



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
SUCCESSION CAUSE NO. 40 OF 2006

IN THE MATTER OF THE ESTATE OF PAULINE BALONGO NAFULA (DECEASED)

AND

MARGARET TAMBITI SIONGO.....PETITIONER

VERSUS

EDWARD ONYANGO OHATO.....APPLICANT

RULING

1. Edward Onyango Ohato, has brought the chamber summons application dated 7th December, 2015 under Section 47 of the Law of Succession Act and rules 59(1) & (5) and 74 of the Probate Administration Rules. Through the application he seeks orders as follows:

"a) The Applicant is a lawful owner of 1½ (one and half) acres of Bunyala/2793 having purchased the same from PAULINE NAFULA BALONGO (deceased).

b) An order be and is hereby issued directing the petitioner/legal representative, MARGARET TAMBITI SIONGO to include the applicant and his share aforesaid in the application for confirmation of grant.

c) Costs of this application be in the cause."

2. The application is supported by the grounds on its face as follows:

"1) That the petitioner herein applied for a grant of representation on 3/4/06.

2) That the petitioner did not list the applicant in the affidavit in support of the petition for grant, as a purchaser of 1½ (one and a half) acres of the asset of the deceased being BUNYALA/BULEMIA/2793.

3) That the petitioner has already obtained a grant of representation which was issued to her on 3/10/06 but is yet to apply for confirmation of grant.

4) The applicant is apprehensive that the petitioner may apply for confirmation of grant without including the interest of the applicant in the deceased's estate, and once issued the petitioner may proceed to distribute the estate of the deceased, to the applicant's detriment.

5) That it is imperative that the Orders sought herein be issued in order to cater for the applicant's interest and also for effective distribution of the deceased's estate."

3. The application is also supported by an affidavit sworn by the Applicant on 7th October, 2015. Through the affidavit the Applicant avers that on 1st December, 2015 he visited the Lands Office in a bid to check on transactions relating to L.R. NO. BUNYALA/BULEMIA/2793 in which he has an interest. It was then that he discovered that the Petitioner herein Margaret Siongo had noted in the lands file that she was the legal representative of the deceased land owner Pauline Balongo Nafula.

4. It is the Applicant's averment that upon proceeding to the registry of this Court he found that the Petitioner/Respondent had applied for a grant of representation and the same had been made on 3rd October, 2006. Further, that the Petitioner had not listed him in the affidavit sworn in support of the petition for a grant as person with an interest in the estate.

5. The Applicant avers that he had bought one and half acres from the deceased and has been living on the said parcel of land ever since. It is his fear that the Petitioner may apply for confirmation of grant any time thus locking him out of the distribution of the estate. He thus seeks orders to take care of his interests.

6. The Respondent opposed the application through grounds of opposition dated 11th April, 2016 and a replying affidavit sworn on the same date. Her grounds of opposition are:

"1. The applicant has no or no reasonable claim in the property.

2. There is no evidence of the alleged transaction of sale.

3. In any event, there is no evidence of application for or grant of the land control board consent."

7. In her affidavit the Respondent avers that the property in question measures no more than one and a half acres. She deposes that the Applicant has not exhibited a sale agreement. Further, that the deceased was illiterate and could not have authored any letter indicating that the Applicant is entitled to one and a half acres of the deceased's parcel of land. The Respondent avers that the Applicant has not proved that he paid for the land and neither has he disclosed any witnesses who will support his case.

8. It is the Respondent's case that even if the deceased wanted to sell the land, the Land Control Board would not have approved such a transaction as the deceased did not have any other parcel of land. The Respondent avers that the Land Disputes Tribunal had determined that the Applicant had not purchased a portion of the deceased's parcel of land in question. She therefore urges this Court to dismiss the Applicant's application.

9. The question that needs to be answered is whether the Applicant has an identifiable interest in the estate of the deceased Pauline Nafula Balongo to warrant issuance of any orders. The answer to that question lies in the proceedings of the Land Disputes Tribunal of Budalangi Division in the case of **Edward Onyango Ohato v Margaret Tambiti** which was in respect of L.R. No. BUNYALA/BULEMIA/2793.

10. After hearing the matter the Tribunal made certain findings and delivered its ruling on 3rd August, 2005 as follows:

"The Tribunal respects the approval given by the Land Control Board of 3.09.1998 which states: "The application of Pauline Balongo Nafula to sub-divide her land into three portions as indicated on the ground was approved." ref; Min. 40/98 which is Bunyala/Bulemia/2793.

Therefore the land sales agreement between Edward Onyango Ohato and Pauline Balongo

Nafula dated 5.11.1994 is not honoured by the panel.

The letter of consent of 7.9.1998 addressed to Pauline Onyango Nafula now in the hands of Edward Onyango Ohato must be surrendered to the next of kin of the addressee, preferably to Lucy Akumu Opondo or Margaret Tambiti.

Edward Onyango Ohato should accept to take the portion of land shown to the panel on 19.7.2005, the land on the upper side of the road near the church.”

11. From that ruling two crucial things relevant to these proceedings emerge. Firstly, that Tribunal did not uphold a sale agreement that had been produced by the Applicant. Secondly, that the Tribunal found in favour of the Applicant in respect of a portion of the deceased’s land that had been identified as being on **“the upper side of the road near the church.”** The award of the Tribunal was subsequently adopted as the judgment of the Court in **Busia P.M. Land Disputes No. 18 of 2006, Edward Onyango Ohato v Margaret Tambiti.** There is no evidence that the decision of the Tribunal was overturned on appeal and that means the decision remains valid to date.

12. Arising from that decision, I find that the Applicant does indeed have an interest in the estate of the deceased. That interest is limited to a portion of the deceased’s land on the upper side of the road next to the church. The Tribunal did not determine the size of the land the Applicant was entitled to, but the members of the Tribunal visited the land and confirmed the portion the Applicant was occupying.

13. In the circumstances of this case, I find that the Applicant’s application has merit. In order to propel this matter forward, I direct that a surveyor visits the land and demarcates the Applicant’s portion which is limited to the upper part of the road next to the church. The Applicant and Petitioner will jointly appoint a surveyor and they will both equally meet the expenses of the surveyor. This should be done within 60 days from today’s date and a report filed in Court within that time. The Court will thereafter give further directions.

14. The costs will be in the cause.

Dated, signed and delivered at Busia this 18th day of August, 2016

W. KORIR,

JUDGE OF THE HIGH COURT