grant was confirmed. The reasons why the applicants seek to revoke the grant are first, the petitioner has sold off part Mitoni farm to over 200 strangers. They attached a copy of the sale agreement. The petitioner denies that she has sold any part of the land but alleges that the land was invaded by squatters. There is no concrete evidence that the petitioner has transferred the deceased's estate. The way the parties had proposed to distribute the estate as per the confirmed grant, the petitioner would have been entitled to 48 acres and if she is selling 5.5 acres, I do not see how this would prejudice the beneficiaries who are also supposed to get 35 acres each.

In any event it is indicated in that schedule of distribution that 65 acres were to be sold and proceeds thereof be used to offset the estate Liabilities i.e. cost of surveying, sub-division, rates, land rents plus legal fees, the remainder if any, be given to Joyce Wanjiku Kamau.

The other way of looking at this matter is under section 35 of the Act. The widow is entitled to a life interest in the whole of the residue of the net intestate. What the petitioner did, when a consent agreement

was filed during the confirmation can be described as appointment of the capital of the net intestate by dividing to the children which is allowed under the Act. As the matters stand, the widow is entitled to the whole residue and thereafter on her death the property shall devolve upon the applicants in equal shares.

For the moment I find no justifiable reasons for interfering with the confirmed grant and the mode of distribution which was agreed by the petitioners and the beneficiaries. I find no merit in the application for revocation of the grant and which is hereby dismissed. This being a family matter each party shall bear their own costs of this litigation.

JUDGMENT READ AND SIGNED THIS 25TH JUNE, 2009.

M.K. KOOME

JUDGE