



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.290 OF 2008

IN THE MATTER OF THE ESTATE OF

CHEMASE AFUBWA DECEASED

AND

IN THE MATTER OF

JONATHAN WAFUBWA OBJECTOR/APPLICANT

VERSUS

MARK CHIMOI CHEMASE)

JOHN CHEMASE)..... PETITIONERS/RESPONDENTS

DAVID SHIKUKU)

JUDGMENT

By summons dated 15th September, 2011 and filed in court on 6th October, 2011 the objector herein, *Jonathan Wafubwa*, applied to have the grant of letters of administration intestate made to *Mark Chemoi*, the petitioner herein on 15th September, 2008 and confirmed on 25th July, 2011 revoked on grounds that the objector was not involved in presenting the petition for letters of administration. The objector raised as a ground the fact that the grant was obtained fraudulently. The summons were supported by an affidavit by the objector sworn on 15th September, 2011.

Upon being served, the petitioner filed a replying affidavit denying committing any fraud and said that the Grant was issued after due procedure was followed. He also said that the estate was shared equally among all the beneficiaries of the deceased hence there was no ground for revoking the grant. The petitioner denied the objector's claim that their father had given him, (objector), a bigger portion of land out of parcel No. *South Kabras/Samitsi/488*.

On 13th June, 2012 the court gave directions that the objection proceeds by way or oral evidence. When the case commenced, the objector took the witness stand as PW1 and testified that the deceased was his father who had two wives. The first wife *Madurache Mesi* had two sons and 2 daughters, *Mark Chimo* and *Jonathan Wafubwa* while daughters were *Fridah* and *Mayello*. The second wife *Margaret Mbone* had seven children, four sons and three daughters – *Charles Wafubwa*, *Laban Wafubwa*, *John Wafubwa* and *William Wafubwa*. Daughters are *Mary*, *Mahaka*. He could not remember the third daughter.

The witness told the court that the deceased died leaving behind *Parcel No. South Kabras/Samitsi/488* measuring approximately 9 acres. The witness further testified that his late father had given the first wife five (5) acres, himself 3.5 acres. This was in 1987 just before his father died in 1988.

When he applied for a search in 2009, he found that the land was registered in the name of the petitioner. He reported the matter to the chief and at the same time registered a caution against the title. He later discovered that his brother had petitioned for a grant of letters of administration. The witness further testified that his father had given him 3.5 acres and petitioner 1.5, while his other brothers from the second wife got one (1) acre each. This was because the petitioner had been educated and was working. The objector said he had a big family and that was the second reason why he was given a bigger portion of land.

PW2 Dina Wafubwa, the objector's first wife testified and told the court that she was married in 1966 and they lived with the deceased who had two wives. The witness told the court that the first wife was given 5 acres while the second wife was given 4 acres. Out of the 5 acres given to the first wife, the objector was given 3.5 acres while the petitioner was given 1.5 acres. The witness told the court that they were blessed with 10 children but some are deceased.

PW3 Benta Wafubwa, the second wife to the objector told the court that her husband the objector was given 3.5 acres by the deceased who was her father-in-law while the petitioner was given 1.5 acres.

PW4, also a wife to the objector by the name *Ann Wafubwa*, also testified that she got married in 1979 and found the deceased living with the objector. In 1987 the deceased gave 5 acres to the first wife and 4 acres to the second wife. Later her husband, the objector was given 3.5 acres and the petitioner 1.5 acres.

DW1 Mark Chimoi, the petitioner herein, testified and told the court that after the deceased who was his father passed away, he applied for and obtained a grant of letters of administration of the estate. That Grant was later confirmed and a certificate of confirmation issued. He said that the deceased was the registered owner of *Parcel No. South Kabras/Samitsi/488*. He told the court that he distributed the land equally amongst the beneficiaries. He denied the objector's assertion that their father had given 5 acres to the elder wife and 4 acres to the second wife or that the objector had been given 3.5 acres. He also denied that he had obtained the grant by means of fraud.

I have considered the objection herein and the evidence tendered by both the objector, his witnesses and the petitioner. I have also perused the affidavit by both the objector and the petitioner and the certificate of confirmation of Grant issued on 25th July, 2011.

From the record, the Land *Parcel No. South Kabras/Samitsi/488* was shared equally amongst the beneficiaries of the deceased whereby each of them got 1.5 acres of land. All the beneficiaries except the objector appear to have been satisfied and have not raised any issue with regard to the mode of distribution. The contention by the objector is that his late father gave him 3.5 acres while the petitioner was given 1.5 acres making a total of 5 acres for the first wife. The second wife, according to the objector, was given 4 acre which translated into four (1) acre each for the four sons in that house. The objector in trying to justify that arrangement told the court that he was living with the deceased and that the petitioner was, unlike the objector, educated and had a job. He, however, did not give any reasons why the first wife was given 5 acres or why sons of the second wife were given 1 acre each.

I also note that the objector only called his wives as his witnesses. These obviously gave evidence which was favourable to the objector. He did not call any of his brothers from the second house or any other independent witness to confirm that indeed their father had wished the land to be shared out in the manner he told the court had been purposed by their father. The objector appears to have been pursuing a personal goal to have a bigger share of the land than any of his siblings. I do not believe his evidence or that of his witnesses.

I have given due consideration to this matter and evidence of the witnesses. I have also taken into account that the land was shared equally among all the beneficiaries. I am of the view that the petitioner tried his best and that way avoided controversy and disputes over the estate of the deceased. I do not therefore find any reason to interfere with the mode of distribution of the estate of the deceased.

For those reasons, I do not find merit in the objection. The objection is hereby dismissed. Each party will bear their own costs.

Dated and delivered at Kakamega this 19th day of October, 2015.

E. C. MWITA

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