REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION APPEAL NO. 1 OF 2017

(from the decision of Hon. F. Makoyo, Senior Resident Magistrate (SRM) delivered on 11th September 2017 in Butere PMCSC No. 30 of 2017)

JASON WERIMO ONYANGO.....APPELLANT

VERSUS

PATRICK ONYANGO SAKWA.....RESPONDENT

JUDGMENT

1. These proceedings relate to the estate of Josephat Sakwa Onyango, who died on 3rd June 2011. There is no letter on record from the Chief of the area where he hailed from, but there is an affidavit, that was sworn on 28th July 2016 by Patrick Onyango Sakwa, the respondent herein. He describes himself to be the elder son of the deceased. He lists the survivors of the deceased as Ruth Mombo Sakwa, Melisa Omuronji Peter, Monica Lukale Sakwa, Patrick Onyango Sakwa, Joshua Omumani Sakwa, Jairus Omusula Sakwa, Daniel Kubuka Sakwa and Nancy Makomere Sakwa. He does not indicate the relationship between these individuals and the deceased, but I suppose they are the widow of the deceased and the children.

2. A petition was lodged, in Butere PMCSC No. 30 of 2017, on 8th March 2017, by the said Patrick Onyango Sakwa seeking representation to the intestate estate of the deceased. He listed in the petition the persons named in the affidavit referred to in paragraph 1 above as the survivors of the deceased and he identified them as the widow and children of the deceased. He expressed the deceased to have had died possessed of a property known as Marama/Shirotsa/762.

3. The filing of the cause was publicized in the *Kenya Gazette* of 17th March 2017, as Gazette Notice No. 2644. That notice prompted the filing of an objection to the making of the grant by Jason Werimo Onyango, the appellant herein, on 31st March 2017, bearing an even date. He asserted that he had been excluded as a beneficiary of the estate of the deceased, and that his consent was not obtained, and that the proceedings had been initiated secretly without involving him. In the affidavit that he swore in support of the objection, he averred that Marama/Shirotsa/762 was family property that the deceased had held in trust for him, and the same was meant to be shared between his family and that of the deceased. He asserted that he had lived on the land since 1994.

4. A date was given for the hearing of the objection dated 31st March 2017. The oral hearing commenced on 18th May 2017. The appellant was the first to take the stand. He testified that Marama/Shirotsa/762 was ancestral land. He said that the deceased was his biological brother, and that their late father had instructed the deceased brother to move into the land, which he did. He thereafter moved the appellant into the same land in 1994. He said that he was objecting to the grant being made as he lived on the land with his family and he had nowhere else to go. During cross-examination, he stated that their late father had three parcels of land. He directed that he and the deceased settled on Marama/Shirotsa/762, while the other brothers were settled on the other two parcels of land. He stated that the deceased had died before he could subdivide the land and transfer to him the portion that was due to him. He denied having been given another piece of land at Ebushieni. He said that the Ebushieni land was not ancestral land.

5. The appellant called Frederick Maina as his witness. He said that he was a village elder in 1969. The father of the appellant called him to his home at a time he was unwell. The appellant's father allegedly told the witness, and other elders, that he had five sons and three parcels of land, one in South Wanga and the other two in Marama. He gave Parcel No. 762 to the appellant and the deceased, while Parcel No. 775 was given to the others two sons, identified as Omusula and Paul. He stated that the appellant's father died three days later. In compliance with those directions, the deceased was said to have had moved into Parcel No. 162 with the appellant, and they lived together there in peace until the deceased died in 2011, when problems began. During cross-examination he stated that all the other elders who had been present had died, and that the other brothers of the appellant were not present when their father shared out the property.

6. The respondent followed. His case was that the deceased had, during his lifetime, instructed him that his property was to be shared out amongst his four sons. When he enquired about the fate of the appellant, who was also on the land, the deceased allegedly told him that the appellant was illegally on the land. He said that the appellant moved into the land when the deceased had bouts of mental instability. He said that the appellant had enough time to sort out his issues with the deceased before he died. He complained that the appellant had taken

advantage of the deceased's mental problems. He said that the appellant worked on another parcel land, which he identified as No. 775, and argued that he, therefore, had another place to go. He said that the appellant's witness lied about a will by the appellant's father arguing that any such oral will ought to have been made in the presence of family members.

