



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 393 OF 2002**

**IN THE MATTER OF THE ESTATE OF DANIEL ANYEMBE NANDAHA – DECEASED**

BETWEEN

CAUDENCIA MAKOSHI MANGO ..... PETITIONER

AND

JAVAN KUYA ANYEMBE ..... OBJECTOR/PLAINTIFF

**JUDGMENT**

**BACKGROUND**

1. Benjamin Nandaha Anyembe petitioned for letters of administration of the estate of his late father, Daniel Anyembe Andaha. He was issued with a Certificate of Confirmation of grant on 21<sup>st</sup> July, 2003. At the time of filing the petition, he disclosed that the beneficiaries to the deceased's estate were himself and his brother Javan Kuya Anyembe. A perusal of the proceedings of 24<sup>th</sup> June, 2003 indicate that only the petitioner was present at the time the grant was confirmed. The Petitioner disclosed that the deceased's assets available for distribution were Marama/Inaya/856, Marama/Inaya/857 and Marama/Inaya/790. The Certificate of Confirmation of grant indicates that these assets were to be shared equally between Benjamin Nandaha Anyembe (Benjamin) and Javan Kuya Anyembe (Javan). Benjamin died on 11<sup>th</sup> March, 2004 and his widow Caudanzia Makoshi Mango (Caudanzia) was on 25<sup>th</sup> July, 2012 appointed a Co-administrator of the deceased estate with Javan. A certificate of Confirmation of grant was issued in the joint names of Javan and Caudanzia and the deceased's estate aforementioned was to be shared equally between the two.

2. Nine years later, Javan filed summons dated 20th September, 2012 seeking review and redistribution of the “**principal assets**” of the estate of the deceased. The Court gave directions on 29th January 2015, on how the objection proceedings were to be undertaken.

**THE PLAINTIFF'S CASE**

3. The objector (now the plaintiff) adduced evidence as PW1. He informed the Court that his late father died in the year 1994 and left four (4) parcels of land being, LR No. Marama/Inaya/791 measuring 2.5 hectares, LR No. Marama/Inaya/790 measuring 1.54 hectares, LR No. Marama/Inaya/857 measuring 0.75 hectares and LR No. Marama/Inaya/856 measuring 1.35 hectares.

4. PW1 informed the Court that in the year 1989 his late father gave his late brother Benjamin Nandaha Anyembe LR No. Marama/Inaya/791 measuring 2.5 hectares and that the land is registered in Benjamin's

name as per the search certificate dated 13<sup>th</sup> August, 2014. He requested the Court to take into consideration the land that his late father gave Benjamin as being part of the deceased's estate. PW1 informed the court that he had sold a portion of the deceased's estate to Carolyn Daisy Ashiono, the 1<sup>st</sup> interested party and would transfer part of the land distributed to him to the said purchaser. He requested this Court to distribute the deceased's estate in a fair manner.

5. On cross examination by Mr. Kundu, PW1 informed the Court that Marama /Inaya 624 represents the entire piece of land. It was sub divided into LR Nos. Marama/Inaya/790, 791 and 792. Thereafter LR No. Marama/Inaya 792 was subdivided into LR Nos. Marama/Inaya/856 and 857. He testified that Benjamin's wife lives on LR No. Marama/Inaya/791 and that his home is on LR. No. Marama/Inaya/790.

6. PW1 proposed that a portion measuring 0.57 hectares should be carved out of No. Marama/Inaya/790 to be given to the defendant. He proposed that LR No. Marama/Inaya/856 measuring 1.35 hectares and LR. No. Marama/Inaya/857 measuring 0.75 hectares should also devolve him. The total acreage that would devolve to him is 4.10 hectares. He proposed that the defendant should not get any portion of land from LR Nos. Marama/Inaya/856 and 857 in view of the parcel of land that was given to his late brother. PW1 further informed the Court that land ref. Nos. Marama/Inaya/856 and 857 abutt the road to Sigalagala/Butere.

7. On cross examination by Mr. Situma, PW1 admitted having sold land in LR. No. Marama/Inaya/857 to Carolyn in which she has built a school. He also sold a portion of LR. No. Marama/Inaya /856 to Carolyn, one Richard and to David Muchelule.

8. PW2, David Anyembe Nandaha stated that PW1 is his step father and described the defendant as his step mother. He informed the Court that he was aware that his late grandfather gave a parcel of land being LR No. Marama/Inaya/791 to the late Benjamin. He was also aware that his late grandfather had parcels of land namely, Marama/Inaya/856, 857, 790 and 791.

9. On cross examination by Mr. Kundu, PW2 confirmed that PW1 has sold LR No. Marama/Inaya/856 and that he lives on LR No. Marama/Inaya/790.

