



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATR MOMBASA

SUCCESSION NO. 380 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE KALAMA MWATSUMA CHUGU

JONATHAN MWATSUMA KALAMAPROTESTOR

VERSUS

MAERE LOKA CHITOSHARESPONDENT

RULING

1. The deceased to whose estate the proceedings herein relate is Kalama Mwatsuma Chugu, who died on 16.5.06 at Bengo-Kisurutini. A Grant of Letters of Administration in respect of the estate of the deceased was on 22.5.12 issued to Maere Loka Chitasha and Mwatsuma Kalama, the Respondent and the Protestor herein respectively. Prior to the filing of the cause herein, the Respondent had filed Citation Cause No. 6 of 2008 against the Protestor which culminated in an order of the Court dated 9.7.10 which allowed the Citor, Maere Loka Chitasha (the Respondent herein) and the Citee Mwatsuma Kalama (the Protestor herein) to “file joint petition for letters of administration to the estate of Kalama Mwatsuma Chugu” The Protestor and the Respondent are both children of the deceased but of different mothers.

2. The Affidavit in support of the Petition for Grant of Letters of Administration indicates that the estate of the deceased comprised of only one asset, namely a 6 acre parcel of land in Rabai. The following are indicated to have survived the deceased:

- a) Jonathan Mwatsuma Kalama son
- b) Maere Kalama daughter
- c) Sidi Kalama daughter
- d) Margaret Kalama daughter

3. Summons for Confirmation of Grant was filed on 25.11.14 with a proposed mode of distribution of the estate to the stated survivors of the deceased in equal shares. On 7.9.15 however, the Protestor filed an Affidavit of Protest on 7. He denied having signed the Petition or Affidavit in support thereof. He averred that his late father had three wives who had children as follows:

1st wife Mauna Kadilo (deceased)

Jonathan Mwatsuma Kalama - son (Protestor)

2nd wife (Kwekwe Mwakoyo)

Maere Loka Chitasha – daughter (Respondent)

Mchemunda Kalama – married daughter (deceased)

3rd wife Anzazi Kalama

Sidi Moni Buburu alias Sidi Kalama – married daughter

Irene Margaret Kalama – married daughter

Elias Mwatsuma Kalama – son (deceased)

Martin Ngoro Kalama – son (deceased)

4. The Protestor claims that the deceased had apportioned his land to each house. To the first and third houses, he gave 3 acres each. The second wife (the Respondent's mother) was divorced and thus her house was not given any land. The Respondent separated with her husband and returned home whereupon the deceased gave her a quarter acre of land to build her house. This portion was part of the land given to Martin Ngoro Kalama, deceased. The Protestor claims that it is the wish of the other beneficiaries of the estate that the land be shared the same way the deceased had given to each house and to the Respondent.

5. In his testimony, the Protestor informed the Court that he is the eldest child of the first house. His mother left his father and remarried. She died at her other husband's home. The Respondent's mother, Kwekwe was married by the deceased as the second wife. The deceased also married a third wife with whom he lived together with Kwekwe in the same house. Kwekwe was however later divorced but the deceased did not ask for a refund of the dowry. Kwekwe remained at the home of the deceased albeit in a separate house for 17 years until the death of the deceased.

6. The Protestor further stated that the Respondent married but later left her husband and returned home. Upon her return, the Respondent was received by the deceased who gave her a quarter acre piece of land upon which to build her house and to farm. Later however, the Respondent angered the deceased because she wanted to dig a pit latrine where the graves were. The police and elders intervened and the Respondent was shown an alternative site but that she declined to dig another pit latrine. The Protestor conceded in his testimony that the deceased had another piece of land measuring 2 acres which was registered in his name as the deceased had already died.

7. Gwande Mwambuburi Kagumba a kaya Elder testified in Court. He recounted how he and other elders went to the parties' home to resolve a dispute regarding the pit latrine which the Respondent had dug against her father's wishes. That they found the Respondent guilty of despising her father and imposed on her a fine of Kshs. 600/= and a goat to give to her father which she defied. The witness stated that under Miji kenda customs, children do not inherit from their maternal grandfathers.

8. Kalama Mwatsuma Kalama, a son of the Protestor reiterated the testimony of his father. He told the Court that the Respondent is a daughter of the deceased and that she came back home after separating with her husband. That the deceased gave her a piece of land on which to build but not to cultivate. According to him, the deceased divided his land to his three sons but did not include his daughters and therefore the Respondent is not entitled to inherit from the deceased. That the deceased disowned the Respondent before he died and said that she should not inherit his estate. His desire was that the deceased's wishes be respected.