7. He called Wilberforce Benjamin Musira as his witness. He said that he was a distant relative of the parties. He explained that the father of the appellant and the deceased, who he identified as Onyango Omurende, had five sons and two daughters. He allegedly subdivided his land amongst his children during his lifetime. The deceased was the first born son; he was given Parcel No. 752. The land in South Wanga he gave to his son, Edward Muchonyi, and he retained Parcel No. 775 with his three young sons and two daughters. The deceased and Muchonyi moved into their respective parcels of land, while the appellant and his brothers, Charles Musula and James Musira, remained with their father on Parcel No. 775. When the appellant got married he began working on Parcel No. 775. Thereafter, the deceased invited the appellant to go and build on Parcel No. 762. After some time, the appellant went to complain to the witness that the deceased was chasing him out of the land calling him a squatter. He sat both of them down, the deceased explained that he had asked the appellant to put up a home on his land since his wife was not getting along well with the other women in their father's homestead on Parcel No. 775. He allegedly said that he had not given the appellant the land absolutely. The genesis of the dispute between them appeared to be from the cutting of trees on the land by the appellant. He urged the two to continue living in peace. During cross-examination, he said that it was he who had helped the appellant move into the deceased's land, and that he had believed then that the two had reached agreement. He further said that it was the appellant who had approached him with complaints that the deceased was trying to remove him from the land.

8. The respondent's last witness was this mother, Ruth Sakwa. She testified that when the appellant came from Kibwezi, he moved from his father's land into the deceased's land and built a house there within a day. The deceased allegedly raised the issue with their mother, but the appellant continued to live on the land, with the deceased complaining about that until he died. She said that the appellant's father's land was still available for him. She said that she assisted the appellant in putting up the house, but she knew that he was only meant to be on the land for a while before moving back to his father's house.

9. After reviewing the evidence, the trial court was of the view that the only issue for determination was whether or not the appellant had established a trust in his favour in Marama/Shirotsa/762. The court concluded that there was no evidence to establish that the father of the appellant and the deceased had created a trust in Marama/Shirotsa/762 in favour of the appellant. The objection was subsequently dismissed on 11th September 2017.

10. It is the decision of 11th September 2017 of the trial court that sparked the instant appeal. As I understand the grounds listed in the memorandum of appeal, the key issues are:

(a) that the trial court misdirected itself on the nature of the appellant's interest in the estate of the deceased;

(b) that the trial court failed to appreciate the evidence of the appellant;

(c) that the trial court failed to appreciate that it was his father who had settled him on Marama/Shirotsa/762 in 1994, where he had been living to date; and

(d) that the ruling was against the weight of the evidence.

11. What the appellant seeks through his appeal is to be allowed to share equally the land between himself and the family of the deceased.

12. The proceedings leading upon to the impugned decision of 11th September 2017, were objections to the making of a grant of letters of administration intestate to the respondent herein, who had filed a petition before the trial court.

13. The deceased herein died in 2011, that was long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation in 1981. His estate, therefore, fell for distribution in accordance with the provisions of the said law.

14. Objections to making of grants are addressed in section 68 and 69 of the Law of Succession Act, and Rule 17 of the Probate and Administration Rules. For avoidance of doubt I shall here below set out the provisions in the Act, which state:

"68. Objections to application

(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.

(2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.

69. Procedure after notice and objections

(1) Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

(2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute."

15. The said provisions envisage the filing of a notice of objection, followed by an answer to the petition and a petition by way of cross-application. What constitutes the objection is the combination of the notice of objection, the answer to petition and the petition by way of cross-application. It would appear that where the objector files a notice of objection but does not file the answer and the cross-petition then the objection pleadings would be incomplete and the court ought to disregard the notice of objection and proceed to make a grant to the petitioner. According to section 69(2), the objection proceedings should only be heard after an answer and cross-application are filed under section 68 (2) of the Act. Under section 69(1) of the Act, where a notice of objection is filed but no answer or cross-application has been filed as required by section 68(1) of the Act, the court ought to make the grant in accordance with the petition.

16. From the record of the trial court, the appellant filed a notice of objection dated 31st March 2017, in keeping with section 68(1) of the Act. I have perused through and pored over all the documents and processes filed in that record. I have not come across any document that would pass as answer to the petition or a petition by way of cross-application. It would mean, therefore, that the appellant did not comply with section 68(2) of the Act, the effect of which was that, as per section 69(1) of the Act, there was no objection that could be heard by the court. The court, therefore, conducted a trial that it ought not have conducted in the first place.

