



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 595 OF 2009

IN THE MATTER OF THE ESTATE OF WANGOMA ODIPO (DECEASED)

ALI OMONDI MALICHI.....1ST PETITIONER/RESPONDENT

MANEYA M. OSAMBAYO.....2ND PETITIONER/RESPONDENT

VERSUS

JOHN MUNGAYI ODIPO.....1ST PROTESTOR/APPLICANT

FRANCIS WESONGA ODIPO.....2ND PROTESTOR/APPLICANT

JUDGMENT

1. On the 12th February, 2012 this court issued a fresh grant of letters of administration to Ali Omondi Malichi, Francis Wesonga Odipo and John Mungayi Odipo. They could however not agree on the mode of distribution of land parcel South Wanga/Lureko/181 that is registered in the name of the late Odipo Wangoma. Ali Omondi Malichi and Maneya Makokha Osambayo (herein referred to as the 1st and 2nd petitioners respectively) then filed summons for confirmation of grant dated 26th June, 2012 seeking to distribute the said land parcel as follows:-

Ali Omondi Malichi - 12 Acres

Francis Wesonga Odipo - 7 Acres

John Mungayi Odipo - 7 Acres

Maneya Makokha Osambayo - 7 Acres

2. Francis Wesonga Odipo and John Mungayi Odipo (herein referred to as the 1st and 2nd protestors respectively) filed a protest dated 17th December, 2012. Two of their sisters Josephine Mutubera and Getruta Nechesa Osimba filed separate protests.

3. The protest proceeded by way of *viva voce* evidence. The 1st protestor Francis testified as PW1 and called one witness, his sister Getruta PW2. The 1st petitioner Ali Omondi and the 2nd petitioner Maneya testified as DW1 and DW4 and called two witnesses - Matias Okereto Sumba DW2 and Ibrahim Amere Juma DW3. The protestors were represented by **Mr. Luchivya**, advocate while the petitioners were represented by **Mr. Nandwa**, advocate.

4. The facts not in dispute are that the father to the late Odipo was called Wangoma. Wangoma had 5 sons, to wit, Odipo Wangoma, Juma Wanga, Malichi Wangoma, Sheban Masinde and Laburende Weruli. The late Malichi Wangoma is the father to the 1st petitioner, Ali Omondi Malichi. Odipo Wangoma is the late father to the protestors.

5. It was the case for the 1st petitioner that his grandfather, the late Wangoma had 2 parcels of land - South Wanga/Lureko/181 and North Wanga/Mayoni/234. That during adjudication land parcel 181 was registered in the name of Odipo Wangoma to hold in trust for his brother, Malichi Wangoma. That land parcel North Wanga/Mayoni/234 was registered in the name of Juma Wanga as the elder son to hold in trust of his two other brothers. That before his death Malichi Wangoma and his late wife were living on land parcel 181. That they were buried on the said land. That the 1st petitioner lives on the same land. That the protestors also live on the same land. That the other sons of his grandfather were settled on land parcel North Wanga/Mayoni/234.

6. The 1st petitioner further said that the father to the protestors had one other brother, the late Osambayo Odipo who was husband to the 2nd petitioner, Maneya Makokha Osambayo. That Osambayo had been living on land parcel 181. That he bought land and settled on land parcel S. Wanga/Lureko/959. However that his wife is still entitled to a share of land parcel 181.

7. It was also the evidence of the 1st petitioner that the 1st protestor went and distributed land parcel Mayoni 234 to its lawful beneficiaries. That he did not give him, the 1st petitioner, any land on land parcel 234. That this is because his entitlement was on land parcel 181.

8. The 1st petitioner stated that since his father and the father to the protestors were brothers, the land should be shared between his father and the father to the protestors. That he is seeking to be given 12 acres and leave the rest to be shared by the children of Odipo Wangoma.

9. The 2nd petitioner, Maneya, supported the evidence of the 1st petitioner that the land should be distributed as proposed in paragraph 1 above for the reasons given by the 1st petitioner.

10. The petitioners' witnesses DW2 and DW3 testified that land parcel 181 was supposed to be shared between Odipo Wangoma and Malichi Wangoma who were brothers. That the other brothers were to share land parcel Mayoni/234.

