



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1767 OF 2012

IN THE MATTER OF THE ESTATE OF MWAJUMA NAWIRE IBRAHIM (DECEASED)

JUDGMENT

1. The deceased herein died on 13th May 2008. A letter from the Chief of Gorofani Location, Nairobi, dated 15th February 2012, indicates that the deceased had two children, Mohamed Yusuf Bilali and Abasi Wanjala Bonde. Representation to his estate was sought in a petition lodged herein on 7th August 2012 by the two, in their capacities as sons of the deceased. They listed themselves as the sole survivors, and stated the estate as comprising of LR No. 209/4401/186 Makadara, Bukhayo/Bugengi/1775, South Teso/Angoromo/1075 and Plot No. 213 Nairobi (unsurveyed). A grant was accordingly made to them on 4th January 2013.
2. On 8th May 2013, a summons for revocation of the said grant was lodged at the registry by Halima Khamala Abdalla, dated 7th May 2013. She raises two main issues. One, she avers that she was a surviving daughter of the deceased, yet the administrators had obtained representation intestate on the lie that the deceased had been survived by just the two of them. Secondly, she states that the deceased had died a Muslim and Islamic law ought to govern her estate. She avers to have had initiated proceedings at the Kadhi's Court being Nairobi Kadhi's Court Case No. 398 of 2012. She asserts that she should be a beneficiary of the estate under Islamic law.
3. Both administrators responded to the application. Mohamed Yusuf Bilali swore his affidavit on 25th July 2014. He indicates that he had no objection to the applicant being joined to the proceedings as administrator, to the two administrators rendering accounts, a hearing being conducted to determine the extent of the estate, and for the estate to be subsequently distributed in accordance with Islamic law. Abasi Wanjala Bonde on his part swore an affidavit on 22nd July 2014. He avers that he had not been fully briefed before signing the probate papers. He concedes that the applicant is his blood sister, and the deceased was their mother. He avers that flat B1/4A on LR No. 36/VI/631 in California Estate Nairobi belonged to the applicant, the property having been gifted to her by the deceased, and the same was transferred to her name during the deceased's lifetime. LR No. 209/4401/186 Makadara, Nairobi was still in the name of the deceased but had been verbally bequeathed to him by the deceased, while Plot No. 213 Nairobi (unsurveyed), also in the name of the deceased, had been bequeathed to Mohamed Yusuf Bilali. The rest of the estate, that is to say Bukhayo/Bugengi/1775 and South Teso/Angoromo/1075, had not been allocated to anyone by the deceased. He explains that there are developments on the same, done by the deceased, the deponent and the applicant.
4. Various aspects of the application were resolved by consents recorded on divers dates.
5. The first consent was recorded in court on 27th October 2014 in terms –

- (a) That the applicant, Halima Khamala Abdalla, be appointed as one of the administrators of the estate;
- (b) That a hearing be conducted to determine the extent of the estate;
- (c) That estate be distributed thereafter in accordance with Islamic law; and
- (d) That accounts be addressed at the hearing.

6. The other consent was recorded on 6th June 2016 to the effect-

- (a) That the estate comprised of the four (4) assets listed in the petition;
- (b) That the other asset, LR No. 36/VI/631 in California Estate Nairobi, was disputed and its distribution was to abide the determination of the dispute in the proceedings then going on before the Environment and Land Court;
- (c) That there was to be a mini-trial to determine who, among the children, had developed the Busia properties, and on the accounts to be rendered by the administrators; and
- (d) That to facilitate the mini-trial, the administrators were to have valuations done on the alleged developments on the Busia properties.

