



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 498 OF 2012

IN THE MATTER OF THE ESTATE OF CLEMENT AUKA KWALIMWA Alias AUKA KWALIMA CLEMENT (DECEASED)

AND

NICHOLAS LILUMBI AUKA.....PETITIONER/APPLICANT

VERSUS

ERNEST UBUNGA AUKA.....PROTESTOR

R U L I N G

1. The petitioner/applicant has filed summons for confirmation of grant dated 7th April, 2016 seeking that the grant of letters of administration intestate issued to him and Ernest Ubunga Auka be confirmed and that land parcel No. Kakamega/Lubao/726 be distributed as follows:

- (a) Andrew Mukhanji Auka - 0.90 Ha
- (b) Ernest Ubunga Auka - 0.40 Ha
- (c) Nicholas Lilumbi Ahuka - 0.42 Ha
- (d) Morris Andove Ahuka - 0.55 Ha
- (e) Patrick Shechero Ahuka - 0.30 Ha
- (f) Kizito Kasiti Ahuka - 0.43 Ha
- (g) Vincent Kwalimwa Ahuka - 0.25 Ha
- (h) Christopher Bitinyu Ahuka - 0.19 Ha
- (i) Nicholas Lilumbi Auka - 0.18 Ha

2. The application was opposed by Ernest Ubunga Auka who has filed a protest on the mode of distribution proposed by the petitioner. The protestor however supports the mode of distribution proposed by the applicant on land parcel 726 save for the parcel of land measuring 0.18 Ha that was previously occupied by their father.

Background

3. The succession cause relates to the distribution of the estate of the late Clement Auka Kwalimwa (herein referred to as the deceased). The deceased left behind a parcel of land LR. NO. KAKAMEGA/LUBAO/726. It is not in dispute that the deceased had distributed his land to his 8 sons before he died. He had left a piece of land measuring 0.18 Ha for himself. It is this portion of land that is in dispute. The applicant contends that his father had sold the said parcel of land to one Jackson Muhatia. That after the deceased died he, the applicant, bought back the parcel of land from the said Jackson Muhatia. He proposes that the said piece of land goes to him.

4. The protestor on his part denies that his father had sold the said piece of land to Jackson Muhatia. He denied that the applicant had bought back the piece of land from Jackson Muhatia. He says that the parcel of land is too small to be shared out among the 8 beneficiaries. He proposes that the parcel of land be sold and the proceeds be shared out among the beneficiaries.

The Evidence

5. The matter proceeded by way of *viva voce* evidence. The protestor was the only witness to his case. The applicant called one witness - Jackson Muhatia. The evidence of the said witness was that he had bought the said parcel of land from the deceased in 1991. That he used the land for 3 years. That after the deceased died his sons claimed back the parcel of land from him. He asked them to refund his money. The others declined to do so except the applicant who refunded the money to him. He handed over the piece of land to him. He says that the land belongs to the applicant. The witness produced a copy of the sale agreement between him and the deceased as exhibit, D.Ex.1. The same was witnessed by some people named therein none of whom was a son to the deceased. He further said that he also entered into an agreement with the petitioner when he sold the said parcel of land to him.

6. The applicant stated in his evidence that he bought the piece of land from Jackson Muhatia in the year 1995. That he entered into a sale agreement with him but the original got lost. He has since been in occupation of the land. He opposed the proposal that the piece of land should be sold and proceeds shared out among the beneficiaries.

7. The protestor stated that he was not aware that his father had sold the piece of land to Jackson Muhatia. He denied that the petitioner has been in occupation of the piece of land since 1995. He said that nobody has been using the land.

Analysis and Determination

8. The petitioner/applicant stated in cross-examination that the only brother who was there when he bought the land from Jackson Muhatia is Andrew who is now deceased. Jackson Muhatia stated in cross-examination that he bought the land from the deceased on 11th May, 1991. When referred to a date on the bottom of the agreement, 2/8/2008, he stated that that is the date he paid the deceased the balance of the purchase price. He said that the family members of the deceased were there when he bought the land but that they did not include them in the agreement.

9. The documents filed in this succession cause indicates that the deceased herein died on 24th September, 1993. How then could Jackson Muhatia have paid him part of the purchase price on 2nd August, 2008 when the deceased was long dead? It is surprising that the sons of the deceased were there when he bought the land but they were not included in the agreement as witnesses. How could strangers have witnessed the sale agreement and excluded the sons of the deceased?

10. The petitioner could not produce the original agreement between him and Jackson Muhatia. He said that it got lost. None of the brothers of the petitioner who are alive today were there when the petitioner allegedly bought the parcel of land from Jackson Muhatia. I am not convinced that the petitioner and Jackson Muhatia are credible witnesses. Jackson Muhatia was exposed in cross-examination as a liar when he purported to have paid part of the purchase price to the deceased at a time when the deceased was long dead. The story about the deceased having sold the land to Jackson Muhatia and Muhatia selling the land to the petitioner is a fabricated story by the petitioner and Jackson Muhatia. I do not believe that the deceased would have sold the land to Jackson Muhatia and failed to inform his sons about it. The claim by the petitioner/applicant on the said parcel of land is dismissed.

11. The petitioner/applicant has filed a consent form, form 37, in support of his proposed mode of distribution. None of the beneficiaries has signed the consent. It could mean that the other beneficiaries were not involved in the distribution of the land or that they do not support the proposed mode of distribution. The court cannot confirm the grant in the absence of consent by the other beneficiaries. Such consent is a requirement of rule 40 (8) of the Probate & Administration Rules.

12. The protestor is seeking that the parcel of land measuring 0.18 Ha previously occupied by their father be sold and the proceeds be distributed to the beneficiaries. He however has not filed a consent of the other beneficiaries in support of his proposal as required by rule 40 (8) of the Probate & Administration Rules. The proposal by the protestor cannot be confirmed for failure by the beneficiaries to give consent to that proposed mode of distribution.

13. It appears that neither the petitioner/applicant nor the protestor involved the other beneficiaries in their preferred modes of distribution of the estate. They are only telling the court their preferred modes of distribution but not the views of the other beneficiaries. None of them called the beneficiaries as witnesses to state where they lie on the opposing modes of distribution. Both of their modes of distribution of the estate are thereby declined.

14. The upshot is that the claim by the petitioner/applicant on the parcel of

land measuring 0.18 Ha on Kakamega/Lubao/726 that was previously occupied by his father is dismissed. In addition his application for summons for confirmation of grant dated 7th April, 2016 is declined for lack of consent by the beneficiaries.

15. On the other hand there is no consent by the other beneficiaries on the proposal by the protestor that land parcel measuring 0.18 Ha on Kakamega/Lubao/726 be sold and proceeds be distributed to the beneficiaries. The proposal is dismissed for lack of consent by the other beneficiaries.

16. The court makes an order that the petitioners do present the other beneficiaries in court for them to inform the court on their preferred modes of distribution of the estate. If the beneficiaries will be unable to agree on the mode of distribution of the 0.18 Ha previously occupied by their father the court will make a determination on how it will be distributed.

Orders accordingly. Each party to bear its own costs.

Delivered, dated and signed in open court at Kakamega this 25th day of April, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Arwanda holding brief Ondieki for petitioner/applicant

Mr. Getanda holding brief for Mukavale for protestor

Parties:

Petitioner/Applicant - present

Protestor - present

Court Assistant - George

Beneficiaries – Patrick and Vincent present