



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 254 OF 2007

IN THE MATTER OF THE ESTATE OF

ALBERT ONGAYE KWOPA.....(DECEASED)

BETWEEN

RODAH SARAH ONGAYE.....1<sup>ST</sup> PETITIONER

AND

RICHARD MUKATIA ONGAYE.....2<sup>ND</sup> PETITIONER

**JUDGMENT**

**Introduction**

1. From the papers filed herein, the deceased in this case died on 29.04.2005 at St Mary's Hospital Mumias. He was aged 66 years. He died from cardiopulmonary arrest due to stroke. At the time of his death, the deceased was survived by 11 heirs, among them the two petitioners who are widow and son respectively. He is said to have left behind a parcel of land known as S. Wanga/Musanda/187, among other properties. The parties have not agreed on whether or not the above stated parcel of land is part of the deceased's estate. For that reason, the court heard oral evidence from both parties.

**The 2<sup>nd</sup> petitioner's case.**

2. The second petitioner testified as PW1 and told the court that the deceased had 2 wives, Ruth Ongaye and Rodah Sarah Ongaye. Ruth Ongaye had 2 children with the deceased, namely the second petitioner and one Ruth Shiundu while Rodah Sarah Ongaye's children are Tom Maina, Esther Nyarotso, Jacob Ombaye (deceased) Rebecca Tubei, Rosebella Awinja and Betseba Mutsoi. He also testified that apart from Land Parcel S. Wanga/Musanda/187, the deceased also owned Land Parcel Nos. S. Wanga/Musanda/861 and 189. That plot No.861, being a commercial plot at Musanda town was shared out among the deceased's beneficiaries before he died, with the 2<sup>nd</sup> petitioner receiving a portion, thereof measuring 40 x 100ft, with the rest of the plot ear marked for the family of the 1<sup>st</sup> petitioner; that plot No. S.wanga/Musanda/189 was for the house of the 2<sup>nd</sup> petitioner's mother Ruth Ongaye. He also testified that his (2<sup>nd</sup> petitioner) house in Mombasa was transferred to the deceased by a transfer dated 02/03/2001. See PExhibit 2. He however sold that house as per transfer dated 17.10.200 PExhibit3. According to the 2<sup>nd</sup> petitioner he bought plot 187 from Patrick Shibalira Mukatia See PExhibit4. PW1

stated further that though he owned plot 187 on paper on the ground the same belonged to Jeremiah Mukatia and that the plot appears as plot 188.

3. PW1 also testified that the 2<sup>nd</sup> petitioner took the Mumias Sugar shares as well as proceeds from sale of cane. That she also took the benefits from Kenya Railways. His prayer to the court is that the court rules that plot 189 which measures 1.6Ha goes to the first house, namely to himself and his sister. That plot 187 is his and that he should also get 40 x 100ft out of plot 861. He produced sale agreement dated 21.02.2007 for the Mombasa house as PExhibit5.

4. During cross examination, PW1 stated that he had not seen any sale agreement showing that the deceased bought plot 187 of land,, and that it was deceased who carried out most of the sale transactions.

5. PW1 called some witnesses. Patrick Mukatia testified as PW2. He told the court that he sold land parcel No.S. Wanga/Musanda/187 to the 2nd petitioner for kshs.25,000/- which sum was fully paid by PW1. PW2 also stated that he did not have a title for the parcel of land as the land was still in his (PW2') father's name, one Chadwick Handa. PW2 confirmed during cross examination that at the time he was concluding the land sale in respect of land parcel S. Wanga/Musanda/187 the registered owner of the land Chadwick Handa had died. He also testified that he was sure the land was now in the name of PW1. PW2 also admitted that he was aware of the sale agreement dated 24.08.1990 DExhibit1.

