



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 7 OF 2019**

**IN THE MATTER OF THE ESTATE OF ZAKAYO OGOMA ANYANGO (DECEASED)**

**BETWEEN**

**JOHN OMOLLO ANYANGO.....1<sup>ST</sup> APPELLANT**

**DANIEL ASILA ANYANGO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**TOPAS WANDAE ODERO.....1<sup>ST</sup> RESPONDENT**

**CONSOLATA ANYANGO.....2<sup>ND</sup> RESPONDENT**

**FREDRICK O. OMBOK.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon J. ONGONDO Principal Magistrate delivered on 20th December, 2018 in Siaya PM Succession Cause No 36 of 2016)*

**JUDGMENT**

1. This appeal arises from the Ruling of Hon J. Ongondo delivered on 20<sup>th</sup> December 2018 on the summons for confirmation of grant of the estate of the late Ogoma Anyango alias Zakayo Ogoma Anyango.
2. The deceased **ZAKAYO OGOMA ANYANGO** died intestate on 4<sup>th</sup> July 1988. He was a monogamous man with several children among them, the father to the two appellants herein and the husband to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, who are all now deceased. His wife predeceased him and therefore he was not survived by any widow. The family selected representatives to petition for letters of administration intestate. Initially, only the 1<sup>st</sup> and second respondents petitioned for grant but the appellants herein intervened and they were enjoined to the succession proceedings culminating in the grant which was issued on 7<sup>th</sup> November, 2016.
3. The grant subject of these proceedings was issued to all the parties to these proceedings but as the law limits administrators to four only, I shall consider the appellants herein and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to be the *bonafide* administrators as the 3<sup>rd</sup> Respondent is a son to the 2<sup>nd</sup> Respondent administratrix.
4. After obtaining the grant, issues arose on the mode of distribution as the beneficiaries could not agree and the Principal Magistrate, Siaya Law Courts, presented with the said Succession Cause No. 36 of 2016 proceeded to distribute the estate assets among the surviving beneficiaries comprising the **grandsons and widows of the sons of the deceased**, comprising land parcel No. **South Gem/ Dienya /750**, as the rest of the land parcels named in the succession cause were *gifts intervivos* and therefore not registered in the name of the deceased **Zakayo Ogoma Anyango and as such, not available for distribution**.
5. Aggrieved by the said decision the appellants herein filed the instant appeal setting out the following grounds:
  1. *The trial magistrate erred in law and in fact by conducting the matter with a clouded mind wherein he used the adjective greed to describe the administrators.*
  2. *The trial magistrate erred in law and fact in relying on surveyor's report to determine the size of the property to distribute the main asset of the estate when the said surveyors report was conflicting with the certificate of title to the asset without calling evidence to determine the actual size of the property.*

3. *The trial magistrate erred in law and in fact by misleading himself that there were widows in the estate when in fact the deceased had only one wife*

4. *The trial magistrate erred in law and in fact by applying improper sections of the law to distribute the estate.*

5. *The trial magistrate erred in law and in fact by displaying open prejudice towards the appellants in this matter by making statements to the effect that the appellants had misled the court yet the assertions in the proceedings were clear that in describing one of the properties in the land, the appellants had given 2 different figures for size meaning there was inadvertence in the appellants' submissions*

6. *The trial magistrate erred in law and in fact by making a ruling and thereafter requiring the parties to file affidavits of distribution when the appellants had already voiced their dissatisfaction with the ruling.*

7. *The trial magistrate erred in law and in fact by purporting to give further orders in the file even after being notified that a notice of appeal had already been filed at the High Court.*

8. *The trial magistrate erred in law and in fact by acting in a dictatorial manner even after his court was functus officio the matter.*

6. The appellants urged the court to allow the appeal herein with costs, annul/ set aside the ruling made on 20<sup>th</sup> December 2018 and orders made subsequent thereof, distribute the assets of the deceased in accordance with the law and occupation by parties over prolonged period of time and that the Respondents be ordered to pay costs of this appeal.

7. In their written submissions filed in court on 15<sup>th</sup> April 2019, the appellants submitted that the trial magistrate lacked the freedom of mind that would enable impartiality by stating that because of greed, the administrators failed to perform their duty as administrators. Further, that he did not explain what he meant and failed to refer to section 83 of the Law of Succession Act to indicate how the administrators had failed to administer the estate.

8. In the view of the appellants, the trial magistrate was prejudiced in his mind. They also referred to a paragraph where the trial magistrate stated that the appellants stated on oath that their late grandfather had gifted parcel No 750 to their father when the search certificate showed that the land was registered in the name of Zakayo Ogoma the deceased. According to the appellants, none of their affidavits claim that the land was gifted to their father Albert Anyango Ogoma.

