



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 62 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE JEREMIAH KITI JUMBA (DECEASED)

ERICK KARANI JUMBA.....PETITIONER/APPLICANT

AND

GEORGE KITI JUMBA.....RESPONDENT/OBJECTOR

JUDGEMENT

1. The deceased herein died on the **9th day of June, 2011** and **ERICK KARANI JUMBA** was appointed as the Administrator of the estate on the **28th day of November, 2011**. On the **7th day of May, 2014** he applied for the confirmation of the said grant.
2. According to the Applicant the deceased died intestate leaving behind the following children and or dependants, namely, **George Gidei Jumba, Margaret Kamidi, Elizabeth Jumba, Erick Karani Kiti, Edward Jumba, Jean Kiti, Eva Mmbone Kiti, Alex Chagwi Jumba, Millicent Adira, Lumumba, Festus Mukono, Monicah Ngachi &, Cleophas Ngachi**.
3. The deceased left behind the following assets, namely **WAITALUK/MABONDE/BLOCK7/KOYO/147, WAITALUK/MABONDE/BLOCK 7/KOYO/99** and some money at Equity Bank.
4. The Applicant/Petitioner's application was opposed by his brother **GEORGE KITI JUMBA** vide an affidavit of protest dated **3rd June 2014** in which he inter alia argued that the beneficiaries did not consent to the mode of distribution proposed by the Applicant and was not in line with the clan wishes arrived to on **14th December, 2012**.
5. The court by reason of the objection ordered that the matter be disposed by way of *viva voce* evidence. The parties did file various rival affidavits which they relied on as well their oral evidence. Their evidence can be summarised as hereunder.
6. The respondent **GEORGE GIDEI JUMBA** testified that he was the first born son to the deceased and that as per the decision of the clan he was entitled and was indeed given the opportunity to guide the family affairs.
7. He said that the main argument was in respect to Land Parcel number **WAITALUK /MABONDE/BLOCK 7/ KOYO/9** measuring 2.9 Ha registered in the name of **ZIPPY KAVERE JUMBA**, his wife. He testified that the deceased sold the land to him and he produced the sale agreement to that effect. Subsequently he decided to transfer the land to his wife by way of gift and she obtained the title on **15th July, 1997**.
8. He testified that he has all along occupied the said land and therefore contrary to the assertion by the Petitioner he was entitled to the deceased estate as of right and being the son to the deceased.
9. He called **PW2 JOHANA MUSYEKA MBIRISIA** a member of the **Vavuluti** clan, the subtribe of the Luhya tribe. He said that he was involved in the affairs of the estate all through after the deceased death and that he was well versed with the customs of the clan. He said that the eldest or the last born son would always be left to inherit the portion of the deceased homestead.
10. He said that he participated in the ceremony called **Luvego** which is always done after the deceased has been buried. He said that in the meeting they agreed that the wishes of the deceased ought to be honoured. He learned during the meeting that the deceased had sold part of the land to the Objector.

11. After the objector closed his case, it was the turn of the petitioner who testified that the deceased could not have sold the land to the Objector without their knowledge. He said that the deceased was a retired teacher and was carrying out some wholesale business and therefore he was a person of means.

12. He said that the deceased had occupied and build the land and he produced some photos to that effect. He also identified some document examiners report which indicated that the signatures on the purported sale agreement between the deceased and the objector in respect to land number **WAITALUK/MABONDE/BLOCK 7/KOYO/9** above was a forgery.

13. As regards the Luvego meeting he said that he did not attend the same as he was invited as a guest and not a beneficiary. That no member of the family was aware or ever consulted on the agreement between the Objector and the deceased. He denied that the Objector has ever build on the said parcel of land.

14. He concluded that the Objector should never benefit on the remainder of the estate as suggested by the clan for the simple reason that he already had Parcel Number 9. He denied that the deceased had disowned him as per exhibit 5 written in 1997 and that in any case the same had been overtaken by events.

15. The Respondent after several adjournments closed his case and did not call any other witnesses.

ANALYSIS AND DETERMINATION

16. The court has perused the submissions by the counsels on record and wishes not to reproduce the same here for want of time. There is no dispute that the Objector and the Petitioner and all the mentioned beneficiaries are all the deceased children herein. In terms of order of inheritance therefore, they all have equal chance and opportunities.

