



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

Succession Cause 379 of 2001

IN THE MATTER OF THE ESTATE OF GEORGE WAMUKOYA KADIMA

(DECEASED)

B E T W E E N

PETER KADIMA.....PETITIONER

VERSUS

FRED OCHIENG KADIMA.....1ST APPLICANT

BON ANYANGA KADIMA.....2ND APPLICANT

WILLIAM MAKAU KADIMA.....3RD APPLICANT

PATRICK SHIUNDU KADIMA.....4TH APPLICANT

JAMES OLWANDA KADIMA.....5TH APPLICANT

RULING

Joseph George Wamukoya Kadima, the deceased herein, had three wives. He died on 11th December, 1997. He was survived by 27 children and his three wives. He left three parcels of land known as N.WANGA/NAMAMALI/549, 534 and 596 measuring 3.8 acres, 7.5 acres and 14.5 acres respectively. One of the deceased’s sons, Peter Kadima, petitioned for Probate of written will. However, on 8th November 2001 a Grant of Letters of Administration Intestate made on 5.11.2001 was issued to Peter Kadima.

By a Summons for confirmation of the Grant dated 8-11-2001, the Petitioner sought confirmation of the said Grant. In the Summons, he showed his name as the only person entitled to inherit the deceased’s estate even though in the application for the Grant he had indicated the names of the other heirs.

On 24-3-2004, Messrs Fred Ochieng Kadima, Bon Anyanga, William Makau, Patrick Shiundu, and James Olwanda applied by summons for revocation of the said Grant on the grounds that it was obtained fraudulently by making of a false statement and without the knowledge of the Applicants.

Further, they contended that the grant was defective and a nullity and that the Petitioner/Respondent had sought Probate of written will but instead obtained Grant of Letters of Administration Intestate.

The affidavit of William Makau Kadima sworn on behalf of all the Applicants averred, inter alia, that

the applicants were not informed of the Petition herein by the Respondent/Petitioner and although the Petitioner had sought Probate he obtained a Grant of Letters of Administration Intestate which, ipso facto, was defective. They pointed out that the Petitioner has filed a summons for confirmation of the Grant. They further averred that despite the fact that the Grant has not been confirmed, the Petitioner has subdivided the parcel of land owned by the deceased and transferred some of the assets to himself and his children. It was the Applicants contention that the subdivision and transfer of the deceased's land comprised in the estate is illegal and null and void and ought to be cancelled and set aside.

Mr. Getanda, learned counsel for the Applicants, urged me to nullify the acts of the Respondent as the Respondent had fraudulently disinherited the Applicants.

Mr. Athunga who appeared for the Petitioner/Respondent contended that the Application was brought after inordinate delay. He submitted that the Grant, though intestate, can always be amended.

The Petitioner/Respondent did not file any replying affidavit. He relied on grounds of opposition. This is a cause under the Provisions of the Law of Succession Act Cap 160. Rule 63(1) of the Probate and Administration Rules imports some of the orders of the Civil Procedure Rules. The orders not imported must be deemed to have been deliberately excluded. Order L of the Civil Procedure Rules which deals with grounds of opposition in civil applications is not one of orders imported. It seems to me that the only way an application or other proceeding under the Law of Succession Act can be opposed is by a replying affidavit unless a Preliminary point of law based on the facts as they stand is raised as a ground. This is not the case here. In absence of a replying affidavit, the averments in the application remain uncontroverted.

I have perused the application and given due consideration to the submissions of both counsel. I am satisfied that the application has merit.

I allow the application. I grant orders 2, 3, 4, 5 and 6. I order that the costs of the application shall be borne by the *Petitioner/Respondent*.

Dated at Kakamega this 6th day of October, 2005.

G. B. M. KARIUKI

J U D G E