



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 33 OF 2004

IN THE MATTER OF THE ESTATE OF OTORO ORANGI (DECEASED)

BETWEEN

WILLIAM SUNDA OTORO.....APPLICANT

AND

JAMES NYABUTO ORANGI.....1ST PROTESTOR

SCHOLASTICA KWAMBOKA GISACHO.....2ND PROTESTOR

RULING

1. This case concerns the estate of **OTORO ORANGI** (“the deceased”) of Bassi Boitangare who died on 21st April 1990. His son, William Sunda Otoro (“William”) applied for and was issued with a grant of letters of administration dated 24th March 2004. The grant was confirmed on 24th November 2006 whereupon the deceased’s only property; BASSI/BOITANGARE/93 (“Plot 93”) devolved to him absolutely.
2. In due course, the deceased’s daughter in law, Scholastica Kwamboka Gisacho, applied to revoke the grant issued to William on the ground that he had failed to disclose that the deceased had other beneficiaries. The summons for revocation was allowed by a ruling dated 31st July 2012 which resulted in Plot 93 reverting to the estate of the deceased. On 29th October 2018, I appointed William, Scholastica Kwamboka Gisacho (“Scholastica”) and James Nyabuti Orangi (“Nyabuti”) to be administrators and directed them or any of them to file an application for confirmation of the grant.
3. William filed the summons for confirmation dated 14th February 2018 in which he once again insisted that he was solely entitled to Plot 93. I directed that the matter be resolved by oral testimony and in that regard I heard the testimony of Agnes Moraa Osindi (PW 1) and William (PW 2). His sisters, Birita Nyanchama Okero (PW 3), Teresa Otoro (PW 4), Pacifica Bokea (PW 5) formally supported his claim. Nyabuti (DW 1) testified and was supported by Scholastica (DW 2), Onduso Nyangau (DW 3) and Prisca Bonareri Nyaundi (DW 4).
4. It was common ground that during his lifetime the deceased had 3 sons. William and two who are deceased; Peter Orangi and Lawrence Gisacho. He also had daughters; Agnes Moraa Osindi, Birita Nyanchama Okero, Teresa Otoro, Pacifica Bokea, Prisca Nyandika, Maria Karagacha and Fridah Sarota. From the evidence and submissions, the thrust of the dispute is whether the deceased gave his sons land during his lifetime thus leaving Plot 93 for William who was his last born son.
5. William testified that the deceased had three sons and during the adjudication he surrendered a portion of his land which was subdivided into two; BASSI/BOITANGARE/927 and 928 and registered in the names of Lawrence Gisacho and Peter Orangi respectively and since he was a child, the deceased was left with 2.43 Ha which was supposed to be his inheritance. He told the court that while his brothers were alive they never claimed a share of the Plot 93. He claimed that Nyabuti and Scholastica invaded his land in 2002 yet they had no claim over it.
6. The deceased’s eldest daughter, PW 2, told the court that before she got married, the deceased had already subdivided the land between the two brothers and her mother remained with William who was expected to inherit Plot 93 as the last born son. In cross-examination she confirmed that the land was properly delineated.
7. Nyabuti (DW 1) testified that his father died in 1985 and that he occupies 1 acre and has lived on Plot 93 for 30 years. He claimed that

when he lived on the land there was no boundary and that the family discussed and agreed to subdivide it and that is how he came to occupy part of Plot 93. He recalled that when the matter was discussed by the elders and the problems started in 2005 when William began processing the title to the land. In cross-examination he admitted that his father and Gisacho had property in their own names and that their parcels of land were neighbouring each other. He stated that until the deceased passed away there were no problems.

8. Scholastica testified that she resides on a small portion of Plot 93 on which she has resided for 15 years and has built a house. She stated that William permitted her to occupy the portion and that she buried her child on the said land. In cross-examination, she accepted that her husband, Gisacho was given Plot 927 and that the dispute arose after the death of the deceased.

9. The testimony of DW 3 was to the effect that he was involved with the elders on several occasions to resolve the dispute between William and other family members. He told the court that after the deceased passed away, they proceeded to divide the land between the deceased's three sons but William did not accept this. DW 4 was of the view that since the land belonged to her father, it should be given to all the children.

10. Since the deceased died during the currency of the **Law of Succession Act ("LSA")**, the starting point for distribution of his property is **section 38** which provides as follows:

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

However, under **section 42** of the **LSA**, the court may, in distributing the property, take into account the property the deceased has already given to or settled to certain beneficiaries. It provides as follows:

42. Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

11. I am satisfied that William had proved that the deceased bequeathed his two elder sons Orangi and Gisacho their own pieces of land during the adjudication period and he remained with Plot 13 which was intended for William. The question is whether Nyabuto is entitled to a share of the deceased's estate. His claim could only be derived from his father's entitlement and since I have found his father had been provided for under **section 42(a)** of the **LSA**, his claim as a beneficiary is untenable. He did not establish that the deceased also gave the land as a gift during his lifetime. I also dismiss the claim in so far it was based on the action by the elders to subdivide the deceased's land. Their role was limited to amicably settling the dispute, they could not purport to distribute the deceased's land contrary to the **LSA** unless William, as a beneficiary agreed. William was adamant that he was the only beneficiary hence elders' efforts were not successful. I find and hold that Nyabuto could not locate his interest on the land on the basis of the law of succession and any claim to the land must be resolved in another forum.

12. Scholastica stated that it was the William who invited her to stay on the land and that she even buried her child on the land. She admitted that her husband had already been provided for hence her claim to the Plot 93 could not be derived from her husband's right of inheritance from the deceased. She therefore must look elsewhere to protect her interest.

13. Having found that William Sunda Otoro was entitled to Plot 93, I now make the following orders:

(a) The grant issued to William Sunda Otoro, Scholastica Kwamboka Gisacho and James Nyabuti Orangi is hereby revoked and re-issued to William Sunda Otoro.

(b) The grant is confirmed on terms that BASSI/BOITANGARE/93 shall be inherited by William Sunda Otoro absolutely.

(c) There shall be no order as to costs for these proceedings.

DATED and DELIVERED at KISII this 28th day of MAY 2019.

D. S. MAJANJA

JUDGE

Mr Onyancha instructed by Koina Onyancha and Company Advocates for the petitioner.

Mr Nyakundi instructed by Momanyi Gichuki and Company Advocates for the respondents.