



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION CAUSE NO 584 OF 2014

IN THE MATTER OF THE ESTATE OF INZEI MUSINDAI (DECEASED)

JUDGMENT

1. The matter involves the estate of the deceased herein, Inzei Musindai.
2. Representation to the estate herein was obtained by the petitioner herein. He filed an application dated 4th April 2016, seeking to have the said grant made to him confirmed. He proposed that the estate of the deceased, Kakamega/Igukhu/501, measuring approximately 0.38 hectares, be granted to him as sole beneficiary. Protests were raised to the said application, seeking that the estate be distributed amongst the protestors to the exclusion of the petitioner.
3. The protestors' position was that they were the children of the deceased. They testified that the petitioner herein was their uncle, and that he was laying claim to land which belonged to their father. They produced as evidence a search certificate that indicated that the land belonged to the deceased, their father. They further stated that their uncle had been warned, vide a ruling of the Ikolomani African Court, not to meddle with the land which belonged to the deceased. They contended that the petitioner had inherited a bigger portion of land from their grandfather and thus he had no right on the deceased's estate. The petitioner stated that the said land belonged to him as compensation as he had sued for trespass on the land and won the case. He claimed that the protestors had bought land elsewhere and thus they had no claim over the deceased's land.
4. The issues that have arisen from these proceedings for determination are whether or not the parcel of land in question constitutes the estate of the deceased herein, who the legal heirs of the deceased are, and how the property is to be distributed.
5. According to section 3 of the Law of Succession Act, Cap 160, Laws of Kenya, "estate" is defined to mean "the free property of a deceased person," while "free property," in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased was legally competent to dispose of during his lifetime, and in which by that time his interests had not been terminated.
6. In determining whether an asset forms part of the estate, the courts are to be guided as in *Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others* (2017) eKLR, where it was stated that: -

"This Court's view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution."

7. In *Re Estate of Job Ndunda Muthike (Deceased)* [2018] eKLR it was observed that -

"In succession matters where the court is called upon to determine whether a property in question belongs to the estate of the deceased, the Court must be satisfied that that is the position so as to avoid a possibility of wrongfully incorporating a third party's property into the estate as that may lead to serious consequences."

8. It was the petitioner's position that Kakamega/Igukhu/501 belonged to him and not the deceased. He did not produce anything to prove that the land belonged to him and not the deceased. The protestors, on their part, produced as evidence a search certificate that showed that the property was registered in the names of the deceased. They also produced as evidence a ruling of the Ikolomani African Court, which stated that the land belonged to the deceased, and that the said court had warned the petitioner to stay away from the land. The assertion by the petitioner that the said property was his therefore not supported by any evidence

9. It was held in *In the Matter the Estate of Sophia Watare Gachigua – Deceased* [2016] eKLR that: -

“In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist...I am also aware that proof in cases of this nature cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the person alleging and there must be clear and convincing evidence and absence of suspicious circumstances surrounding the case. For example, availing documents to confirm how the shares were acquired or the share certificates, or evidence of dividend payment, or the transfer instruments purporting to transfer shares to the petitioner could have shed light on the issue.”

10. The petitioner had the burden to prove the allegation that the land was his and that he had a claim over the said land.

11. Section 26(1) of the Land Registration Act, No. 3 of 2012 states that: -

‘The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon registration or by transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party, or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

12. The petitioner herein did not prove any fraud neither did he show that the land had been transferred to him by the deceased. He also did not produce any documents to back up his claim over the land. It is thus my finding that the petitioner had utterly failed to prove his claim on the land and thus his claim must fail. Further, the protestors proved that the land belonged to the deceased and thus it formed part of the estate.

13. It would appear that the deceased herein died intestate, as there was no allegation that he had made a will, and no will was placed before the court. The deceased herein died on 19th February 2012, long after the Law of Succession Act had come into force on 1st July 1981. His estate, therefore, fell for distribution in terms of the provisions of the said law. He died intestate and therefore the relevant dispositive provisions are in Part V of the Act. He was survived by children but without spouse. The devolution in intestacy in such circumstances is governed by section 38, which states as follows -

“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.”

