



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 745 OF 2013

IN THE MATTER OF THE ESTATE OF ASOMA OKWANG' (DECEASED)

ISMAEL OKWANG' ASOMA PETITIONER

VERSUS

MOSES NYANGULE AMAKOBE 1ST PROTESTOR

MARSELINE NAWATE OUMA 2ND PROTESTOR

JAMES OWINO OLUOCH 3RD PROTESTOR

JAMES ATITWA NYAPOLA 4TH PROTESTOR

KEDURUDA AUMA ODHIAMBO 5TH PROTESTOR

SAMUEL OTUYA TUMBO 6TH PROTESTOR

FREDRICK ODHIAMBO MULWANI 7TH PROTESTOR

NEEMA NIGHT HUSSEIN 8TH PROTESTOR

PETER OTSIENO ODHIAMBO 9TH PROTESTOR

HADIJA CHITECHI 10TH PROTESTOR

SALOME AKOTH WANGA 11TH PROTESTOR

BONVENTURE SUNGU 12TH PROTESTOR

JUDGMENT

1. This Succession Cause relates to the estate of the late Asoma Okwang' who was the registered proprietor of land parcel No. north Wanga/Indangalasia/459.

2. Moses Nyangule Amakobe (herein referred to as the 1st protestor) and 11 Others have filed a protest to confirmation of grant dated 19th January, 2018 in which they are opposing the mode of distribution of the estate of the deceased herein filed by the petitioner/respondent as proposed in the petitioner's summons for confirmation of grant dated 21st February, 2014 in which the petitioner proposes to have the estate distributed as follows:-

Ismael Okwang' Asoma - 4.0 Acres

Adija Chitechi Wanyama - 0.5 Acres

Wilfrida Auma Asoma - 1.5 Acres

Mwanaisha Atikinyi	-	1.47 Acres
Moses Nyangule Amkobe	-	1.0 Acres
Marseline Nawate Ouma	-	2.0 Acres
James Owino Oluoch	-	1.0 Acres
James Atitwa Nyapola	-	1.5 Acres
Keduruda Auma Odhiambo	-	0.03 Acres
Samuel Otuya Tumbo	-	1.0 Acres
Fredrick Odhiambo Mulwani	-	0.5 Acres

The proposed mode of distribution by the petitioner is supported by his affidavit.

3. The protest is supported by the affidavit of **Moses Nyangule Amakobe** in which he states that he bought 1 ½ acres of land parcel No. North Wanga/Indangalasia/459 but the petitioner in his proposed mode of distribution of the estate has proposed to give him 1.0 acre. That James Atitwa Nyapola the 4th Protestor bought 2 ½ acres but the petitioner has proposed to give him 1.5 acres. That the rest of the petitioners are buyers who are in possession and occupation of their portions. That they engaged a private surveyor who carried the survey on the land and ascertained the exact acreage occupied and or possessed by each of the protestors as follows:-

Moses Nyangule Amakobe	-	0.6 Ha
Marseline Nawate Ouma	-	0.6 Ha
James Owino Oluoch	-	0.62 Ha
James Atitwa Nyapola	-	1.57 Ha
Keduruda Auma Odhiambo	-	0.12 Ha
Samuel Otuya Tumbo	-	0.57 Ha
Fredrick Odhiambo Mulwani	-	0.14 Ha
Neema Night Hussein	-	0.64 Ha
Peter Otsieno Odhiambo	-	0.45 Ha
Hadija Chitechi	-	0.2 Ha
Salome Akoth Wanga	-	0.33 Ha
Bonventure Sungu	-	0.2 Ha
Ismael A. Okwang	-	0.2 Ha

The Protestors propose that the estate be distributed as per the surveyor's report.

4. The 1st Protestor annexed to the protest a photocopy of his sale agreement with the petitioner dated 21/7/1999 which indicates that he bought 1 ½ acres from the petitioner/respondent. He also annexed a photocopy of a sale agreement between the 4th protestor and the petitioner dated 20/12/2000 which shows that the 4th petitioner bought 2 ½ acres from the petitioner. The protestor also annexed what he called a photocopy of the surveyor's drawing showing the estimate of the acreage the protestors are occupying on the ground.

5. **Miss Omar** appeared for the respondents while **Mr. Makokha Oaka** appeared for the petitioner/respondent. The advocates by consent adopted the evidence filed by the parties together with their affidavits. Miss Omar made written submissions in which she stated that the protestors bought their portions of land from the petitioner's father. That each of them is in occupation of his/her portion. That the surveyor's drawing shows the estimate of each of the protestor's portion as occupied by the protestors. She urged the court to uphold the proposed distribution of the estate as per the mode of distribution proposed by the protestors.

6. Mr. Makokha did not make any submissions.

7. I have considered the rival evidence by the parties, the pleadings and the submissions by Miss Omar. The deceased's death certificate filed in the pleadings indicates that he died on 16/5/1984. The petitioner was issued with a grant of letters of administration on the 21/2/2014. The sale agreements produced by the 1st protestor show that he and the 4th protestor bought their parcels of land from the petitioner on 21/7/1999 and 20/12/2000 respectively. This means that they bought their parcels of land from the petitioner before the petitioner was issued with a grant of letters of administration. The other protestors did not file any sale agreement to show from whom they bought their parcels of land.

8. Section 145 of the Law of Succession Act makes it a crime for any person to take possession or dispose of, or otherwise intermeddle with any free property of a deceased person when not seized of a grant of letters of representation. The 1st and 4th protestors did not buy their parcels of land from the deceased. The other protestors have not shown that they bought their parcels of land from the deceased. The protestors are therefore not protectable creditors to the estate of the deceased as they did not buy the land from the deceased. They are intermeddles of the estate.

9. Further to the above there is nothing to show that the document referred to as a surveyor's report is actually from a surveyor. It has no signature of surveyor. It is not indicated the person who prepared it. The court cannot rely on such a document whose source is not known.

10. The Petitioner does not recognize some of the people he seems to have sold land to. In some cases he proposes to give the purchasers less than the acreage he has sold them. It is not the duty of this court in its jurisdiction as a succession court to enforce any contracts between the protestors and the petitioner/respondent as the protestors are not protectable creditors to the estate of the deceased. The petitioner seems to have sold more land than is available for distribution to the beneficiaries and the purchasers. The claim for the purchasers lies in a civil suit against the petitioner.

11. In the foregoing, there is no merit in the protest. The same is accordingly dismissed. The summons for confirmation of grant by the petitioner dated 21st February, 2014 are confirmed as prayed in paragraph 7 of the petitioner's supporting affidavit. The estate of the deceased herein is accordingly to be distributed as proposed in paragraph 2 above.

Costs of the protest to go to the Petitioner.

Delivered, dated and signed in open court at Kakamega this 28th day of November, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omar for Protestors/Applicants

No appearance for Petitioner/Respondent

Protestors/Applicants – present except 1st protestor

Petitioner/Respondent - absent

Court Assistant - Polycarp

30 days right of appeal.