



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
FAMILY DIVISION
SUCCESSION CAUSE NO. 513 OF 2013

IN THE MATTER OF THE MUJERA NDENGWANGWA DECEASED
BETWEEN
ELIZABETH KHASEYI SAMUEL.....PETITIONER/APPLICANT
AND
JOTHAM MUJERA.....1ST OBJECTOR/RESPONDENT
HANNAH KHAVERE.....2ND OBJECTOR/RESPONDENT
FRED A SHINGULI.....3RD OBJECTOR/RESPONDENT

RULING

Introduction

1. This matter has had some history around it. The petitioner took out grant of letters of administration intestate to the estate of Paul Mujera Ndengwangwa who died on 16.05.1985 leaving behind land parcel number Kakamega/Cheptulu/294 which measures 0.7 Hectares. From form P&A5, the deceased was survived by Elizabeth Khaseyi holder of ID No. [particulars withheld] a daughter and Selina Ligoyo Mujeru holder of Id. No. [particulars withheld]. Selina is the petitioner's mother and widow of the deceased. Grant was issued to the petitioner on 09.10.2013 and same was confirmed on 28.07.2014. The deceased's only estate wholly devolved to the petitioner Elizabeth Khaseyi Samwel.

2. On 14.11.2014, the objectors filed their summons for revocation of grant through the firm of M/S Amena Amendi & CO. Advocates on grounds that the grant issued to the petitioner was obtained fraudulently with an intention of disinheriting the 1st and 2nd objectors and denying the 3rd objector who is a purchaser his right to a part of the deceased's estate; that the petitioner concealed material facts to wit that the deceased had 2 wives and 2 houses and that the members of the deceased's first house did not consent to the grant being made to the petitioner; that the petitioner never informed the objectors of her intention to seek the grant of letters of administration and that the petitioner sold the share due to the second house to which she belongs and now wanted to sell the share due to the first house which rightfully belongs to the 3rd objector who bought it from the 1st and 2nd objectors.

3. After various attempts at an amicable settlement of the dispute, the matter proceeded by way of oral evidence, during which Johana Shilumba Muchera and Hannah Khavere White testified as PW1 and PW2

respectively. On the 28.06.2016, and in order that the court gets a clear understanding of the deceased's on the ground, the court ordered as follows;

“

- 1) the Vihiga County Surveyor do visit the suit property with a view to establishing the boundaries on the ground as between the 1st and 2nd houses of the deceased.
- 2) The surveyor do file the report with this court within sixty (60) days
- 3) The parties to share and pay the surveyors costs, (if any) to facilitate the exercise
- 4) All parties to attend when the surveyor visits the site
- 5) Further mention to be on 7th September, 2016”

4. In compliance with the above orders, the surveyor visited the suit property in the presence of all the parties and their counsel and on 10.03.2016, the Vihiga County Surveyor, Mr. David C.O.K. Ombuor filed his report dated 10.8.2016 on 07.09.2016. The parties appeared before court several times after the filing of the surveyor's report when it was agreed that they would file their respective written submissions on the surveyor's report to assist the court make a finding on the application.

5. It is clear from the record that the 1st and 2nd objectors are brother and sister in-law of the petitioner respectively. It is also clear that the deceased had two wives (houses) the first wife being Phoebe Muhavi who had 2 sons and one daughter. The first son Elijah Ndegandwa is deceased and is survived by the 2nd objector. Dorcas Khaseyi the daughter is married and lives in Lugari.

6. The deceased's second wife (house) was that of Selina Musilili who had one son and a daughter who is the petitioner herein. The son also known as Elijah Ndegandwa is deceased.

The Submissions

7. The petitioner contends that the objectors are propagating false hoods by alleging that Dorcas Khaseyi is a member of the 2nd house and that they have further failed to disclose that each of the 2 houses had a son by the name Elijah Ndegandwa and that each of those sons is since deceased. The Petitioner also says that the petitioner was the rightful member of the deceased's family to take out the grant, considering the fact that the objectors were nowhere to be seen at the time when the petitioner applied for the grant. It is also the petitioner's contention that the objectors' allegation of fraud on her part has not been substantiated and that the same is a malicious ploy to malign the petitioner's name.

8. With regard to distribution of the deceased's estate, the petitioner submits that this should be done in accordance with Tiriki- Maragoli cultural practice during the ceremony known as “eshikhalo” which is to be convened by clan elders.

9. The objectors on the other hand submit that the petitioner in her papers filed in court failed to disclose that the deceased had 2 wives. It is also submitted that the grant issued to the petitioner should be revoked because the petitioner went ahead and gave to herself the whole of the deceased's estate without considering the interest of the objectors.

Analysis and determination

10. Although the objectors think that the issue of whether or not the grant issued to the petitioner and the subsequent confirmation has been overtaken by events, it is the considered view of this honourable court that the issue is alive and at the centre of the dispute between the objectors and the petitioner. From the evidence on record, and the submissions, the deceased had 2 wives or two houses. By the time of his

death the first house was represented by children while the second house to which the petitioner belongs was represented by the petitioner and her mother. Yet in her suit papers, the petitioner did not make mention of the first house, on the pretext, as contended in the submissions, that the objectors were not in person in the area. Even if the objectors were not present in the area, the petitioner knew that they were alive and that they were beneficiaries of the deceased's estate and that they needed to be informed of her desire to apply for the grant. She also needed to have their names listed in form P & A5. The law also required the petitioner to obtain the consent of the objectors, but instead she only obtained the consent of her mother Selina Musilili. Clearly, the petitioner obtained the grant through fraud by failing to disclose the other beneficiaries to the deceased's estate and by proceeding to obtain the grant on the strength of only the consent of her mother.

11. It was on the strength of those falsehoods that she proceeded to have the grant confirmed wholly in her favour. There is no doubt that if the court had known that there were other beneficiaries to the deceased's estate, it would neither have issued nor confirmed the grant of representation to the petitioner. Section 38 of the Law of succession Act Cap 160 Laws of Kenya, provides as follows;

“38 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 be equally divided among the surviving children”

12. In the present case, the deceased left behind more than one child and that means that his estate should be distributed in accordance with Section 38 of the Law of Succession Act (supra).

Conclusion

13. In light of all the above, the grant of representation to the estate of Paul Mujera Ndagandwa issued to the Petitioner on 09.10.2013 and confirmed on 26.07.2014 respectively be and is hereby revoked. A fresh grant shall be issued in the joint names of the petitioner Elizabeth Khaseyi Samuel, the 1st objector, Johana S. Mujera and the 2nd Objector Hannah Khavere White. Once the fresh grant is issued the three petitioners shall proceed to file summons for confirmation of grant for consideration by this Honourable court. Should any one of them not agree to be part of the summons for confirmation they shall file their respective affidavits of protest as required by the Law of succession Act. The 3rd Objector's case is a matter for the parties to consider during the process of confirmation of the grant.

14. Each party to these proceedings shall bear their own costs.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega on this 20th day of July, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Imbenzi holding brief for Dr. Khaminwa.....for petitioner/respondent

.....Mr. Amendi(present).....for objectors/applicants

.....Polycap.....court Assistant