



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 194 OF 2015

IN THE MATTER OF THE ESTATE OF ISAAYA OKUKU OBILO.....DECEASED

AND

LUDOVICO OPIYO OBILI.....PETITIONER

VERSUS

RAYSON OCHIENG ODUKE.....1ST OBJECTOR

SIMON KHALONYERE ODUKE.....2ND OBJECTOR

RULING

1. The deceased, Isaya Okuku Obilo died intestate on 13th September, 1989. Subsequently the Petitioner, Ludovico Opiyo Obilo was granted letters of administration to the deceased's estate on 12th October, 1992. The grant of probate was confirmed on 10th January, 1994.
2. On 6th May, 2015, Rayson Ochieng Oduke and Simon Khalonyere Oduke filed a chamber summons application dated 30th April, 2015 in which they seek orders as follows:

“1) That this application be certified urgent and service be dispensed with in the first instance.

2) That this honourable court be pleased to stay proceedings and subsequent orders of lower court case NO. 161 of 2014 pending the hearing and determination of this application.

3) That this honourable court be pleased to revoke and/or annul the grant of letters of administration issued to the Petitioner/Respondent herein on 12/10/1992 and confirmed on 10/1/1994.

4) That upon granting prayer 3 this honourable court be pleased to issue the grant of letters of administration to the Objectors/applicants herein.

5) That the costs of this Application be borne by the Petitioner/Respondent.”

3. The Objectors claim that the Petitioner failed to disclose the true list of the heirs and beneficiaries of the estate of the deceased. It is their case that they are indeed the sons of the deceased and have lived their entire lives on the parcel of land left by the deceased and which has now been transferred to a third party thus rendering them squatters.

4. The Objectors swore a joint affidavit in support of their application. They aver that the Petitioner who is a step-brother to the deceased secretly and without their knowledge or consent petitioned for letters of administration to the estate of the deceased. They further allege that their late mother, Mary Auma Malo who was the wife to the deceased came to discover some years later that the deceased's land had been sold off to a third party. It is their case that their mother in an attempt to pursue her claim to the estate filed a complaint with the Land Disputes Tribunal at Funyula. They aver that the dispute was heard and determined in favour of the Petitioner and later adopted as a judgment of the court in Busia CM Land Dispute Case No. 60 of 2008.

5. In his oral testimony the 2nd Objector testified that Clement who testified as the second witness for the Petitioner is neither their brother nor a son to the deceased. He stated that if the witness was a son to the deceased he would have been included in the letter of the chief introducing the beneficiaries of the estate of the deceased. Further, that the said witness lived far from their home.

