

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.697 OF 2009

IN THE MATTER OF THE ESTATE OF APASIANA SARYAELI MURUNGA (DECEASED)

ALICE SHIHUNDU..... PETITIONER

VERSUS

MICHAEL CHIVOLO MURUNGA..... RESPONDENT

J U D G M E N T

Apasiana Saryaeli Murunga, the deceased to whose estate these proceedings relate died on 16th July 2008. On 25th March, Alice Shihundu (the Petitioner) petitioned this court to be issued with a grant letters of administration intestate in respect of the estate of the deceased. She described herself as the sister in-law of the deceased. She listed other beneficiaries of the deceased as Bernard Ndeyanka Lemueli Masawe and Joyce Tonga Samueli Shoo, the nephew and niece of the deceased. The petitioner listed several assets that comprise the estate of the deceased. Among them, is a property registered as LR. No. Kisumu/Kogony/1879 which was registered in the name of the deceased and one Tom Masiache Murunga. Another parcel that was jointly registered between the two is a parcel of land registered as LR. No. MSA/MS/Block 1/742. From the affidavits filed on record, it was common ground that the deceased was married to the said Tom Masiache Murunga. He predeceased her on 6th February 2001. The deceased and Tom Masiache Murunga were not blessed with any children. However, Tom Masiache Murunga was married to two other wives namely Irene Nang'eni Murunga and Henny Wanyama Murunga. The two wives were married after the deceased had been married. The two wives were blessed nine (9) children who were listed in the affidavit in support of the application subsequently filed for revocation of grant.

The Petitioner was issued with a grant of letters of administration intestate in respect of the estate of the deceased on 21st July 2009. The grant was confirmed to her on 3rd November 2010. The Petitioner proposed that all the properties belonging to the estate of the deceased be held by herself in trust for the named nephew and niece of the deceased. On 10th February 2011, the Respondent filed summons seeking to have the above grant revoked on the grounds that the Petitioner had fraudulently obtained the said grant by failing to disclose that the deceased had other dependants other than the ones that were disclosed in the petition. In particular, the Respondent complained that the Petitioner had failed to disclose the fact that other beneficiaries of the deceased included two of the deceased's co-wives and nine (9) step-children. In the affidavit in support of the application, the Respondent stated that the deceased was the wife of Tom Masiache Murunga (deceased). The said Tom Masiache Murunga (deceased) was his father. The deceased was the first wife. She was not blessed with any children. It was the Respondent's case that the Petitioner's failure to recognize them as dependants of the deceased rendered the said grant issued amenable to be revocation by this court.

The Petitioner filed a replying affidavit to the summons for revocation of grant. She denied the claim by the Respondent to the effect that the co-wives and step-children of the deceased were dependants of the deceased. She deponed that at the time of her death, she lived with the deceased in her premises at Ngong. She took care of the deceased. The deceased had indicated that her beneficiaries would be the children of her late brother Lemueli Saryaeli, who were named in the petition. She disputed the claim by the Respondent that they were the deceased's next of kin. This is because the deceased was not related to them. The Respondent's claim to be recognized as dependants of the deceased could only succeed if the co-wives and the step-children established that they were maintained by the deceased prior to her death. She denied the suggestion put forward by the Respondent which was to the effect that their deceased

father (Tom Masiache Murunga) had purchased the properties that comprise the estate of the deceased and therefore they are entitled to inherit the same. It was the Petitioner's case that matters relating to the distribution of the estate of Tom Masiache Murunga (deceased) were dealt with in **Succession Cause No.69 of 2003** which was filed by the Public Trustee at Kisumu. She took issue with the fact that the Respondent was raising the issue of distribution of the estate of the deceased eight (8) years after the estate of Tom Masiache Murunga (deceased) had been distributed. She urged the court to dismiss the application for revocation of grant.

Directions were taken in this matter. It was agreed that the matters in dispute be resolved by the advocate of the parties making oral submission. This court heard oral arguments made by Mr.Khamati for the Respondent and by Miss Mushoka for the Petitioner. Counsels for the parties essentially reiterated the contents of the various affidavits filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the Respondent indeed established that they were dependants of the deceased and therefore entitled to benefit from her estate. As stated earlier in this judgment, it is not disputed that the deceased was the wife of Tom Masiache Murunga who predeceased the deceased in these proceedings on 6th February 2001. The deceased was not blessed with any children with her husband. Her husband however married two (2) other wives namely Irene Nang'eni Murunga and Henny Wanyama Murunga. The two co-wives of the deceased were blessed with nine (9) children. It was common ground that after the death of Tom Masiache Murunga (deceased), the properties that comprised the estate of the deceased were distributed to the beneficiaries. It was not clear from the affidavit evidence whether the two properties that were jointly registered in the name of the deceased with her late husband were distributed to her. What is without doubt however is that the deceased was jointly registered with her late husband as the owner of the two properties. The presumption therefore is that when her husband died, those two properties reverted to the name of the deceased as the sole proprietor. The said properties had however not been transferred to the deceased at the time of her death. As regard the other properties, namely LR. No.25542 (IR No.109159) the same was registered in the name of the deceased on 31st December 2004. This property cannot therefore be said to have constituted part of the estate of the Tom Masiache Murunga (deceased). Likewise, the property registered as LR. No. Ngong/Ngong/32369 was registered in the name of the deceased on 13th July 2006. This was more than five (5) years after the death of the deceased. That property too cannot be said, in the circumstances to have constituted part of the estate of Tom Masiache Murunga (deceased).

The Respondent claims that the deceased's two co-wives and her step-children are dependants of the deceased. The Petitioner disputes this fact. **Section 29** of the **Law of Succession Act** provides thus:

“For the purposes of this part, “dependant” means –

- a. *The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
- b. *Such of the deceased's parents, step-parents, grand-parents, grand children, step children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were maintained by the deceased immediately prior to his death; and*
- c. *Where the deceased was a woman, her husband if he was being maintained by her immediately prior to her death.”*

The Respondent's claim for dependency is therefore hinged on **Section 29(b)** of the **Law of Succession Act**. The Respondent was required to establish that the deceased maintained them immediately prior to her death. It was clear from the evidence adduced that the deceased lived with the Petitioner in Ngong, Kajiado District immediately prior to her death. The co-wives of the deceased and their children meanwhile lived in Kisumu. The Respondent was therefore not able to establish that the deceased maintained them immediately prior to her death to entitle them to be considered as her dependants.

Further, this court agrees with the Petitioner that the Respondent failed to establish a relationship between them and the deceased that would disentitle the Petitioner herein and the nephew and niece

of the deceased to claim the estate of the deceased. From the evidence adduced by the Petitioner, the deceased had indicated that she (Petitioner), as the widow of her late brother and the two children of her late brother, were entitled to inherit the properties that comprise the estate of the deceased. The Petitioner is covered under **Section 29(b)** of the **Law of Succession Act**. The Respondent further failed to establish that the properties that the Petitioner inherited belonged to the estate of their late father. The court has given an explanation why the properties that were jointly registered in the name of the deceased and her late husband are now considered to belong to her estate. The Respondent has no claim over these properties. It was clear that the Respondent and his siblings never at any time took care of the deceased since Tom Masiache Murunga (deceased) died to the time the deceased died. Their claim on her estate is therefore belated and has no basis in fact and in law.

The upshot of the above reasons is that the summons for revocation of grant filed by the Respondent lacks merit and is hereby dismissed with costs to the Petitioner. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY, 2014.

L. KIMARU

JUDGE