9. On the accuracy of the surveyor's report it was submitted that the trial magistrate erred in law and fact in finding that the land in question was 15.8 acres when the copy of search certificate showed that the land was about 16.796 acres.

10. According to the appellants, the trial court erred in law in distributing the subject parcel of land equally without considering the long period of occupation and that that in effect led to the three families running into each other yet the Appellant's family had already developed the subject parcel of land.

11. It was also contended in submission that the trial Magistrate understood the 2 widows / Respondents to be widows of Zakayo Ogoma which is not the case and that the acreage that he gave was erroneous. It was submitted that the trial magistrate should have interrogated the acreage of the land before such distribution.

12. Further, that the widows are not the wives of Zakayo Ogoma but of the sons of Zakayo and that there were *gifts inter vivos* i.e. South Gem/592 to Odera and 1013 made to Anyango who was told to give Ombok part of 1013 because Ombok left parcel No. 750 and settled on 1013 where they currently farm, whereas the family of Odera live on 750, farm apart of it and also own 592.

13. The appellants maintain that the family of Anyango should have been left on the portion they had developed and that the family of Ombok should have 4 acres of 1013 equivalent to the land they left in Parcel No. 750 and that they would also have the entire 1010 which is 2 acres.

14. The appellants hold the view that the Odera family would have 5 acres on 750 which would not cross the demarcation that was existing. They would also have 592 which is 2 acres. Further, that the Anyango Family would have 11 acres on Parcel No. 750 plus 6 acres on 1013 which would not interfere with the residences of any of the parties and that there would also be no distribution to widows because there are none.

15. The respondents opposed the appeal. The 1<sup>st</sup> respondent Topas Wandae Odera submitted orally and stated that she was the widow to Paul Odera, the son to Zakayo Ogoma. That her father in-law gave 10 acres of 1013 to her elder brother in-law **Albert Anyango**. That he had also given her 2 acres on Parcel No.592. She stated that Albert's sons wanted her to move away from her 2 acres on Parcel 750 and go to build on Parcel No. 592. She stated that after distribution, they were each given 5 acres on Parcel No.750. She submitted that they used to live on Parcel 750 since she got married in that home and added that even Anyango's family has a home on Parcel 750. She stated further that she was barred by the Anyango's from cultivating Parcel No. 750. She denied interfering with any development of the Anyango's. She submitted that she was satisfied with the way the lower court distributed the estate.

16. The 2<sup>nd</sup> Respondent Consolata Anyango orally submitted stating that she understood the appeal before the court. That her husband Ombok had never been given any land. That she was learning from court that Anyango was given 10 acres in Parcel No. 750 and 2 acres given to Odera, her brother in-law. She stated that when she got married, her husband moved from Parcel No. 750 to Parcel No.1010.

17. She submitted that when her husband died, Albert Anyango took her away from Parcel No. 1010 which was near River Yala (banks) and told her to cultivate Parcel No. 750 because her husband was the last born and so his portion was in Parcel No. 750. She stated that after Albert Anyango died, John Anyango his son refused her son to construct a house on Parcel No. 750.

18. She further submitted that the Anyango sons also told her that because she only had 2 sons, she should not have a big land so she should go to Parcel No. 1010 but she declined. She maintained that she had a right to own a portion of Parcel Nos. 750 and 1010. She stated that she could not move from Parcel No. 750. She stated that she lives on Parcel 1013. She further stated that she was satisfied with the distribution of the property by the lower court as it was done in their presence but that later the appellants brought a private Surveyor who did another survey in the respondents' absence.

19. Fredrick Ombok, the 3<sup>rd</sup> Respondent submitted opposing the appeal and stated that Consolata Anyango the second respondent was his mother. He submitted that his deceased grandfather gave to Albert Anyango 10 acres of Parcel 1013. However, that their home is on Parcel 750, whereas his homestead is on Parcel No. 1013. He stated that he moved to land Parcel No. 750 and built a house after the lower court distributed that land.

20. He submitted that although his father lived on Parcel No. 1010, after his death, Albert took them to Parcel No.1013 and that his mother used to farm on Parcel No. 750. He submitted that they were entitled to land parcel No. 1010 where his father was buried and 5 acres out of Parcel No. 750 because they had moved out of Parcel 1013. He stated that he was satisfied with the distribution done by the lower court. He further submitted that they had not interfered with the developments by the appellants and that they only cleared the bushes on Parcel No. 750 and constructed a house thereon after the distribution by the lower court.

