



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

SUCCESSION CAUSE NO. 216 OF 2017

FORMERLY MACHAKOS HIGH COURT P&A 595 OF 2008)

IN THE MATTER OF THE ESTATE OF MULE KITAVI (DECEASED)

DAVID MULE KITAVI.....PETITIONER/APPLICANT

-VERSUS-

PAUL MUSEMBI MWANIKI.....OBJECTOR/RESPONDENT

RULING

1. The grant issued to the petitioner and confirmed on 12/03/2010 was revoked on 20/11/2014 at the instance of the objector on grounds of fraud.
2. Following the revocation, the objector filed his objection to the petition filed on 01/11/2008. He also filed an answer to the petition and cross-petitioned for the grant. The objection, answer and cross petition are all dated 08/02/2018 and were filed on 09/02/2018. The gist of the objection is that the petitioner is not a son of the deceased hence not a beneficiary of the estate.
3. The petitioner filed a replying affidavit on 20/03/2018 and maintained that he is a biological son of the deceased and the only heir of his estate. Affidavits were also sworn and filed by Harrison Mwanthi and Wilson Kimuyu in support of the petitioner's position.
4. The objector swore a supplementary affidavit on 09/05/2018 in response to the affidavits sworn by the petitioner and his witnesses. He avers that when the petitioner's mother got married to the deceased, the petitioner and his siblings were already in existence and that in 1960, they left with their mother pursuant to a divorce and went back to their biological father, Mwanja Muinde Tulimani.
5. In response to the supplementary affidavit, the petitioner filed a further replying affidavit on 26/06/2018.
6. The matter was canvassed by way of viva voce evidence.

Petitioner's case

7. **PW1** was the petitioner. He testified that he was born in 1953 by the deceased and a woman known as Nduku who is also deceased. That his parents separated and he was left with his father and deceased brother, Kimondiu. His other siblings were Mutune, Musyoka and Mueni (deceased) but were sired by another man. PW1 used to hear from deceased that he (deceased) had paid dowry and after divorce, he was told to go for it but never did. That the refund of the dowry has never been done to date.
8. He testified that the deceased had brothers, Mutisya and Mwaniki who are also deceased but have living children. That he lived with his father on the suit land and his deceased uncles had their own land. That he obtained an ID card in 2006 in the names of David Mule Kitavi. That the deceased had the original title of Mbooni/Liani/428 but after death, his cousin Musembi Mwaniki (objector) took and hid it.
9. He reported to the elders and police and Musembi was arrested whereupon he disclosed where he had hidden it. It was taken by the police who then gave it to family members and clan. It was later given to PW1. By that time, PW1 had not taken the ID and used to stay at home with the deceased and take care of the land. After deceased's death, he obtained the chief's letter and filed succession. The chief informed them that Musembi had applied for registration of the land and had gone missing. The chief ordered that Musembi be looked for.
10. PW1 learnt that Musembi had sold the land but had not transferred it. He denied lying about his relationship with the deceased and further testified that the clan and family members had confirmed that he was the deceased's son. It was also his testimony that he genuinely

obtained the deceased's death certificate as he was the one living with him and that Musembi never reported him to the police over the title.

11. It was also his testimony that he got injured and did not have anyone to help him move so he went to live with the chairman of the clan and Musembi dismantled his house and sold the bricks. He said that the clan elder was still taking care of him.

12. On cross examination, he said that he was not on suit land and was not farming there. That Musyoka bought land from his father but he did not have the agreement. That the clan and family members confirmed that he was a son of the deceased. That he never sold land as per paragraph 18 of his affidavit and never gave possession or obtain LCB consent as per paragraph 22. That he only gave possession in order to check Musembi away. That there is a sale agreement of 11/10/2010 but the Court should accept that he never sold land.

13. That when deceased died; he had not obtained ID and did not have the names of David Mutinda Mwanja. That he was born in 1953 and deceased died in 2004 and he took ID in 2006 thus 53 years after his birth. That he changed his ID in order to get land in his name. That he is the third born and has one sister and two deceased brothers but in his affidavit sworn on 20/03/2018, he deponed that he was the last born and the only one.

14. That in the petition, he said he was the only son because the others refused to go for the petition. That they were alive but he never sought their consent, never cited them in the matter and they never renounced their rights. That he left the land after getting injured and reported that Musembi had dismantled his house to the clan and family members but not to the police. That he was born in 1953 but ID says 1958. That he stays with the chairman of the clan and the same clan says that he is deceased.

15. In re-examination, he said that he failed to include his siblings because they denounced their father and said that they belong to Mwanja. That before taking his ID, he did not have any other name apart from David. That the delay in taking ID was because he was living with his father and was not going out. That he went upto class 5. That he refused his mother's proposal to accompany her to the new husband and by the time his brother died, the deceased had tried to bring the other children back but they refused.