7. The administrators complied with the terms of the consent by filing the accounts and the valuation reports.

8. The mini-trial, on the accounts and the developments, commenced on 2nd November 2016. The applicant took to the witness box first. She described the deceased as her mother, and the administrators as her siblings. She stated that the deceased died possessed of three (3) assets – a *shamba* at Busia, a property at Majengo, Pumwani Nairobi, and another at Makadara, Nairobi. She said the deceased had constructed buildings on the two Nairobi plots. She mentioned that the *shamba* at Busia was actually two plots adjacent to each other. She testified that on South Teso/Angoromo/1075 were two semi-permanent structures which she had constructed through her younger brother, by sending money to him for that purpose. She produced a bundle of MPesa statements and a diary where she allegedly recorded the money she had sent or given to her younger brother, as evidence that she used to send money to her younger brother over the period it is alleged that the property was developed. She said she spent Kshs. 700, 000.00 on the bungalows on the said land. She said that it was their elder brother who was managing the Busia property, and collecting rent therefrom. During cross-examination, she said it was three structures that stood on the subject land; one had been constructed by her, the other by the deceased and the other by her younger brother. She said that no tenant stays on the property. She also mentioned that there was a borehole on Bukhayo/Bugengi/1775, dug by the deceased.

9. The elder brother of the applicant, who is also the first administrator, Mohamed Yusuf Bilali, testified next. On accounts he stated that between 13th March 2008 and 4th January 2013 there was income coming into the estate and he was prepared to account for it. He stated that he could only account for income from the Majengo property. He mentioned that there were thirteen tenants on that property, and he gave figures of what each tenant paid as rent per month. The money collected would then be deposited into his personal bank account. He said that he did not collect any rent from the Busia properties, or from the Makadara house. On the three structures on South Teso/Angoromo/1075, he testified that two were put up by the deceased, while the second administrator, his younger brother, Abasi Wanjala Bonde, constructed the third one. He asserted that the applicant had not constructed a house on the property, saying that the same was built during the deceased's lifetime, and the deceased did not contribute a dime to the development. He also mentioned the borehole, saying that it was not usable after the deceased died, and had to be rehabilitated. He, however, differed with the applicant by saying that the borehole was on South Teso/Angoromo/1075 and not Bukhayo/Bugengi/1775. He stated that he planted many trees on the property; with seedlings that he bought from the Forest Department and the Kenya Wildlife Service,

Busia. He said that the Busia houses had tenants.

10. The second administrator, Abasi Wanjala Bonde, testified last. He stated that the deceased had called his three children together and told them about how to share out the four assets, three (Makadara, California and Majengo) in Nairobi and one (actually two plots adjacent to each other) at Busia. The Busia property was meant to be shared by all three of them, and not to be sold. He accused his elder brother, the first administrator, of going against the word of his mother. He explained the reason for not including the applicant in their petition was that the deceased had allocated to her the property at California, which she was in the process of transferring to their sister when she died. He stated that he was given the Makadara property, while Mohamed Yusuf Bilali was given the Majengo property. He asserted that their sister, the applicant, was also entitled to a share in the Busia property. He stated that he collected rent from the Makadara property, while his elder brother collected rent from the Majengo property. He testified that on the Busia property stood three structures. He said two of the permanent structures were put up by the deceased, but when she died he found one of them in a dilapidated state and he renovated it. He stated that the third structure is semi-permanent, and was put up by him with money sent to him by the applicant. He said he was the one who recommended the erection of that house to the applicant for her. She would send him money through MPesa or give it to him directly whenever he met her in Nairobi. He stated that some tenants occupied their mother's house and he collected rent from them. He asserted that the first administrator had not planted any trees on the land, insisting that the same were planted by the deceased. He insisted that he found them on the land after he retired from employment, saying that the deceased had relocated to Busia from Nairobi after she fell ill.

11. At the conclusion of the trial, I directed the parties to file and exchange their respective written submissions. There has been compliance therewith. I have read through both sets of submissions and noted the arguments made therein.

12. From the consent of 6th June 2016, only two issues were identified for determination – who was responsible for the developments on the Busia property and on whether the administrators should render accounts.

