



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT BUNGOMA

P & A. CAUSE NO. 119 OF 2006

LONGINO KHAOYA WASOLO.....DECEASED

BETWEEN

DAVID MASIKA KHAOYA.....PETITIONER

VERSUS.

WYCLIFFE WAFULA KHAOYA.....APPLICANT

JUDGMENT

The deceased Longino Khaoya Wasolo died Intestate on 15.11.1985 leaving the estate and according to the letter from Chief Musikoma Location dated 24.8.2006 left the following beneficiaries;

1. *David Masika Khaoya*
2. *Dennis Wabwire Masanja*
3. *Wycliff Wafula Khaoya*
4. *Daniel Sikuku Khaoya*
5. *Thomas Wanyonyi Khaoya*

He left Land Parcel No. E. Bukusu/S. Kanduyi/611 measuring 18.0 Acres as the only asset. David Masika Khaoya the petitioner filed this Petition for grant of letters of administration which were granted, on 19.4.2007. On 5th December, 2007 the Petitioner filed an application for confirmation of grant and in Paragraph 5 of the Supporting affidavit he tabulated this mode of distribution. He allocated the shares of the beneficiaries as follows;

1. *David Masika Khaoya - 3.2 Acres*
2. *Dennis Wabwire - 3.4 Acres*
3. *Wycliffe Wafula Khaoya - 1.8 Acres*
4. *Daniel Sikuku Khaoya - 2.27 Acres*
5. *Thomas Wanyonyi Khaoya - 1.8 Acres*
6. *Timina Mohonja Olienge - ¼ Acre*
7. *Cleophas Wamalwa Wanyonyi - 1¾ Acres*
8. *Nixon Marende - ½ Acre*

9. Robert Simiyu

10. Caleb W. Simiyu - 2 Acres

11. Walter J. Simiyu

12. Hoghston Eliis Ominde - ¼ Acre

13. Lazarus Nyongesa - 1½ Acres

By further affidavit sworn on 4.12.2008 he appealed to court to allow that the shares due to Daniel Sikuku Khaoya who has since died to be held in trust by Rose Nabwile Sikuku the wife to hold it in trust for her 3 sons. The objector Wycliff Wafula Khaoya who is one of the beneficiary filed this protest on the following grounds.

1. **THAT** identification of shares to individual beneficiaries are not properly ascertained.

2. **THAT** Lazarus Nyongesa is not one of the beneficiaries.

3. **THAT** Lazarus Nyongesa is not a purchaser.

4. **THAT** his purported share of 1½ acres is not known and identified.

5. **THAT** any purported document in respect of sale is a forgery.

By consent the objection was to be canvassed by way of viva voce evidence. Both parties filed witness statements. The objector adopted his witness statement as evidence in chief. He stated that his father was called Zacharia Wanyonyi the son of the deceased Longino and therefore the objector is the grandson of the deceased to which this proceedings relate. He stated that the deceased sub-divided this land among all his 4 sons but also included him giving his share as a son despite the fact that the objector's father Zacharia Wanyonyi Longino had been given his equal share. He contends that he should be given 3.3 acres and not 1.8 acres as proposed. He also contends that Lazarus Nyongesa is not a purchaser of 1½ acres and that the purported Sale agreement is a forgery. Upon being Cross-examined by Makali for Petitioner, the objector stated that the area he is claiming is the one now being occupied by Lazarus Nyongesa. The objector called Francis Sikuku Wanyama who testified that the deceased in 1981 asked him to assist in planting sisal boundary as he was sub-dividing his land for his sons and a grandson. He planted the sisal boundary from the land which was divided among his 2 wives. His only duty was to plant the sisal boundary.

The petitioner David Masika Khaoya adopted his affidavit in reply to the protest as evidence. He deponed that the protestor is a grandchild of the deceased and that he has been allocated his share from his father Zacharia Wanyonyi Longino and that if there was any issue it should be addressed to the estate of his father. He also deponed that one Gregory Wamalwa purchased land from the deceased and annexed an agreement to which he was a witness. Lazarus Nyongesa Pw2 testified that his brother Gregory Wamalwa bought land from the deceased which he then sold to him. James Nyongesa Ocholo only confirmed the sale of Land by Gregory to Lazarus.

From the evidence and submissions, the objectors objection is on the basis that he was given the piece of land now occupied by Lazarus by his grandfather the deceased over and above that of the sons of the deceased as a gift. He contends that the reason he was given land by deceased is that he was the first grandson and that the deceased participated in his circumcision. He readily admits that he got his share of his fathers estate.

The petitioner dispute this assertion contending that it is not true that the deceased gave the objector land at the tender age of 11 years, and that the Parcel of land the objector claimed to have been gifted was already sold to Gregory by the deceased. He annexed the sale agreement to that effect. The parcel of land having been sold and occupied the deceased would not have gifted it to the objector.

The objector readily admits that he is the son of Zacharia Wanyonyi who was the son of the deceased. He also admits that Zacharia Wanyonyi received his share of the estate which he would sub-divide to his children including the objector. The objector contention that he was given land by the deceased and considered a son is not supported by evidence. The witness he called only testified to having been asked to plant Sisal boundary by deceased. No evidence that he was specifically given separate parcel of land from what his father got was adduced and it is unlikely that that would be done to an 11 years old and in any case the land the objector alleged to have been given by deceased was already sold to Gregory by the deceased.

Considering all the evidence and submissions. I find that the objector has failed to prove his objection which is hereby dismissed with costs.

Dated and Delivered at Bungoma this 28th day of May, 2019.

S.N. RIECHI

JUDGE