



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.790 OF 2006

IN THE MATTER OF THE ESTATE OF HESBORN MUDOGO (DECEASED)

BETWEEN

**ZIPORAH ANYOLO ALIAS SIPORAH
ANYOLO.....PETITIONER/RESPONDENT**

AND

NOEL AMBOSO OYOMBEOBJECTOR/APPLICANT

RULING

Introduction

1. The deceased herein died at age 65 on 27/02/2006. According to the Petition papers, the deceased was survived by among others the Petitioner herein who is the widow. The deceased left behind 3 parcels of land, namely Kakamega/Municipality Block 1/696, South Kabras/Shamberere/39 and South Kabras/Shamberere/200. The Grant of Letters of Administration were granted to the petitioner on 19/03/2007 and it appears from the said grant that all the above named 3 parcels of land devolved to the Petitioner together with share certificate No.00208777 from the Kenya Commercial Bank.

2. The only parcel of land in dispute is South Kabras/Shamberere/200. On 21/09/2012 the said parcel of land was cautioned restricting any dealings in or on it until succession case was filed and resolved in a Court of law.

The Objection

3. The Objector did not approve of land parcel 200 devolving to the Petitioner and on 05/11/2012, she filed the Summons for Revocation or annulment of Grant. The Summons was filed under Rule 44(2) of the Probate and Administration Rules. Rule 44 provides the mode of challenging a grant by any person interested in doing so. Rule 44 (2) provides for the documents to accompany the Summons of revocation.

4. The Objector alleges that the Petitioner mounted the Succession cause without the consent of the deceased's other dependants and that by naming only herself as the sole beneficiary of the deceased's estate the Petitioner has demonstrated her unfaithfulness as the administrator of the deceased's estate. The Objector further alleges that she and her six children are the bona fide beneficiaries of the disputed parcel of land. Finally the Objector accuses the Petitioner of unlawfully selling part of the disputed parcel of land and thereby depriving the Objector and her 6 children of their rightful share in the estate of the deceased.

Response to the Objection

5. The Petitioner opposed the objection through her replying affidavit sworn on 14/12/2012 in which she denies the objector's allegations and also alleges that before the deceased died he had provided for John Ambulwa Mudogo and his family. The Objector is admittedly the wife of John Ambulwa Mudogo who is also deceased. The Petitioner further alleges that John Ambulwa Mudogo had been given L.R. No.Kakamega/Sango/677 but after his demise the same was sold by the Objector to one Benfandi Wafula of Sinai village, Mawe sub location, Kongoni location in Lugari District of Kakamega County and that in the circumstances, the Objector is not entitled to any share in the disputed parcel of land.

The Objector's Evidence

6. The Objector testified and also called 2 witnesses. She told the Court that her late husband, John Ambulwa Mudogo was son to Rebecca, the first wife of the deceased herein while the Petitioner sired 4 children with the deceased one son and 3 daughters. She told the Court that she lives on plot 200 which was given to her husband by the deceased before the deceased died. She also confirmed that for many years she and her husband lived outside the home. She denied the Petitioner's allegations that John Ambulwa Mudogo had been given LR No/ kakamega/Sango/677. Her plea to the Court is that the Court gives her the whole 3½ acres comprised in plot 200. She however had no documentary evidence to support her claims that plot 200 was given to her late husband by the deceased before the deceased's death. She also denied knowledge of sale of plot No.kakamega/Sango/677 to Bonfandi Wafula or at all. She also told the Court in cross examination that she was not willing to share plot 200 with her sister in law Caroline.

7. Alfayo Fuchingo testified as PW2. He testified that the deceased showed John Ambulwa plot 200 and built a house for him on the said plot. PW2 stated that the deceased shared his estate between his 2 houses, though the deceased's first wife Rebecca left soon after giving birth to John Ambulwa Mudogo. PW2 also testified that there was no document to support his allegations.

8. PW3 was Stephen Muhongo Kisindu, a village elder of Bukhakunga village. He testified that the Objector lives on plot 200 after the deceased gave it to John Ambulwa Mudogo in or about 1998 or 1999. He asked the Court to give the whole 3 ½ acres comprised on plot 200 to the Objector. PW3 did not produce any documents to support his claims that plot 200 was given to John Ambulwa Mudogo by the deceased before the deceased died.

The Petitioner's Evidence

9. The Petitioner testified and called one witness for the defence. She produced her Marriage Certificate and testified that she had 6 children with the deceased though 3 of them were now deceased. She told the Court that the Objector was brought to her home by her brother-in-law one Fred Lubisia in 2009. Before then, the Objector and her husband John Ambulwa Mudogo had been living in LR No.Kakamega/Sango/677 which land was sold by Fred Lubisia after John Ambulwa Mudogo died. The Petitioner also testified that her brother-in-law Fred Lubisia wanted to disentitle her of the deceased's estate because of the fact that her two sons had died.

10. The Petitioner further testified that plot 200 was bought with her own money and that it was only in 2009 that Fred Lubisia built a house on the land for the Objector. She stated that though the Objector was not entitled to any share of plot 200, she was willing to give her a portion and to give the other portion to her daughter Carolyne. The Petitioner had no documentary proof of her purchase of plot 200.

11. In cross examination, she denied having sold plot 200 and further denied that the deceased gave plot 200 to John Ambulwa Mudogo.