13. On the developments on the Busia property, the contention is that the applicant and Abasi Wanjala Bonde each put up a house on the land, or have houses attributable to them, and it is only Mohamed Yusuf Bilali who did not have a house on that land. The applicant's contention is that she gave money to Abasi Wanjala Bonde to put up a structure on the land. She produced a diary and an MPesa statement as evidence of the transaction. Abasi Wanjala Bonde supports her case, saying that he had advised her to put up a structure on the land, whereupon she began to send him money by MPesa and sometimes she would give him the money directly. Mohamed Yusuf Bilali asserts that she never put up any house on the land, saying that two of the houses were put by the deceased, while the third one was erected by Abasi Wanjala Bonde. I found significant contradictions in the evidence of the witnesses. They all agree that there were three houses standing on the land. The applicant assigns one house to the deceased, one to herself and the other to Abasi Wanjala Bonde. Mohamed Yusuf Bilali says that two of the houses were put up by the deceased, while one belonged to Abasi Wanjala Bonde. While Abasi Wanjala Bonde himself says that two of the houses were put up by the deceased and the third by the applicant. The one he claims to own, he says was one of the two put up by the deceased, and he only renovated and refurbished it after the deceased's demise, and after his retirement to make it habitable by his family.

14. Mohamed Yusuf Bilali says that one of the permanent houses belonged to Abasi Wanjala Bonde, and assigns the semi-permanent house to the deceased. The semi-permanent structure is the property claimed by the applicant. Abasi Wanjala Bonde claims to have put it up himself, while the permanent house where he stays is the house built by his mother that he renovated. The question then is who put up the semi-permanent house. The applicant and the second administrator assert that they were responsible for it, and it belonged to the applicant. The only evidence they have are MPesa records and diary entries. Are these sufficient proof that both were responsible for the erection of the said structure? I think not. The diary entries and the MPesa records only show that money changed hands between the two, but for what purpose the money was put to there is no evidence. It was incumbent upon them to provide records of materials bought, or of bills of quantities prepared, or construction agreements signed, among others.

Alternatively, they should have called as witnesses persons who did the actual construction, for Abasi Wanjala Bonde was not categorical as to whether he actually did the lifting and the fixing. Without such material, I can only conclude that the semi-permanent structure was done by the deceased, and not the applicant.

15. There is the issue of the trees; Abasi Wanjala Bonde describes it as a forest. He asserts that the same was planted by the deceased. Mohamed Yusuf Bilali appears to claim to have planted the younger trees, and therefore implying that the older trees were planted by someone else. The person settled on the Busia property is the second administrator, the first administrator lives in Nairobi. It is not clear from the material before me the nature of the business that the first administrator carries out on the Busia property, if any. The second administrator resides on the property, and appears to be the person who collects rent from some of the estate assets. I hold the view that Mohamed Yusuf Bilali has no connection with the Busia land, and therefore there is no foundation for his claim to have planted the forest of trees on the land. The evidence points to the said trees having been planted by the deceased.

16. The other development thereon is a borehole. It is common ground that the same was sunk by the deceased. The survivors only talk of its rehabilitation. The evidence of its actual location is, however, hazy, pointing to the fact that the same is rarely used.

17. On the accounts, it is quite clear that the applicant is not on any of the assets of the estate, but his brothers are. Both the administrators have conceded to collecting rent from estate assets. From what emerges, the rent from the Majengo and California property is collected by Mohamed Yusuf Bilali; while Abasi Wanjala Bonde collects rent from the Makadara and Busia properties. Both administrators conceded that they do not share what they collect with the applicant. As a child of the deceased, the applicant is entitled to a share of the rents collected by both administrators. I shall not consider whether the accounts filed by the administrators are adequate, and I shall leave it to the Kadhi's Court to address that when it shall be considering what the two should pay to the applicant as her share of the rents collected.

18. My final finding regarding the developments on the Busia property is that all were carried by the deceased, and that the only significant improvement done on any of the assets was by Abasi Wanjala Bonde, to the permanent house that he occupies with his family. On the accounts, the applicant should be allocated a share out of all the rents collected by the administrators from the date of their appointment to date. As the parties are agreed that the distribution of the estate ought to be in accordance with Islamic law, I shall remit the matter to the Kadhi's Court for apportionment. The matter shall thereafter be returned to this court for adoption of the apportionment to be made by the Kadhi's Court and for other final orders. Each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 13TH DAY OF OCTOBER, 2017.

W. MUSYOKA

JUDGE