



In re Estate of Elizabeth Lutenyo Anaita (Deceased) (Succession Cause 338 of 2012) [2023] KEHC 18083 (KLR) (24 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 338 OF 2012
RN NYAKUNDI, J
MAY 24, 2023**

IN THE MATTER OF THE ESTATE OF ELIZABETH LUTENYO ANAITSA (DECEASED)

BETWEEN

**ALFAYO MUMBO AMIANI 1ST PETITIONER
JOSEPH LUMITI 2ND PETITIONER
BENEDA MUHADIA KENYABUS 3RD PETITIONER**

AND

JOHN ODEKE OKISEGERE APPLICANT

RULING

1. Before this Court are two applications. The first is dated October 4, 2022 and is filed by the Applicant John Odeke Okisegere, whereas second is dated is dated November 11, 2022 and is filed by the 1st Petitioner herein.
2. In the first application the Applicant seeks orders that:
 1. The administrators be ordered to sign all the documents necessary to have land reference Uasin Gishu/Kimumu/8455 transferred by transmission to the Applicant John Odeke Okisegere.
 2. Costs of the summons be borne by the administrators.
3. The application is premised on the grounds therein and it is further supported by the affidavit sworn by John Odeke Okisegere, on October 4, 2022.
4. The Applicant's case is that he is the beneficiary of the estate of Elizabeth Lutenyo Anaita. That his entitlement is limited ½ an acre. The Applicant maintains that this is in accordance with the Certificate of Confirmation of grant and mode of distribution. That the portion he is entitled to is in parcel of land known as Uasin Gishu/Kimumu/8485.



5. The Applicant contends that the administrators herein with the exception of Beneda Muhadia Kenyabus have declined to sign the transfer by transmission to facilitate transfer into his name.
6. The Applicant maintains that the administrators are under a duty to obey and facilitate the enforcement of Courts orders.
7. The application is opposed vide the Replying affidavit sworn by Alfayo Mumbo Amiani, the 1st Petitioner/Respondent dated November 11, 2022.
8. The 1st Petitioner contends that the Applicant is not entitled to half an acre from the estate of her grandmother as the available evidence shows that he only purchased quarter an acre and in fact never completed paying the balance of Kshs 70,000/=.
9. The 1st Petitioner further contends that the information borne by the Certificate of Confirmation of grant that the Applicant is entitled to half an acre was made by an Assistant Chief vide a letter written to the Deputy Registrar which was also reproduce in the mode of distribution.
10. The 1st Petitioner deposed that he has since applied to Court for the amendment of the Certificate of Confirmation of grant so as to reflect that the Applicant's entitlement to the said estate is only subject to him clearing the balance owed to his father in respect of a quarter an acre of the subject land. According to the 1st Petitioner the Applicant took advantage of his father's feebleness to defraud him of the quarter acre.
11. The second application is dated November 11, 2022 filed by the 1st Petitioner/Applicant herein in which he seeks the following orders:
 1. That the mode of distribution of the estate dated 23rd October and filed in this Honourable Court on the October 28, 2013 giving the Respondent $\frac{1}{2}$ an acre of land be and is hereby amended to read $\frac{1}{4}$ of acre as per his sale agreement.
 2. That the Certificate of Confirmation of Grant issued by this Honourable Court issued on the 22nd of July, 2019 based upon the erroneously made the mode of distribution of the estate alluded to prayer to prayer (1) above be amended to read $\frac{1}{4}$ of an acre in terms of the Respondent's sale agreement.
 3. That the Respondent's Chamber Summons filed herein dated October 4, 2022 be stayed until the Applicant's application is determined.
 4. Costs of this Summons be provided for.
12. The application is premised on the grounds therein and it is further supported by affidavit sworn by Alfayo Mumbo Amiani, on November 11, 2022.
13. The 1st Petitioner deposed that the Applicant herein bought from his father a $\frac{1}{4}$ an acre of land from his father Richard Kifumba Amiani. That the Respondent never completed payment of the purchase price of the $\frac{1}{4}$ of an acre he had intended though he sold the same to third parties. That out of the agreed sale price of Kshs 230,000/= the Applicant only paid Kshs 160,000/=.
14. The 1st Petitioner further deposed that the portion his father sold to the Respondent from the subject land was his father's beneficial interest in the estate of the late Elizabeth Anitsi Lutenyo. That the deceased herein died in the year 2011 before she to transfer the subject land to her heirs.
15. The 1st Petitioner contends that the Respondent was among those people who were close to his late father at the time when these instant proceedings were being commenced more particularly at the



