



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE NO. 543 OF 2001

IN THE MATTER OF THE ESTATE OF

OKUL OKULO (DECEASED)

AND IN THE MATTER OF APPLICATION BY

BETWEEN

LUCAS JUMA OKUL PETITIONER/APPLICANT

AND

THOMAS DEYA OKUL PROTESTOR/ RESPONDENT

RULING

1. This matter concerns the estate of Okul Okulo (“the deceased”) who died on 26th August 1997. His son Lucas Juma Okul (“Lucas”) filed the petition for grant of letters of administration. In the petition, he stated that he was the only survivor and listed the only asset of the deceased as KISUMU/OJOLA/2747 (“Plot 2747”). In due course, he was issued with a grant of letters of administration which was confirmed on 26th October 2002 as a result of which Plot 2747 was divided into between Lucas and his brother Thomas Deya Okul (“Thomas”).

2. The subdivision of the property resulted in serious conflict between the brothers leading to a case of assault being lodged at the Maseno Law Courts where the Lucas was convicted of common assault (*Maseno PM Criminal Case No. 113 of 2010*). Following this incident, Lucas filed an application dated 29th September 2015 seeking partition of the Plot 2747 and directing the Land Registrar to remove the restriction registered against Plot 2747 by Thomas. Thomas filed a replying affidavit in which he stated that he was the one entitled to the whole of Plot 2747. He also accused Lucas applying for letters of administration and confirming the grant without his consent.

3. When the application came up hearing before me, I declined to grant the application dated 29th September 2015 and directed that the replying affidavit by Thomas be deemed as an application for revocation in order to resolve the underlying dispute between the two brothers. Both brothers testified.

4. It is common ground that prior to his death the deceased had, apart from Plot 2747, the had the following parcels of land; KISUMU/OJOLA/2558, 2750 and 2745 (Plots 2558, 2750 and 2745 respectively). Thomas testified that the deceased gave him Plot 2558 which is held equal shares between himself and Lucas. He told the court that Lucas resides on Plot 2745 which his father gave him. As regards Plot 2750, he stated that the deceased sold the same to one Margaret Ochieng in 1997 before he

died. His position is that since Plot 2747 is the only one remaining property of the deceased, he is the one entitled to it as he was never given any property in his name. He further told the court that his father had another plot; KISUMU/KADONGO/1298 which was given to Lucas by the deceased prior to his death hence he was entitled to a property on his own.

5. The position taken by Lucas is that KISUMU/KADONGO/1298 never belonged to the deceased and was given to him by another old man whom he took care of. He told the court that Plot 2558 was divided into two parts between himself and Thomas. As regards Plot 2747, he told the court that it should be shared equally. He testified that he took out succession proceedings because he was the eldest son. In cross-examination, he told the court the Plot 2750 was given to Thomas but he sold his share to Margaret Ochieng hence he was not entitled to the whole of Plot 2747.

6. Before I consider the key issue in this matter concerning Plot 2747, I note that Lucas lodged the petition for grant of letters of administration of the deceased was lodged without the consent of Thomas. However, in the application of confirmation Lucas disclosed that Thomas as a son of the deceased was entitled to half share of the property. The issue then is how Plot 2747, which is the deceased's only free property, is to be subdivided.

7. Since the deceased died without a spouse and left two surviving children, **section 38** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* provides that the deceased's net estate shall be divided equally among the surviving children. That section is subject to **section 42** of the *Act* which provides that where the deceased has, during his lifetime, paid, settled or gave any property for the benefit of a child, then that property shall be taken into account when determining the share of the net intestate estate finally accruing to that child. In this case, it is Thomas who bears the burden of showing that prior to his death, the deceased distributed a larger portion of his property to Lucas.

8. Lucas produced the green card for KISUMU/KADONGO/1298 which showed that the property was first registered in his name and a title deed issued to him on 27th October 2008 which was after the deceased's death. There is no indication that the property belonged to the deceased or was in fact given to Lucas as a gift. Hence, I find and hold that this property cannot be considered in determining the final distribution.

9. Plot 2558 was registered in the name of Thomas and Lucas in equal shares on 21st July 1978 while it was not in dispute that Plot 2745 was given to Lucas. It was also common ground that the Plot 2750 was sold to Margaret Ochieng. According to the green card, the Plot 2750 registered in the name of the deceased and Thomas in 1978. The land was transferred to Margaret Achieng on 5th June 1997 slightly over a month before the deceased died.

10. After hearing the testimony of the parties, I am not satisfied that Thomas proved that the deceased expressed the wish that he should have Plot 2757 exclusively. Nothing would have been easier than for the deceased to divide it amongst his two sons during his lifetime. While it is possible that the deceased sold his land to enable him pay for treatment prior to his death, Thomas sold his own share voluntarily. I therefore hold that both the deceased's sons are entitled to **KISUMU/OJOLA/2747** in equal shares.

11. I therefore decline to set aside the certificate of confirmation dated 26th October 2002. As this is a family matter, each party shall bear their own costs.

DATED and DELIVERED at KISUMU this 18th day of May 2017

D. S. MAJANJA

JUDGE

Mr Ko'winoh instructed by Ko'winoh and Company Advocates for the applicant.

Respondent in person.