17. The main issue in dispute is in regard to land Parcel Number **WAITALUL /MABONDE/ BLOCK 7/KOYO/9** owned previously by the deceased. The objector argued that it no longer formed part of the estate as the same was sold to him by the deceased. He went ahead and produced the sale agreement dated **1st March, 1991** between him and the deceased. (**exhibit D1**)

18. He also produced **exhibit P2** the letter by the deceased to the Kibagenge farm officials informing them that he had sold the 8 acres of his shares in the then L.R No. 5324 to the Objector.

19. **Exhibit P3** was a free **gift agreement** by the Objector giving the land to ZIPPY KAVERE his wife on the 10th day of March, 1993. The same just like the agreement above dated 1st March, 1991 was witnessed by a magistrate.

20. It then appears that eventually on the **15th July, 1997** the said ZIPPY KAVERE JUMA obtained title to the land. There are also list of the farm records showing the names of the owners and the deceased name was deleted in favour of Zippy.

21. The Respondent has argued that the documents produced above were a forgery. He sought the services of a document examiner. Save that the same were contained in the affidavits filed on record the marker of the same was not called to produce despite several series of adjournments.

22. The court has carefully perused the said exhibits and respectfully, and in the absence of any evidence of forgery I am not persuaded that they were forged. The document examiner was not called to testify and to be cross examined on his report. To simply place it in an affidavit was not sufficient. The report should be subjected to cross examination and merely placing it on record and submitting that the court should admit it is not tenable.

23. The other reason is that it appears that the transaction took place almost 20 years before the deceased died. If there was any fault on the part of the objector, the deceased would have known even at the level of obtaining the title.

24. The farm register was altered in favour of the Objector and by extension his wife. It is presumed that the farm officials after receiving the letter of instructions dated 31st August, 1987 must have proceeded to carry out the changes and if there was any fraud they should have notified the deceased.

25. The court has also seen the minutes of the Luvego meeting of 14th December, 2012 where they have indicated that the money used to buy land from the deceased was from a sale of Mombasa land by the Objector's wife. That position was not disputed just like the fact that the Objector has occupied the suit land all along without any let or hindrance from the deceased or any of the beneficiaries.

26. In the premises, the provisions of Section 42 of the Succession Act does not apply herein. The same states that;

Where—

“

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of [section 26](#) or [section 35](#) of this

Act,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

27. This was not a gift but a direct sale. It was done way before the decease demise and the purchaser did obtain title some years before he died as well. By all standards the same cannot be said that it was a gift to the objector. He paid a sum of kshs. 120,000 which the deceased acknowledged as well as the then provincial administration and the farm directors and that is why the changes were effected in the register of the farm and title issued later.

28. In the premises, the only available properties of the estate for inheriting by the heirs are Parcels Numbers 99 and 147 indicated above.

29. What should then be the formular for dividing the same? The provisions of Section 38 of the law of Succession Act provides guidance. It provides thus;

“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.”

30. The Respondent’s proposal was to side-line the Objector for the reason that he already had Parcel Number 9. By virtue of this court’s finding that the same does not form part of the estate, he his therefore entitled under the provisions of Section 38 above.

31. Section 38 afore stated is however not cast on a stone. The court must be guided by other intervening factors for instance the renunciation by the beneficiaries and other customs which are not repugnant to justice and morality.

32. The court has perused the application for the confirmation of grant by the Petitioner /Administrator as well as the replying affidavit dated 3rd June, 2014. It appears that clearly there was objections based on the fact that the Objector was not supposed to inherit the remainder of the estate because of the reasons advanced above. Now that the court has refused to go with the Petitioner’s contention, it is only fair that there should be a fresh application for the confirmation of the grant taking into consideration the courts findings.

33. It is also necessary to reapply afresh for the reason that some of the beneficiaries did not sign the consents to accept or renounce their rights over the estate. Even if they may have no interest, it is necessary that they formally express so.

34. Taking into account the factors obtaining herein, this court shall therefore add the objector GEORGE KITI JUMBA to be a join Administrator to the estate herein together with the Petitioner.

CONCLUSION

A) It is therefore found that Land Parcel Number WAITALUK/MABONDE BLOCK 7/ KOYO/9 does not form part of the estate herein.

(B) The Objector has equal rights to inherit the share of the estate herein just like the rest of the beneficiaries.

(C) The Objector GEORGE KITI JUMBA is hereby enjoined as an Administrator to the estate together with the Petitioner ERICK KARANI JUMBA.

(D) Either of the Administrators be at liberty to apply within the next 45 days for the confirmation of the grant.

(E) Costs shall be in the cause.

Dated, signed and delivered in open court at Kitale this 8th day of April, 2020.

H. K. CHEMITEI

JUDGE

8/04/2020