



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 436 OF 2014**

**IN THE MATTER OF THE ESTATE OF MUHATI AMENENA (DECEASED)**

**AND**

**GABRIEL IMBAYI SHILASI.....PETITIONER**

**VERSUS**

**LOICE ISOMBI ANENABI.....PROTESTOR**

**R U L I N G**

1. The petitioner herein has filed summons for confirmation of grant dated 16<sup>th</sup> May, 2016 seeking that land parcel No. Isukha/Lukose/517 be distributed as follows:-

Gabriel Imbayi Shilasi - 1.75 Acres

Zablon Lumala Limula - 1.5 Acres

2. The protestor on her part has filed an affidavit of protest dated 9<sup>th</sup> September, 2016 protesting against the proposed mode of distribution of the estate by the petitioner. She contends that she and other beneficiaries of a similar hierarchy to that of the petitioner were locked out of the distribution of the estate. She proposes that the estate be shared equally between –

Asafa Shinoko Likhanga

Jenifer Muranditsi Musebe

Loice Isombi Asenabi (Protestor)

Gabriel Imbayi Shilasi (Petitioner)

3. Directions were taken that the matter be heard by *viva voce* evidence. The protestor testified as PW1 and called the other two claimants named above as her witnesses, Jenifer Muranditsi PW2 and Asafa Shinoko PW3. She also called one other witness, Silvanus Amenena Anyula PW4.

4. The petitioner testified as DW1 and called two witnesses, Lawrence Tendwa DW2 and Charles Alfayo DW3.

5. The dispute herein relates to the estate of the late Muhati Amenena who died and left behind the above stated parcel of land. He died unmarried with no sibling.

6. The deceased had two brothers – the late Thomas Shilasi and the late Peter Likhanga. The petitioner is a son to the late Thomas Shilasi. The protestor is a wife to the late brother of the petitioner, Andriano Asenabi Shilasi and thus a sister-in-law to the petitioner. Jenifer Muranditsi PW2 is a wife to the late brother of the petitioner, David Musebe and thus a sister-in-law to the petitioner. Asafa Shinoko PW3 is the wife of the late Peter Likhanga and thus a sister-in-law to the deceased. The petitioner on his part is a nephew to the deceased.

7. It is the case for the protestor PW1 that the deceased Muhati was working in Nairobi. That she was cultivating the shamba of the deceased when the deceased was alive. That the petitioner never used to cultivate it. That when the deceased died he was buried at the shamba of

Thomas Shilasi as he had not built a house at his own shamba. She said that the land should be shared equally between the four claimants.

8. The protestor further said that the petitioner has sold part of the estate to one Zablon Lumala Liluma but that the purchaser can only claim from the share of the petitioner.

10. Jenifer Muranditsi PW2 testified that the petitioner is her brother-in-law. She similarly said that the deceased was not buried in his shamba because he had not built a house there. She said that nobody was using the shamba of the deceased. That the land should be divided equally between the four of them.

11. Asafa PW3 testified that her late husband was a brother to the deceased. That the deceased was staying in Nairobi. That whenever he came visiting he would stay at her home. That when the deceased was alive, it is her and a son to the protestor who were using the deceased's land. That a lady called Lucia was also using it. She proposed that the land be distributed equally between the four of them.

12. Silvanus PW4 testified that the deceased herein was his relative. That nobody was using the shamba of the deceased when he was alive but there are now some people using it. That the deceased was buried at the shamba of his elder brother, Thomas Shilasi. That it is a son of Asenabi who presided over the burial. That the shamba in issue should be divided among the four claimants.

13. The petitioner on his part testified that the deceased herein was a brother to his late father. That he died in 1994. That he died unmarried and had no children. That the deceased had in the year 1974 or 1975 verbally given him his said land in a family meeting. He started using the land. That later on the deceased told him that in case he died to take charge of his funeral. That he was responsible for the welfare of the deceased till when he died in 1994. Upon his demise he organized his burial and had him buried on his own parcel of land No. Isukha/Lukose/312. That his brothers Andriane, Asenabi, Clemendi and David Musebe attended the funeral and supported the idea of him burying the deceased on his land. That since the death of the deceased he has been using the land uninterrupted by anybody. That before his brothers died they never made any claim on the land. That the land has been under his custody since 1974.

14. The witness further stated that the deceased was staying in Nairobi. That whenever he came visiting he was staying at his home as he had not built a house at his shamba. He said that he is the one who has the right to inherit the land.

15. The petitioner further stated that before his father died he had given each of his sons a parcel of land. He produced the title deeds for their respective parcels as exhibits – Isukha/Ingotse/262 in the name of Asenabi Shilasi, Isukha/Ingotse/258 in the name of David Musese Shilasi and Isukha/Ingotse/351 in his name.

16. The petitioner further said that Asafa Shikone PW3 has her husband's land parcel No. Isukha/Lukose/303.

17. The petitioner's witness Lawrence Yendwa DW2 testified that he is the one who ferried the deceased from Nairobi when he was sick. That the deceased told him that he had given his shamba to the petitioner. That he announced what the deceased had told him to those who were attending the burial. That it is the petitioner who was using the land when the deceased was alive. That he is still the one in use of the land.

18. The other witness for the petitioner DW3 testified that he was working in Mombasa. That the deceased met him in Mombasa and told him that since he did not have children, he would leave his land to the petitioner herein. The witness further stated that he did not know who was using the deceased's land before the deceased died. That he does not know who is in current use of the land.