16. PW2 was 84 years old **Wilson Kimuyu Mumo** from Kalawani Location. He testified that both PW1 and Paul Musembi Mwaniki were known to him as they were from the same clan with him i.e clan of Ethenga Mbanthi. That he knew the father of PW1 was David Mule Kitavi but did not know the father of Paul Musembi Mwaniki. That PW1's father used to own land in Liani location, was married to Nduku Kitavi and they had 4 children. That he couldn't recall the children's names but knew PW1 as the others had left with their mother.

17. That Nduku was married elsewhere by Mwanja who tried to refund the dowry but Mule refused because he was left with 2 sons but one is deceased. That the deceased's land had a title deed but when he died, Paul Musembi took it before PW1 arrived. Musembi tried to sell land but he was informed as the clan chairman. He summoned Musembi to avail the title deed but he declined. That it was the chief who got the title from Musembi and handed it to PW2 who then gave it to Isaiah Ngengi, a member of the deceased's family.

19. He also testified that Mwanja accepted the children who followed him as his own and that it is PW1 who should inherit the deceased's land. That Musembi's father was deceased's brother and Musembi sold his land after death. That when a woman is married with children, the new husband becomes their father.

19. On cross examination, he said that the deceased was his classmate. He disagreed with paragraph 2 of his affidavit which states that the deceased was his classmate. He agreed signing the affidavit but said that he did not know how to read and write. He didn't know whether the deceased went to school and said that they were not age mates as deceased was older. He didn't know when the deceased married and got children.

20. That when he joined this case in Machakos, he knew that the deceased had children. He was told that the deceased's family members included PW1. That the deceased told him before he died. He confirmed that the deceased told him about children and said that at that time, he had employed PW1 but could not remember when. That he did not attend the burial and did not know when the deceased died. He also did not know when Nduku left the deceased as he was working in Nairobi. That they were from different locations but same clan.

21. That the chief had written a letter to Musembi saying that the deceased had no children and he was the one who told the chief to change as deceased had children i.e PW1, the ones who left with their mother and the son who died. That he stays with PW1 as he does not use the land because he was disabled after an accident. That it is Jackson Makali Munandu who uses the land with the permission of PW1.

22. That he has never built on the suit land and there is no house. That Musembi had sold some land but refunded the money to pastor Kitata. That there is an agreement dated 11/10/2010 between PW1 and Jackson at a consideration of kshs 100,000/=. He maintained that no land was sold and that Jackson will part with possession once the case is finalized.

Objector's case

23. DW1 was Harrison .K. Mwanthi. He said that he was a retired chief and that in 2006; he was the acting chief of Tulimani Location in Mbooni. That the deceased was known to him as he was from Liani sub-location within Tulimani. That the one in charge of the sub location is David Ngumbi. That he knew of the deceased's death because it was reported by the objector who went for a letter to lodge a succession cause. He identified the letter he wrote and said that he wrote it as per the information given.

24. That on 24/02/2006, the chairman of the clan, village elders and others questioned him for issuing a letter yet the deceased had a family. They said that he had been misinformed. He summoned the people he had issued with the letter as well as the opposing side but the objector did not show up. The assistant chief said that the deceased had children. He never wrote another letter for lodging succession. He got information about deceased and children from other people. He saw the death certificate with the objector.

25. On cross examination, he said that the objector was alone when he went for the letter and that the petitioner took another group together with village elders and said that deceased had children. That the petitioner said he was the deceased's son and he was convinced that the deceased had children.

26. In re-examination, he said that he was transferred to another location before resolving the issue. That they normally use the assistant chief to confirm deceased's heirs but he was not present.

27. **DW2** was George Mutisya Kiswili, a chief from Wanzauni Location. He said that the parties are known to him as well as the deceased. That he wrote a letter over the deceased on 04/11/2016 and then the objector went to him with a letter of 04/02/2006 written by DW1. He said it was outdated and wanted a current letter. He just reproduced it.

28. On 21/02/2017, he wrote another letter at the instance of the objector. He was stopping damage to land and also for peace and harmony over the same land. According to him, the petitioner went with the clan in 2018 and asked him to call Mutava Muinandu who had the ID and title deed of the deceased. The chairman of the clan said that PW1 was the deceased's son. He enquired from the area and was told that the deceased had a wife. He didn't know whether the wife left with any child.

29. On cross examination, he said that he was 40 years old and that in 2006, he was 28 years. That the objector gave him a letter of 2006 which he reproduced because he (*objector*) wanted it to have a current date. He signed it but did not tell him the purpose of the letter. He knew the objector's brothers; Mutua and Mbalu but had never seen them in his office over the matter. That the objector told him that customary rights of divorce were performed when the deceased separated with his wife but never told him the name of the wife. That he never told him about marriage and children of deceased.

