



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 564 OF 2013

IN THE MATTER OF THE ESTATE OF DAMAR ANGANO GIBENDI (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 273258, dated 29th August 2012, the deceased herein, Damari Angano Gibendi, died on 9th June 2012. According to the letter from the Chief of Central Maragoli Location, dated 31st August 2012, the deceased was said to have had been survived by two sons and two daughters, namely Joshua Lugusa Gibendi, Cossam Ogada Gibendi, Philoice Musimbi and Susan Kageha. She was said to have had a property known as Kakamega/Lugovo/106.
2. Representation to the intestate estate of the deceased was sought in a petition that was lodged in Vihiga PMSC No. 73 of 2012, on 5th September 2012 by Joshua Lugusa Gibendi, in his capacity as son of the deceased. He listed himself and Cossam Ogada Gibendi, Philoice Musimbi and Susan Kageha as the survivors of the deceased. The estate was said to comprise of Kakamega/Lugovo/106. Representation was granted to Joshua Lugusa Gibendi, and a grant was issued, dated 29th November 2012.
3. On 18th April 2013, Joshua Lugusa Gibendi filed a summons, of even date, for confirmation of his grant. He listed the survivors of the deceased as three, being Joshua Lugusa Gibendi, Cossam Ogada Gibendi and Philoice Musimbi. He proposed that Kakamega/Lugovo/106 be shared out between them so that Joshua Lugusa Gibendi and Cossam Ogada Gibendi take 0.35 hectare each and Philoice Musimbi 0.1 hectare. That application was dismissed by an order made on 18th April 2013.
4. Subsequent to that Joshua Lugusa Gibendi filed another summons for confirmation of grant, dated 4th June 2013. He listed the survivors of the deceased as four individuals, namely Joshua Lugusa Gibendi, Cossam Ogada Gibendi, Philoice Musimbi and Susan Kageha. He proposed that Kakamega/Lugovo/106 be shared out between Joshua Lugusa Gibendi, Cossam Ogada Gibendi and Philoice Musimbi based on demarcation on the ground.
5. Rather than filed an affidavit of protest to the summons, dated 4th June 2013, Cossam Alwondi Gibendi, filed a summons for revocation of grant herein, dated 23rd July 2013, seeking revocation of the grant made in Vihiga PMSC No. 73 of 2012, to Joshua Lugusa Gibendi. He argued that the said grant was obtained fraudulently by the making of a false statement, and the primary court had no jurisdiction to make the grant. He avers that the administrator was his younger brother, who had his own property, described as LR No. 1273 Kitale, which had been bequeathed to him by their late father. It was averred that Joshua Lugusa Gibendi never lived on the Lugovo land, as his residence was at Matunda. Cossam Alwondi Gibendi averred to be the one who resided at Lugovo, and to have had developed the same. He averred that Philoice Musimbi was not a daughter of the deceased. He averred that the court was misled. He complained that the other family members were not consulted.
6. To the summons for revocation, Joshua Lugusa Gibendi filed a reply, by an affidavit, sworn on 18th December 2013. He conceded that the applicant was his brother, and said that he was included in Vihiga PMSC No. 73 of 2012. He said that their father died when he, Joshua Lugusa Gibendi, was very young, and he could not have bequeathed any property to him. He further said that their father had no land at Kitale, and that he had never been to the alleged land.
7. On 26th February 2014, it was ordered that a grant be issued in the joint names of Joshua Lugusa Gibendi and Cossam Alwondi Gibendi, which had the effect of appointing both administrators of the estate of the deceased. No orders were made or directions given with respect to the grant made in Vihiga PMSC No. 73 of 2012, but I suppose the appointment of fresh administrators had the effect of revoking that other grant. Cossam Alwondi Gibendi was directed to file a summons for confirmation of the grant of 26th February 2014, which he did file on 2nd July 2014, of even date. He listed himself, Cossam Alwondi Gibendi, the late Elamu Peter, Joshua Lugusa Gibendi and the late Anjugi as the surviving children of the deceased, which was a misnomer given that some of the children were dead, and could not have survived the deceased. He proposed that Kakamega/Lugovo/106 be devolved wholly to himself.
8. Directions were given on 24th May 2015, that the summons for revocation of grant dated 23rd July 2013 and the summons for confirmation of grant dated 2nd July 2014 be heard simultaneously, by way of oral evidence. My view is that no revocation application existed as at 24th May 2015, for the appointment of fresh administrators, as per the orders of 26th February 2014, had the effect of disposing of the summons for revocation of grant, and what was then available for disposal was the summons for confirmation of grant, dated 2nd July