- time when the Chief's letter was being obtained. Further that it was at the Chief's office where the Applicant's portion was wrongly captured as $\frac{1}{2}$ of an acre instead of $\frac{1}{4}$ an acre which was in accordance with the sale agreement.
16. According to the 1st Petitioner, the Respondent has no other evidence to show that he purchased an additional $\frac{1}{4}$ acre from his late father other than the inadvertent mistake that was captured in the Chief's letter to the Deputy Registrar.
 17. The 1st Petitioner contends that this mistake continued up to the point of distribution. That the mistake is what now forms the basis for the Respondent's request for an additional $\frac{1}{4}$ acre from the administrators herein.
 18. According to the 1st Petitioner, the Respondent only seeks to unlawfully enrich having already sold the $\frac{1}{4}$ acre that had earlier sold to him.
 19. The application is opposed vide the Replying affidavit sworn by John Odeke Okisegere, the Respondent on January 24, 2023.
 20. The Respondent deposed that the confirmed grant which was obtained by the Petitioners herein has already been acted upon and enforced by the Land Registrar Uasin Gishu County. That pursuant to the confirmation of grant being enforced the Petitioner and all the beneficiaries have obtained title deeds to the parcels of land allocated to them.
 21. According to the Respondent this instant application is incompetent and untenable. That the Petitioners cannot be allowed to reprobate and approbate at the same time.
 22. The Respondent maintains that the grant issued on 22/7/2019 was made pursuant to the Petitioners' application.
 23. The Respondent contends that he is entitled to $\frac{1}{2}$ an acre of the subject land and not a $\frac{1}{4}$ acre as alleged. That the application dated November 10, 2017 was made by the Petitioners with full knowledge of the mode of distribution.
 24. The Respondent contends that he is not a beneficiary of the estate on account of the sale agreement dated 25/5/2012 but on account of agreements made in 2005 but which agreements got destroyed on account of arson arising from the 2008 post-election violence.
 25. The Respondent maintains that he has been on the $\frac{1}{2}$ acre of the subject since 2005.
 26. The Respondent contends that litigation ought to come to an end.

Determination

27. I have perused and considered the two applications, the evidence and submissions on record and find that the only issue for determination is whether the orders sought can issue.
28. From the pleadings by the respective parties, it is evident that there is a dispute as to the proposed mode of distribution that was adopted by this Court and later confirmed vide the Certificate of Confirmation of Grant dated July 22, 2019 with respect to a parcel of land known as Uasin Gishu/Kimumu/8455.
29. The Applicant herein is claiming $\frac{1}{2}$ an acre of the subject land whereas the 1st Petitioner contends that what is lawfully due to the Applicant is $\frac{1}{4}$ of an acre which is per the sale agreement dated May 25, 2015 and that a mistake had been occasioned in the Chief's letter to the Deputy Registrar that indicated the portion that was due to the Applicant was $\frac{1}{2}$ an acre instead of a $\frac{1}{4}$ an acre.



30. The resolution of this matter as between the applicant and the administrator of the estate of the deceased Elizabeth Lutenyo is substantially factual. There is no dispute the context as to whether the applicant John Odeke Ogisegere purchased either $\frac{1}{2}$ or $\frac{1}{4}$ acre from the estate of the deceased is not to be premised in the certificate of confirmation of grant dated June 26, 2014. Signed by Kimondo J as he then was the session judge at Eldoret High Court.
31. The determination of the claim is based on the interpretation of the sale agreement dated 25th day of May 2012 which reads as follows:
1. The total consideration for the said a quarter($\frac{1}{4}$) of an acre is Kenya shillings Two Hundred and Thirty Thousand (Kshs 230,000/=) only.
 2. The seller has received from the purchaser a sum of Kenya shillings one hundred and thirty thousand (130,000) only in cash receipt of which of the seller acknowledges by signing this instrument.
 3. The balance of the consideration Kenya Shillings one Hundred Thousand (Kshs 100,000/=) only will be paid on or before May 30, 2012.
 4. The seller has handed over vacant possession of the land to the purchaser.
 5. The seller will undertake subdivision of the land to curve out a quarter ($\frac{1}{4}$) of an acre to the purchaser.
 6. The seller will obtain the requisite consent of the Land Control Board to have the subdivision and transfer effected to the purchaser.
 7. The seller's family does not have any objection to the sale
 8. The land is sold free of encumbrances
 9. The seller will clear all the rates outstanding to date
32. The parties having entered into agreement fully conscious of the fact the payment by the purchaser was for a share of a quarter ($\frac{1}{4}$) an acre cannot turn around to place reliance on the certificate of grant of confirmation to increase the share to half ($\frac{1}{2}$) an acre. There is apparent error or mistake on the face of the record of that certificate of grant endorsed by the court at that particular time. The agreement for the sale of land between the applicant and one Richard Kifumba has never been reviewed or amended to meet the contractual obligations by remedying it to half ($\frac{1}{2}$) an acre. The contract provided for a purchase of property known as Uasin Gishu/ Kimumu/37 with various instalments as scheduled to take place in favour of the purchaser and vacant possession to be handed over on completion by the seller was that of a quarter ($\frac{1}{4}$) an acre. It is common ground that at the initiation of the petition for grant of presentation the area chief's letter dated September 28, 2012, seems to capture existence of half ($\frac{1}{2}$) an acre share due to applicant John Odeke is in contravention of the written sale agreement dated 25th day of May 2012. The chief's letter cannot rescind, vary, substitute, or amend the clear terms of the sale agreement between the parties. The intention of the parties by the agreement dated 25th day of May 2012 is plain and clear. The entire turn of events which point to an extra a quarter ($\frac{1}{4}$) an acre remains improbable. If the parties had intended something more than a quarter($\frac{1}{4}$) an acre the instrument on record would have said so, otherwise the express provision of the instrument are to continue to operate undisturbed. If the sale in question has caused loss to the applicant the loss lays where it falls. The certificate of confirmed grant upon which the applicant has attached great weight cannot give the contract efficacy for an additional share of land as described in the application. I bear