30. On re-examination, he said that he never verified the information on deceased's children.

31. **DW3** was Joshua Katuva Nzivo. He said that he was an immediate neighbour of the deceased and that the suit land was owned by deceased's father. That the deceased died without a child and the lady whom he had married had two children sired by Mwanika Muinde. That she came with 2 children to deceased and then gave birth to 2 more, then when she left deceased, she left with the two children. That the petitioner's mother went at Mwanika's where she died and was buried.

32. That the petitioner went with his mother where he was born but currently lives with the clan chairman. That PW1 has never occupied the suit land and is a son of Mwanika thus he cannot claim the deceased's land. That the land should go to Mule Kitavi, Mutisya Kitavi, Mwanika Kitavi because it was their father's. That Paul Musembi who is alive is supposed to inherit the land. That the documents were with objector but clan and police took them by force.

33. On cross examination, he said that he belongs to the clan of Mwithanga and PW1 belongs to musii clan. That Mule Kitavi was 3rd husband of PW1's mother. That Mwanika paid the dowry he had paid for the same woman. That he was in clan meeting and knows Musyoka Mwanika, Mutune Mwanika, Mule Kitavi who were also in the meeting save Mutie. That no child remained with deceased when he separated with wife Nduku and where dowry is not paid back on separation, children remain with their father.

34. On re-examination, he said that at the clan meeting for refund of dowry, it was resolved that children should go to Mwanika.

35. **DW4** was the objector. He adopted his statement and affidavits as evidence in chief and further stated that when he was in class 6, there was a meeting over returned dowry for all children to remain with their father, Mwanika. That the deceased left no child and PW1 was pushed from where he was by clan chair in 2005.

36. On cross examination, he said that in 1979, Kitavi had wife, he got 2 children and wife died. That Mwanika had 3 sons and a married daughter. That the suit land has been in deceased's name since 1983. That he left ancestral land in 1980's and it should therefore be divided among Mule Kitavi, Mutisya Kitavi and Mwanika. That PW1 was born by Mwanika and Nduku and he was in clan's meeting. That he knows the names of those who attended the meeting as mentioned in the minutes but his name is not on record.

37. He denied telling PW2 to write letter and also denied going to the chief when he was summoned. He maintained that the deceased had no child.

38. In re-examination, he said that he never returned to the chief after getting the letter from him as he feared that he would be robbed of the documents. That when he went to the chief, he was with elders and one assistant chief was not involved. That the assistant chief was given the letter by the chief.

39. I have keenly looked at the record, the evidence of the parties and the rival submissions and it is my considered view that the following issues arise for determination;

a. Whether the petitioner is a son of the deceased.

b. Who are the rightful heirs of the deceased?

Whether the petitioner is a son of the deceased

40. The introductory letter (Dex1) issued to the objector by DW1 indicated that the deceased had no wife or children. This letter was later cancelled at the instance of the petitioner and his clan elders including PW2. DW1 confirmed that he cancelled the letter on the basis of information given by petitioner and clan. PW2 confirmed that he was the one who told the chief to change the letter and indicate that the

deceased had children.

41. PW2 was the only witness called by the petitioner. His evidence crumbled on cross examination and he ended up denying crucial contents of his affidavit. It turned out that the deceased was not his classmate, they were not age mates, he didn't know whether the deceased went to school or when he married and got children. He did not know when the deceased died and did not even attend his burial. In my view, this witness could not authoritatively speak about the deceased's life and any information from him to the local administration should have been treated cautiously.

42. Further, it was PW2's evidence that the petitioner was his employee at some point and even at the time of testifying, he confirmed that he was the one taking care of the petitioner who had become disabled after an accident. It is therefore evident that there was a close relationship between PW1 and PW2 and it is only natural for people in close relationships to be biased for each other. Then there is the issue of the petitioner's identity card which he changed 53 years after being born. This is not only suspicious but it buttresses the objector's case that indeed, when the petitioner's mother got married to the deceased, the petitioner and his siblings were already in existence.

43. There is no evidence to show that the deceased adopted the petitioner as his son. The petitioner testified that when his siblings followed their mother after the divorce, he stayed with the deceased and took care of the land. It is however my considered view that the petitioner's evidence could not stand on its own and required corroboration. PW2's evidence could not be considered as corroborative as I have already opined that he was not a credible witness.

44. The upshot of the foregoing is that in the absence of medical evidence, the petitioner did not prove on a balance of probability that he is a biological or adopted son of the deceased.

Who are the rightful heirs of the deceased?

45. It is not in dispute that the objector is a nephew of the deceased and that there are other nephews and nieces in existence. It is therefore my considered view that the surviving children of the deceased's siblings are the rightful heirs.

CONCLUSION

The court thus arrives at a conclusion that the objector has proved his case on balance of probabilities. Thus court makes the following orders;

i. The grant herein is directed to be issued to the objector.

ii. No orders as to costs

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

.....

C. KARIUKI

JUDGE