9. On 28th September 2016, the court stated that the orders of 26th February 2014 had not been complied with, for no confirmation of grant had been filed, which was incorrect, for such an application had been filed, dated 2nd July 2014, and was pending and directions had been given, on its disposal, on 24th May 2015. Anyhow, the parties were directed to file a summons for confirmation of grant, and one was filed on 11th October 2016, dated 6th October 2016. It was at the instance of Joshua Lugusa Gibendi. It is that application that I shall determine by way of this judgment. It identifies the survivors of the deceased as Joshua Lugusa Gibendi, Cassam Ogada Gibendi, Philoice Musimbi and Susan Kageha, being sons and daughters, and proposes that Kakamega/Lugovo/106 be shared out equally between them. I shall refer to Joshua Lugusa Gibendi as the applicant.

10. An affidavit of protest was filed on 20th December 2016, by Cossam Alwodi Gibendi, vide an affidavit sworn on even date. He avers that the deceased was their mother, and the applicant his brother. He avers that the deceased had six children, namely Peter Elam Gibendi alias Mwugusi, Cossam Ogada Gibendi, Joshua Lugusa Gibendi, Thomas Anzugila, Susan Kaguha and Phyloice Musimbi. Peter Elam and Thomas Anzugila are said to have died. Peter Elam was survived by a widow and children, but Thomas Anzugila was said to have had no heirs for he married, but did not have children, and his wife had deserted. He explains that the deceased was the only wife of their father, who had died before land adjudication. The deceased was inherited, and, out of that union, she got a daughter, Phyloice Musimbi, who he describes as a step-sister on account of having a different father from them. He states that the deceased had two parcels of land, one at Kivagala and the other at Lugovo. After land adjudication they became Kakamega/Lugovo/106 and Kakamega/Kivagala/1273, both of which were registered in the name of the deceased. At some point, Peter Elam and the applicant asked to be given their share of land to sell, to enable them purchase bigger parcels elsewhere. The deceased gave out Kakamega/Kivagala/1273, which was sold to Shem Abwova, as requested by the two brothers in 1973. Peter Elam bought land in Nandi, and moved out and settled there, with his wife and children. He asserted that Peter Elam was not given the land in Nandi, but he bought it after the sale of Kakamega/Kivagala/1273. The applicant moved to Matunda, Kitale, where he bought land and settled with his family. He avers that he was the one who remained on Kakamega/Lugovo/106, with Thomas Anzugila. When Thomas Anzugila died, he was left as the sole inheritor of Kakamega/Lugovo/106. He avers that his sisters, Susan Kaguha and Phyloice Musimbi, know about that, but were being intimidated by the applicant. He avers that the applicant only moved back to Kakamega/Lugovo/106 when the deceased was unwell, ostensibly to take care of her during her ailment. He would like Kakamega/Lugovo/106 to be devolved to him wholly. He has attached, to his affidavit, a document in Ki-Maragoli, with a translation in English, purported to be a sale agreement entered into on 15th August 1976, between the deceased and Shem Bwova, with regard to Kakamega/Kivagala/1273, together with some acknowledgements of receipts of money. There is also a copy of official search certificate for Kakamega/Kivagala/1273, showing it to be registered in the name of the deceased since 1973. I shall refer to Cossam Alwodi Gibendi as the protestor.

11. A second protest was filed in the matter on 20th December 2016, by Solomon Kakiyi Abwoba, sworn one even date, apparently supporting the affidavit by the protestor. The deponent avers that his late father, Shem Abwoba, had bought Kakamega/Kivagala/1273 in 1976 from the deceased, took immediate possession, and put up a permanent home there. He died leaving the family in possession, after which the land was subdivided between his sons, John Aluzimbi and Thomas Kedeng'e, who, in turn, put up their own permanent structures on the land. He avers that the said land belonged to his family. Although he alleges that he has attached a copy of the sale agreement to his affidavit, none is attached.

