



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 365 OF 2008
(Formerly Siaya PM Succession Cause No. 16 of 2008)
IN THE MATTER OF THE ESTATE OF
OLOO OFUYA (DECEASED)
AND IN THE MATTER OF APPLICATION BY
BETWEEN
DERRICK KOLANYA MBASA APPLICANT
AND
JOTHAM OMONDI OBIERO RESPONDENT/PETITIONER
RULING

1. This matter concerns the estate of Oloo Ofuya (“the deceased”) of Ramula Sub-location in Gem, Siaya County who died on 11th November 2002. Jotham Omondi Obiero (“Obiero”) applied for the grant of letters of administration of his estate in *Siaya Principal Magistrate’s Court Succession Cause No. 16 of 2008*. He merely described himself as the administrator while the letter from the local chief described him as the deceased’s next of kin. The deceased’s only property was a land parcel; ½ share of EAST GEM/RAMULA/623 (“Plot 623”). In due course, he was issued with a grant of representation on 24th June 2008.

2. By summons for revocation dated 28th July 2008, Derrick Kolanya Mbaso (“Derrick”) through the holder of his power of attorney, Patrick Wasonga Mbaso (“Patrick”), moved the court for the revocation of the grant issued. The application was duly opposed by Obiero. After the parties filed their depositions, the matter was derailed by various interlocutory applications. However, I finally heard a total of 5 witnesses. On the applicant’s side Patrick (PW 1), Fredrick Oduor Kolanya (PW 2) and Olwero Guda (PW 3) testified in support of the application while on the respondent’s side, Meshack Odhiambo Mbaso (DW 1) and Obiero (DW 2) testified in opposition.

3. In his deposition sworn on 29th July 1978, Patrick deposed that he was the holder of a Power of Attorney issued by his brother Derrick. He stated that Derrick purchased Plot 623 from the deceased in 1987 and became registered owner on 15th October 1980 with the deceased. Patrick further deposed that the deceased held an interest in the property on the ground that he had no survivor to sustain him and that he relied on the family to support him until his death. He further stated that he was closer to the deceased according to blood relationship as he and the deceased came from the Kamhore line of the Usiandha Clan

while Obiero came from the Kamsungu line of the Usiandha Clan. Patrick contended that the Obiero did not seek his consent to commence proceedings.

4. In response, Obiero filed a replying affidavit sworn on 19th January 2009. He admitted that the Derrick purchased half of Plot 623 and became half owner of the property. He deposed that the deceased subdivided the parcel into two parts; Plot 935 and 936. Thereafter the deceased sold Plot 936 to Joshua Ndege creating in the process Plot 938 and leaving for himself Plot 937 on 28th October 1998. Thereafter the said Joshua Ndege sold his parcel to Joseph Odera Olocho (“Olocho”). Following the sale, there was a dispute Derrick and Olocho before the Land Dispute Tribunal. The matter ended up before the Provincial Land Dispute Tribunal where the Olocho’s claim was recognised. Obiero further deposed that the deceased recognised the purchase by giving him the original certificate of title for Plot 937 and his original identity card to facilitate the transfer of the property to his name but he died before the transaction could be completed.

5. As regards his lineage, Obiero deposed that Derrick, the deceased and himself come from the Usiandha Clan in Siandha ‘A’ Village and as such they are all cousins of the deceased. In any case, he stated that the deceased did not leave behind immediate family members. He deposed that he was the person who was taking care of the deceased until his death. He further deposed that Derrick and his family had long ago migrated to Kudho Village, Kanyakwar where their grandparents had settled and where they were buried and that their father Charles Mbsa Resa bought Plot No. 622 from the deceased when he returned to Ramula. His case is that Patrick is trying to take advantage of the demise of the deceased to take the land that belongs to him.

6. The testimony of the witnesses followed the contours set out in the depositions. Several issues are common ground. First, that the deceased died without any direct survivors or heirs. Second, that the deceased and both parties belong to the larger Usiandha clan and are in fact cousins. Third, that the deceased owned half share of Plot 623 while Derrick owned the other half. The applicant’s case was that he was the closest surviving relative of the deceased and as such he was entitled to administer the property. The respondent’s case was that whereas he was a cousin to the deceased, he was entitled to administer the property as a purchaser of ½ share of Plot 623 from the deceased.

7. The transmission of the deceased’s estate in this case is governed by **section 39(1)** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* which provides that where an intestate has left no surviving spouse or children, the net estate shall devolve upon kindred of the intestate in the following order of priority:

(a) father, or if dead

(b) mother, or if dead

(c) brothers and sisters, and any child of the deceased brothers and sisters, in equal shares, or if none,

(d) half-brothers and half-sisters and any child or children of the deceased’s half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity upto and including the sixth degree in equal shares.

8. Obiero readily admitted that he, the deceased and Derrick were cousins and part of the larger Usiandha Clan but that he was of the Kamsungu lineage while Patrick and the deceased were from the Kamhore lineage. PW 3, an old man who knew the deceased, and came from the same family and PW 2, Derrick’s son, confirmed as much. Based on lineage, I would hold that Patrick was closer to the deceased than Obiero and in terms of **section 39(1)(e)** of the *Act*, he would be entitled to administer the deceased’s estate on behalf of the deceased’s relatives of like degree who would share the estate equally amongst themselves. But this does not end or resolve the matter at hand as Obiero’s case is that he was a

purchaser of the deceased's land.