10. On cross examination by Mr. Situma, PW2 stated that LR Nos. Marama/Inaya/856 and 857 have a school constructed thereon after PW1 sold the land.

11. PW3, Reuben Imbukwa reiterated what PW1 and PW2 had stated.

### **THE DEFENDANT'S CASE**

12. DW1, the respondent (now the defendant) Caudanzia Makoshi whose name appears as *Caudanzia Makoshi* in the pleadings requested the court to distribute LR Nos. Marama/Inaya/856 and 857. She informed the Court that her home is on LR No. Marama/Inaya/791 whereas the Plaintiff lives on LR No. Marama/Inaya/790. She requested the Court to distribute the deceased's estate such that she and the plaintiff can get equal shares. She also requested the Court to distribute the land to the extent that she too can get a portion of land abutting the Sigalagala/Butere road.

13. On cross examination by the plaintiff, she stated that the land her husband was allocated was 5 acres and that she would like LR No. Marama/Inaya/856 to be sub-divided.

14. On cross examination by Mr. Situma, she informed the Court that her husband was the deceased's first born son. She confirmed that there is a school standing on LR No. Marama/Inaya/856 but does not know if the school extends to LR No. Marama/Inaya/857.

### **THE INTERESTED PARTIES CASE**

15. The 1<sup>st</sup> interested party, Carolyn Daisy Ashiono (Carolyn) testified that she bought 3.2 acres from the plaintiff and paid for the same.

16. She informed the Court that she bought 0.75 hectares of LR No. Marama/Inaya/857 where her school stands, she also bought 0.50 hectares from the plaintiff on LR No. Marama/Inaya/856 and a portion measuring 0.05 hectares on LR No. Marama/Inaya/790. She indicated that she has constructed classrooms on Marama/Inaya/857 and an orphanage on her portion of LR No. Marama/Inaya/856. She clarified that she was given a portion of land on LR No. Marama/Inaya/790, where she has constructed toilets for the children.

17. She prayed for distribution of her share of the land she had bought from the Plaintiff.

18. On cross examination by the plaintiff, she informed the Court that there is no written agreement in respect to LR No. Marama/Inaya/790 where the toilets stand.

19. On re-examination by her Counsel she clarified that the construction of the toilets on LR No. Marama/Inaya/790 was based on a gentleman's agreement because the toilets could not fit on LR Marama/Inaya/857. She added that the toilets are fenced within the school compound and the plaintiff did not object to their construction on LR No. Marama/Inaya/790.

## **INTERESTED PARTY 2**

20. Reverend David Moi Henry Muchelule testified that he bought a piece of land measuring 0.05 hectares from the plaintiff and would like the same taken into consideration during distribution.

21. On cross examination by the plaintiff, he requested that the piece of land he bought be carved out of LR No. Marama/Inaya/856 or LR No. Marama/Inaya/857.

## **SUBMISSIONS**

22. The plaintiff pleaded with the court to distribute the deceased's estate in a fair manner as his late brother had not done so. He prayed that LR Nos. Marama/Inaya/790 and 856 be allocated to him. The total measurements being 2.11 hectares. Since his late brother had been given LR No. Marama/Inaya/791. He asked for his prayer to be granted so that he can give the interested parties their portions of land.

23. The defendant's learned Counsel, Mr. Kubebea submitted that it had been established that LR No. Marama/Inaya/791 was a gift to the Defendant's husband and that he established his home on that parcel of land. It was also acknowledged that the plaintiff established his home on LR No. Marama/Inaya/790.

24. It was submitted that LR Nos. 856 and 857 should be shared equally between the plaintiff and the defendant with each party getting 1.05 hectares. Thereafter the plaintiff would surrender his shares to the interested parties in this case as he admitted having sold land to them.

25. Mr. Kubebea proposed a 2nd option for the plaintiff to get a share of 0.96 hectares carved out LR Nos. 856 and 857 in addition to his portion in LR No. Marama/Inaya/790 as that will put him on the same footing as the defendant. The remaining 1.14 hectares would be shared equally with each party getting 0.57 hectares.

26. Mr. Situma, Learned Counsel for the interested parties concurred with the plaintiff and the defendant that both the parties had established their homes on parcels of land that belonged to the deceased. This Court was urged to take into consideration LR No. Marama/Inaya/791 which the deceased had given to his late son Benjamin, and distribute the deceased's assets in a fair manner.

27. It was submitted that LR No. 857 be given to the plaintiff as he had sold the land wholly to the 1<sup>st</sup> interested party who put up a school and an orphanage. He also prayed that a portion measuring 0.50 hectares be hived off LR No. Marama/Inaya/856 for the 1<sup>st</sup> interested party and a portion measuring 0.05 hectares from LR No. Marama/Inaya/790.