12. In response to the protest, the applicant filed an affidavit on 6th October 2017, sworn on 5th October 2017. He avers that their brother Peter Elam Gibendi and Thomas Anzugila pre-deceased the deceased. He avers that he did not know of the sale agreement of 10th August 1976, or any other with respect to Kakamega/Kivagala/1273. He asserts that the document placed on record did not bear the signatures of the parties, and, therefore, it did not meet the threshold of an agreement. He avers that he and Peter Elam were literate, and if they had sold any land, then they must have had entered into written sale agreements. He asserts that the land occupied by Peter Elam's family had been bought by Peter from his own resources, and not from proceeds of sale of Kakamega/Kivagala/1273. He avers that Kakamega/Kivagala/1273 was a mere 0.5 hectare, while the land at Nandi, Nandi/Kapkangani/922, was 3.4 hectares, and one could not sell the smaller portion to raise money to buy a larger portion as alleged. He avers that Peter Elam moved to Nandi in 1968/1969, and not in 1976, when it is alleged Kakamega/Kivagala/1273 was allegedly sold. He avers that Thomas Anzugila never married, and did not live at Maragoli. He further avers that the deceased was not inherited, and never remarried, and that Phyloice was their true sister, being a child of their father. He explains that the deceased and the first protestor were not in good terms. He denies filing for administration secretly, saying that it was the protestor who was uncooperative. He accuses the protestor of using all means to prevent him from accessing Kakamega/Lugovo/106. He points to the attempts by the protestor to forge documents to enable him take away Kakamega/Lugovo/106 from him. He would like Kakamega/Lugovo/106 shared equally between himself, the protestor, Phyloice Musimbi, Susan Kaguha and Azibeta Cheredi w/o Peter Elam. He has attached a copy of green card for Nandi/Kapkangani/922, showing that it was registered in the name of Peter Elam since 1983. Medical documents to show the violence meted out on him by the protestor. Other documents to show efforts at reconciliation.

13. Directions, on the disposal of that application, were given on 24th April 2017, for *viva voce* evidence.

14. The oral hearing happened on 27th November 2018. The protestor started. He testified that the deceased had four sons and one daughter, and left behind two parcels of land, Kakamega/Lugovo/106 and Kakamega/Kivagala/1273. He did not agree that Kakamega/Lugovo/106 be shared equally, asserting that the deceased had said that he would remain on Kakamega/Lugovo/106, as the other sons had moved out. He stated that the deceased had sold Kakamega/Kivagala/1273, and gave them the money to buy land elsewhere. They got their share and bought land in Nandi and Kitale. He said that his sister, Susan, was not entitled to a share of Kakamega/Lugovo/106. He said Kakamega/Kivagala/1273 was sold to the late Shem Walubomba, and should be given to his eldest son, Solomon Kakii. During cross-examination, he stated that Thomas was buried on Kakamega/Lugovo/106, and died unmarried and without children. He said Susan was married and lived at Kitale. He also said Musimbi was a child of the deceased, who was unmarried, and lived on Kakamega/Lugovo/106, in the house of the deceased, then again he said she lived in his house. He said he was not privy to the agreement of 1976. He said Elam was a teacher. He said he did not know the land reference number for the property that applicant owned in Kitale. He said that the applicant was the youngest son, and it was unusual, under custom, for such a child to inherit their mother's house. He said a portion of Kakamega/Lugovo/106 was utilized by the applicant. He said he was not aware that he had forged a court document. He confirmed that Elam moved to Nandi in 1969, while the sale happened in 1976. He said that his sisters were married and, therefore, they were not entitled to a share in the property.

He said he did not buy his own land, but the applicant and Elam did. He said that the fate of Musimbi and Susan should have been considered when Kakamega/Kivagala/1273 was being sold.

15. No other witness testified thereafter, and the parties agreed to file written submissions, which they did. I have read through them and noted the arguments made.

16. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

17. On administrators, there is no contest. The applicant and the protestor were appointed as such by the court, by an order made on 26th February 2014, and, therefore, the issue of them not being properly appointed should not arise. None of the parties has raised issue with how they have administered the estate, and, therefore, I have no basis for judging them on that. On whether they will administer the estate in accordance with the law upon their confirmed, I note that they have been squabbling and do not appear to get along. I doubt whether they would get along. However, there is little choice, since there is sibling rivalry and each would like to administer the estate. Depending on what else I may say hereafter, it may be necessary to have all the children of the deceased, who are alive, involved in the administration..

18. The principal purpose of confirmation is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined.”

19. Has the proviso to subsection (2) of section 71 been complied with? It is now common ground that the deceased had four surviving children, being the applicant, the protestor, Susan and Phyloice. Two sons are dead, one was survived by a family and the other was not. The five are the ones entitled. Whether all will get a share will depend on my conclusions hereafter. So far, there is adequate disclosure, and compliance with the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules, so far as children and family are concerned.

20. The proviso to section 71(2) of the Law of Succession Act talks about ascertainment of beneficiaries and also of their shares. Shares refer to distribution of the assets of the estate. Before distribution is done, there must be ascertainment of the assets. It is common ground that the deceased herein died possessed of Kakamega/Lugovo/106 and Kakamega/Kivagala/1273. What emerged from the oral hearing is that both are registered in the name of the deceased, but it is alleged that Kakamega/Kivagala/1273 was sold to a third party in 1976. 1976 is a long time ago. It is not clear why it has never been transferred to the buyers all those years.

