



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 238 OF 2011

IN THE MATTER OF THE ESTATE OF MUNENE MUTHIGE (DECEASED)

JULIUS NDEGE MWANGI.....PETITIONER

VERSUS

MUTHIKE MWANGI.....OBJECTOR/APPLICANT

RULING

1. The objector/applicant filed this application to challenge the confirmed grant issued by this court (*Ong'udi, J*) on 2nd October 2012. The basis of his application is that the deceased had written a will giving him the entire suit land Land Reference No. Ngiriana/Merichi/24. The 2nd basis of challenging the confirmed grant is that the petitioner had been given land elsewhere by their deceased father and was therefore not entitled to a share in the instant suit land.

2. The applicant testified that the deceased had dictated a will, which was written down by his elder son, Danson Mwangi (PW 2). This will was put in evidence as exhibit PEX 1 (a) and (b). The will was written in Kikuyu language and he provided an English translation of that will. It was also his evidence that the petitioner who is his elder brother, had been given land elsewhere by their late father. He also testified that his late father made that will giving him the entire suit land. In cross-examination, he admitted that his father had not given any parcel of land to the petitioner. Instead, he admitted that it was their grandfather who had given land parcel No Ngiriana/Ngiriambui/2312 to the petitioner.

3. The evidence of his son (PW 2) is that the whole of the instant suit land belongs to his father. It was his evidence that he wrote the will under the instructions of his grandfather, the deceased in this application. Furthermore, it was his evidence that his grandfather, the deceased in the instant case did not sign that will and it was not witnessed by any person. It was also his evidence that the wife of the deceased was alive when the will was made. His other evidence is that the grandfather who instructed him to write the will was very sick at that time when the will was made. He finally testified that his grandfather was illiterate.

4. The petitioner, Julius Ndege Mwangi (DW 1) testified in opposition to the evidence given by the objector/applicant. He testified that his late father did not make any will. He also testified that he was not given any piece of land by his late father. Furthermore, there is evidence that the objector/applicant chased the petitioner and their two sisters from the suit land following the death of their parents claiming that the land belonged to him.

5. The petitioner's evidence is supported by that of his sister Grace Muthoni Mwangi (DW 2). Her further evidence was that the objector/applicant refused to subdivide and distribute the suit land as among themselves in terms of the confirmed grant. When she too claimed that she was also entitled to a share of the suit land, Danson Mwangi (PW 2) assaulted her, which matter she reported to the police. It is this same Danson Mwangi who demolished the house of her father on 19th April 2010, which they similarly reported to the police. It is as a result of the objector/applicant's refusal to subdivide the land among themselves that forced Julius Ndege Mwangi to file the instant succession cause. In terms of the confirmed grant, each of the beneficiaries was given 3 acres of the 12 acres suit land.

6. In the light of the foregoing, I find that the main issue for decision is whether the will "PEX 1 (a) and (b)" is valid will. I find from the evidence of both parties that the purported will of the deceased is not valid. It is a piece of paper because it does not bear the signature or thumb print of the deceased. Furthermore, it is also not witnessed by any person. I find that the objector/applicant and his son Danson Mwangi were not credible witnesses. They impressed me as very intelligent witnesses but were not telling the truth.

7. I believed the evidence of Julius Ndege Mwangi (DW 1) and his sister Grace Muthoni Mwangi (DW 2), who impressed me as credible witnesses. Grace Muthoni Mwangi testified that the objector/applicant is not a born again Christian. She also testified that their late father although illiterate had an elder by the name Edward Ndambiri, who used to write on his father's behalf because of his illiteracy. It therefore follows that if their late father had the intention of writing a will, he could have called upon Edward Ndambiri to do so.

8. I also find that the petitioner was given land by his grandfather and not by their deceased father. In this regard, the objector/applicant contradicted himself. First by stating that the petitioner had been given land by their deceased father. Second when he was shown the green card in respect of that land, he changed his evidence only to admit that the parcel of land given to the petitioner was by their grandfather.

9. In the light of the foregoing evidence, I find that the application for revocation of the confirmed grant lacks merit. It therefore follows that the instant suit land will be distributed in terms of the confirmed grant issued by this court with each beneficiary getting a share of 3 acres, which I also find is in accordance with section 38 of the Law of Succession Act (Cap 160) Laws of Kenya. The provisions of that section direct that where an intestate is survived by a number of children, his net estate shall be divided equally among his surviving children.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of DECEMBER, 2016

In the presence of both the petitioner and the objector/applicant

Court clerk Njue

J.M. BWONWONGA

JUDGE

07/12/2016