



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

SUCCESSION CAUSE NO. 127 OF 1995

IN THE MATTER OF THE ESTATE OF THE LATE JOHN ODEBERO – DECEASED

BETWEEN

LUCY ANYANGO BUDHOS.....OBJECTOR/APPLICANT

VERSUS

ODA MARY KIBISU.....PETITIONER/RESPONDENT

JUDGEMENT

1. On 10th January, 2015 the Petitioner/Respondent, Oda Mary Kibisu and the Objector/Applicant, Lucy Anyango Budhos entered a consent before Tuiyot, J in which the grant earlier issued to the Petitioner was revoked and a fresh grant issued in the names of the Petitioner, the Objector and two others. Through the said consent, they also agreed that they would adduce evidence to guide the court in distributing the estate of the deceased Johana Mutanda Odebero (hereafter simply referred to as the deceased).

2. I concluded hearing this matter on 27th March, 2017 and directed the advocates for the parties to file and exchange submissions but I was transferred from Busia to Malindi in April, 2017 before I could take this file into my custody for the purpose of writing judgement. This file was forwarded to me through a letter dated 7th May, 2018 for the purpose of writing judgement. I apologise to the parties for the time it has taken for this matter to be finalized.

3. The evidence adduced shows that the deceased was blessed with three sons namely Paul Maloba Mutanda, Augustino Mutanda and Fredrick Mutanda who are all now deceased. The deceased was also blessed with four daughters being Petronila Aloo Wandera, Oda Mary Kibisu, Lucy Anyango Budhos and Teresa Nabwire. The four daughters are all alive.

4. There is also agreement that the properties registered in the name of the deceased at the time of his death were Kisumu Municipality 10/31, Samia Bujwanga/1149, Samia/Buburi/140, Samia/Buburi/269 and Samia/Buburi/603.

5. The evidence that emerged at the hearing indicated that L.R. No. Samia/Bujwanga/1149 was disposed by the Petitioner/Respondent prior to the revocation of the grant initially issued to her.

6. In essence what remains to be determined in this matter is whether L.R. No. Samia/Bujwanga/1149 formed part of the estate of the deceased and the distribution of the other properties of the estate of the deceased.

7. On L.R. No. Samia/Bujwanga/1149 (hereinafter simply referred to as L.R. 1149) the Petitioner's case is that the same is no longer available for distribution as it was already sold to a third party and that the same was a gift to her from her grandfather Ogoro. She produced a letter dated 8th December, 1976 allegedly addressed to her by the deceased telling her that there was need for the issue to be passed quickly.

8. She called her former driver Juma Olum Buliala who told the court that the deceased used to tell him the land belonged to the Petitioner and had been given to her by Ogoro who was the uncle of the deceased.

9. Another witness called by the Petitioner was Vincent Mutanda the son of the late Fredrick Mutanda and thus a grandson of the deceased. This witness concentrated on the Kisumu property.

10. Vincent Mutanda another grandson of the deceased also talked about the Kisumu property.

11. The fourth witness called by the Petitioner was Peter Juma Bubolu a retired assistant chief. He averred that Ogoro Mubinge was the brother of his father whereas the deceased was the nephew of Ogoro Mubinge. He testified that after land adjudication in 1974, Ogoro who had relocated came back and sold part of his land and gave the remainder to the deceased. The deceased then said that he would leave the land to the Petitioner. The witness testified that he even saw the Petitioner work on the land and she later went and thanked their clan for giving her the land.

12. The last witness called by the Petitioner was Raphael Ojiambo Bubolu. His evidence was that in 1977 Ogoro gave land to the Petitioner in the presence of the deceased and the Petitioner's late brother Paul Mutanda. The witness testified that Ogoro said he was giving the land to the Petitioner as she had been given the name of his grandmother Achieng Naimandi.

13. The Objector and her two other sisters Petronila Aloo Wandera and Teresa Nabwire focused their testimony on the Kisumu property.

14. In the middle of the testimony of the Petitioner's witnesses, counsel for the Objector applied and was allowed by consent to avail two more witnesses. Peter Ouma told the court that he lived with the deceased from 1954 upto 1979 when the deceased passed away. The deceased was married to his aunt. His evidence was that he surveyed L.R. No. 1149 with the deceased after the land was given to the deceased by Mzee Ogoro. He also planted sisal on the boundaries of the land. His testimony was that in their custom an uncle could give land to his nephew and this is what happened when Ogoro gave the land to the deceased who was the son of his sister. The witness told the court that there was a time that he visited the land with the deceased and the Petitioner and the deceased told the Petitioner that Ogoro had given him the land. According to this witness, at no time did the deceased pass the land to the Petitioner.

15. David Lewis Ojiambo the other witness called by the Objector also confirmed that Ogoro gave L.R. No. 1149 to the deceased.

16. A perusal of the evidence adduced by both sides will show that the deceased was the registered holder of L.R. No. 1149 which was only transferred to the Petitioner after she surreptitiously obtained letters of administration to the estate of the deceased. In her petition she had listed herself as the sole beneficiary of the estate of the deceased. She had also listed L.R. No. 1149 as the sole property but later sought to amend the grant to include other properties.