9. Obiero told the court that the deceased approached him in 1999 to purchase his land which was Plot 937. He accepted the offer and they entered into a written agreement dated 3rd August 1999 in which he was to pay Kshs. 20,000/- and build for him a semi-permanent two roomed house. Obiero produced the sale agreement and schedule of expenses to support his contention. Obiero told the court that the deceased gave him the original title deed and a copy of his identity card. He took possession of the land and started farming it until 2008 when the deceased passed away and Patrick forcibly took over the land and started cultivating it. When he attempted to take the land back, Patrick lodged a criminal complaint causing him to be charged in Siaya but the charges were dismissed. Obiero also told this court that this litigation was being pushed by Patrick and not Derrick. Contrary to assertions that Derrick was unwell, Obiero said that he was at home enjoying his retirement and had since revoked the power of attorney.

10. DW 1, who was Derrick's younger brother and Patrick's elder brother, testified that when he was born in 1958, their family was living in Kudho, Kanyakwar in Kisumu where their grandfather had settled. In 1967, the family returned to Ramula where they bought land from the deceased to settle. DW 1 told the court that since the deceased was unmarried he began to dispose of his land to support himself. He approached Derrick and sold to him part of the land. Thereafter he continued to sell portions of his land other people including to Killion Owino. He confirmed that the deceased approached Obiero in 1999 and sold him part of the land in consideration for Kshs. 20,000/- cash and a house to be built by Obiero. Thereafter, the deceased gave Obiero his ID card and the original title he was holding to enable him to complete the transaction. DW 1 further told the court that because the deceased kept selling his land, disputes began to arise and the larger family sat and decided to settle the matters at meeting on 10th January 1987 where the clan recognised that several people had purchased land from the deceased. DW 1 told the court that Derrick had his own portion of Plot 623 and there were no issues about the land until the deceased passed away. DW 1 denied that Patrick was close to the deceased during his lifetime and that it is Obiero who actually took care of him.

11. Patrick denied that Obiero purchased land from the deceased. He told the court that since the deceased was not married, he wanted to sell his land and leave the village. That the deceased initially sold the land to one Omuonga but since the clan was against the sale, they looked for someone to refund Omuonga his land and Derrick was identified to purchase the land and refund Omuonga his money. He produced an agreement dated 30th March 1979. In that way, the deceased stayed in the village and would be looked after by the Mbasas family. He told the court that his family took care of the deceased until he died. Patrick further testified that although the land was subdivided and two certificates of title issued, the Land Registrar cancelled the new titles and the land reverted to Plot 623. As regards, the case before the Land Disputes Tribunal, Patrick told the court that decision had been set aside by the High Court.

12. What is clear from the evidence is that since the deceased did not have a wife and children, he kept selling the land to support himself and Derrick was a beneficiary of that process. I am satisfied on the balance of probabilities that the deceased sold his share of the property to Obiero and apart from signing a sale agreement which was honoured by Obiero, he evinced his clear intention to part with the land by giving Obiero the certificate of title for his land parcel and his identity card which Obiero surrendered to the Registrar of Births and Deaths. It does not matter that the Land Registrar subsequently cancelled the title to Plot 937 and 938 because, at the time material to the sale, the deceased was capable of disposing of his share of the land. But for his death, the sale would have been completed.

13. There was suggestion by Patrick, that the deceased's land was family land which the deceased was holding in trust for the Mbasas family. I reject this suggestion. The deceased land was neither family nor clan land. The evidence from DW 1 and accepted by PW 3 is that when the Mbasas family returned from Kudho, it is the deceased who sold them land to settle. He also sold half of Plot 623 to Derrick and had he intended to give the entire land to the Mbasas family he would have sold all of it to him or to any other person. The fact that he continued to sell his land during his lifetime negates any notion of trust in favour of the Mbasas family.

14. It must now be clear that the summons for revocation is for dismissal. My reasons are further fortified

by the fact that the application was filed by Patrick holding a Power of Attorney for Derrick on the grounds that he was incapacitated. When cross-examined, Derrick's son, PW 2 told the court that his father was retired and he was at home and he did not know the reason why he was not in court. Obiero produced a Notice of Revocation of Power of Attorney dated 19th August 2013 in which Derrick revoked the Power of Attorney to Patrick. Patrick did not contest this fact nor call Derrick to testify despite having the opportunity to do so.

15. When the summons for revocation was dismissed on 16th December 2010, an application to set aside the order was filed on 4th March 2011 and the affidavit sworn by Derrick in which he stated that, "*[I] got involved in a road traffic accident wherein I sustained serious body injuries (Annexed and marked DKM – 1 copies of police abstract, P3 form and treatment card)*". All these documents annexed to the affidavit showed that it is Patrick who was in fact injured in a road accident, issued with a P3 form and treated for fractures on his hands, ribs and injuries to his spine as evidenced by the treatment card. I therefore conclude that Derrick did not make any claim and after the power of attorney was revoked in 2013, the objection, if any, fell by the wayside. The inference is irresistible and I find that it is Patrick was driving this case yet he did not lodge an objection in his own right.

16. I dismiss the Summons for revocation dated 28th July 2008. The petitioner may now proceed to apply for confirmation within 30 days. The costs of the application shall be borne by Patrick Wasonga Mbasa.

17. Finally, there is evidence that signature of Derrick Kolanya Mbasa, in several affidavits before this court and in Kisumu ELC Case NO. 141 of 2016, was forged. Patrick was in fact passing off as Derrick. This conduct, if proved, amounts to a criminal offence and has deleterious effect on the administration of justice. I hereby instruct the Deputy Registrar to forward this matter to the Directorate of Criminal Investigation, Kisumu County to investigate the matter and report to this court within the next 60 days.

DATED and DELIVERED at KISUMU this 17th day of May 2017

D. S. MAJANJA

JUDGE

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

Mr D. Otieno instructed by Otieno, Ragot and Company Advocates for the respondent/petitioner.