9. In her response to the Protest, the Respondent expressed her wish that the estate of the deceased be divided to the houses according to the number of children in each house. She averred that her mother, the

2nd wife of the deceased who is still alive and the son of Mchemunda her deceased sister should be included as beneficiaries of the estate. She further claimed that the deceased had another piece of land which the Protestor has already registered in his name. She wished that the said property be included in the estate.

10. In her testimony, the Respondent claims that she wants her mother's coconuts marked. She further wants her pit latrine restored to her. She conceded that the children of her deceased siblings have a right to inherit their parents' share in the estate of the deceased. She claimed that Ibrahim, J. (as he then was) directed that she and the Protestor apply for the grant of Letters of Administration but that the Protestor refused to do so she proceeded on her own.

11. I have considered the Affidavit of Protest, the response thereto as well as the testimony of the witnesses. The issues for determination are:

- a) Whether the Respondent signed the Petition for Grant of Letters of Administration and Affidavit in Support thereof.
- b) Whether all the beneficiaries of the estate of the deceased are entitled to a share of the estate of the deceased.
- c) Whether the 2 acre piece of land registered in the Protestor's name forms part of the estate of the deceased.

12. On whether the Protestor signed the Petition and Affidavit in support thereof, I have perused the same and I note that the same were signed by the Respondent alone yet the Protestor is named as one of the Petitioners. The Respondent concedes this fact and states that the Protestor declined to sign the documents. From what is available on the record, it is not clear how the Grant was issued in the name of both the Respondent and the Protestor yet the Protestor had not signed any of the pleadings. Section 76(a) of the Law of Succession Act provides:

“76 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-...” [emphasis added]

a. that the proceedings to obtain the grant were defective in substance;

b. ...

13. In view of the above provisions of the law, I find that the grant was issued to the Respondent and the Protestor in proceedings that were defective in substance. Having so found, the Grant should not be allowed to stand.

14. On whether all the beneficiaries of the estate of the deceased are entitled to a share of the estate of the deceased, I note that the Protestor seeks to have the estate inherited amongst the 3 sons of the deceased to the exclusion of the 2nd house. The Protestor and his son Kalama claim that this is per the wishes of the deceased. It is not disputed that the deceased was a polygamous man with three wives. The first wife, the Protestor's mother was divorced and remarried elsewhere. The 2nd wife is the Protestor's mother was divorced but continued to stay in the homestead of the deceased but in a different house. The 3rd wife is deceased. The Protestor states that the 2nd wife's house was not given land as the 2nd wife was divorced. The Protestor however states that dowry was not returned and the 2nd wife continued to stay in the land herein. It is instructive to note that though the Protestor's own mother (1st house) left his father and remarried, the first house was given 3 acres of land.

15. The deceased died intestate on 15.6.2006. The law applicable to the succession of his estate is the Law of Succession Act. The Act makes provision for the distribution of the estate of a polygamous

intestate. Section 40(1) of the Act provides:

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.

16. The estate of the deceased ought to be divided amongst the three houses of the deceased in accordance with the number of the children in each house adding any surviving wife. The Protestor’s mother, the 1st wife, is excluded from the inheritance on account of her remarriage. The Respondent’s mother, the 2nd wife, shall be added as an additional unit in the 2nd house. Though the Protestor claims that she was divorced, he did state that the deceased did not ask for a refund of the dowry and that that she remained in the home of the deceased though in a separate house for 17 years until his demise. The 3rd wife being deceased, shall not be included as an additional unit in respect of the 3rd house. Where any children of the deceased are themselves deceased, their share will be taken by their children under the principle of representation under Section 41 of the Act.

17. The Respondent claims that the deceased had another piece of land which the Protestor registered in his name. The Protestor in his testimony conceded that the 2 acre piece of land was indeed registered in his name as the deceased had already died. Given that this was property belonging to the deceased, the Protestor had no authority to have the same registered in his name. Consequently, I find that the said piece of land forms part of the estate of the deceased and shall be distributed among all the beneficiaries of the estate as set out above.

18. In the result, I make the following orders:

- a) On my own motion I do hereby annul the Grant issued to Maere Loka Chitasha and Mwatsuma Kalama on 22.5.12.
- b) A fresh Grant is hereby issued in the name of Maere Loka Chitasha and Jonathan Mwatsuma Kalama.
- c) That the 2 acre piece of land referred to by the Respondent and the Protestor does form part of the estate of the deceased.
- d) The said Maere Loka Chitasha and Jonathan Mwatsuma Kalama shall file a Summons for Confirmation of Grant within 30 days with a clear mode of distribution of the two properties of the estate of the deceased making provision for all beneficiaries of the estate including Maere Loka Chitasha.
- e) Mention on 10.10.16 to confirm compliance.

DATED, SIGNED and DELIVERED in MOMBASA this 1st day of September, 2016

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**