#### **Submissions -**

19. The advocates for the petitioner, **Momanyi Manyoni & Co. Advocates**, submitted that the deceased had bequeathed the entire land to the petitioner at a consideration which the deceased fulfilled as an adopted son of the deceased. That the deceased had given the possession of his estate to the petitioner before his demise. That his brothers who stood at the same degree of consanguinity with him had obliged the fact that the land had been gifted to the petitioner. That the petitioner is entitled to the entire estate. That the petitioner sold a portion of the land to Zablon Lumala and none of the protestors objected to the sale yet they knew about it. That the fact that the deceased left the petitioner using the land, that the petitioner was in charge of the deceased's funeral and buried him on his own land and that the brothers of the petitioner respected the gift bequeathed to the petitioner till their individual demises attested to the fact that the petitioner was an adopted son of the deceased.

20. The advocates further submitted that since the protestors do not have any share in the estate then the sale of the land to Zablon Lumala does not affect them.

21. The advocates for the protestor, **Amasakha & Co. Advocates**, on the other hand submitted that there is no proof that there existed a verbal will in the deceased bequeathing the land to the petitioner. That the parties are related to the deceased. That none of them ranks in priority or higher to the other. That the evidence adduced by each of the parties is conflicting. That at one point all the parties or their family members have utilized the land. That the fairest and equitable manner is for the property to be shared equally between all the parties.

#### **Analysis and Determination**

22. The questions for determination in the dispute herein are:-

(1) Whether the deceased adopted the petitioner as his son.

(1) Whether the deceased bequeathed the land to the petitioner in an oral will.

(2) How the land should be distributed.

23. The petitioner stated that the deceased bequeathed the land to him in a family meeting held sometimes in 1974 or 1975 wherein the deceased adopted him as his son. That those who were in attendance were the deceased, Matitsa, Lukano, Clemendi, Andrew and Peter Likale.

24. Laurent Yendwa DW2 told the court that when the deceased was ailing he told him that the petitioner was to inherit his land on condition that he should take care of his burial expenses.

25. The Law of Succession Act Cap 160 of the Laws of Kenya provides as follows on wills:-

***“8. A will may be made either orally or in writing.***

***9. (1) No oral will shall be valid unless –***

***(a) it is made before two or more competent witnesses; and***

***(b) the testator dies within a period of three months from the date of making the will.”***

26. The first oral will in this case is said to have been made in 1974 or 1975. The deceased did not die within three months of the making of the will but came to die about 20 years later in 1994. None of those people who were said to have been present during the making of the oral will were presented in court. It was not explained why none of them was called to testify in the case. There was no evidence how the deceased adopted the petitioner as his son. The will, if any, was not valid as there were no competent witnesses called to prove it and the testator did not die within a period of three months of the making of the will.

27. The second oral will is said to have been made to DW2 and another person when the deceased was ailing. DW2 did not give the exact date when the deceased made the oral will and particularly whether the deceased died within three months of the making of the will. DW2 said that the other person who heard the deceased making the will is dead. This thereby cannot be a valid oral will as it has not been proved that it was made before two or more competent witnesses. The same does not comply with Section 9 of the Law of Succession Act.

28. The third oral will is said to have been made to DW3. DW3 never mentioned the issue in his evidence-in-chief. He did not mention it in his written statement. He only mentioned it in cross-examination in court. He is thereby not a credible witness. His evidence is thus dismissed.

29. The petitioner says that he is the one who has been in exclusive use of the land since 1974. The protestor said in her evidence that she is the one who was cultivating the land. Asafa PW3 also claimed to have been in use of the land. The parties have thereby given conflicting evidence as to who has have been in use of the land. It is not possible to know whether the petitioner has been in exclusive use of the land.

30. In the foregoing I find no evidence that the deceased adopted the petitioner as his son and that he bequeathed his land parcel Isukha/Lukose/517 to him. The petitioner's exclusive claim to the land is therefore dismissed.

31. The petitioner is a brother to the late husband to the protestor and brother to the late husband to Jenifer Muranditsi PW2. It is the petitioner's father who had a right to inherit the estate of the deceased. In his absence all his children have an equal right to the estate of the deceased. The petitioner and his late brothers are therefore entitled to the share that would have gone to their father in the estate of the deceased. The share of his late brothers in the estate should go to the protestor and Jenifer PW2.

32. Asafa's late husband was a brother to the deceased. She is also entitled to the share of the estate.

33. When the petitioner filed the succession cause he indicated in form P&A 5 that one Zablon Lumala Liluma was a beneficiary to the estate. The Petitioner said that he has sold part of the estate to the said person. It is apparent that the petitioner did not have a grant of letters of administration when he sold the land to the said person. Section 45 of the Law of Succession Act makes it an offence for any person to dispose of the estate of a deceased person unless the person is possessed of a grant of letters of administration. Further to that, Section 82 (b) (ii) outlaws selling of any immovable property before confirmation of grant. In the premises the sale of part of the estate to the aforesaid purchaser is not enforceable. The purchaser can only claim what he bought from the petitioner after the distribution of the estate.

34. The upshot is that the petitioner, the protestor and the beneficiaries mentioned herein are all entitled to a share of the estate of the deceased. The mode of distribution that commends itself to me is for equal sharing of the estate between the beneficiaries as proposed by the protestor. The court therefore orders that land parcel No. Isukha/Lukose/517 be distributed as follows:-

(1) Asafa Shinoko Likhanga - 0.9 Acres

(2) Jenifer Muranditsi Musebe - 0.9 Acres

(3) Loice Isombi Asenabi - 0.9 Acres

(4) Gabriel Imbayi Shilasi - 0.9 Acres

Orders accordingly. Each party to bear its own costs.

**Delivered, dated and signed in open court at Kakamega this 4<sup>th</sup> day of June, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

No appearance for Petitioner

No appearance for protestor

Parties:

Petitioner - present

Protestor - absent

Court Assistant - George

Beneficiaries - absent

30 days right of appeal.