17. The objective of objection proceedings should be to determine whether or not the person who has petitioned for representation is qualified to be appointed as personal representative, or, if qualified, he or she is competent to administer the estate, or if qualified and competent, whether he or she is suitable for appointment. Qualification largely depends on the relationship between the deceased and the person seeking authority to administer the estate. In testacy, that person should be that appointed by the deceased under the terms of his will as executor, unless he has renounced executorship, going by the provisions of sections 59, 60 and 61 of the Act. Where there is no executor to prove the will, for whatever reason, then sections 63, 64 and 65 of the Act would apply, and those qualifying for appointment ought to be the persons named in the will as beneficiaries. In intestacy, the persons who qualify would be the immediate survivors of the deceased as spelt out in Part V and section 66 of the Act.

18. Competence is about the ability of the persons who qualify for appointment to administer the estate. Their competence may be compromised by their either being too old, and, therefore, tottering towards senility; or too young, raising the spectre of immaturity. There is ample case law to suggest that illiteracy, by itself, does not amount to incompetence, unless the estate is vast or comprises of complex forms of property, which may require the hand of a more enlightened and worldly manager. See *In re Estate of Wamira* (2002) KLR 12. Suitability looks at the circumstances of the proposed personal representative, who is otherwise qualified and competent, but perhaps is not available because he or she lives abroad, or is still too busy in school or college to afford time for the affairs of the estate, or is not so closely related to the deceased person in comparison with other survivors. See *Chelang'a vs. Juma* (2002) 1 KLR 339.

19. The notice of objection lodged by the appellant at the trial court, and the affidavit that he swore to support it, do not address the questions that touch on the above – qualification, competence or suitability of the petitioner for appointment as administrator. During the oral hearing, which I hold ought not have been conducted in the first place, his case was not built on those critical issues. The evidence he led was not geared to demonstrating that the respondent herein did not qualify to administer the estate of his deceased father, or that, even if he did qualify, he was not competent to so administer it, or even if he were competent he was not suitable for appointment for whatever reason. Instead, he dwelt on matters that were peripheral to the central issue, appointment of the administrator. The pleadings as framed and the proceedings as conducted were not suitable for objection proceedings, and assisted the court little in determining whether to appoint the respondent administrator of the estate of his deceased father or not.

20. Whether the appellant was entitled to a share in the estate of the deceased or not was not a matter for determination at the objection stage, for the same is not germane to the considerations that go into appointment of personal representatives. That matter ought only to arise at the stage of distribution of the estate, which does not arise until six months after the appointment of personal representatives. The appellant, therefore, raised the issue prematurely. He should have waited for the respondent to be appointed an administrator, and after the appointment for him to apply for confirmation of grant under section 71 of the Law of Succession Act, whereupon he, the appellant, would have lodged his protest affidavit in terms of Rule 40(6) of the Probate and Administration Rules, staking his claim to a share in the estate. So that the filing of the confirmation application did not pass without his notice, he should have lodged a caveat in the cause as provided for by Rule 15 of the Probate and Administration Rules.

21. Was the appellant a beneficiary of the estate of the deceased to warrant his consent being sought before the petition was lodged in court? He claims as a brother of the deceased. The deceased had been survived by a widow and children. These two categories of survivors had a prior right to administration over him. They were not obliged to notify him of their intent to initiate a succession cause, neither was it necessary for them to obtain his consent. Conversely, were he, the appellant, to petition for representation, he would have been obligated to obtain their consent, among other requirements, since he does not have a prior right to administration over them.

22. The law on this is section 66, which sets out in order of preference to guide the court when it comes to appointment of administrators in intestacy. Priority is given to surviving spouses, followed by surviving children. Siblings of a deceased person, where he is survived by a spouse and children, come way down the list. The provision says:

> *"66. Preference to be given to certain persons to administer where deceased died intestate When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*
>
> *(a) surviving spouse or spouses, with or without association of other beneficiaries;*
>
> *(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
>
> *(c) the Public Trustee; and*

(d) creditors …"

23. Rule 7 of the Probate and Administration Rules sets out the procedure for applications for representation. Sub-Rule (7) addresses situations where the petitioner has a lesser right to representation, and requires that he or she either causes citations to issue to the persons with prior right to apply, or gets them to renounce probate, or obtains their written consent allowing the petitoner to apply for representation. The said provisions state as follows:

"7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "

24. In the instant case, the appellant did not have prior right to administration of the estate of his deceased brother over the surviving spouse and her children. The respondent was, therefore, not obliged to obtain his consent before moving to court for grant nor to consult him in any way. In any case, the appellant was not at all in the dark. He claimed, at the oral hearing, that the respondent sought the grant only after he had caused citations to issue upon the widow to apply for letters of administration intestate or to renounce her right to apply. He cannot now be heard to complain that he was kept in the dark.