6. John Joseph Kwoba, who was blind as at the time of his testimony on 20.02.2013 testified as PW3. He confirmed as did PW2, that PW1 was the son of his elder brother known as Albert. He confirmed that Albert had 2 wives, Ruth Ongaye and Rodah Ongaye and that when Albert died he was buried on plot 861. He further testified that Albert also owned plot No. 189 and that in 1994, Albert allowed PW1 to build a house on that plot 189, while PW1's other brothers, Isaac and Jacob (deceased) were given shares in commercial plots. No questions were put to this witness.

7. PW4 was Livingstone Olula Wabudi. He testified that DW1 was the deceased's eldest son while the 1<sup>st</sup> petitioner was the deceased's second wife. He confirmed that he was one of the witnesses when the deceased was dealing with plot 189.

### **The defence case**

8. At the close of the 2<sup>nd</sup> petitioner's case, the first petitioner testified as DW1. She stated that whereas the deceased's first wife Ruth had 2 children, she had 8 children, one of whom Jacob Ombaye had died and was survived by 2 children Omondi and David. She also stated that her husband left behind 3 plots. S/Wanga/Musanda/861, 187 and 189, though only plots 861 and 189 were in the names of the deceased. That plot 187 was still in the name of the person who sold it to the deceased. She produced the sale agreement- DExhibit 1 – being sale Agreement between Patrick Mukatia Shibalira (seller) and Albert Ongaye Kwoba(buyer) dated 24.08.1990 executed before the Assistant Chief of Musanda Sub-location. She also produced the green card – DExhibit2. She further stated that DExhibit 1 erroneously referred to plot 188 when the actual plot sold to the deceased was 187 because plot 188 belongs to Jeremiah Mukatia, the deceased's brother. The official search, for plot 188 was produced as DEhibit3. She also produced documents showing she was growing cane on plots 187 and 189 as a contractor for Mumias Sugar Company Limited. DExhibits 4(a) and (b) DW1 stated that PW1's claims that he bought plot 187 were false though he transferred the land to himself in 2001 when Chadwick Handa died. She thus proposed to distribute the deceased's estate as follows.

- i) LP S.Wanga/Musanda/187 Measuring 0.44 Ha. to Richard Mukatia Ongaye (whole)
- ii) L.P S/Wanga/Musanda/189 measuring 1.6 acres to be shared equally at 0.53 acres among Tom Maina, Ruth Namale and Esther Nyarotso.
- iii) L.P S.wanga/Musanda/861 measuring 3.5 acres to be shared in equal shares of 0.58 acres amongst Isaac Kwoba children of Jacob Omaye, Rebecca Tubeyi, Grace Wetende , Rosebella Awinja and Bethseba Mutsoli.

iv) The retirement benefits from Kenya Railways, shares from Mumias Sugar Co. Ltd. sugarcane proceed from plots 187 and 189 all to go to Rodah Sara Ongaye.

9. On the other hand, the 2<sup>nd</sup> petitioner contends that she should receive plot 187 as of right because the same does not form part of the estate of the deceased and to get 0.078 acres out of LP S.Wanga/Musanda/861.

10. DW2 was Joseph Anda Werimo former Assistant Chief of Musanda sub-location. He confirmed the sale of land parcel S. Wanga/Musanda/187 on 24.08.1990 between the deceased and Patrick Mukatia Shibalira. He also testified that though the sale agreement referred to plot 188 the plot that was sold was 187. He confirmed that the sum of Kshs.13,000/=, being the purchase price was fully paid by the deceased and that since then the land has always been used by DW1. DW2 stated further that by 24.8.1990 Chadwick Handa who owned plot 187 had already died in 1986. He denied any knowledge of Chadwick Handa having transferred the land to PW1 and stated that the changes in ownership of plot made by PW1 in 2001 were fraudulent. DW1 closed her case after DW2 testified.

