



REPUBLIC OF KENYA



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**In re Estate of Wilbrondo Wanyonyi Sichangi (Deceased) (Succession Appeal
2 of 2019) [2024] KEHC 10713 (KLR) (22 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION APPEAL 2 OF 2019
REA OUGO, J
AUGUST 22, 2024**

IN THE MATTER OF THE ESTATE OF WILBRONDO WANYONYI SICHANGI (DECEASED)

BETWEEN

GODFREY WANYONYI SICAHNGI APPELLANT

AND

JOHN SICHANGI WANYONYI 1ST RESPONDENT

DISMASS SIKUKU WANYONYI 2ND RESPONDENT

*(An Appeal from the Judgment of Hon. C.A.S Mutai, Senior
Principal Magistrate's Court Bungoma delivered on the 11th day
of October 2021 in Bungoma Succession Cause No. 485 of 2017)*

JUDGMENT

1. Godfrey Wanyonyi Sichangi hereinafter, referred to as the appellant, has filed a Memorandum of Appeal dated the 17th of December 2019 after being dissatisfied with the judgment of Hon. Court delivered by Hon. C.A.S Mutai SPM on 6/12/2019 in Bungoma Succession Cause No. 485 of 2017. His grounds of appeal are as follows;
 - i. The trial magistrate erred in law and fact when he failed to hold that the 2nd petitioner/objector sold the whole of his land to the 1st petitioner.
 - ii. That the trial learned Magistrate erred in law and fact when he failed to observe that the 2nd petitioner/ objector had admitted selling land to the 1st Petitioner.
 - iii. That the trial learned Magistrate erred in law and fact when he failed to observe that the 1st petitioner has been residing on the said land for 30 years to date without interference from the 2nd petitioner.



- iv. That the trial learned Magistrate erred in law and fact when he failed to take into consideration that a part from the 2nd petitioner no other beneficiaries came to contest the cause
 - v. That the trial magistrate erred in law and fact when he failed to take into consideration that 2nd petitioner was not entitled to any share in the said land as he had sold the whole of his share to 1st petitioner.
 - vi. That the trial learned magistrate erred in law and fact when he failed to recognise the 3 acres sold one Lorna Nasongo Toili in the year 1974 which land she later sold to the appellant in 1994.
 - vii. That the trial magistrate erred in law and fact when he failed to acknowledge the boundaries as was earlier administered by the deceased 15 years before his death.
 - viii. That the trial magistrate erred in law and fact when he turned down the minutes of the 1st meeting (LUFU) that discussed assets and liabilities of the deceased on the 3rd day after burial which is mandatory among the BUKUSU customary laws.
2. The appellant seeks the following orders; that the appeal be allowed; the Honourable court do set aside the lower court's judgment and evidence on record and arrive at its conclusion as it deems fit as per evidence adduced and that the costs of the appeal and lower court costs be awarded to the appellant.
 3. This being the first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
 4. A brief background of the matter from the lower court record is as follows; Wilbrondo Wanyonyi Sichangi the deceased died on 26.11.2009 and as per the affidavit in support of the petition for letters of administration intestate Godfrey Wanyonyi Sichangi, a son was his only beneficiary. The asset listed in the said petition is Land Parcel No. East Bukusu/ North Nalondo/846. A limited grant ad litem was issued to Godfrey Wanyonyi Sichangi on the 20th of August 2012.
 5. On 9.12.2012 John Sichangi Wanyonyi filed an affidavit of protest. He averred that the deceased had 2 wives and a large estate and that after he died the family sat and had a resolution that there must be more than one administrator to manage the estate but the appellant filed the petitioner himself as the sole administrator. A grant of letters of administration intestate was issued to Godfrey Wanyonyi Sichangi on 24.10.2012.
 6. A summons for revocation of annulment of the grant dated 6.11.2012 was filed by John Sichangi Wanyonyi (John) and Dismas Sikuku Wanyonyi (Dismas) the 1st and 2nd respondents on 7.11.2012. The respondents sought to have the grant issued to the appellant on 26.11.2012 revoked or annulled. In their affidavit in support of the application, they averred that they are the sons of the deceased and that the deceased left behind 2 widows and 7 sons as listed in paragraph 2 of their affidavit dated 6.11.2012. They claimed that the appellant obtained the letters of administration without the knowledge and