12. DW2 was Alfred Mbakaya Mwatia. He testified that in 2010, the Petitioner allowed John Ambulwa Mudogo to put up a house on plot 200 after a series of discussions. He also testified that plot 200 was shared out equally between the Objector and the Petitioner's daughter Carolyne. He also confirmed that

prior to 2009, nobody was occupying plot 200 and that it was Fred Lubisia who built the house on plot 200 for John Ambulwa Mudogo. He confirmed that he participated in the distribution of plot 200 between the Objector and Carolyne.

Submissions

13. Both parties filed final written submissions. M/s Andia, Counsel for the Objector prays that the whole of plot 200 be given to the Objector arguing that the Petitioner's desire to give part of the plot to her daughter Carolyne was an afterthought.

14. The Petitioner through M/s Nyikuli Shifwoka & company Advocates contends the Objector and her husband squandered their share of the deceased's estate being LR Kakamega/Sango/677. Counsel relied on Sections 26, 27 and 28 (a) (d) and (e) of the Law of Succession Act. Reliance was also placed on Article II (1) and 2(a) 59 and 61(1) (a) & (o) of the Constitution. Counsel also cited the persuasive authority in the case of in Re Estate of **Pratik Ramesh Meghji Shah [2015] e KLR** to support the Petitioner's case that the Objector is not entitled to any share in plot 200.

15. In the alternative, the Petitioner proposes that plot 200 can be shared equally between the Objector and the Petitioner's house.

Analysis and Determination

16. From the pleadings and the evidence the only issue for determination is whether plot Kakamega/South Kabras/200 is part of the deceased's estate and if so whether the Objector is entitled to the whole of it, a share of it or none of it. The Objector stated that the said plot was given to her late husband by the deceased before the deceased died, but she did not produce any evidence of the alleged devolution. The only undisputed fact is that the Objector and her children live on the said plot and have done so since about 2009/2010 or thereabouts. It is not agreed how the Objector ended up settling on the plot. While the Objector says it was the deceased who built a house for them and settled them there, the Petitioner's position is different. According to the Petitioner, it was her brother-in-law Fred Lubisia who after selling the Sango plot 677 moved the Objector to plot 200 and even built a house for her. The Petitioner also testified that though plot 200 was registered in the deceased's name she is the one who bought the plot with her own money. She did not however produce any documentary proof of the alleged land transaction. The Petitioner also alleged that the Objector's husband was given L.R. Kakamega/Sango/677 by the deceased before the deceased died and that the Objector squandered her family's inheritance by selling off the said land to one John Bonfandi. Again the Petitioner produced no documentary evidence to support her claims. Finally, the Petitioner testified that it is her brother-in-law Fred Lubisia who is fuelling this dispute, on grounds that she has no sons.

17. Now, turning back to the issues it is clear in my mind that L.R. South kabras/Shamberere/200 forms part of the deceased's estate. The same is therefore available for distribution to the beneficiaries of the deceased's estate. According to the evidence on record, the deceased's son John Ambulwa Mudogo is one of the beneficiaries of the deceased's estate, although it appears likely that he had already been given a separate parcel of land being kakamega Sango/677. However in the absence of documentary evidence of the said land having been given to John Ambulwa Mudogo and its subsequent disposal, this Court is unable to make a finding that John Ambulwa Mudogo squandered his inheritance comprised in LP Kakamega/Sango/677. In the circumstances, the family of John Ambulwa Mudogo is entitled to a share of plot 200. The question is: How much of it? According to the Objector she wants the whole of it, namely 3 ½ acres, while at the very worst, the Petitioner wants the land shared equally between the Objectors family and the Petitioner's daughter Carolyne. After carefully weighing the two rival positions, I am of the considered view that sharing the land equally between the two beneficiaries is the most just mode of distribution. I say so because the Objector who has made the allegations has not given cogent reasons for her demand for the whole of plot 200. In any event, giving Carolyne less acreage because she is a woman would clearly be discriminatory and in contravention of the provisions of the Constitution of Kenya 2010 as well as the provisions of the Law of Succession Act, Cap 160 of the Laws of Kenya. In any event, the Objector was not forthright when making claims she could not substantiate. It is also to be

noted that the Objector and her late husband John Ambulwa Mudogo distanced themselves from the deceased throughout his life and did not even attend his funeral. That clearly shows they were comfortable wherever they were living.

18. For the reasons stated hereinabove, L.R No.South Kabras/Shamberere/200 forms part of the estate of the deceased and the same shall be shared equally between John Ambulwa Mudogo's family (represented by the Objector) and Carolyne Mudogo a daughter to the deceased and the Petitioner.

19. Before I conclude this ruling there is an issue raised by Counsel for the Petitioner that the Objector lacked locus to bring these proceedings. I think that in the circumstances of this case, Article 159 (2) (d) of the Constitution 2010 would take care of her lack of locus. The Objector would however have to regularize her status with regard to the estate of her deceased husband John Ambulwa Mudogo before she accesses title to her share of plot South Kabras/Shamberere/200

20. With regard to costs and this being a family dispute, each party shall bear its own costs.

21. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 16th day of August 2016.

RUTH N. SITATI

J U D G E

In the presence of:

.....M/S Andia(absent).....for Objector/Applicant

.....Mr. Shifwoka (present).....for Petitioner/Respondent

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