



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 1238 OF 2014
IN THE MATTER OF THE ESTATE OF
LAWRENCE SOGO ONGANYO (DECEASED)
AND IN THE MATTER OF APPLICATION BY
BETWEEN
AGNES ADHIAMBO SOGO
PELESIA ANYANGO SOGO
ALICE AKUMU SOGO.....PETITIONERS
AND
PHILIP SOGO OUDA.....PROTESTOR

RULING

1. This matter concerns the estate of Lawrence Sogo Onganyo (“the deceased”) of Wagai Central Location in Gem, Siaya District. He died on 3rd September 1983 and the petitioners, who described themselves as his widows, applied for grant of letters of administration for his estate. He left behind one property; East Gem/Wagai/27 (“Plot 27”). The petitioners were granted letters of administration on 21st April 2015. The petitioners have now moved the court, by a summons dated 26th April 2016, to confirm the grant in their favour.

2. Philip Sogo Ouda (“Philip”), the protestor, initially filed a summons for revocation for grant dated 9th February 2016. The basis of his claim was that Ouda Okumu (“Ouda”), his biological father, who died in 1968 was the original owner of Plot 27. He accused the deceased of acquiring the property irregularly without obtaining a grant for his late father’s estate. He thus claimed that he was a lawful beneficiary of the deceased and was excluded from these proceedings by the petitioners. Philip abandoned the application for revocation of the grant and elected to pursue his claim as a protest to the summons for confirmation of grant dated 26th April 2016.

3. The parties filed depositions and witness statements and also relied on oral testimony. The protestor testified and called Washington Omondo Obare (PW 2) while Pelesia Sogo (DW 1) and Alice Owino (DW 2) and Joshiah Serua Misita testified on behalf of the petitioners. The matter in issue is whether the Philip was the son of Ouda, a brother to the deceased and if so, whether he was entitled to inherit a share of Plot 27. The evidence material to this case was as follows.

4. Philip testified that he was born in 1963 and was the son of Ouda and Margaret Omulo (“Margaret”). Margaret’s first husband was Opiyo Nyamwanga who had passed away when she married Ouda. He told the court that his father was the first registered owner Plot 27. After Ouda died in 1968, his estate was succeeded by the deceased who became the registered owner of Plot 27 in 1978 while Philip was still a child. According to him, both the deceased and Ouda were first cousins. He further testified that he started working on the land in 1980 while the deceased was still alive and when he wanted to build a house on the land he was stopped by the deceased’s brother, Owino Onganyo. This matter was referred to the Assistant Chief who then called a meeting of clan members on 10th May 2001 where the issue was discussed. Philip testified that the clan members, who included the deceased’s widows, agreed that he was a son of Ouda and that he was entitled to part of Plot 27. After the meeting he built a house on the land where he has since been residing.

5. Washington Omondi Obare (PW 2) supported Philip’s case. He told the court that Philip was the son of Ouda through his second wife, Margaret. He recalled that when the land was adjudicated, the land where Philip resides belonged to Ouda and when he died, Philip was still very young. He confirmed when the dispute arose between Philip and the deceased family about where to build his home, the Assistant Chief called a meeting where it was resolved that Philip should settle on the land. He stated that the land belonged to Ouda before the deceased took it.

6. The testimony of Pelesia Sogo (DW 1) and Alice Owino (DW 2) is that Philip was not Ouda’s son. They claimed that deceased’s grandfather, Okumu, had two sons namely; Onganyo Okumu and Ouda Okumu. That Ouda died without any child although he married several times. Onganyo Okumu had two sons; Sogo Onyango, the deceased herein and husband to PW 1 and Owino Onganyo, the husband to PW 2 and a daughter; Aoko Onganyo. They took the position that Philip’s mother, Margaret, had initially married Opiyo Nyamwanga and after his death she married Walter Watta Nyamwanga who brought him up. Both DW 1 and DW 2 told the court that although there was meeting called by the Assistant Chief, they could not recall what was discussed and in any case no resolution was reached regarding Philip’s status.

7. The deceased’s cousin, Joshiah Seruya Misita (DW 3) testified that Philip was the son of Walter Watta Nyamwanga and Margaret. He recalled that Margaret was originally married to Malachi Opiyo, the first son of Nyamwanga, and when he died she was married by his brother, Walter Watta. Together with Watta, Margaret had three children; Okoth, Abidha and Philip. DW 3 further testified that Ouda had a wife but never had any children. He told the court that he did not attend the meeting called by the Assistant Chief on 10th May 2011.

8. The protestor had the burden of proving that he was Ouda’s son on the balance of probabilities. It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard of proof is the legal standard to which a party is required to prove his case. In civil cases the standard of proof is on the balance of probabilities. In the case of **Miller v Minister of Pensions [1947]2 All ER 372**, Lord Denning said stated as follows regarding the standard of proof in civil cases:

The ...[standard of proof]...is well settled. It must carry a reasonable degree of probability but no so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.

Thus proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

9. From the evidence I have outlined, it is common ground that Philip was Margaret’s son. The point of departure is that Philip claims he is Ouda’s son while the petitioners contend that he is Walter Watta Nyamwanga’s son. When the issue was put to him in cross-examination, he told that court that Watta was the son of Opiyo and a brother to Okumu and Opiyo. He denied that Watta brought him up and that it is a son of his brother, Opiyo who brought him up. PW 2 also confirmed that Watta was the son of

Nyamwanga who was the brother of Okumu Sogo, the father to the deceased. The testimony of DW 1 and his knowledge of the family was rather threadbare and since he could not recall many facts hence his testimony, I did not find his evidence particularly useful.

10. Philip's claim is intimately connected to Plot 27. If indeed he was the son of Ouda and recognised as such by the family, he would have been welcomed to the land as soon as he reached the age of majority. In his evidence he stated that he started working on the land in 1980 while the deceased was still alive. He was 17 years old at the time and by time the deceased passed away in 1983, he was 20 years old and still ploughing the land. It is not clear why he could not have built on the property if he was recognised by the deceased as the son of his late brother. The reason though emerges from the minutes of the meeting of 10th May 2001 is that he had been notified to vacate the land he was residing before June 2001. The question that comes to mind is why didn't he make his claim or assert his right in 1983 or earlier while the deceased was alive and why did it take another 18 years for him to assert his claim as Ouda's son.

11. In order to make his case, Philip relied heavily on the meeting called by the Assistant Chief, to resolve the issue whether he was Ouda's son and was therefore entitled to Plot 27. DW 1 and DW 2 confirm that there was a meeting but they denied that it resolved anything relating to issue at hand. From the minutes attached, the attendants expressed various views on the matter. What is however puzzling is the fact that the family which took care of Philip while he was growing up did not attend to give evidence in his favour. In these proceedings no one from the Nyamwanga family, particularly his step brothers Francis Nyamwanga and Okoth Abidha, were called to testify on behalf of Philip. They would have had an interest in ensuring that he obtained his legitimate inheritance and assisted him maintain his claim.

12. The totality of the evidence is that Philip did not surmount the first stage of proving, on the balance of probabilities, that he was the son of Ouda. Accordingly, his protest is dismissed.

13. The Summons for confirmation is confirmed on terms as prayed.

14. There shall be no order as to costs.

DATED and DELIVERED at KISUMU this 31st day of October 2017

D. S. MAJANJA

JUDGE

Mr Mugoye instructed by Mugoye and Associates for the petitioners.

Mr Mung'ao instructed by Mung'ao, Rachier and Company Advocates for the protestor.