



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

MISC. SUCCESSION CAUSE NO. 448 OF 2009

IN THE MATTER OF THE ESTATE OF SARATUKI WAMBULULU (DECEASED)

BETWEEN.

WEPUKHULU SARATUKI.....PETITIONER

VERSUS

JOSECK SIMIYU PRICHANI (also known as

JOSECK SIMIYU SARATUKI..APPLICANT

JUDGMENT

Saratuki Wambululu the deceased died in 1963. He had one wife Kezia and one Son. Wepukhulu Saratuki; Joseck Wepukhulu is the father of Joseck Simiyu Saratuki the objector/applicant.

Saratuki Wambululu had a parcel of land known as Kimilili/Kamukuywa/409 measuring 33 acres. Upon his death, Wepukhulu Saratuki filed Succession Kimilili Succession Cause No. 15/1970 and was appointed the Administrator. He then transferred the deceased Parcel No. Kimilili/Kamukuywa/409 to his name and became the Registered owner.

The applicant Joseck Simiyu Prichani alias Joseck Simiyu Saratuki then filed this application dated 4.2.2009 seeking the following reliefs;

a. That the Grant of letter of administration issued on the 7/8/1970 in the District Magistrate's Court at Kimilili be revoked or annulled.

b. Costs.

The grounds of revocation or annulment are;

a. That the grant was obtained fraudulently by making a false statement or by concealment from court something material to the cause.

b. That the grant was obtained by means of allegations of a fact or law to justify a grant.

c. That the District Magistrate's court Kimilili lacked jurisdiction to grant the orders.

d. That the grant is yet to be confirmed.

e. That the Petitioner has failed to diligently administer the estate.

By consent the application was heard by viva voce evidence. The objector/applicant Joseck Simiyu gave evidence. He testified that he is the son of Wepukhulu Saratuki the Petitioner. He further testified that his father, the Petitioner is the only son of the deceased. He testified that he has 7 brothers. He stated that the deceased, who was his grandfather arranged for his circumcision according to Bukusu customary law.

In 1963 at time of circumcision the grandfather gave him the whole of the Parcel of land Kimilili/Kamukuywa/409 for the reason that he is the one who circumcised him and also had a special relationship as the objector had been breast-fed by the deceased's wife – his

grandmother. Further the deceased told him he had disowned the Petitioner because he was hostile to him and therefore he didn't want the Petitioner at his home, and he had bought him land in Mt. Elgon. The applicant was then 13 years old. The deceased died in 1963 and in 1970, the petitioner filed a Succession case in respect of the deceased property and Kimilili/Kamukuywa/409 was registered in his name. He now prays that this court annuls and/or revokes the grant on the grounds that it was obtained fraudulently. He confirmed that his mother had 7 other children who are now staying in that parcel of land.

The applicant/objector called Pw2 Henry Makokha and Gilbert Simiyu Miyeko all aged over 70 years old who testified that the deceased had given the land to the applicant/objector.

Julius Wepukhulu Saratuki the Petitioner testified that Joseck the applicant is his son. The deceased Saratuki Wambululu was his father. The deceased had wife, Kezia Naliaka who was the mother of the Petitioner. He testified that the Applicant was born in 1950 but it is not true that he grew under the care of deceased but deceased circumcised him as per Bukusu Customary law. He deponed that he took care of the applicant needs from Primary upto University. He further deponed that upon the death of his father the deceased, it is the Petitioner who was the immediate beneficiary and it is for that reason the he filed Succession Cause in 1970; in respect of the estate of the deceased.

Counsel for the parties filed respective written submission. Bw'Onchiri for the applicant submitted that the issues for determination in this application is (a) What is the law applicable (b) Was African customary law applicable and (c) If so is the applicant/objector entitled to a share of the estate of the deceased. Counsel submitted that the law of Succession Act came into force on 1.7.1981. That Section 2(2) of the act provides that in the event when a person died before the commencement of act, the law applicable is customary law in this case Luhya Customary Law. He submitted that from the evidence of the witnesses, the deceased had taken in the applicant as his son and had given the parcel of land to the applicant.

Mr. Makali for the petitioner submitted that the main issue for determination beside the law applicable is whether it has been established that the grant was obtained by fraud and whether sufficient ground has been laid for this court to revoke and/annul the grant. Counsel for the Petitioner submits that the applicant has come to court for revocation of the grant. He submits that the law of Succession Act does not apply in this case as the deceased died in 1963 and the law of Succession Act came into force on 1st July 1981. Finally Counsel submits, that even if it is customary law that would apply, the court should take judicial notice that under Bukusu Customary Law, sons inherit land from their fathers nor their grand-parents. The applicant can therefore only claim land from his father the Petitioner and not his grandfather the deceased.