25. The issue as to whether a trust was established has been placed before me to determine. I have held that that was an issue that ought not have been addressed in the first place. As it is likely to arise again at confirmation I should address it now so that the parties do not have to go back to it.

26. The case by the appellant as, I understand it, is that their deceased father, whose name he does not disclose, had distributed his property during his lifetime to his sons, whose names he does not disclose, save for himself and the deceased. Each of the sons was alleged to have had been given their share. The share allotted to him was also that given to the deceased. It was on that basis, according to him, that the deceased let him enter the land, Marama/Shirotsa/762, in 1994 to put up his house on it and generally to settle there.

27. The respondent takes a contrary view. He argues that the father of the appellant and the deceased had distributed his property before he died. The deceased was the first born and was allotted Marama/Shirotsa/762, another son was given another piece of land whose details are not disclosed, and the father of the deceased and the appellant then retained Parcel No. 775, where he lived with his wife and the other sons, including the appellant, and that the other sons were entitled to that Parcel No. 775 retained by the deceased.

28. After hearing the evidence adduced and considering the two versions presented, the trial court was not satisfied that the appellant had established that there was evidence to support the claim that there was a resulting trust in Marama/Shirotsa/762 in favour of the appellant. I have carefully gone through the record. I would agree with the trial court. The appellant conducted a very sketchy case before the trial court. It is in fact, in my view, the respondent who did a better of job of presenting clearer evidence. I agree that from the material presented it cannot be concluded that the late father of the appellant and the respondent transferred Marama/Shirotsa/762 to the name of the deceased with intent that the deceased hold it, or a portion of it, in trust for the appellant.

29. The appellant left out significant gaps in the evidence, as to whether the parcels of land in question were originally registered in the name of the late father of the deceased and the appellant, whether the said properties were subdivided subsequently before registration in the names of the deceased and Edward Muchonyi, what became of the property that the deceased retained in his name after he died in 1969, among others. That material, and other evidence, would have been relevant to give the court a global picture of the state of the estate of the father of the appellant and the deceased as a background to understanding how he distributed his property and his probable intent in distributing it in the manner that he did. The appellant and the deceased had siblings. It was not disclosed whether or not they were alive at the time of the trial, and if they, or some of them were, alive, they were not brought forth to shed light on the matter. It would be expected that they had information that would have been useful to the court given that the property in question emanated from their father's estate, and they, therefore, must have been privy to some of the goings on in that estate.

30. It is important to underscore the fact that the system of justice in operation in Kenya is adversarial. It is up to the party who alleges to prove his case. He should not make allegations and hope that the court would conduct its investigations so as to find the truth. The Kenyan judicial system is not inquisitorial or investigative. The duty to inquire and investigate lies with the parties. They should gather their evidence before they come to court, and they should file their cases only after they are satisfied that they have a watertight case, supported by concrete evidence. Once they file their cases in court they must endeavour to present evidence in a manner that gives a clear picture of the circumstances on the ground so that the court can make an informed decision. The officer presiding over the court does not, invariably, live in the same community with the parties. He or she, therefore, does not know, firsthand, what happens on the ground, and, therefore, he or she depends wholly and completely on the parties to present to him or her a clear picture of the facts and the events. Even if the judicial officer were a member of that local community, the parties would still have a duty to present concrete evidence, for cases are decided on the basis of the facts as presented before the court by the parties, and not on what the presiding judge may know privately about the matter.

31. For the reasons that I have given above, there cannot possibly be any merit in the appeal herein. The same is for dismissal, and I hereby dismiss the same with costs to the respondent. The trial court shall proceed to issue a grant of letters of administration intestate to the respondent herein out of Butere PMCSC No. 30 of 2017. The trial court's file shall be returned to the Butere Principal Magistrate's Court for finalization. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF July, 2019

W. MUSYOKA

JUDGE