6. The 2nd Objector told the court that their mother had informed them that the deceased was their father. He told the court that he and his brother took care of the deceased until his death and at no time did the deceased disown them. It was his testimony that when his mother petitioned to administer the estate of the deceased she discovered that the land had been secretly given away and that that is when she proceeded to the Land Disputes Tribunal.
7. Upon cross-examination, the 2nd Objector stated that his mother was inherited by the deceased from 1948 and they knew the deceased as their father. He stated that when they discovered that their land had been taken away they went to the Land Disputes Tribunal and thereafter to the Environment and Land Court. The 2nd Objector told the court that they were surprised by the eviction orders issued against them at the behest of one Armstrong.
8. Peter Cornell Bwire Osoyo was the second witness called by the Objectors. He began his testimony by stating that he was 67 years old and he knew the deceased very well. He told the court that he was the Assistant Chief of Bujwanga Sub-Location from 1983 to 1996. His evidence was that the deceased was a husband to Mary Auma Malo and to his knowledge the Objectors were sons of the deceased. According to him the Objectors and their late mother depended on the deceased for provision of basic needs including shelter, food and clothing. On the evidence given before the Land Disputes Tribunal, he stated that the same did not reflect the late Mary Auma's evidence. Further, that the Tribunal was biased and the Objectors could not appeal for lack of finances.
9. James Machiyo Oduke was the third witness called by the Objectors. He told the court that he knew the deceased well as they both attended the same church. His evidence was that the Objectors were the sons of the deceased and they entirely depended on him for all their needs. In cross-examination he stated that he did not seek to know the details of the Objectors' parenthood.
10. In their written submissions, the Objectors asserted that based on the definition of a dependant by Section 29(b) of the Law of Succession Act, Cap 160, they are the deceased's dependants.
11. In his testimony, the Petitioner told the court that he took out the letters of administration in respect of the estate of the deceased who was his brother. It was his testimony that the Objectors were not entitled to any inheritance from his deceased brother. He told the court that his witness Clement Oduke Malo who was an ex-chief and had testified before Land Disputes Tribunal was conversant with the history of the land. It was his evidence that it was the deceased and not himself who sold the land in question to one Armstrong Kasuku. He produced the proceedings before the Land Disputes Tribunal in support of his case.
12. Upon cross-examination, the Petitioner told the court that the late Mary Auma had sued Armstrong before the Land Disputes Tribunal on the basis that he had grabbed her parcel of land. Further, that Mary Auma was not the wife of the deceased but a sister-in-law. He testified that Mary Auma who had no child was only living with the deceased and was only interested in the parcel of land. His evidence was that the Objectors were the sons of one Zedekiah Oduke.
13. Clement Oduke Malo who was the only witness called by the Petitioner told the court that he is a retired Senior Chief. He adopted the contents of his affidavit sworn on 4th January, 2016. He told the court that the Objectors were known to him and they were his brothers. It was his evidence that his father inherited their aunt Mary Auma. While Mary Auma was still living with his father, Florence Namude who was the sister of Mary Auma disagreed with her Ugandan husband and came to live with her sister. His father befriended Florence Namude who gave birth to three children. One of the children died and the surviving two children are the Objectors herein. It was his testimony that Florence Namude subsequently went back to her Ugandan husband leaving the Objectors at their home. It is this witness's testimony that he even helped his father in paying school fees for the Objectors. The Petitioner's witness further told the court that he was a witness before the Land Disputes Tribunal. According to him, Mary Auma told the Tribunal that the Objectors were the sons of his father Zedekiah Oduke and they would inherit land from him.
14. During cross-examination the witness was shown a letter dated 10th April, 2012 written by a chief indicating that the 2nd Objector and Armstrong Kasuku were the beneficiaries of the estate of the deceased. He was also shown a certificate of death. The witness told the court that Mary Auma was married to the brother of the deceased long time ago.
15. This matter is convoluted and it requires some patience to unbundle it. The Petitioner herein filed Probate and Administration Cause No. 86 of 1992 at the Senior Resident Magistrate's Court at Busia in respect to the estate of the deceased Isaaya Okuku Obilo. On 12th October, 1992 a grant of letters of administration intestate was made to the Petitioner. The grant was confirmed on 10th January, 1994. The only property identified in the proceedings was Samia/Bujwanga/1580. The only identified beneficiaries were the Petitioner Ludovico Opiyo Obilo and a purchaser by the name Armstrong Freddie Kasuku. The information on record shows that Armstrong Freddie Kasuku subsequently obtained a title deed for the deceased's parcel. Armstrong Freddie Kasuku will hereinafter be simply referred to as the Interested Party.
16. Sometimes in 2008 Mary Auma Obilo commenced proceedings against the Interested Party before Funyula Land Disputes Tribunal alleging that the Interested Party had grabbed the deceased's land through fraudulent means. After hearing the witnesses, the Tribunal decided that:

“1) The court rules that the land under dispute Busia/Bujwanga/1580 belongs to and should be owed by the defendant Armstrong Freddie Kasuku as per title deed issued on 22/2/1994.

2) The court orders the defendant Kasuku to allow the plaintiff Mary Auma Malo to have life interest on this land.

3) The court requests the defendant to honour his promise to the two nephews of the plaintiff.

4) Any aggrieved party ...is free to appeal to a higher court of law within 30 days thereof.

5) Please keep peace.”