11. The 1st protestor said in his evidence that the father to the 1st petitioner Bakari Malichi was a brother to his father. That land parcel 181 is registered in the name of his father and therefore is the property of his late father. That Bakari Malichi never lived on land parcel 181 during the life time of his father. That Bakari went to live on the land after the death of his father. That Bakari had been working in Taita. That when he came back they gave him a place to stay as he prepared to settle on the ancestral land on land parcel Mayoni 234. That the 1st petitioner went to live on the land in 1973 when his father was staying on the land. That the 1st petitioner has no entitlement to land parcel 181.

12. The 1st protestor further said that the late Sambayo Odipo was a brother from his mother but from a different father. That the late Sambayo came with his mother when the 1st protestor's mother was married by the late Odipo Wangoma. That since he was not a member of the family, the family bought him a parcel of land No. S/Wanga/Lureko/959 where he settled. That Sambayo was buried on the said land. That his wife is not entitled to land parcel 181.

13. The 1st protestor further said that he has 3 sisters – the late Teresa Nabwoba, Getruta Nechesa (PW2) and Josephine Mutobera. That his sisters should be considered during distribution. He proposed that the land be distributed as per his supplementary affidavit dated 1/8/2016 as follows:-

(1) Francis Wesonga Odipo - 6.6 Acres

(2) John Mungayi Odipo - 6.6 Acres

(3) Getruta Nechesa Osimba - 6.6 Acres

(4) Josphine Mutobera - 6.6 Acres

(5) Wesonga Makokha (to take

share of his late mother - 6.6 Acres

Teresia Nabwoba Odipo)

14. Josephine Mutobera PW2 supported the mode of distribution proposed by the 1st protestor. She stated that the late Osambayo was her step-brother. That the family bought him land to settle elsewhere because he was not a member of the family.

15. The 1st petitioner and Maneya denied that Osambayo was not a biological son to Odipo Wangoma. They denied that the family bought him land because he was not a member of the family. The witnesses said that it is Osambayo himself who bought the said parcel of land.

16. The 1st protestor admitted that he is the one who went and sub-divided land parcel Mayoni/234 to its beneficiaries. When questioned in cross-examination why he did not give Malichi land on land parcel 234 when he carried out the sub-division, he responded that he did not do so because Malichi was not around. He denied that the reason he failed to do so was because Malichi's inheritance was on land parcel S/Wanga/Lureko/181.

17. **Mr. Luchivya** for the protestors submitted that the subject land is registered in the name of the deceased as first proprietor. That nowhere is it indicated that he held it in trust of Bakari Malichi. That Bakari Malichi never claimed any land from the deceased when the deceased was alive. That it was not proved that land parcel 181 was ancestral land as the ancestral land is North Wanga/Mayoni/234. That the 1st petitioner is not entitled to any share of land parcel 181.

18. Counsel further submitted that it was proved that Osambayo Odipo was not a biological child of Odipo Wangoma. That it was proved that the family bought Osambayo land because he was not son to the protestors' father. Counsel urged the court to distribute the estate as

proposed by the 1st protestor in his supplementary affidavit dated 1/8/2016.

19. **Mr. Nandwa** for the petitioners on the other hand submitted that Odipo Wangoma was the elder brother of Malichi Wangoma. That the land was registered in the name of Odipo Wangoma in trust for Malichi Wangoma. That Malichi Wangoma lived, died and was buried on the subject land. That Malichi's son, the 1st petitioner is entitled to 16.5 acres of the 33 acres but however that he sought 12 acres only. That Section 41 of the Law of Succession Act allows the 1st petitioner to benefit from the share which his father was entitled to.

20. Counsel submitted that the 1st protestor shared out the ancestral land in North Wanga to its beneficiaries while acknowledging that the 1st petitioner was entitled to land parcel South Wanga/Lureko/181. That the 1st petitioner has for the whole of his lifetime stayed on the subject land. That he is entitled to his share of the land.

21. Counsel submitted that 2nd petitioner Maneya, is entitled to a share of inheritance that was due to her husband, Osambayo Odipo. That it was proved that her husband is the one who bought the parcel of land where the 2nd petitioner is now settled. That there was no proof that the land was bought for him by the family of the protestors. That there was no evidence that he was not a biological son of Odipo Wangoma. That the 2nd petitioner is entitled to a share of 7 acres equal to that of the other sons of the deceased.

Analysis and Determination -

22. The questions before the court are:-

(1) Whether the 1st petitioner Ali Omondi Malichi is a beneficiary to the estate of the late Odipo Wangoma.

(2) Whether the 2nd petitioner Maneya Makokha Osambayo is a beneficiary to the estate of the late Odipo Wangoma.