21. Mrs. Muigai counsel for the appellant submitted in a rejoinder that it was clear as to where the households are, that distribution should take into account sustainable development. That the appellants had dug a toilet next to a water well which was hazardous. She submitted that it was not a mere inconvenience as there was compromise to the environment.

22. Counsel submitted that homesteads should also guide and that the water well is right outside the home of Anyango's son. She submitted that the appellants would be amenable to a retrial for the lower court to visit the land and establish the actual status of the respective parcels of land as the parties were not legally represented in the lower court.

## **DETERMINATION**

23. I have carefully considered the grounds of appeal herein, the parties' respective submissions and the applicable law. In my view, the only issue for determination is whether this appeal has any merit.

24. It is not in dispute that the appellants herein are all beneficiaries of the estate of the late **Zakayo Ogoma Anyango**. Further, the appellants and the 3<sup>rd</sup> respondent are the deceased's grandsons as they are sons to the deceased's sons being the late **ANYANGO**, the late **ODERO** and the late **OMBOK**.

25. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are daughter in-laws to the two deceased Zakayo Ogoma Anyango as they are widows of **Odero** and **Ombok** respectively. The 2<sup>nd</sup> respondent is also the biological mother to the 3<sup>rd</sup> respondent **Fredrick O. Ombok**.

26. All the parties hereto were appointed as administrators of the estate of the deceased **Zakayo Ogoma Anyango** but as the law only recognizes four administrators, I shall refer to the appellants and the 1<sup>st</sup> and second respondents as administrators.

27. A joint grant was issued in their favour on 7<sup>th</sup> September 2016. A dispute only arose during confirmation of the grant as the beneficiaries could not agree on the distribution of the said estate which basically involves Parcel No. 750, as the rest of the parcels mentioned in these proceedings had been shared out by the deceased Zakayo to his three sons in the form of gifts *inter vivos*. The trial court intervened and called on the surveyor to survey the contentious parcel to determine the actual acreage on the ground.

28. The surveyor's report indicated that the disputed land was **15.8 acres and not 16.8 acres as stated in the title deed**. The court then directed the surveyor to subdivide the said parcel of land to accommodate the three families with each family representing the three sons of the deceased **ZAKAYO OGOMA ANYANGO** in equal shares.

29. The parties were also asked to file written submissions on the surveyor's report. From the filed submissions, the family of the late Odero and the late Ombok who are the late sons to the deceased **ZAKAYO OGOMA ANYANGO** agreed with the surveyor's report whereas the family of the late Anyango who was the elder son of **ZAKAYO OGOMA ANYANGO**, represented by the appellants herein rejected the surveyor's report.

30. The basis of their objection to the surveyor's report were that the new demarcations denied them access to their home which is developed and that the first appellant's fence fell into the home of the Ombok family.

31. The appellants also argued that the Ombok family had not developed any part of Parcel No 750 hence they were undeserving of a portion in Parcel No. 750 as they had established their home on Parcel No. 1013 and were also using parcel No 1010 for farming. Further, it was contended that the Odero family occupied 2 acres of parcel No. 750.

32. The trial court analyzed the evidence received from the beneficiaries and the surveyor's report and objections thereto and found that the appellants' objections lacked substance because they occupied a much bigger portion of land on Parcel No 750 as compared to the Respondents who only have a combination of 4 acres and one quarter of the estate.

33. Further, the trial court observed that the appellants had claimed that the parcel No. 1010 was 8 acres yet the survey showed that it was only 2 acres. That the appellants had claimed that parcel No. 592 was transferred to the Odera family by his late father and that their father was gifted parcel No. 750 yet the latter was still registered in the name of the deceased Zakayo Ogoma.

34. In addition, the trial court found that the appellants had deliberately misled the court by failing to indicate the acreage of Parcel No. 1010 which was 10 acres and which was registered in their late father's name.

35. The trial court found that the estate that was available for distribution was parcels Nos. 750 and 1010 since 1013 was a gift *intervivos* but that since there was no dispute over parcel No 1010, it would remain to the family of Ombok.

36. It is not in dispute that Parcel No. 750 is the land which is in issue and which is available for distribution and therefore the appellants cannot claim that the respondents are not entitled to it as the said land belonged to the deceased Zakayo Ogoma Anyango and prior to his demise, he had shared out other parcels of land to his sons and left out this particular parcel without distributing it among his sons who are all dead and are survived by their children the appellants herein and the 3<sup>rd</sup> respondent while the 1<sup>st</sup> and second respondents are his widowed daughter in laws.