14. Section 71 of the Law of Succession Act provides that in cases of intestacy, like in the instant case, ‘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.’

15. The petitioner herein was the brother to the deceased while the objectors were the sons to the deceased. It is clear therefore that the protestors enjoy statutory preference as the heirs to the estate of the deceased over the petitioner. That being the case the petitioner could only benefit from the estate if he sought to prove that he was dependent on the deceased during his life time vide an application properly brought under section 26 of the Law of Succession Act, which application was not brought.

16. What is more is that the petitioner herein did not include the protestors herein as beneficiaries or survivors of the deceased. He stated, in his affidavit in support of his application for confirmation of grant, that he was the sole survivor.

17. Section 76 of the Law of Succession Act provides for revocation of grants of representation, and states as follows in that regard: -

“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 ... ‘

18. The grant herein is available for revocation on account of the material non-disclosure on the petitioner’s part, and also on account of the exclusion of key beneficiaries of the deceased from the succession proceedings. The petition had been filed contrary to the provisions of section 51 (2) (g) of the Law Succession Act and Rule 7(1) Probate & Administration Rules, which require that the petitioner lists all the survivors of the deceased. The petitioner herein being the brother of the deceased by taking everything from the estate of his brother to the exclusion of the deceased’s sons meant that the rightful heirs would be disinherited.

19. In *Re Estate of Wahome Mwenje Ngonoro Deceased* [2016] eKLR it was said that –

“The deliberate failure by the Respondent to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in view in bad faith and amounts to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant. The applicant did not disclose that the deceased's widow lives in the same land, hence she was not only a lawful beneficiary but a person interested and entitled to benefit from the deceased estate. Further, the omission to disclose her presence and interests was bound to adversely affect her interests. I am persuaded that the Respondent concealed crucial information to the court, information which could have influenced the court in issuing the grant to him.”

20. From the above, it is clear that the petitioner's actions were in abuse to the court process. This was because he intentionally excluded the rightful beneficiaries in his petition and went ahead to award himself the entire estate of the deceased thus totally disinheriting them. It is a principle of equity that he who comes to equity must do so with clean hands. The petitioner herein acted in bad faith.

In view of everything that I have stated above, I shall dispose of the application before me in the following terms -

- a) That I declare that the asset known as Kakamega /Igukhu/501 constitutes the estate of the deceased person in this matter;
- b) That I declare that the petitioner herein is not entitled to a share in the instant estate;
- c) That the rightful heirs and survivors of the deceased who are entitled to a share in the estate are the protestors herein;
- d) That pursuant to section 76 of the Law of Succession Act the letters of administration intestate made to the petitioner herein on 21st July 2015 is hereby revoked, and the grant issued herein on 25th September 2015 is hereby cancelled;
- e) That pursuant to section 71 of the Law of Succession Act, I do hereby appoint Ernest Khayadi Inzeyi, Saulo Muteyi Inzeyi, Johnson Lumati Inzeyi and Julius Shikutwa Inzeyi administrators of the estate of the deceased;
- f) That a grant of letters of administration intestate shall issue to them accordingly;
- g) That the estate of the deceased shall be distributed equally between Ernest Khayadi Inzeyi, Saulo Muteyi Inzeyi, Johnson Lumati Inzeyi, the estate of the late Alfred Bulemi Inzeyi and Julius Shikutwa Inzeyi in keeping with section 38 of the Law of Succession Act;
- h) That the grant made in (d) above shall be confirmed in those terms, and a certificate of confirmation of grant shall issue accordingly;
- i) That the protestors shall have the costs of the application; and
- j) That any party aggrieved by the orders made herein shall be at liberty to challenge the same at the Court of Appeal within twenty-eight (28) days.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF February, 2019

J. NJAGI

JUDGE