



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 277 OF 2008

IN THE MATTER OF THE ESTATE OF LAWRENCE KINOTI ZAKERY (DECEASED)

ANGELA GATUMI MUCHEKEPETITIONER/RESPONDENT

VERSUS

PATRICK KABURUOBJECTOR/APPLICANT

RULING

1. **Lawrence Kinoti Zakayo** (the deceased) died on 20/5/2007. The chief in his letter dated 4/3/2008 indicated that the deceased left LR. NKUENE/MITUNGUU/860 and NKUENE/MITUNGUU/861 as his assets and was survived by the following;

- 1) Angela GatumiMuceke – wife
- 2) Dorcas Karwitta- daughter
- 3) Rosemary Kathambi- daughter

2. Angela Gatumi petitioned for letters of administration intestate and was granted on 20/5/2007 and thereafter the grant confirmed on 29/2/2012. On 22/4/2014 the objector filed summons brought under section 76 of the Law of Succession Act and Rule 44 and 43 of the Probate and administration rules seeking for the revocation of the confirmed grant dated 29/2/2012.

3. The application was based on the grounds as per the applicant's affidavit where he stated that the deceased was his blood brother and that upon his death the petitioner neither cared for the deceased nor did she attend the funeral. The petitioner also filed this matter secretly and without regard to other beneficiaries and though the petitioner was once married to the deceased never bore any children by the deceased and therefore wants to acquire the land fraudulently.

4. The application was heard vide viva voce evidence where **OW1 PATRICK KABURU ZAKAYO** testified that he is the brother of the deceased herein who was buried according to Kimeru custom. He applied and was issued with the certificate of death the certificate of death. The deceased before his death sold 1 acre to Elphas Albert Arithi but died before he could transfer the same. The petitioner herein came after the death of the deceased and claimed that she had two daughters with the deceased and introduced a list of stranger to his estate. According to the meru culture and traditions the younger mother should be inherited by his older brother and in this case if the petitioner was his late brother's wife he would have inherited her and took her children to be his. The petitioner alleges that the deceased left two children but has not produced any birth certificate to support her claim.

5. **OW1** added that he wanted to restore NKUENE/MITUNGUU/861. He has his parcel NKUENE/MITUNGUU/3096 and they are three brothers and each was given their own land. He added that the petitioner was not married to his brother as no dowry was paid.

6. **OW2 HENRY MWEBIA** told the court that he knew the deceased herein as he was his brother. The petitioner herein was never married to his brother as is married to a certain Mr. Kiria. The deceased herein died in his home and he and OW1 reported the matter. The petitioner never participated in the funeral of the deceased.

7. **OW3 EVILINE NAITORE ZAKAYO** told the court that the deceased and objector are her brothers. The deceased herein never had a wife nor left any children. On 20/5/2007 she went to serve the deceased breakfast as usual but when she called him he did not respond and when she touched his body it was cold. She called her mother and brothers who confirmed that he had died

8. **OW4 JAMES KINYUA** who was a neighbor to the deceased told the court that the deceased used to lease his land to him for family activity. He recalled that the deceased never married nor did he leave any issues. The petitioner herein came with a court order to evict him and all the leasees and they move out of the land. He knows the petitioner herein as a business lady to whom he used to sell farm produce and

is surprised to see her posing as the deceased wife.

9. **PW1 ANGELA GATUMI** testified and told the court that the deceased herein was her husband and she got married to him in 1987 under Kimeru customs. They lived in his home that was given to him by his mother and bore him two daughters namely Dorcas Karwitha and Rosemary Kathambi who are both adults. They lived happily with her husband until he died. They buried the deceased in the matrimonial home and later went to the area chief and was issued with a letter to file this succession cause. The Objector is her brother -in -law and was given his own parcel which he sold and went away. Henry Mwebia zakayo, evelyn Naitore Zakayo, Patrick Kaburu and Lawrence Kinot were all given their share and her mother in law was left with the balance.

10. **PW2 SAMSON KINYUA** told the court that the deceased was his neighbor and the petitioner is indeed the wife of the deceased who sired him 2 children. The petitioner lives in the land that her husband was living in and objector had his respective parcels which were given to him by his mother. Upon the death of the deceased the objector wanted to inherit the petitioner which was not possible as his intention was to take the deceased land. Upon the death of the deceased herein he was the one who organized the burial and the petitioner gave them the place where he was to be buried.

11. **PW3 CICIRIA KANGARIA KIRUGI** mother to the petitioner told the court that the petitioner and the deceased were married through Meru customary rites. The petitioner was married when she was in primary school and went to live with the deceased in his house. The deceased paid dowry in full and they were blessed with 2 children.

12. I have carefully perused through the application, affidavits, submissions and the record in entirety and the issue to be determined is **whether to revoke/annul the grant confirmed on 9/5/2011?**

13. It was the Objector case that the Petitioner kept the Objector in the dark until she filed NKUBU CMCC No. 74 of 2013 seeking eviction orders against Aliphan Mbae Arithi. It was his case also that the Petitioner did not prove that her two daughters were sired by the deceased as she did not present their birth certificates. It was his averment in his testimony that if indeed she were his brother's wife he would have inherited her as per the Kimeru custom.

14. On the other hand the petitioner in her testimony argued that she was involved in the deceased funeral as a matter of fact she was the one who indicated where he would be buried. Therefore all claims by the objector are false. It was her testimony that she married the deceased in 1987 and bore him two daughters. The petitioner's testimony was supported by PW2 and PW3 and corroborated by the chief's letter dated 4/3/2008.

15. Section 76 of the Law of Succession Act deals with the issue of Revocation or Annulment of grant and provides that;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

16. On perusal of the record the Objector herein in his affidavit dated 22/4/2014 indicated that the Petitioner was once the wife of the deceased but in his testimony indicated that she was not. The Objector has made contradictory statements and in light of this it is my view that the Objector was unable to prove to this court that the grant made to the deceased widow should be revoked and/or annulled

17. Consequently, the application dated 22/4/2014 is dismissed with costs for want of merit.

HON.A. ONGINJO

JUDGE

JUDGEMENT DATED AND DELIVERED AT MERU VIA EMAIL THIS 21ST DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONGINJO

JUDGE