



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.833 OF 2012

**IN THE MATTER OF THE ESTATE OF JOTHAM SHILINGI CHONANYE alias JOTHAM
SILINGI CHONANYIE (DECEASED)**

WILSON KIDIGA SILINGIAPPLICANT

VERSUS

TIMOTHY MUGODO SILINGIRESPONDENT

J U D G M E N T

Introduction

1. The Petitioner herein TIMOTHY MUGODO SILINGI was issued with a confirmed grant on 31/10/2013 which showed the share of each beneficiary. On the 01/04/2014 this Court ordered the Land Registrar Vihiga to effect the said grant despite the fact that some of the beneficiaries were not co-operating. On the 09/06/14, WILSON KIDIGA SILINGI objected to the confirmed grant having filed an application for revocation of grant dated 10/03/2014 and again a Notice of Motion seeking injunctive orders dated 20/05/2015. The Court ordered the petitioner to file a response to the application for revocation of the grant and the confirmed grant was suspended. It was further ordered that no sub division of the land should take place until the objection was heard and determined through oral evidence.
2. On the 19/03/2015 the case proceeded orally as ordered by Court. The objector/plaintiff called one (1) witness and the petitioner also called one (1) witness.

Plaintiff/Objectors Case

3. In his opening statement, Mr. Wekesa Counsel for the objector/plaintiff told the Court that the issue at hand was on distribution. He stated that two of the deceased's parcels of land had already been distributed and that the objector/plaintiff objected to the confirmation of grant dated 31/10/2013 on grounds that distribution had not been done in accordance with the wishes of the deceased.
4. PW1 the objector told the Court that the deceased herein had two wives:-
 1. Agnes K. Silingi (Deceased)
 2. Dayana L. Silingi

Agnes K. Silingi the first wife to the deceased herein had six (6) sons and four (4) daughters but one (1) son is dead. The names of Agnes children were:-

- Lonah Mbayaki
- Mary Kageha
- Timothy Mugodo (Petitioner)
- Thomas Madiga
- Henry Chandwalo (Deceased)
- Wilson Kidiga (Objector)
- Mustapha Amusavi
- Tamara Kegehi
- Sarah Kedogo

5. PW1 further stated that Dayana had three (3) sons and one (1) daughter namely:-

- Francis Okwemba
- Philip Chahenza
- Morris Chunguli
- Margaret Kageha

PW1 also testified that the deceased's four (4) parcels of land were:-

- Nyangori/Gimarakwa/29
- Nyangori/Gimarakwa/225
- Nyangori/Gimarakwa/228
- Nyangori/Gimarakwa/234

6. He also testified that before the deceased died he shared out plot no.29 which was given to mama Dayana and her children and they have a title. That plot 225 was also shared among 5 of the deceased's sons:-

- Thomas Madiga
- Mustapha Amusavi
- Stephen Akaranga
- Henry Chandwalo (Deceased)

While plot 234 remained in his father's name and had not been subdivided. He claimed that the plots that are in dispute are 234 and 225. In his view, plot 234 should be shared out equally among the deceased's 14 children representing the deceased's two (2) houses. He further claimed that according to the confirmed grant, Timothy took the whole of plot no.234 which was wrong. As for plot no.225 he stated that the same had been given to:-

- Wilson Kidiga (Objector)
- Thomas Madega
- Mustapha Amusavi
- Stephen Akaranga
- Henry Chandwali (Deceased)

See "Plaintiff exhibit 1". He also stated that he does not know TAMARA JOTHAM SILINGI, GEORGE SIMWA OCHOLA and SAMWEL UKIRU CHADWALI who are listed as beneficiaries in the confirmation of grant. He explained that since his father had already shared out plot 225 the same should remain so in order to maintain his father's wish.

7. On cross examination by the Defendant he maintained that plot 234 was not given to the Defendant. He disagreed with the contents of "DMF I – 1" and maintained that he never attended the alleged meeting.
8. PW2 Maurice Chunguli Silingi told the Court that his father had four parcels of land, Nyangori/Gimarakwa 29,225,234 and 228 which he had bought for their eldest son. On the 04/02/1997 his father shared out his land through the Chiefs office as follows:-.

- Plot 29 to Mama Dayana Silingi to share with Francis Okwemba, Philip Chahenza and Maurice Chunguli and nobody else had a share on this plot.
 - Plot 225 was given to Agnes and her children Thomas Madiga, Henry (Deceased) Stephen Akaranga, Wilson Kidiga and Mustapha Amusavi.
 - Plot 228 was given to Timothy Mugodo way back in 1997
 - Plot 234 remained in the deceased's name had not been shared out by the time the deceased died.
9. PW2 refuted the claim that plot 234 was given to Thomas (petitioner). He explained that Tamara is their big sister who is married, but he stated he did not know George Simwa Ochola though he knows Samuel Ukiru Chadwali who is his father's grandson. He wants plot 234 to be shared equally among his father's fourteen (14) children. He maintained that plot 225 should be distributed to Henry, Thomas, Stephen, Wilson and Mustapha.
10. On cross examination he maintained that plot no.234 was not given to the Defendant by the deceased although the defendant stays on it.