16. The Objectors claim that Mary Auma Malo is their mother whereas the Petitioner alleges that Mary Auma Malo was a sister to Florence Namude who was the biological mother of the Objectors. I shall demonstrate why this is not an important factor in due course. It is said that Mary Auma Malo is now deceased. The parties agree, but have not exhibited any documents, that the decision of the Land Disputes Tribunal was adopted as a decision of the court in Busia Magistrate's Court Land Disputes Case No. 60 of 2008.

17. Everything went quiet thereafter until the Interested Party filed Busia Chief Magistrates' Court Civil Case No. 161 of 2014 seeking to evict the Objectors from the land in question. It is apparent that the Objectors' attempts to resist the issuance of the eviction order failed.

18. The Objectors subsequently filed the instant application seeking the orders already reproduced in this ruling. Their case before this court is Probate and Administration Cause No. 194 of 2014. The Registry must have found itself in a quagmire as the proceedings were initially before the Magistrates' Court when Busia had no Judge but the objection proceedings had to be filed before a Judge now that Busia has a High Court. No prejudice has been suffered by any of the parties because of this state of affairs.

19. On 6th May, 2015 Tuiyott, J. dismissed the second prayer of the Objectors' application in which they had sought stay of the proceedings in the lower Court and the orders issued by that Court. What therefore await the consideration of this court is the Objectors' prayers for revocation of the grant and that they be appointed administrators of the estate of the deceased.

20. Having reviewed the evidence and the documents placed before this court, the story that emerges is as summarised hereafter. Mary Auma Malo was first married to Malo who was a brother to the deceased Isaaya Okumu Obilo whose estate is the subject of this probate and administration cause. Their marriage was not blessed with any child. Upon the demise of her husband she left her matrimonial home and went and lived with Zedekiah Oduke the father of the Petitioner's witness Clement Oduke Malo. Again the cohabitation did not produce any child. However, Florence Namude the sister of Mary Auma Obilo went and lived with her at one time and Zedekiah Oduke commenced a relationship with her. The Objectors are products of that liaison.

21. The evidence shows that when Florence Namude went back to her husband in Uganda, she left the Objectors in the custody of Mary Auma Malo. The Objectors thus grew up knowing Mary Auma Malo as their mother.

22. After staying at the home of Zedekiah Oduke for a while, Mary Auma Oduke went back to the home of her original husband. Her first husband had died long ago. When she went back to her first husband's home, she was taken in by the deceased herein. She lived on the land in question with the deceased and the Objectors until the deceased passed away. Mary Auma Malo lived and died on the land and was buried there.

23. The question to be answered in this matter is whether the Objectors were legally entitled to a share of the estate of the deceased. The court also needs to determine whether the deceased left behind any property prior to his demise.

24. An overview of the evidence shows that the Objectors were not the biological sons of the deceased. It is, however, not disputed that Mary Auma took care of them. She even moved back to the home of her first husband with them notwithstanding the fact that Zedekiah Oduke was their father.

25. The Objectors' claim that they took care of the deceased when his health failed has not been rebutted. The deceased who was not married nor blessed with any child took Mary Auma and her nephew under his wings.

26. Section 29 of the Law of Succession Act, Cap. 160 define a dependant as follows:

“29. For the purposes of this Part, “dependant” means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to this death;

(b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

27. The evidence in this case points to the fact that the Objectors were **“children whom the deceased had taken into his family as his own”** as per Section 29(b). They were thus the deceased's dependants for all intents and purposes and they ought to have been named as beneficiaries by the Petitioner when he applied to administer the estate of the deceased. In any case, as provided by Section 38 of the Law of Succession Act, Cap. 160, the Objectors ought to have been given priority in the issuance of the grant of letters of administration to the estate of the deceased. If there was anything to be inherited from the estate of the deceased, the Objectors and their deceased aunt Mary Auma were entitled to it. It must be remembered that Mary Auma provided succour and comfort to the deceased in his sunset years. The deceased must have appreciated this fact and that is why he never disposed his entire parcel of land as will be seen shortly.

