



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 567 OF 2006

IN THE MATTER OF THE ESTATE OF HARRON MURUNGADECEASED

AND

SALOME OMUMIA AMUKAMBWA..... PETITIONER

VERSUS

MANASE CHITERESI MURUNGA.....1ST PROTESTOR

JOHN MUTESA MURUNGA.....2ND PROTESTOR

R U L I N G

1. This succession cause relates to the estate of the late Harron Murunga (herein referred to as the deceased). The deceased was survived by a wife, Salome Omumia Amukambwa (herein referred to as the petitioner) and two brothers, Manase Chiteresi Murunga and John Mutesa Murunga (herein referred to as the protestors). The deceased left behind a parcel of land known as S/Kabras/ Bushu/1094 measuring 2.2 hectares.
2. The petitioner has filed an application for summons for confirmation of grant dated 7th February 2017 seeking for orders that the grant of letters of administration made on 11th November, 2006 be confirmed in terms of paragraph 5 of her supporting affidavit that land parcel No. S/Kabras/Bushu/1094 transmit to her and the deceased's daughter, Petronilla Lukania Harun.
3. The application was opposed by the protestors who filed a separate summons for confirmation of grant dated 17th July, 2017 in which they have proposed that the said land parcel be shared equally between themselves and the petitioner.
4. The court gave directions that the matter be disposed of by way of viva voce evidence. The Petitioner testified and called her daughter Petronilla as a witness in the case. The protestors also testified in the case. They did not call any witness in the case.
5. It was the evidence of Salome that she married the deceased in 1971. That they had one daughter, Petronilla. That they were living on land parcel S/Kabras/Bushu/1094 upto the time the deceased died in 2006. That she still lives on the land. That each of the protestors has his own parcel of land.
6. Petronilla testified that she is a daughter to the deceased. That she was born in 1973 and that she is the only child. That she lives with her mother on land parcel No. 1094. She has lived there since when she was born. She has 2 children and is not married. That the protestors have their own parcels of land.
7. The protestors stated in their evidence that the deceased was their brother. That the petitioner is a wife to the deceased. That their father had given land to each of the brothers. The deceased was given land parcel No. S/ Kabras/ Bushu/1094. Manase was given land parcel No. S/ Kabras/Bushu/676 while John Mutesa was given land parcel No. S/ Kabras/ Bushu /675 . However that the deceased did not sire any children with the petitioner. That the petitioner had a daughter, Petronilla, when she was married by the deceased. That as the deceased did not sire a child with the petitioner their luhya customary law dictates that if a woman does not sire children with a deceased brother, she is required to share the deceased's land with the brothers of the deceased brother. That that is why they have proposed that the deceased's land be shared equally between them and the petitioner.
8. The advocate for Salome, **Mr. Athunga**, submitted that it has been established that the land in issue belonged to the deceased. That the deceased left behind a widow and a daughter. That the protestors have their own parcels of land that they inherited from their father. That the deceased inherited his parcel of land from his father. The petitioner should therefore inherit the estate of her husband. He submitted that the Luhya custom being relied on by the protestors is repugnant to justice.

9. The protestors on their part asked the court to order that the land be shared equally between them and the petitioner.

10. The certificate of official search filed with the petition indicates that land parcel No. S/ Kabras/ Bushu/ 1094 is registered in the name of the deceased herein. It is not in dispute that the deceased left behind a widow, the petitioner and a daughter. It was admitted that the father to the deceased had given each of his sons parcels of land. The protestors have their own parcels of land given to them by their late father.

11. The protestors allege that Petronilla is not a biological daughter to the deceased. The petitioner stated that Petronilla was born in 1968 and that she, the petitioner was married by the deceased in 1971. This supports the evidence of the protestors that the petitioner had a daughter, Petronilla, when she was married by the deceased. The deceased was therefore not the biological father of Petronilla. However, the deceased seems to have recognized Petronilla as his daughter. He lived with her for 35 years after he married her mother until when he died in 2006. There is then a rebuttable presumption that Petronilla is a daughter to the deceased. Even if that were not the case, it has not been proved that there is a Luhya customary law that says that a wife who has not sired children with a man is required to share the man's land with the man's brothers. The protestors did not call any independent witnesses to prove that there is such a custom.

Even if there was such a custom, the court agrees with the advocate for the petitioner that such a custom is repugnant to justice.

12. In the foregoing the protestors have no legal right over land parcel No. S/Kabras/ Bushu/1094. Their summons for confirmation of grant and their proposed mode of distribution dated 17/7/2017 is thereby dismissed. The summons for confirmation of grant by the Petitioner, Salome Omumia Amukambwa, dated 7/2/2017 and her proposed mode of distribution contained in paragraph 5 of her supporting affidavit is granted as prayed, save that the relevant grant of letters of administration is the one granted by the court on 17th November, 2016. Land parcel No. S/ Kabras/ Bushu/ 1094 is therefore to transmit to **Salome Omumia Amukambwa** and **Petronilla Lukania Harun**. Orders accordingly. Each party to bear its own costs.

Delivered, dated and signed at Kakamega this 16th day of October, 2018.

J. NJAGI

JUDGE

In the presence of :

Mr. Athungafor petitioner

1st protestorPresent

2nd protestorPresent

PetitionerPresent

George.....court assistant

30 days Right of Appeal.