consent of the family. Another application to revoke and or annul the grant was filed by John and Dismas on 8.1.2013. Godfrey Wanyonyi Sichangi (Godfrey) filed a response to the application dated 8.1.2013 giving details of the deceased's 4 wives and their households and the properties left in the name of the deceased and Dismas being East Bukusu/ north Nalondo/ 846 (hereinafter referred to as parcel no. 846)and East Bukusu/ North Nalondo 848, hereinafter referred to as parcel no 848), respectively. According to the appellant his father had shared parcel number 846 to his sons and with clear boundaries. On 9.5.2011 John sold to him his share of one acre at Kshs. 120,000/- and thereafter John moved to Busia. Later Dismas started threatening him and his relationship with the respondents went sour then. He further deponed that he filed the petition for the grant with his siblings' blessings including the respondents. During his father's 'lufu' ceremony on 7.12.2009 it was agreed that the sharing be done by the deceased should not be disturbed.

7. On the 7.6. 2018 parties agreed to file a consent on the mode of distribution. They failed to agree and on 14.2 2019 Mr. Kweyu informed the court that they would apply to confirm the grant.
8. Godfrey filed his written statement on 15.1.2019 detailing the beneficiaries from the 4 houses and the 2 parcels of land no. 846 and 848 which as per him available for distribution. he reiterated what was deposed in his replying affidavit opposing the application to confirm the grant. His additional evidence was that on 6.7.1994 Lorna Nasongo Toili sold 3 acres which she had purchased from his late father out of land parcel number 846 and that his late father witnessed the same amongst other witnesses. He sought to have a surveyor carry out a survey on the ground and confirm the acreage of each of the dependants in line with his father's 'lufu'.
9. John filed his statement on the 25.2.2019. In this statement, he listed the beneficiaries and the properties left by the deceased for distribution and his proposed mode of distribution on parcel no. 846. John averred that parcel no. 848 was never owned by the deceased and it is therefore not part of the deceased's estate available for distribution.
10. The matter proceeded to hearing and Hon. Mutai heard the appellant and the 1st respondent and delivered a judgment on 6.12.2019. It was the court's finding that though the appellant claimed that he had bought an acre from the 1st respondent and that the 1st respondent had received 60000/- the purchase price was Kshs. 120,000/- which was the consideration for the one acre in parcel number 846, the appellant was only entitled to a refund of his purchase price as he did not pay the balance of the 120,000/- thus he did not honour his part of the agreement and was therefore in breach of the contract. Further from the evidence it was not clear who is in occupation of the suit piece of land. The court further held that on the claim of Lorna Wesonga Toili, the said Lorna did not testify nor did she file any documents in support of her claim.. Having not attached any document to confirm the transaction on the said 3 acres the court held that the appellant lack the capacity to enter into an agreement on the said 3 acres as he was not the registered owner and that the deceased had always been the registered owner. The court further stated that the deceased having passed away on 26.11.2009 even if they were to disregard this, that the transaction took place some 28 years ago. The appellant's claim was dismissed. This ruling is the subject of this appeal.
11. Parties filed written submissions. I have carefully considered the said submissions. The appellant has raised the following issue in his submissions; whether the trial court erred in failing to find that the 3 acres and I acre sold to the appellant by Lorna Nasongo Toili and John Sichangi Wanyonyi the 1st Respondent respectively were entitlements of the appellant to be considered during the distribution of the deceased's estate. The appellant's submissions are as follows; the deceased sold 3 acres out of parcel no. 846 in 1975 to one Lorna Nasongo Toili which he later bought from Lorna in 1994 during his father's lifetime. When his father was distributing his land the 3 acres were not touched. Before the deceased died, he left each of his sons staying in their portions of land, which they occupy to date. The