23. The 1st petitioner claims entitlement to a share of the deceased's estate on ground that land parcel South Wanga/Lureko/181 was registered in the name of the deceased in trust of his father, Malichi Wangoma. It is admitted that Malichi Wangoma was the younger brother of Odipo Wangoma. It was the case for the 1st petitioner that land parcel 234 was shared between 3 brothers while Malichi Wangoma was to get his share in land parcel 181. The 1st protestor however contends that the entitlement for Malichi Wangoma lay on the ancestral land on land parcel North Wanga/Mayoni/234.

24. The subject land is registered in the name of the late Odipo Wangoma. Section 25 of the Land Registration Act grants a registered proprietor of land absolute ownership of the land subject to such rights and interests that do not require to be noted in the register. Some of these rights according to Section 28 of the Act that do not require to be noted in the registered are "*trusts including customary trusts.*" The 1st petitioner is laying his claim on customary trust.

25. I have considered the evidence adduced by the parties in respect to the claim by the 1st petitioner. The 1st petitioner's father was a younger brother to the father of the protestors. The father to the 1st petitioner was living on the subject land before he died. He was buried on the subject land. His wife was buried there. The 1st petitioner has continued to live on the land. When the 1st protestor sub-divided land parcel North Wanga/Mayoni/234 to his uncles he did not give the 1st petitioner land there. He could not give a satisfactory explanation why he did not give him land there if his entitlement lay there. The only reason why the 1st protestor would have acted this way is because he knew that the entitlement for the 1st petitioner's father was on land parcel South Wanga/Lukero/181. The fact that the father to the 1st petitioner was living on the said land before he died proves that his late brother was holding the land on trust for him. There is no truth that the entitlement for the 1st petitioner's father lay on land parcel 234. The 1st petitioner has proved his claim that he is entitled to the share of his late father in land parcel South Wanga/Lureko/181.

26. The protestors contend that the late husband to the 2nd petitioner (Maneya) was not a biological son to their father. That they bought him land so as to move out of their land because he was not a biological son to their father. Section 107 of the Evidence Act places the burden of prove on the person who alleges anything to prove it. The 1st protestor said that it is his parents who told them that the late Osambayo was not a biological son to their father. The said parents are deceased. There is no way of confirming these allegations. There was no evidence that it is the protestors' family who bought Osambayo land so as to move out of their land. The protestors did not produce any written agreement to show that they are the ones who bought him the land. The assertion by the 2nd petitioner that it is her husband who bought the land is the more believable one. That her husband bought land outside did not extinguish his claim on the family land. The averments by the protestors in respect to the late husband of the 2nd petitioner are dismissed. I find that the late Osambayo was a son to the late Odipo Wangoma. His wife is entitled to a share of his father's estate.

27. In view of the above and the fact that Odipo Wangoma was registered as proprietor of the land in trust for his brother Malichi Wangoma, land parcel South Wanga/Lukero/181 ought to be shared between the heirs of Odipo Wangoma and Malichi Wangoma in two equal portions. The land measures 33 acres. However the 1st petitioner desires to be given 12 acres only. I therefore find for the 1st petitioner that he is entitled to 12 acres of land parcel South Wanga/Lureko/181.

28. According to the evidence of the 1st protestor and his witness PW2, the late Odipo Wangoma had 5 children as named in paragraph 13 above. This number includes daughters who are also entitled to inherit the estate of their father. To this I add the late Osambayo Wangoma. That makes a total of 6 beneficiaries to share the 21 acres remaining after deduction of the share of the 1st petitioner. Each beneficiary will therefore get 3.5 acres of the land. John Mungayi Odipo is reported to have died during the pendency of the succession cause. His share will go to his son, Ramadhan Wanzofu Mungayi.

29. In the foregoing the court distributes land parcel South Wanga/Lureko/181 as follows:-

Ali Omondi Malichi - 12 Acres

Maneya M. Osambayo - 3.5 Acres

Francis Wesonga Odipo - 3.5 Acres

Ramadhan Wanzofu Mungayi - 3.5 Acres

Getruta Nechesa Osimba - 3.5 Acres

Josephine Mutobera - 3.5 Acres

Wesonga Makokha - 3.5 Acres

Orders accordingly.

Each party to bear its own costs.

Delivered, dated and signed at Kakamega this 17th day of June, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Petitioners/Respondents

..... for the Protestors /Applicants

Petitioners/Respondents - Absent

Protestors/Applicants - Absent

Court Assistant - Polycap

30 days right of appeal.