Petitioner's Case

11. DW1 Timothy Mugodo Silingi the petitioner explained to the Court that the deceased had three (3) plots. Plot 234 was given to him by his father (Deceased herein) plot 29 was given to his step mother and plot 225 was given to his father's first house. He produced the letter dated 01/07/1997 as an exhibit "D Exhibit 1." DW2 William Sabwa Muhadi told the Court that he knew the family of the deceased herein very well. That knew the deceased's wives very well. Agnes had six (6) sons and Dayana three (3) sons.
12. He testified that Timothy Mugodo bought a parcel of land but he did not know the number. He claimed that Dayana was given the plot bought by Timothy and Timothy Mugodo went to the small portion bought by his father. He further claimed that when the deceased herein fell ill he advised him to call his children together so as to share out his land. Kidiga (plaintiff) was given the 1st plot but out of it he retained a small portion for himself and his wife. He also claimed that Kidiga now wants to take that portion in addition to what he already had. DW2 told the Court that as far as he was concerned Timothy (Petitioner) is entitled to stay where he is and since Madiga sold his share to Simwa there is no problem with Simwa being given his share.
13. On cross examination by Mr. Wekesa for the objector he explained that the deceased had 3 parcels of land No.234, 225 and 29 which he distributed in 1975 but he had no proof for the same. Upon being shown the letter dated 01/07/1997 "DMFI – 1" he explained that it was addressed to the petitioner asking him to stop Timothy from interfering with Dayana's shamba. He explained that Timothy was being given the portion of land that was far and that he was given plot number 29 where he lives. DW2 was also shown "PExhibit 1" and explained that he was not aware of the said meeting because he was attending Council meetings in Kakamega. He was again re-examined and shown "DEXhibit 1". He explained that the said letter referred to the distribution done by the deceased at the Chiefs office.

Analysis of the Evidence

14. From the evidence presented to Court, the deceased herein had two wives and four plots. It has been explained by PW1 and PW2 that the deceased distributed his plots to both the families as follows:
1. Plot 29 was given to Dayana who was to share it with her children.
 2. Plot 225 was shared amongst Agnes' sons.
 3. Plot 228 was given to the petitioner/objector
 4. Plot 234 remained in the names of the deceased
15. The defence on the other hand told the Court that the deceased had three (3) parcels. Plot 234 was given to him by the deceased, 29 was given to her step mother and 225 to his father's first house. The defence have not mentioned plot 228.

Issues for Determination

16. The only issue for determination is the distribution of land parcel numbers Nyangori/Gimarakwa/225 and 234. From the Certificate of Confirmation of Grant deceased's estate ought to devolve unto the beneficiaries of the deceased. This Court notes that Tamara Jotham Silingi is one of the beneficiaries as she is a sister to them. This Court also notes that Samuel Ukiru Chadwali is the deceased's grandson.
17. The prevailing situation in this matter is well captured under Section 35(5) of the Law of Succession Act, Cap 160 of the Laws of Kenya (the Act). The whole of Section 35 of the Act provides as follows:-

“35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

- a. **the personal and household effects of the deceased absolutely; and**
- b. **a life interest in the whole residue of the net intestate estate:**

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to-

- a. **the nature and amount of the deceased's property;**
- b. **any past, present or future capital or income from any source of the applicant and of the surviving spouse;**
- c. **the existing and future means and needs of the applicant and the surviving spouse;**
- d. **whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;**
- e. **the conduct of the applicant in relation to the deceased and to the surviving spouse;**
- f. **the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and**
- g. **the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.**

(5) subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

18. The clear spirit of the law under the said Section 35(5) of the Act is that where the deceased is survived by a number of children like in the present case, his net estate is to be shared equally among such children. If any of the deceased's children herein were minors, this Court would have invoked the provisions of article 53(2) of the Constitution in ensuring that the best interests of such children take paramountcy in the distribution of the deceased's estate.
19. In the instant case, I am satisfied that the deceased's net estate, namely plot No. Nyangori/Gimarakwa/234 shall be divided equally among the deceased's surviving 14 children, both male and female. In this regard, a fresh Certificate of Confirmation of Grant shall issue to take this new distribution into account. Since the distribution of plot No.225 is not challenged this Court shall not interfere with it.
20. Regarding costs, I order that each party bears its own costs.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 8th day of October 2015

RUTH N. SITATI

J U D G E

In the presence of:-

Mr. Wekesa (absent) but applicant is present for Objector/Applicant

Absent – now deceased for Petitioner/Respondent

Mr. Lagat - Court Assistant