in mind also the observations made by the court in *Speaker of Kisii County assembly v James Omariba Nyaoga* (2015) eKLR where the court observed as hereunder:

“The 1st appellants attempt to vary the terms of the letters of appointment, in our view, offends the provisions of section 97 and 98 of the *Evidence Act*, Chapter 80 Laws of Kenya, which attempt we must reject. This is not the first time we are doing so. In the case of *John Onyancha Zurwe vs Oreti Atinda alias Okethi Atinda* (Kisumu Civil Appeal No. 217 of 2003 (UR) we cited with approval, *Halbury’s Laws of England* 4th Edition Vo. 12, on interpretation of deeds and non- Testamentary instruments paragraphs, 1478 as follows:

Extrinsic evidence generally exclude:

Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the documents.

Evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document”

33. In the same strength the court in *Twiga Chemicals Industries Limited v Allan Stevens Reynolds* (2015) eKLR where the Honourable court held as hereunder:

“it is familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contract in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence”.

34. A contract may contain terms which are not expressly stated in the agreement but which the law recognises as implied either because the parties intended that to be so or it is implied by custom or operation of the law. It should be noted from the sale agreement in question there is no implied term or one which can be construed by custom or usage in such contract. The point at which the applicant is claiming an extra quarter ($\frac{1}{4}$) of an acre is by reference to the chief’s letter and the generated certificate of confirmed grant by the court dated June 26, 2014 and subsequently endorsed by the court on July 22, 2019. The irresistible inference one will naturally draw from the documentary evidence on record hitherto, is that both certificates of confirmation of grant endorsed by this court in so far as the share of the applicant to the estate of the deceased is concerned, reflect an error or mistake apparent on the face of the record. The ordained provisions on this proposition are expressly stated in Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules*. See also the principles in *Muyodi vs Industrial and Commercial Development Cooperation & Another* (2006) 1 EA 243, *Nyamogo & Nyamogo vs- Kogo* (2001) EA 174 , *Chandrakant Joshibihai Paterl –v- R V* (2004) TLR 2018
35. As regards substantive consideration of the application by the applicant it raises the two interrelated issues although the parties avoided to speak on review jurisdiction conditioned on the two certificate of confirmed grant and the original letter generated by the chief of the location correctly cited as the local domicile of the deceased. The conflict in text between the letter by the chief and the certificates of confirmed grant issued at different sessions by this court can be legally resolved by making reference to the sale agreement. In the instant case therefore, I am not convinced that the applicant purchased a share equivalent to half ($\frac{1}{2}$) an acre from Richard Kifumba Amiani.



36. This means that the applicant has not discharged the burden of proof on a balance of probabilities to warrant this court exercise discretion in his favour for an incremental share of additional quarter (¼) an acre. For the reasons I have already outlined, it follows from this that the applicant's application lacks merit to sustain the remedy in respect of half an acre from the estate of the deceased. It is strongly good for dismissal only that I am constrained not to award costs

DATED SIGNED AND DELIVERED VIA E-MAIL AT ELDORET THIS 24TH DAY OF MAY 2023.

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R.NYAKUNDI

JUDGE

