



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 959 OF 2011**

**IN THE MATTER OF THE ESTATE OF SAMWEL MIJINA MUYEKA ALIAS MUCHINA  
MUYEGA DECEASED**

**AND**

**MARY IMBENZI NECHESA.....PETITIONER**

**VERSUS**

**FELIX KHAYESA.....INTERESTED PARTY**

**ELISHA AYIRO.....OBJECTOR**

**J U D G M E N T**

1. The deceased herein SAMUEL MUJINA MUYELA alias MUCHINA MUYEGA died on 19/05/1994 and thereafter Grant of letters of Administration Intestate was issued to MARY IMBENZI NECHESA on the 2.2.2012. By a summons for revocation of grant dated 23.8.2015 ELISHA AYIRO the objector/applicant prays for the revocation of the above mentioned grant amongst other orders;

2. After hearing the said application the court ordered a stay of Kakamega Criminal Case No. 1983/2015 pending the outcome of this cause. Petitioner was ordered to file an application for confirmation of grant and serve the same upon the objector and meantime also transfer of the suit land No. KAKAMEGA/SHIKULU/1828 to FELIX M KHAYESA was cancelled and property was reverted to the original owner. By the same order, the Court directed the Kakamega Land Registrar to effect the order failure to which summons were to be issued upon him to explain how the land was transferred without a confirmed grant.

3. In compliance with the said court orders, the petitioner went ahead and filed summons for confirmation of grant on the 16.5.2014 in the standard form and laid out how the deceased property was to be distributed.

4. The objector/applicant, after being served with the Summons of Confirmation filed an affidavit of protest to the summons for confirmation of grant. In the affidavit he claimed that the deceased was his paternal uncle and that he (deceased) had one son by the name FRANCIS MUCHINA MULIMA who died without a child. He claimed not to know the petitioner and says that the Muchina family does not know the Petitioner as she was not a daughter to the deceased. He claimed further that he was the one who used to stay with the deceased herein and he took care

of him for over six (6) years before the deceased died and that the deceased bequeathed the suit land to him as a gift.

5. The Objector listed the following as beneficiaries of the deceased's estate:-

ELISHA AYIRO – paternal uncle

ERNEST LIPESA - nephew

ALFRED OKWERA MAHINDU - nephew

GABRIEL SHIVACHI JUMBA - nephew

ATNAS SHIVACHI JUMBA - nephew

BONFACE ACHUTA - nephew

6. He opposes the confirmation of grant in the manner proposed by the petitioner saying that the Petitioner is a stranger to the deceased and instead insisted that the said land should be allocated to him to hold the same in trust for Muchina's family as detailed hereinabove.

7. In response to the affidavit of protest MARY IMBENZI the petitioner/ administrator of the deceased estate filed a replying affidavit sworn on 7.10.2014. She deponed that the deceased was her biological father and paternal uncle to the objector herein as shown by the copy of letter from the chief dated 07.12.2011 which is annexed to her affidavit and marked "MFI".

8. She maintains that as far as the law of succession is concerned she is the rightful beneficiary of the estate of the deceased and that the objector is a stranger to the estate. She states that the list of beneficiaries as outlined by the objector/applicant is not known to her and the persons named therein are all strangers to the estate.

9. She further maintains that the deceased was survived by only one daughter who is herself and no one else thus the purported beneficiaries as listed by the objector are intruders and meant to frustrate her and prevent her from inheriting the estate of her late father.

10. The Petitioner has attached proceedings of 8<sup>th</sup> October, 2011 before the Assistant chief who dismissed the objector/applicants case and confirmed that she was the only surviving daughter of the deceased and therefore entitled to Land parcel No. Kakamega/Shikulu/1828 which is marked as 'MI 2'. She wants the court to adopt her mode of distribution and dismiss the objector's affidavit of protest as filed with costs.

11. On the 26/01/2015 parties agreed that the matter would proceed by way of viva voce evidence on 02/06/2015. On that date, Mr. Khayumbi advocate who appears for the Objector/Applicant was present in Court while M/s Khasoa for the Petitioner was absent. It was Mr. Khayumbi who asked for and obtained the hearing date, but come 02/06/2015, Mr. Khayumbi was not present at the time allocated for the hearing to prosecute his client's case. M/s Khasoa's brief was held by Mr. Amasakha. Earlier during the call-over, the Court was informed by Miss Wilunda who held Mr. Khayumbi's brief that he would be ready to proceed at 12.00pm. Mr. Khayumbi was not in Court at 12.00p.m nor did he appear in Court thereafter on the said date.

12. Mr. Amasakha was allowed to proceed with the case of the petitioner on the basis of affidavit evidence. He submitted that the petitioner was the sole heir to the estate of the deceased herein as she is the only surviving child and daughter of the deceased. He submitted further that the interested party on the other hand had acquired an interest in the whole parcel as purchaser and that the petitioner has relinquished any interest in the estate and has signed an agreement to have the whole interest transferred to the interested party. He urged the court to rule out alleged interest

of the objector on grounds that as admitted in his affidavit of protest, the objector does not rank in priority to the petitioner as the deceased is his paternal uncle. He urged the Court to dismiss the protest.

13. From the submissions the main issue for determination is who ranks in priority to the other between the petitioner and the objector. The petitioner has shown that she is the only daughter and surviving child to the deceased. This was proved by the letter from the chief dated 27/12/2011 which she has annexed to her affidavit and which is marked "MI 1".

14. On the other hand the objector has deponed in his affidavit that the deceased was his paternal uncle. It therefore means that the petitioner ranks much higher in priority than the objector.

15. In the circumstances, I refer to Section 38 Law of Succession Act cap 160 laws of Kenya which 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.**"

16. In light of the above provisions, I am satisfied that the petitioner is the only heir to the estate of the deceased herein. Since the petitioner has relinquished her interest in the estate of the deceased and has signed an agreement to have the whole interest transferred to the interested party, this Court accordingly distributes the deceased's estate as per the consent of distribution prepared by the petitioner. The objector's interest in the deceased's property is ruled out on the grounds that he does not rank in priority to the petitioner as the deceased is his paternal uncle. The grant is confirmed in terms of paragraph 5 of Form 9 dated 16/05/2014 which is further supported by the duly executed consent dated 16/05/2015.

17. The Objector shall pay the costs of these proceedings.

18. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 10<sup>th</sup> day of November 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Khayambi (absent) for Objector/Applicant

Mr. Nyikuli for Khasoa for Petitioner/Respondent

Mr. Lagat - Court Assistant

Dated at Kakamega this 10<sup>th</sup> day of November 2015