28. The next question is whether the deceased left anything to be inherited by the Objectors. The Petitioner claims that the deceased had sold his parcel of land to the Interested Party by the time of his death. This is the position he took before this court and this is the position he took before the Land Disputes Tribunal. The Land Disputes Tribunal agreed with him.

29. It is, however, noted by this court that the observations made by the Tribunal do not add up. I will cite two observations made by the Tribunal to demonstrate this fact. The Tribunal found that:

“5) The Court further observes that, that there was a deal of selling and buying between Isaya Okumu and the Defendant, whereby Isaya Okuku agreed to sell five acres of land to the defendant Armstrong Kasuku at the cost of Kshs. 5000/- per acre. This fact was confirmed by village elders such as Senior Chief Clement Oduke, Robert Nyongesa aged 78 years and etc.

6) The court observed that unfortunately Isaya Okuku died before completing the process of transfer. Opiyo Obilo Marko Obilo as the next of kin completed the process of succession. This fact is confirmed by the defendant’s witness, Opiyo Obilo and Senior Chief Clement Oduke. This process enabled the defendant, Armstrong Freddie Kasuku to get title deed No. Samia/Bujwanga/1580 –1.34 ha.”

30. If the deceased had indeed sold five acres to the interested party how come the Interested Party only managed to process a title deed for 1.34 hectares which is equivalent to 3.35 acres? The Petitioner’s case is not helped by the fact that when he applied for letters of administration to the estate of the deceased in 1992, he clearly indicated in Form P&A 5 that the liability of the estate was 2½ acres. The certificate of confirmation of grant issued on 10th January, 1994 shows that the Petitioner was to be the sole heir in respect of L.R. No. Samia/Bujwanga/1580 and the Interested Party was to get 2 ½ acres from the estate. A certificate of official search issued on 22nd June, 1992 shows that the approximate area of L.R. No. Samia/Bujwanga/1580 registered in the name of Isaaya Okuku Obilo was 1.34 hectares. Even assuming that the Petitioner was executing the wishes of the deceased, it is clear that at least ¾ of an acre of the deceased’s land was available for distribution to the beneficiaries. I therefore find that whatever claim the Interested Party had in the estate of the deceased there remained some land that was to go to his dependants. I am aware that the Interested Party did not participate in the objection proceedings. However, he will, at the distribution stage, have an opportunity to stake his claim to the estate of the deceased.

31. The outcome of these proceedings is that the Objectors’ application succeeds. The Petitioner failed to disclose material facts when he applied for letters of administration in respect to the estate of the deceased. The late Mary Auma Obilo and by extension the Objectors had priority over the Petitioner when it came to applying for a grant in respect to the estate of the deceased. The Land Disputes Tribunal had no jurisdiction to delve into succession matters as that jurisdiction belongs to this court.

32. The result is that the grant issued to the Petitioner on 12th October, 1992 and confirmed on 10th January, 1994 is revoked. The Objectors are appointed the administrators of the estate of the deceased. The meaning of this decision is that any action taken by the Petitioner in exercise of his powers as an administrator of the estate of the deceased becomes null and void. That includes the transfer of L.R. No. Samia/Bujwang’a/1580 to the Interested Party. L. R. No. Samia/Bujwang’a/1580 shall revert back to the name of the deceased.

33. In order to protect the interests of the Interested Party, the *status quo* at the time of this ruling shall be maintained pending the distribution of the estate. From the record, the *status quo* is that the Interested Party is in occupation of the entire parcel of land and the Objectors have already been evicted. That is the *status quo* that is to be maintained awaiting the proposed distribution by the Objectors. The Interested Party, who is yet to be heard is entitled to stake his claim to the estate of the deceased at the distribution stage.

34. Considering the circumstances of this case, I do not find it just to burden any of the parties with costs. I direct the parties to meet their own costs of the objection proceedings.

Dated, signed and delivered at Busia this 30th day of November, 2016

W. KORIR,

JUDGE OF THE HIGH COURT