28. It was submitted that the 2nd interested party bought 0.05 hectares from the plaintiff which should be carved out of LR No. Marama/Inaya/856.

## **ANALYSIS AND DETERMINATION**

The issue for determination is if the plaintiff is entitled to additional assets from the deceased's estate.

29. It is not disputed that the plaintiff is in occupation of LR No. Marama/Inaya/790 measuring 1.54 hectares whereas the defendant is in occupation of LR No. Marama/Inaya/791 measuring 2.5 hectares. LR No. Marama/Inaya/856 measures 1.35 hectares whereas Marama/Inaya/857 measures 0.75 hectares. It is clear that LR Nos. Marama/Inaya/856 and 857 abutt the Sigalagala/ Butere road. This Court notes that the plaintiff admits having sold the entire parcel of LR Marama/Inaya/857 to Carolyne. She also bought 0.50 hectares from him from LR No. Marama/Inaya/856 and that toilets for her school are constructed on LR Marama/Inaya/790 and sit on 0.05 hectares thereof.

30. It is evident that when the plaintiff's late brother, Benjamin, petitioned for letters of administration, he disclosed in his affidavit in support of the said petition that the beneficiaries to the deceased's estate were himself and the Plaintiff herein. He disclosed that the deceased's estate comprised LR Nos. Marama/Inaya/790, 856 and 857. He made no mention of LR No. Marama/Inaya/791 given to him by the deceased during his lifetime. The documents on record show that Marama/Inaya/791 was transferred to the late Benjamin by his late father on 3rd April, 1990.

31. Section 42 of the Law of Succession Act provides that where :-

**“(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**(b) property has been apportioned or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,**

**That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house”.**

32. Halbury's Laws of England 4<sup>th</sup> Edition volume 20(1) at paragraph 67 state as follows:-

**“..... If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”**

33. In the instant case, I am satisfied that the deceased had bequeathed his late son Benjamin, 2.5 hectares of land. In view of the evidence adduced herein and after considering the applicable legal provisions, I hold that the parcel of land Reference No. Marama/Inaya/791 must be taken into account in distribution of the deceased's estate. I also take note the 1<sup>st</sup> Interested party has constructed classrooms on LR No. Marama/Inaya/857 and part of LR No. Marama/Inaya/856 contains an orphanage. I have also considered the portions of land that the parties are currently living on so as not to cause any disruption to their current residences.

34. I must express distaste at the manner in which the plaintiff has intermeddled with the estate of the deceased by selling the choicest parcels of land which is the subject of this succession cause, with abandon. It is apparent that his actions were tantamount to distribution of the deceased's estate before this case was heard and determined.

35. Some of the interested parties mentioned in the claim did not attend Court to adduce evidence. It will be upon the plaintiff to settle their claims from his share of inheritance. Carolyne informed the court that the toilets standing on LR Marama/Inaya/790 are based on a gentleman's agreement, this court can therefore not distribute that portion of land to her. It is up to her and the plaintiff to formalize that

gentleman's agreement so that it can be binding on both parties.

36. This Court will distribute the land measuring 6.14 hectares into two equal portions. The rules of equity dictate that the defendant like the plaintiff should get a share of land that abutts the Sigalagala/Butere Highway. Each party will get 3.07 hectares. The two interested parties have satisfied this court that they are entitled to the portions of land they claim out of the plaintiff's share of the inheritance.

37. I hereby distribute the deceased's estate as follows:-

**(1) LR No. Marama/Inaya/790**

(i) Javan Kuya Anyembe - 1.54 hectares.

**(2) LR No. Marama/Inaya/791**

(i) Caudanzia Makoshi Mango - 2.50 hectares

**(3) LR No. Marama/Inaya/857**

(i) Carolyne Daisy Ashiono - 0.75 hectares

**(4) LR No. Marama/Inaya/856**

(i) Caudanzia Makoshi Mango - 0.57 hectares

(ii) Carolyne Daisy Ashiono - 0.50 hectares

(iii) Javan Kuya Anyembe - 0.23 hectares

(iv) David Moi Henry Muchelule - 0.05 hectares.

The cautions registered against LR Nos. Marama/Inaya/856 and 857 are hereby lifted.

It is so ordered.

**DATED and SIGNED at MOMBASA on this ..... day of ....., 2016.**

**NJOKI MWANGI**

**JUDGE**

**DELIVERED, DATED and SIGNED at KAKAMEGA on this 21st day of July, 2016**

**E.C. MWITA**

**JUDGE**