



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 82 OF 2019

LUCY NJOKI KAUMA.....1ST APPELLANT

GEORGE MWANIKI KAUMA.....2ND APPELLANT

VERSUS

IRENE LENAS KINA MULUNGA.....1ST RESPONDENT

CATHEREINE MERCY WARUE MBOGO.....2ND RESPONDENT

JUDGMENT

1. The succession cause, the subject of this appeal relates to the estate of Mbogo Kaume who died intestate, on the 3rd day of March, 2008. Upon his demise, his wife Roseline Kathanje Mbogo filed Succession Cause No. 318 of 2010 in the high Court of Kenya at Embu but the matter was transferred to the Senior Principal Magistrate's Court at Runyenjes and given a new number being Succession Cause No. 217 of 2017.
2. In her petition, the wife of the deceased listed her seven (7) children and herself as the only beneficiaries to the said estate and the only ones entitled to inherit the estate of the deceased, which consists of land reference No. Kyeni/Mufu/1597 and land reference No. Kyeni/Kathanjuri/749.
3. On the 31st day of March, 2011, one Catherine Mercy Warue Mbogo filed a petition by way of cross application for a grant claiming to be a beneficiary of the estate of the deceased. She objected to the grant being issued to the wife of the deceased and prayed that the grant of letters of administration be issued to her.
4. Thereafter, several applications relating to the administration of the estate were made and heard by the court and eventually, vide a ruling delivered by Muchemi, J., on the 29th day of January, 2015, the court appointed Catherine Mercy Warue Mbogo; Duncan Wain Kauma and George Mwaniki Kauma as joint administrators to the estate of the deceased Mbogo Kauma.
5. On the 24th April, 2018, the said administrators filed summons for confirmation of grant dated the 23rd day of April, 2018 in which, they sought orders that the grant of letters of administration made to them be amended to include Lucy Njoki Kauma as a co-administrator in place of Duncan Wain Kauma who was by then deceased. They further sought for orders that the grant of letters of administration so amended be confirmed and they listed their proposed mode of distribution as per the schedule in paragraph 7 of the supporting affidavit.
6. On the 29th August, 2018, Lucy Njoki Kauma and George Mwaniki filed an affidavit of protest against summons for confirmation of the grant and averred that Catherine Mercy Warue Mbogo is not a daughter of the late Mbogo Kauma and she is not a beneficiary or dependant of the estate of the deceased as she is only their cousin and therefore not entitled to a share of the estate. They contended that the mode of distribution as proposed by the administrators was contrary to their parents' wishes as their late mother, Roseline Kathanje Mbogo had informed them of her wish during a family meeting held before the area chief (a copy of the minutes for that meeting was annexed to their affidavit of protest). That, according to their parents' wishes, each of the deceased's son was to get 2½ acres out of parcel No. Kyeni/Mufu/1597 and Kyeni/Kathanjuri / T.49 was to be shared equally to George Mwaniki and Duncan Wain Kauma.
7. They deposed that they are in actual possession of land parcel No. Kyeni/Mufu/1597 where they have been residing and whereon they have heavily invested and none of the other beneficiaries have ever utilized the said land. As such, if the summons of confirmation is allowed as drawn, the intended beneficiaries will be disinherited and/or greatly prejudiced as they have already heavily invested in their portions as per their parent's wishes.
8. The court heard the parties on the protest and vide an undated judgment, the learned magistrate dismissed the protest and proceeded to confirm the grant issued on the 16th day of March, 2015 as amended. The court ordered that the estate of the deceased be distributed in terms

of paragraph 7(a) and (b) of the affidavit in support of the summons for confirmation of the grant.

9. The protestors being dissatisfied with the said judgment filed the memorandum of appeal dated the 16th day of December, 2019 wherein they have listed nine (9) grounds of appeal.

10. When the appeal came up for directions, the court directed the parties to file and exchange written submissions, but counsel for the appellant did not file his submissions despite having been given an opportunity to do so.

11. The court has considered the documents filed herein and the submissions by the counsel for the respondents.

12. On the first ground of appeal, as to whether Catherine Mercy Warue is a daughter of the deceased, as rightly submitted by the respondents, the affidavit sworn by the late Duncan Wain Kauma on the 26th day of September, 2012 positively identifies her as their sister. In the said affidavit, he deponed that he refused to consent to his late mother’s petition for letters of administration of the estate of his late father when he noticed that Catherine had been left out as a survivor of the deceased.

13. Further, in her ruling delivered on 19th February, 2013, Lady Justice Ong’udi made a finding that Catherine Kauma is a daughter of the late Mbogo Kauma and it was on that basis that she ordered that grant of letters of administration be issued in the joint names of the wife of the deceased and the said Catherine Kauma.

14. Though there is a notice of appeal that was filed in respect of that ruling, there is nothing on record to indicate that any of the parties filed an appeal against the decision by Hon. Justice Ong’udi. Her finding on that issue is therefore conclusive in absence of any appeal against the same.

15. On the 2nd ground of appeal, the appellant contends that the learned magistrate erred in law and in fact when he failed to find that there was an agreement made earlier among the beneficiaries of the deceased’s estate on the mode of distribution. In this regard, the court has perused the record of the proceedings. I note that the beneficiaries herein through their advocates on record, filed a consent on the mode of distribution on the 4th day of April, 2013. That consent was duly signed by advocates for all the parties and on 17th day of April, 2013 the court adopted it as an order of the court and proceeded to order that a certificate of confirmed grant be issued accordingly.

16. I have confirmed from the record that the said consent was not set aside by any of the parties. On the 27th November, 2013, when the matter was in court, the court gave Duncan and George 14 days to file and serve a protest if any, to the confirmation of the grant.

17. The court further ordered the petitioner and the objector to respond within 14 days of service. It is my considered view that the orders of the court that were made on 17th April, 2013 remains in force as no party applied to set aside the same. In fact, the effect of the said orders was to conclude the succession matter as the court ordered that a certificate of confirmed grant be issued accordingly. All the other proceedings that took place thereafter were a nullity and the grant ought to issue as per the terms of the consent filed in court on 4th April, 2013.

18. As to the 3rd ground of appeal, the deceased did not leave behind any will and therefore his estate ought to be distributed as per the law on intestacy but in this case, the parties had agreed on the mode of distribution vide the aforesaid consent.

19. In the end, the appeal is hereby allowed. The decision by the learned magistrate is hereby set aside and in its place, the court makes the following orders: -

a) That the grant of letters of administration made to Irene Lenas Kina Mulunga, Catherine Mercy Warue Mbogo, Duncan Wain Kauma and George Mwaniki Kauma be amended to include Lucy Njoki Kauma as a co-administrator in place of Duncan Wain Kauma who is now deceased.

b) The said amended grant be confirmed as per the consent of the parties filed in court on the 4th day of April 2013.

c) Each party to bear its own costs of the appeal.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent