



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 72 OF 2008**

**IN THE MATTER OF THE ESTATE OF WANGA ABITSA Alias MELKAZADOCK WANGA (DECEASED)**

**MARK KUTA ABITSA.....PETITIONER**

**VERSUS**

**ROSEBELLA ANDEYO ACHINDA.....PROTESTOR**

**JUDGMENT**

1. The petitioner has filed summons for confirmation of grant dated 11<sup>th</sup> May, 2011 seeking that the grant of letters of administration intestate made to him and Rosebella Andeyo Achinda in this matter on 23<sup>rd</sup> February, 2011 be confirmed. The same was opposed by the protestor, Rosebella Andeyo Achinda vide her affidavit of protest dated 29/7/2011.
2. The dispute herein relates to the estate of the late Wanga Abitsa (herein referred to as the deceased) who was the father to the petitioner and to the late husband of the protestor, the late Philip Abitsa Wanga. The protestor is therefore a sister-in-law to the petitioner.
3. The deceased left behind land parcel No. **Kisa/Mwikalikha/957**. After the death of the deceased the petitioner filed this succession cause seeking to distribute the estate of the deceased. The petitioner has his own land given to him by his father and is therefore not a beneficiary to land parcel No. 957.
4. It was the case for the petitioner that after the death of his deceased father, the family sold a portion of the subject land to one **Crispus Alukwe Akhonya** to fund this succession cause on condition of being given part of the estate.
5. The petitioner also contends that before the deceased died he had sold part of the land to one Isaak. That Isaak did not complete payment. After the death of the deceased a person called **Elphas Amakanji** bought Isaak's portion. They refunded Isaak's money. He contends that Elphas Amakanji is a liability to the estate of the deceased.
6. The petitioner contends that his late brother was survived by two sons, Elphas Bukachi and Vincent Ang'ana who are entitled to a share of the estate of the deceased. He contends that the protestor remarried after the death of her late husband and therefore that she is not entitled to any share of the estate. He proposed that the estate be distributed to the two sons of his late brother and the purchasers as follows:-  
  
Elphas Bukachi Obulumbi - 0.9 Ha.  
  
Angana Obuluchi - 0.39 Ha.  
  
Crispus Alukwe - 0.39 Ha.  
  
Elphas Amakanji Isiaho - 0.53 Ha.
7. In opposing the mode of distribution proposed by the petitioner the protestor contends that the subject land parcel was allocated by her father-in-law to her late husband while the petitioner was allocated land parcel No. Kisa/Mwikalikha/1024. That Crispus Alukwe and Elphas Amakanji are strangers to the estate of the deceased. That she did not participate in any sale of land to Crispus Alukwe. That she was not aware that the deceased had sold part of the land to one Isaak. That Angana Obuluchi is her son while Elphas Bukachi is her step-son. That both are entitled to a share of the estate. That the petitioner should not interfere with her husband's portion. That the purchasers should claim land purportedly sold to them from the petitioner. She proposed that the land be given to her to hold in trust for her two sons and grandsons. She further stated that the mode of distribution proposed by the petitioner is meant to disinherit her and her children and therefore that it should be dismissed. She denied the petitioner's allegation that she had remarried after the death of her husband.

8. The summons and the protest proceeded by way of *viva voce* evidence. The protestor testified and called her son, Vincent Angana PW2 as a witness in the case. PW2 supported the position stated by his mother. The petitioner testified but did not call any witness.

9. It is admitted by both sides that the deceased had two sons, the petitioner and the late husband to the protestor, Philip Abitsa Wanga. It is admitted that Philip was survived by two sons, Elphas Buluchi and Vincent Ang'ana. Though the petitioner alleged that the protestor had remarried after the death of her husband, there was no evidence to prove so. This was only a mere allegation without any evidence to prove it. The allegation is therefore dismissed.

10. The petitioner annexed an agreement, purporting to be an agreement of sale of land to Crispus Alukwe. The said agreement is purported to be signed by himself, the protestor and some other witnesses. The protestor denied ever signing such a document. The petitioner did not call any of the witnesses who purportedly witnessed the sale. Section 108 of the Evidence Act places the burden of proof in a suit on that party who would fail if no evidence were adduced on either side. The burden of proof was on the petitioner to prove the authenticity of the document. He did not do so. It has not been proved that the petitioner signed the document. The document could be a forgery.

11. Even if it were true that there was an agreement to sell the land to Crispus Alukwe this would be contrary to the provisions of Section 82 of the Law of Succession Act which bars sale of immovable property of a deceased person before confirmation of a grant. The sale would thereby be illegal.

12. Though the petitioner alleged that his father had sold a portion of the subject land to one Isaak he did not produce any agreement to prove so. His explanation was that he forgot to file the document. I do not think that that was the case. The real reason can only be that there was no such an agreement. The petitioner cannot have remembered to file Crispus' agreement and fail to file one with Isaak. There was then no evidence that Isaak was a liability to the estate of the deceased and that Elphas Amakanji had only re-bought the portion sold to Isaak by the deceased. The only conclusion is that it is the petitioner who sold the land to both Crispus Alukwe and Elphas Amakanji. This amounted to intermeddling with the estate of the deceased contrary to the provisions of Section 82 of the Law of Succession Act.

13. In the foregoing, it is my finding that Crispus Alukwe and Elphas Amakanji Isiaho have no entitlement in the estate of the deceased. They can only make their claim to the person who sold them land. The lawful beneficiaries of the estate of the deceased are Elphas Bukachi (otherwise known as Elphas Obulumbi Wanga), Angana Obulumbi (otherwise known as Vincent Angana Abetsa) and the protestor, Rosebella Andeyo Achinda.

14. The protestor prays that the court makes orders for her to hold the land in trust for her sons and grandsons as she fears that if it is given to her sons they are likely to sell it. Section 71 of the Law of Succession requires the court before confirming a grant in cases of intestacy to satisfy itself as to the respective identities and shares of all persons beneficially entitled and when confirming the grant to specify all such persons and their respective shares. The court is required to comply with the said section before confirming the grant.

15. In view of the above I order that land parcel Kisa/Mwikalikhha/957 be distributed as follows:-

Elphas Obulumbi Wanga

Vincent Angana Abetsa To share equally

Rosebella Andeyo Achinda - To have life interest in the portion bequeathed to Vincent

Angana Abetsa

Orders accordingly.

**Delivered, dated and signed in open court at Kakamega this 22<sup>nd</sup> day of May, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

No appearance for the Protestor

Petitioner – No appearance

Protestor - absent

Court Assistant - Polycap

30 days right of appeal.