17. The evidence of Juma Olum Buliala cannot be given much weight. He was the Petitioner's official driver at Mumias Sugar Company. He testified that the deceased told him that the land had been given to the Petitioner by Ogoro. He did not explain under what circumstances the deceased made him his confidant. It is also clear that the witness is an untruthful person having been a surety to the Petitioner in the petition for letters of administration in which she had claimed to be the sole beneficiary of the estate of the deceased, a fact which the witness knew was not true. I thus find the evidence of this witness to be unreliable.

18. Indeed Peter Juma Bubolu who was called as a witness by the Petitioner told the court that the parcel of land was a gift from Ogoro to the deceased. The evidence of this witness ties up very well with that of Peter Ouma and David Lewis Ojiambo who were called by the Objector.

19. There is however a thread running through the evidence adduced by all sides showing that the Petitioner was the one working on L.R. No. 1149. It is most likely that the deceased intended to gift the land to her but this was not actualized during his lifetime. The land was therefore part and parcel of the estate of the deceased at the time of his demise.

20. Through an affidavit sworn on 15th February, 2016, the Objector and the two other administrators proposed that the properties of the deceased be divided equally between the four surviving daughters and the estates of the three deceased sons of the deceased. This suggestion is lawful and in accordance with Section 38 of the Law of succession Act, Cap. 160 which provides that:

“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 divided among the surviving children.”

21. Section 42 requires that any previous benefit by a beneficiary should be taken into account when distributing the estate. The Section states:

“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 had been appointed or awarded to any child or grandchild under the provisions of section 26 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.”

22. Sections 26 and 35 provides the factors to be taken into account in the distribution of the net intestate estate. Of relevance to this case is the nature and amount of the deceased's property and whether the deceased had made any advancement or other gift to the beneficiaries during his lifetime.

23. The estate before me has suffered wastage from both the Petitioner and the Objector. There is no valuation report in respect of the properties of the estate. There is bad blood in the family of the deceased. This matter has been in the judicial system for far too long and a

resolution needs to be found so that the parties can move on with their lives.

24. I note that the Petitioner sold L.R. No. 1149 measuring over eight acres and pocketed all the proceeds. It is immaterial whether the parcel of land was awarded to her by the deceased or whether she gifted herself the land. What is clear is that the parcel of land belonged to the deceased. That parcel of land is enough to take care of the interest of the Petitioner in the estate of the deceased.

25. The sizes of L.R. No. Samia/Buburi/140, L.R. No. Samia/Buburi/269 and L.R.No. Samia Buburi/603 are unknown. It emerged from the evidence that the families of the deceased's three deceased sons (Augustino Mutanda, Paul Maloba Mutanda and Fredirck Odebero Mutanda) have settled on these parcels of land. There is no reason to disturb the *status quo* but only to add that the estates of the three deceased sons will have equal shares of the three parcels of land. Consideration shall be given to the sites each of the three families have settled on so that there will be no interference with the developments as far as practicable. The three daughters (Teresa Nabwire Sanga, Petronilla Aloo Wandera and Lucy Anyango Budhos) will take Kisumu Municipality/Block 10/31 and share it among themselves equally. It is upto them to decide what they want to do with the property going forward. The distribution ensures that each child gets something from the estate of their late father.

26. It emerged during the later stages of this matter that the deceased had some 10,250 EABL shares which were made the subject of a different succession cause (Busia HC Succession Cause No. 40 of 2013) by Vincent Mutanda and Stephen Eugene Maloba who are the grandsons of the deceased. It is not appropriate to give any orders in regard to those shares in this decision. The parties will make appropriate applications both in this matter and in the other succession cause.

27. In summary the estate of the deceased is distributed as follows:

(a) L.R. No. Samia/Bujwanga/1149 is vested in Mary Oda Kibisu, the Petitioner absolutely.

(b) L.R. No. Samia/Buburi/140, L.R. No. Samia/Buburi/269 and L.R. No. Samia/Buburi/609 to be shared equally by the estates of Augustino Mutanda, Paul Maloba Mutanda and Fredrick Mutanda.

(c) L.R. No. Kisumu Municipality/Block 10/31 shall be shared equally between Teresa Ogola Sanga, Petronilla Aloo Wandera and Lucy Anyango Budhos (Objector).

28. This matter would not have dragged on for this long were it not for the unbridled greed exhibited by the Petitioner. She wanted the entire estate of the deceased transmitted to her and hence claimed in her papers in court that she was the only surviving child of the deceased. Ordinarily, she should bear the costs of this matter. However, such an order will not only prolong this matter but may also delay the healing of the family. In the circumstances I will make no order as to costs, meaning that the parties will meet their own costs for these proceedings

Dated and signed at Malindi this 30th day of May, 2018

W. KORIR,

JUDGE OF THE HIGH COURT

Dated, signed and delivered at Busia this 26th day of Sept., 2018.

KIARIE WAWERU KIARIE

JUDGE OF THE HIGH COURT