### **Issues for determination.**

11. From the pleadings and the evidence the only issue that arises for determination is whether Plot 187, which is being claimed as of right by Richard Mukatia Ongaye forms part of the estate of Albert Ongaye Kwoba, deceased. Whereas Richard Mukatia Ongaye disputes that the plot forms part of the deceased's estate, Rodah Sarah Ongaye says that it does, Richard's argument is that while it is true that the deceased bought plot 187 from the family of Chadwick Handa, he bought the plot from the deceased after he (Richard) sold the house he owned in Mombasa. Richard produced a letter dated 10.11.1994 by the deceased mentioning of some unidentified property that was to be subdivided and shared among the deceased's sons. Completion of the proposal was to be determined upon Richard's visit to the rural home in Mumias. Richard also produced as DExhibit 2, a transfer from himself to the deceased of that piece of land containing 0.0301 hectares or thereabouts situated in North of Mtwapa in Kilifi District for Kshs. One million paid to him by Albert Ongaye Kwoba (deceased) The agreement is dated 02/03/2001. Though Richard alleged that he paid for plot 187, he produced no documents to that effect and he also said he did not know how the title was processed.

12. When Richard's evidence is put side by side with that of Rodah Sarah, I do find that Rodah Sarah's version of the story looks more credible and therefore believable. It is not clear how plot 187 left the hands of the deceased into the hands of Richard. Even the evidence he gave concerning distribution of plot 861 by the deceased among the deceased's sons is not supported by evidence. What is on record (and it is also not very clear) is that the deceased was proposing to distribute some unidentified property among his sons. I have also considered the issue of the typographical error in the sale agreement produced by Rodah Sarah regarding the actual plot that was sold to the deceased by Patrick Shibalira and note that the evidence given by DW2 removes any doubts as to which property the deceased purchased from the Patrick Shibalira. The document was made before DW2 who also confirmed that plot 188 which belongs to Jeremiah Kwoba was not a subject of sale on 24.08.1990. I have also not appreciated the relevance of the sale agreement between Richard and the deceased regarding the Mombasa property. I also find that by the time Patrick Shibalira purported to sell plot 187 to Richard, that parcel was not available for sale. In any event it is strange that Chadwick Handa who had long died and whom Richard never saw, could have been the one to hand over the title to Richard on 24.04.2001.

### **Conclusion.**

13. In conclusion I find and hold that the deceased herein owned as at the time of death, 3 parcels of land being LP S. Wanga/Musanda 187, (measuring 0.44ha (or 1.1 acres), S.wanga/Musanda/189 measuring 0.64 Ha (or 1.6 acres) and S. Wanga/Musanda/861 measuring 1.4 Ha (or 3.5 acres). The deceased also owned shares in Mumias Sugar Co. Ltd. through account No.21518.

14. Having reached the above conclusion, and in view of the law

I now distribute the deceased's estate as follows;-

i) Shares in Mumias Sugar Co. Ltd. A/C No. 21518 to Rodah Sarah Ongaye

ii) L.R. No. S. Wangamusa/187 wholly to Richard Mukatia Ongaye

iii) L.R. No. S. Wangamusa/189 to be shared out to

a) Tom Maina.....0.53 acres

b) Ruth Namale .....0.53 acres

c) Esther Nyarosto.....0.53 acres

iv) LR. No. S. Wangamusa/861 to be shared out as follows;

a. Isaac Kwoba..... 0.58 Acres

b. Rebecca Tubeyi ..... 0.58 Acres

c. Grace Wetende..... 0.58 acres

d. Rosebella Awinja .....0.58 Acres

e. Bethseba Mutsoli ..... 0.58 acres

f. Albert Omondi Omayo S/O Jacob Omayo – 0.29 Acres

g. David Kwoba Omayo S/O Jacob Omayo – 0.29 Acres

The titles of Albert Omondi Omayo and David Kwoba Omayo shall be held in trust for them by Rodah Sarah Ongaye and Esther Nyarosto

Costs shall be in the cause.

Orders accordingly

**Judgment delivered, dated and signed in open court at Kakamega this 21st day April, of 2016**

**RUTH N. SITATI**

**JUDGE**

**In the presence of**

.....**Mr. Kundu for Akwala.....1<sup>st</sup> Petitioner**

.....**Mr. Ondieki for kiveu.....2<sup>nd</sup> Petitioner**

.....**Mr. Lagat.....Court Assistant**