21. The applicant would like the two assets shared equally between himself, the protestor, their sisters and the family of their late brother, Peter Elam. The protestor would like Kakamega/Kivagala/1273 given to the alleged buyer. The family of the buyer never came to court to testify, in support of its claim to the property. The protestor would like to have Kakamega/Lugovo/106 devolve wholly to himself. He says his brothers moved out, after Kakamega/Kivagala/1273 was sold, and after they were given the sale proceeds to buy land elsewhere, which they did. It would appear that the late Elam moved out in 1968/1969, long before the alleged sale in 1976. He cannot have bought the subject

land with the moneys raised in 1976. No evidence was provided that the applicant owned land at Kitale, and that he lived there. The protestor says his sisters are not entitled to inherit, because they are women and are married. Well, the law does not say so. The deceased died in 2012, long after the Law of Succession Act had come into force. She died intestate, and her estate fell for distribution under Part V of the Law of Succession Act. That law does not discriminate between sons and daughters. It does not even consider marriage as a factor in distribution. There is, therefore, no legal basis at all for exclusion of the daughters of the deceased on grounds of their gender and marital status. It is said Musimbi was not the biological child of their father. The answer to this is that the estate herein is of their mother, the deceased, and not their father. The property is in the name of their mother. Musimbi is a child of their mother, whether she has the same father with the applicant and protestor is neither here nor there. She is entitled equally to the property like everyone else, by dint of section 38 of the Law of Succession Act, which provides as follows:

“38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

22. Creditors, and others who claim the estate is liable to them in one way or another, fall within the category of persons beneficially entitled to a share in the estate, who should be ascertained and allocated shares, in terms of the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules. Such creditors and liabilities would be persons or entities that dealt with the deceased during his lifetime, or with his personal representatives upon representation being granted to them. The protestor has hoisted the late Shem Abwoba as one such a creditor or liability. He got one of the sons of Shem Abwoba to swear an affidavit, averring that his father had bought Kakamega/Kivagala/1273 in 1976. The said son of Shem Abwoba did not testify to breathe life to the averments in his affidavit. It could be that he was a trojan horse for the protestor. There are, however, documents on record, which suggest that there was a transaction of one sort or other involving their father and the deceased, over Kakamega/Kivagala/1273. What I remain wondering is why it has taken them so long to have the conveyance done.

23. I shall not venture to distribute Kakamega/Kivagala/1273, on grounds that there is a contest as to whether it is available for distribution, on account of the alleged sale. I have no jurisdiction, sitting as a Judge of the High Court, to determine whether the alleged sale was valid or not. That is an issue as to title to land or ownership of land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over such matters, while Article 162(2) vests that jurisdiction on the Environment and Land Court. The parties are advised to place the issue as to who is entitled, as between the estate and the family of the late Shem Abwoba, to Kakamega/Kivagala/1273, before the Environment and Land Court for determination, before the same can be distributed by the probate court, if at all.

24. So, how should the property be distributed? Since there is no dispute on ownership of Kakamega/Lugovo/106, and no evidence that any of the children benefitted from lifetime distribution, or gifts, which the court could reckon under section 42 of the Act, I shall distribute the same in terms of section 38 of the Act, equally between Joshua Lugusa Gibendi, Cossam Ogada Gibendi, Philoice Musimbi, Susan Kageha and the estate of the late Peter Elam. The family of the late Elam shall have to initiate succession proceedings for distribution of their portion amongst themselves thereafter.

25. In conclusion, I shall make the following orders: -

- a) That the Summons for Confirmation of Grant, dated 6th October 2016, and filed on 5th October 2016, is hereby allowed, and the grant confirmed;**
- b) That the estate shall be distributed in terms of paragraph 24 hereabove;**
- c) That a certificate of confirmation of grant shall issue in those terms;**
- d) That each party shall bear their own costs, this being a family matter;**
- e) That as the estate is situate within Vihiga County, this matter shall be transferred to High Court at Vihiga, and the certificate of confirmation of grant to be issued under (c), above, shall issue out of the cause to be opened at Vihiga upon the transfer; and**
- f) That any party aggrieved, by the orders made herein, has leave to move the Court of Appeal, appropriately, within twenty-eight (28) days.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....10thDAY OF.....
DECEMBER.....2021**

W MUSYOKA

JUDGE