From the evidence these following are not contested;

1. It is not the dispute that the deceased person to whom the proceedings related SARATUKI WAMBULULU is the father to the Petitioner and a grandfather to the Objector. The deceased died in the year 1963 before the current succession Act was enacted in 1981.
2. There is equally no dispute that the deceased was registered as the owner of L.R. No. KIMILILI/KAMUKUYWA/409. There is also no dispute that the Petitioner herein moved the court pursuant to the then provisions of **Section 120 of the Registered Land Act vide KIMILILI SUCCESSION CAUSE NO. 15 OF 1970** as a consequence of which L.R. No. KIMILILI/KAMUKUYWA/409 was registered in his names. He still remains the registered proprietor to date. There is also no dispute that the Objector is a son to the Petitioner.

On the issue of the law applicable, it is not indispute that the deceased died in 1963. It is also not disputed that the petitioner filed Kimilili Succession 15/70 and on 7.8.10.70 the court ordered that the property of the deceased to devolve to the petitioner as the son of the deceased.

The deceased died in 1963, before the law of Succession Act came into force on 1st July 1981. Section 20(2) of the act provides;

“The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act” see decision in:-

In the matter of the estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alais Mbura (Deceased) Nairobi High Court Succession Cause No. 935 of 2003.

Before the law of Succession came into force courts in Succession Causes would issue a Certificate of Succession and not a grant in MUSYOKA J in Re Estate of NDUATI MBUTHIA (Deceased) 2015 eKLR held as follows:

“...was the Certificate of Succession issued under Section 120 of the Registered Land Act equivalent to a grant of representation? I think not. A grant of representation appoints a personal representative and vests the person so appointed with powers to administer the estate of the deceased with the mandate to eventually distribute it. The Certificate of Succession envisaged in Section 120 of the Registered Land Act did not appoint a personal representative and the same did not constitute the person named therein as proprietor or the administrator of the estate of the deceased...”

From the provisions of the Act, it is clear that the law of Succession applicable in respect of the estate of person who died before the commencement date of 1st July 1981 will be the written laws then or customary law applicable to the deceased at that time in this case is not contested that the deceased was a Luhya and by Section 3(2) of the Judicature Act, he was subject to the african customary law in personal law which provides;

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary law in civil cases

in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue regard to technicalities of procedure and without undue delay.

The applicant in his evidence, seeks this court to revoke the transfer of land vide Kimilili Succession No. 15/70. He contends that the whole land Kimilili/Kamukuywa/409 measuring 33 acres was given to him by his grandfather the deceased to the exclusion of the petitioner who was his son. He therefore contends that having been given the land, it was an act of fraud for the petitioner to file succession and have the property registered in his name. He called witnesses to support his contention that the land was given exclusively to him. He explained the reasons why deceased gave him the land as there being a special relationship, as the applicant was breast-fed by the wife of deceased, his grandfather; the deceased is the one who circumcised him, and that the petitioner used to assault the deceased, who therefore cursed him and did not want him on his land.

The petitioner testified that the applicant was born in 1951 and the deceased died in 1963 when applicant was 12 years old. He admits he had bought land in Mt. Elgon which he later sold. He testified that he is the one who took care of applicant and paid for his fees from Primary to University. He stated that he had no bad blood with the deceased as to disinherit him. He testified he was the only son of the deceased; and upon his death was the natural heir of his estate.

Though the applicant contends that he was given the land by his grandfather the evidence of his witness is that the grandfather expressed the wish that the applicant stays with him. Reliance has been placed on the fact that deceased is the one who circumcised the applicant. That is the traditional role of a grandfather in respect of his grandson according to Bukusu Customary Law. That does not entitle him to become the heir of the estate to the exclusion of everybody else. It is not contested that the Petitioner was the only son of the deceased. The land in question was ancestral or clan land to be passed to the children. Deceased not displace his son and give all the land to a 12 year old grandson and not other grandchildren.

For an applicant to succeed in application like this, he must demonstrate that he was the one entitled to the estate and that there was fraud by the petitioner. In this case the applicant is not the son of deceased. The deceased being subject to customary law would upon death his estate to pass to his sons. The children of the sons, i.e. the grandchildren will get the estate from their father. I therefore find that in the absence of any other son of Saratuki Wabululu (deceased), the property Kimilili/Kamukuywa/409 Legally devolved to him as the only beneficiary. The applicant being a son of the Petitioner will legally obtain his share from the Petitioner; for which the petitioner will have no right to deny him.

In the result, I find no merit in this application which is hereby dismissed with costs.

Dated and Signed at Bungoma this 3rd day of March, 2020.

S.N. RIECHI

JUDGE