37. It follows that the trial court's finding that the surviving widows were entitled to an acre each from the subject parcel of land, was an error of fact on the face of the record as the widows were not the deceased's widows but daughter in laws who would only be entitled to the respective shares of their deceased husbands for distribution to their respective households. In other words, the first and second respondents represent the houses of Odera and Ombok whereas the appellants represent the house of Anyango.

38. In distributing the said estate, the trial court assumed that the deceased was polygamous which was not the case and therefore all his three sons were equally entitled to the share of the intestate property, subject to confirmation of the acreage.

39. Under Section 42 of the Law of Succession Act, *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, that property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild or house; or taken had he not predeceased the intestate that property shall be taken into account in determining the share of the intestate estate finally accruing to the child, grandchild or house."***

40. This means that the law recognizes that during one's lifetime he/she may settle any of his/her properties upon any of his/her beneficiaries. Upon such a person's demise, it is a requirement that such a property settled should be taken into account when distributing the estate. Thus, such a settled property or portion will be subject to distribution taking into account the areas which are fully developed when undertaking distribution. It will not be removed from the hands or possession upon whose beneficiary it was settled by the deceased. This is so in order to avoid a situation whereby any particular beneficiary is favored by having to share twice in the property of the deceased, that is, during his life time, and after his demise.

41. The provision seeks to maintain equity in the distribution of a deceased's estate. In this regard, Section 42 of the Act seeks to respect the wishes and decisions arrived at by the deceased during his lifetime. It would seem therefore that, once a deceased has settled any property during his lifetime, the same may not be subject to disruption after his demise.

42. This presupposes that in the event any person felt aggrieved with such a settlement, he has the opportunity to raise the issue with the settlor whilst he is still alive. In other words, the law respects how a person decides to deal with his free property during his lifetime.

43. It is for this reason that, in situations where there are more than one house, the Court would and indeed should be very slow to uproot and remove the widows from the properties and/or spots where they have been living and/or settled by the deceased during his lifetime. This is so because, if during his lifetime the deceased had made a conscious decision that his widows would be settled and live in a particular manner, place or area, why should such a conscious decision be interfered with upon his demise? In my view, what the court should do, is to take into account such circumstances when carrying out distribution so as to be equitable in the circumstances.

44. In the instant case, there was evidence that the appellants live and occupy South Gem/Dienya/1013 which measures 10 acres and is registered in their father's name Albert Albans Anyango's name. 592 measures 2.04 acres and is registered in the name of Paul Odera Ogoma whereas 1010 measures 2 acres and is registered in the name of Zakayo Ogoma and that is where David Ombok's family resides.

45. It is clear that the appellants father had a bigger portion of land being Parcel No. 1013 and therefore any other parcel remaining in the deceased's name, unless otherwise agreed as was in this case over Parcel No. 1010, is available for distribution equally among the beneficiaries and therefore unless the appellants agree with the respondents to settle the latter elsewhere, Parcel No. 750 is available for distribution to all, subject to where his sons were settled and were living in specific properties during the lifetime of the deceased.

46. The other factor which must be taken into consideration is the developments undertaken by individual beneficiaries. The appellants told the trial Court that they have already constructed permanent homes in Parcel No. 750 and dug a water well which is being interfered with by the respondents. In this regard, the court has to ensure that while trying to maintain equity, the lives of the beneficiaries are to be disrupted only at the minimum and therefore it was important to visit the site to establish how the appellants are settled before distribution as the parties' dispute the Surveyor's reports.

47. Nonetheless, albeit the trial court used strong language in describing the conduct of the appellants, I do not find any evidence of apparent or perceived bias in the matter as he was commenting on the inaccuracies in the evidence adduced by the appellants, which he is bound to do so in analyzing evidence on record.

48. For the above reasons I would allow the appeal partly and direct that the parcel of Land Parcel No. South Gem/Dienya/ 750 be redistributed equally upon the County Surveyor and Land Registrar Siaya County visiting the land in the presence of the court to determine where the appellants are settled to avoid any disruptions of their permanent homes. Both parties will share the cost of visitation by the trial court and the Land Registrar and County Land Surveyor.

49. Accordingly, in exercise of appellate powers conferred on the court under section 78 of the Civil Procedure Act, this matter is remitted back to the trial court to abide by the directions given above, in carrying out distribution of the land Parcel No. South Gem/ Dienya/ 750 into three equal parts with beneficiaries representing the three sons of the deceased Zakayo Ogoma Anyango. The earlier distribution of the estate is hereby set aside and vacated.

50. As parties are family members, each party will bear their own costs of the appeal

**Dated, Signed and Delivered at Siaya this 24<sup>th</sup> Day of July, 2019**

**R.E.ABURILI**

**JUDGE**

**In the presence of all parties**

**CA: Brenda and Modestar**