



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 411 OF 2011

**IN THE MATTER OF THE ESTATE OF BENJAMIN OKUMU ODUKI-----
DECEASED**

AND

JOSEPH NYERERE OKUMU-----PETITIONER

VERSUS

JOSEPH PETER ODUKI-----OBJECTOR

RULING

1. This Cause is in respect of the Estate of Benjamin Okumu Oduki(The Deceased) who died Intestate on 29.1.1990. An Objection to the making of Grant to Joseph Nyerere Okumu(The Petitioner) was filed herein on 26th April 2012 by Joseph Peter Oduki(The Objector). This Decision is an answer to those Objection Proceedings.
2. The hearing of the Objection was by way of oral evidence preceded by the filing of Witness Affidavits.
3. Emerging from that evidence are some undisputed facts. At Death the Deceased was survived by the following biological children:-
 - a. Peter Odongo Okumu
 - b. Joseph Nyerere Okumu(The Petitioner)
 - c. Edwin Wafula Okumu
 - d. Elizabeth Anyango

Peter Odongo Okumu post-deceased the Deceased when he died on 23rd November 1993. Edwin Wafula Okumu and Elizabeth Anyango separately swore Affidavits on 29th February 2016 in which they confirmed that the Petition by the Petitioner herein has their support. While on behalf of the house of the late Peter, his son Stephen Juma Okumu swore a witness Affidavit on 12th March 2014, also, in support of the Petitioner's position.

4. Again, uncontested is that at the time of his Death the Deceased was the registered owner of Bukhayo/Ebusibwabo/1604. That land, was somehow formally subdivided some time in 1996 into three portions, namely Bukhayo/Ebusibwabo/2646, 2647 and 2648. That subdivision would be curious as it happened after the Death of the Deceased and before the appointment of an Administrator to his Estate.
5. Also uncontested is that the biological father of the Objector was Makokha Agoya Oduki (Agoya) who died when the Objector was just 6 years of age. In an Affidavit sworn by the Objector on

26th April 2012 in support of the Objection, the Objector gives the impression that he is a son of the Deceased by attaching thereto a letter dated 25.4.2012 from the Assistant Chief of Nasira Sub Location in which he is named as a son of the Deceased. In another Affidavit of 29th October 2013, the Objector clarifies this status when he states

“g. That my father died when I was 6 years of age and the Deceased herein took me and raised me as his son.”

6. I think there is no serious contest that the Deceased had taken in the Objector as his child because in a Replying Affidavit sworn by the Petitioner on 27th September 2013 he states,

“5. That after the death of the Objector’s father my deceased father Benjamin Okumu took the Objector to live with him.”

7. The position of the Petitioner is that prior to his Death, the Deceased shared out his land amongst his children and subdivided them to 3 portions which were eventually formalized as portions Bukhayo/Ebusibwabo/2646, Bukhayo/Ebusibwabo/2647 and Bukhayo/Ebusibwabo/2648. That the Objector was given Bukhayo/Ebusibwabo/2647 which he sold to a third Party.
8. At the hearing that third party turned out to be Jackson Wabwire Oduori (Oduori) who testified before Court. His evidence was that he bought 3 acres from the Objector. That is the land that is now designated as Bukhayo/Ebusibwabo/2647 which is duly registered in his name.
9. Although the Objector had not disclosed this sale in the Objection he presented to Court, he nevertheless at the hearing admitted having sold 3 acres to Oduori. His position, as I understand it, is that his entitlement to the land left behind by the Deceased was more than these three acres. This is what he testified

“I sold 3 acres to Jackson Oduor. I remained with about 3 acres”.

10. That stand by the Objector is borne out by his contention that his father’s share in Bukhayo/Ebusibwabo/1604 was 6 acres and that at the time of the Land Consolidation and Adjudication the whole of Bukhayo/Ebusibwabo/1604 was registered in the name of the Deceased but 6 acres thereof was to be held in trust for his father. In other words the Deceased was merely a custodian of that share for Agoya.
11. That confuses the Objectors claim, somewhat. On the one hand he stakes his claim to the Estate of the Deceased as a Dependant of the Deceased’s having been taken in by the Deceased as his own son at the age of 6 years. Yet on the other hand he seems to be pressing for Agoya’s share from the Deceased’s Estate. Unlike the former, this latter claim is infact a claim against the Estate. It is claim in the nature of a Trust which this Court being a Probate and Administration Court may not be in a position to determine.
12. On the claim as a Dependant, there is a disturbing aspect of the Objector’s case. In his Affidavit of 29th October 2013 sworn in support of his Cross-Petition, the Objector avers:

“5. That the Deceased died intestate leaving L.R. No. Bukhayo/Busibwabo/2648 measuring 2.36 hectares and L.R. No. Bukhayo/Busibwabo/2646 measuring 2.83 hectares. Attached and marked JO-1 (a) and (b) are copies of certificate of official search.

“10. That the Deceased subdivided his land amongst his children and he gave me portions thereof and I am presently occupying L.R. Bukhayo/Busibwabo/2648 together with Stephen Juma Okumu while the petitioner is occupying L.R. No. Bukhayo/Ebusibwabo/2646 together with Edwin Wafula Okumu”

The Objector fails to disclose anything about Bukhayo/Ebusibwabo/2647 which alongside Bukhayo/Ebusibwabo/2648 and Bukhayo/Ebusibwabo/2646, were the subplots resulting from Bukhayo/Ebusibwabo/1604. This non-disclosed parcel was the one sold by him to Oduori. In the papers that the Objector initially presented to Court, the Objector was studiously silent about his benefit of

Bukhayo/Ebusibwabo/2647 and subsequent sale.

13.The Objector only admitted to the sale after it was raised by the Petitioner in his reply to the Objection and Answer to Cross-Petition. This lack of candour on the part of the Objector sways me to believe the version of Petitioner that prior to his Death, the Deceased shared out his land amongst his sons (including the Objector) and made gifts to them and that the Objector sold his portion (2647) to Oduori.

14.Having come to this conclusion, I do not find any merit in the Objection as the Objector does not have further entitlement in the Deceased's Estate. The Objection is hereby dismissed. I however, make no order on costs as the Protagonists herein are brothers.

Dated, signed and delivered at Busia this 23rd day of May 2016.

F. TUIYOTT

JUDGE

In the presence of:-

Orwasa - C/Assistant

Petitioner in person

Objector in person