1st respondent sold his one acre out of Parcel no. 846 to him in the year 2011, the purchase price was Kshs.120,000/-. He paid Kshs. 60,000/-. Later on, John moved out of the said land and surrendered it to the appellant and he took possession. The 1st respondent did not dispute the sale of the one acre to him nor did he dispute the validity of the agreement. After the deceased died they held a meeting known as Lufu as per Bukusu traditions and the issue of distribution of the deceased's estate was settled to everyone's contentment. That the trial court failed to consider the deceased's wishes on distribution of his estate as the deceased had distributed his estate in 1995 to his children. All children were satisfied with the said distribution and took possession and occupation of their land. The boundaries exist to date. The trial court's decision was not only disruptive to the deceased family but also in contravention of the provisions of section 42 of the Law of Succession Act Chapter 160 (LSA/the Act). Section 42 of the Act recognizes and secures property delivered or transferred by the deceased during his lifetime from being distributed under intestate succession. That though the deceased's property was to be shared out under section 40 of the Act which is on sharing of the deceased's estate according to the houses and number of children within the units. In this case, the court was bound to invoke Rule 73 of the Probate and Administration rules which empowers the Court to invoke its inherent powers and exercise its discretion in ensuring that the mode of distribution it adopts is the one that meets the end of justice. The deceased had his wishes that parcel no. 846 goes to his sons as shared, that part of the estate was bought by the appellant the evidence was availed and the said portion was to be distributed to the appellant section 40 notwithstanding. The six daughters who were given a portion of the estate did not attend court nor did they swear an affidavit to confirm their respective shares yet the trial court went ahead and confirmed their shares. The daughters did not claim any portion of the estate. it was further submitted that the trial court deviated from the critical issues of proof of entitlement to benefit and went on a spree to examine issues of breach of agreement and its terms since the validity of the agreement was never in question. The trial court was sitting as a probate court, not a civil court. The court further misguided the law on the issue of distribution of the estate when it held that in circumstances where there are several houses, the property is shared amongst the children and not the wife. That as per the provisions of section 40 of the Act, where the deceased died and was survived by more than one wife the estate property is shared equally among the houses and based on the number of children in this case classified as units. Each unit is then shared among the children falling within the units and a surviving spouse falls within one unit and cannot be excluded. The trial court misdirected itself in finding that the appellant lacked the capacity to enter into a transaction by virtue of having not been the registered proprietor of the land in question.

12. The Respondents submitted as follows; the appellant is only making allegations of purchasing part of the deceased's estate from a stranger who was not a witness in the proceedings which this court has no jurisdiction other than the Environment and Land Court. The trial court upon hearing oral evidence found that the Respondent's mode of distribution was proper as per the provisions of section 26 of the Act. The trial court made a finding that the Respondent's mode of distribution was proper as per the provision of section 26 of the Act.

Analysis And Determination.

13. I have considered the submissions in this appeal, the lower court proceedings, and the law as per the Law of Succession Act Cap (LSA or the Act).
14. The main issue in this appeal is whether the appellant is entitled to the 3 acres he states he bought from one Lorna Nafula and the one acre from John. The matter before the trial court was the distribution of the estate of the deceased after the objectors filed an application objecting to the mode of distribution. The parties filed their modes of distribution and they were heard. The trial court made findings as follows; Lorna did not testify nor did she file any documents in support of her claim and the transaction



took place sometime in the year 1974. The court found that the appellant had not annexed or given evidence confirming that the transaction took place neither were any witnesses called to confirm the position that the appellant had purchased the 3 acres of land from Lorna. The court further held that the appellant lack the capacity to enter the transaction as he was not the registered owner of the parcel of land. On the one acre sold to the 1st respondent, the court found that there was an agreement but there was a breach of contract of the said agreement.

15. The issues raised by the appellant in this appeal, touch on ownership, possession, and occupation of the 3 acres bought from Lorna and the one acre bought from John. This court lacks the jurisdiction to deal with matters touching on ownership, title, and /or land occupation. As correctly submitted the court with the property jurisdiction is the Environment and Land Court (ELC) (see Article 162 (1) (b) of *the Constitution*,2010). Once the ELC court makes a finding on the ownership of the said parcels of land the appellant can move the court to make a finding on his entitlement as a beneficiary of the said parcels of land.
16. In conclusion for the reasons given above I find no merit in this appeal and it is dismissed. This being a family matter each party shall bear its costs. It is so ordered.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 22ND DAY OF AUGUST 2024.

R.E.OUGO

JUDGE

In the presence of:

Appellant - Absent

Mr. Kweyu -For the Respondents

Diana - C/A

