



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.273 OF 2001

IN THE MATTER OF THE ESTATE OF SOLOMON LUSENO BAKHUYA (DECEASED)

AND

DERESINA MMANANI.....PETITIONER

VERSUS

JANET INZERO alias

JANET KHAYELA OTENYOOBJECTOR/APPLICANT

J U D G M E N T

1. The deceased in this case, Solomon Luseno Bakhuya died on 02/10/1990 at age 78. He died at Shivagala following cough with long illness. According to the papers filed herein the deceased was survived by a daughter, Deresina Mmanani Shipaka who is the Petitioner herein.
2. On 27/06/2001 the Petitioner filed for Letters of Administration intestate and indicated in Form P & A 5 that she was the only survivor of the deceased. The Petitioner did not indicate whether the deceased owned any property at the time of his death. On the 19/06/2002, the Petitioner was issued with Form P & A 41.
3. By the Summons for Confirmation of Grant dated 14/07/2005, the Petitioner sought confirmation of grant. At paragraph 5 of the supporting affidavit, the Petitioner deponed that the deceased's only asset was L.P. No. Idakho/Shivakala/1024 which parcel she prayed should be devolved to her in whole. The Petitioner has throughout these proceeding been represented by M/s Akwala & co. Advocates.
4. Before the Summons for Confirmation could be heard, Janet Inzero filed an affidavit of protest. In the affidavit the protestor alleged she was one of the daughters of the deceased and a step-sister to the Petitioner. She further deponed that her mother Elizabeth Tsiluma was the deceased's second wife and that as such she (protestor) was entitled to part of the deceased's estate. She also deponed that the Petitioner had deliberately omitted her name from the list of beneficiaries of the deceased's estate with the aim of disinheriting her.
5. Further, the Protestor deponed that before his death, the deceased had hired off ½ acre from L.P Idakho/Shivakala/1024 and given it to one Stephen Maina, a cousin to both Protestor and Petitioner in appreciation of Stephen's care of the deceased during the deceased's last days and also for ensuring that the deceased got a decent burial. I hasten to state here that if the deceased bequeathed the alleged ½ acres before he died it could possibly not be true that he gave out the said portion of land because Stephen gave him a decent burial. The Protestor finally proposed the distribution of the deceased's estate as follows:

- a. 0.5 acres to Stephen Maina
 - b. 0.375 acres to Protestor, Janet Inzero
 - c. 0.375 acres to Deresina Mmanani Shipaka, Petitioner
6. For one reason or another the protest was not heard for many years despite the same having been fixed for hearing on divers dates. This resulted in the Court ordering registration of a caveat on LP Idakho/Shivakala/1024 pending the hearing and determination of the cause. The order for registration of caveat was made on 26/09/2012.
 7. By a ruling dated 14/04/2011 Lenaola J. directed that oral evidence be adduced to determine the status of Janet Inzero and Stephen Maina *vis –a- vis* the deceased before determining whether the two were to benefit from the deceased's estate at all. The parties appeared before Court on a number of occasions consequent upon the ruling by Lenaola J. on 14/4/2011. The matter came up for hearing on 24/11/2014 when the Court was informed that the Objector/Protestor was sick. The Petitioner and her Counsel were in Court. The matter was then adjourned and parties were ordered to take dates at the registry. The Court also made it clear that the Objector would not get another adjournment from the Court. On 27/01/2015, M/s Akwala & Co. Advocates attended the registry and fixed the objection for hearing on 29/06/2015. They were to serve.
 8. The hearing proceeded on 29/06/2015 in the absence of the Protestor. The Petitioner testified and told the Court that apart from herself, all her siblings and her mother had died. She also testified that her step-mother Lucia Mutola also deceased had no child. The Petitioner denied knowing Janet Inzero, the Protestor. She also denied that Janet Inzero's mother was her step-mother. Regarding allegations that Stephen Maina had been given ½ acre out of L.P Idaho/Shivakala/1024 the Petitioner stated that those allegations were not true and that the said Stephen Maina was not entitled to any share of the deceased's estate.
 9. Mr. Anziya who came into Court during the proceedings did not put any questions to the Petitioner. Mr. Anziya sought for an adjournment but since the Objector had been granted a last adjournment the same was not granted. Mr. Anziya then closed the Objector's case as he had no witnesses to call.
 10. After a careful analysis of the evidence on record the only issue for determination is whether Janet Inzero and Stephen Maina have established their relationship with the deceased as directed by Lenaola J. on 14/04/2011. If the answer to the above is yes, are the two persons entitled?
 11. It is my considered view that both Janet Inzero and Stephen Maina have not established their relationship with the deceased. First of all, it is instructive to note that Stephen Maina did not swear any affidavit in support of Janet Inzero's contention that the deceased gave him ½ acre out of L/P No. Idakho/Shivakala/1024 in appreciation of his (Stephen's) having looked after the deceased. So, what is before me is the Petitioner's word against Janet Inzero's word. However, Janet Inzero's allegations were not tested on oath so it is the view of this Court that such allegations had no basis.
 12. It is also instructive to note that though Stephen Maina was said to be in Court on 29/06/2015 Counsel for the Objector did not put him in the witness box to state his side of the story and confirm to the Court that indeed the deceased hired off ½ acre out of L.P No. Idakho/Shivakala/1024 and gave it to him. In the absence of such evidence the only inference the Court can make is that the allegations contained in Janet Inzero's affidavit of Protest are untrue and have no basis.
 13. In the circumstances, I have no option but to accept the petitioner's evidence that she was the only beneficiary to the deceased's estate. This being the case Section 36 of the law of Succession Act would apply and since the Petitioner is the only surviving child of the deceased the whole of L.P No. Idakho/Shivakala/1024 devolves to her.
 14. In conclusion therefore, the Summons for Confirmation of Grant dated 14/07/2005 and filed in Court on 11/11/2005 is hereby confirmed in terms of paragraph 5 of the Petitioner's supporting affidavit dated 15/06/2005 to the effect that the whole of L.P. No. Idakho/Shivakala/1024 devolves to the Petitioner herein.
 15. I make no orders as to costs.

Judgment delivered, dated and signed in open Court at Kakamega this 2nd day of December 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Anziya (absent) for Applicant/Protestor

Mr. Akwala (present) for Respondent/Petitioner

Mr. Solomon Lagat - Court Assistant