



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL (PROBATE ADMINISTRATION) NO. 150 OF 2011

JOSHUA MBALO NDIKULI APPELLANT

VERSUS

FIDELIS MUSYIMI MATOTHYA RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Kitui of Hon A.G. Kibiru (PM) in P & A Cause No. 71 of 2008 dated 4th October 2011)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Joshua Mbalo Ndikuli** was the protester in the succession cause before the lower court. There was a 2nd protester by the name **Michael Makau Musyoka** who is not a party in this appeal.
2. The Respondent **Fidelis Musyoka Matothya**, had petitioned the Lower Court for the grant of Letters of Administration in the estate of his uncle, the late Kimongo Mbalo (*herein after the deceased*) who died intestate on 7/1/1997 and left behind no wife or children. The beneficiaries of the estate of the deceased were listed as the Respondent and his brother, **George M. Motothya**. The property the subject of distribution was listed as land parcel No. **Kyangiwthya/Misewani/215**.
3. The Appellants and the Respondent are cousins. Their fathers were step brothers who jointly owned the land in question. This was inherited land. The Respondent's contention was that the land was held in equal shares between the two deceased brothers and therefore should be shared on a 50;50 basis between their estates.
4. The Appellant who is the administrator of his late father's estate contended that the suit land was not equally owned. He stated that his father owned a bigger portion of the land.
5. The trial magistrate in his judgement held that the land was held in equal shares between the two deceased brothers. The trial magistrate then went ahead to distribute the half share of the deceased herein to the beneficiaries thereof. These included the Respondent; his brother **Gerald Mbalo Matothya** and the 2nd protester, **Michael Makau Musyoka** who was a purchaser. The trial magistrate further made orders for the eviction of any squatters and trespassers who were on the land. He further ordered for the cancellation of any sub-divisions of the land parcel no. 1789 which was a subdivision of **Kyangiwthya/Misewani/1215**.

6. The Appellant was aggrieved by the said judgement and appealed to this court on grounds that can be summarized as follows:

- a. **That the trial magistrate erred in holding that the land was jointly owned in equal shares.**
- b. **That the judgment was against the weight of the evidence.**

7. The appeal was canvassed by way of written submissions.

8. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. *See for example Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*

9. It is common ground that the land in question was jointly registered in the names of two deceased brothers.

The following matters are also not in dispute

- That the Respondent and his brother **Gerald Mbalo Matothya** are the rightful beneficiaries of the estate of the deceased herein.
- That the Respondent and one **Michael Makau Musyoka** had bought portions of the land belonging to the deceased.
- That the land was subdivided and part of it acquired by the Umaa Dam project.
- That the deceased herein received Kshs. 87,285/= and his purchaser Michael M. Musyoka received Kshs. 8,740/= while the appellant's father received 96,025/=.

10. The bone of contention is whether what remained of the land known as land parcel No. **Kyangwithya/Misewani/1789** was owned by the brothers in equal shares or whether the Appellant's father held a bigger share.

11. From the undisputed evidence on the sharing of the compensation proceeds from Umaa Dam Project, it is clear that the payment was made in equal shares. The deceased and his purchaser (**Michael M. Musyoka**) received a total of Kshs. 96,025/=. The Appellant's father received Kshs. 96,025/=.

12. The Appellant's evidence and that of pw2, **Musyoka Mbalo** was that the portion of the land owned by the two deceased brothers was divided by an access road and that the deceased share was smaller. However, according to Pw2 who is a step brother to the deceased, the share held by the Appellant's father was only slightly bigger. Pw1 and pw2 did not however state in their evidence why the deceased held the smaller share. Pw2 contradicted himself when he was recalled to testify as he turned around and talked of equal shares.

13. The evidence of Pw3 **Richard Stephen Nzuki**, a Cartographer with Survey of Kenya was that the sharing ratio was 1:79 Ha for the deceased and 13:79 Ha for the brother. This contradicts the evidence of pw2 who talked about the deceased's share being only slightly smaller. Pw3 was however not a surveyor when he carried out the said subdivision. His evidence reflects a sharing ratio that cannot be described as slightly smaller or bigger. It is worth noting that the Umaa Dam project payment was made after investigations carried out by experts subsequent to the work, carried out by pw3 apportioned the payments to the deceased and his brother equally.

14. Pw4 **Saverio Kionja Mutua** who is a qualified surveyor gave evidence that the two brothers held the land that remained in equal shares after the compensation by Umaa Dam Project. Although the surveyor gave evidence in respect of further subdivisions of the land in question, he was not able to state who gave the consent for the said subdivisions.

In any event, the deceased herein died on 7/1/1997. Any subdivisions of the property carried out thereafter amounts to intermeddling with the property of a deceased person.

15. The Respondent's position was that the two deceased brother held land parcel No.

Kyangwithya/Misewani/1789 in equal shares. He produced a copy of a search certificate dated 5/5/09 which reflects that position. The Respondent testified that there had been earlier attempts to subdivide the land into unequal shares without the deceased's knowledge. A letter dated 26/7/94 from the office of the D.O, Kitui was produced as an exhibit. The letter confirmed that the two brothers held the land in equal shares.

16. The evidence of Dw2 **James Munyalo Mbalo**, a brother to the two deceased brothers corroborates that of the Respondent. His evidence that the original land parcel no. **Kyangwithya/Misewani/1215** was inherited from their forefather by his two brothers in equal shares. The brother also gave evidence that the Appellant's family had made earlier attempts before the compensation by Umaa Dam project to have the land divided in unequal shares. He further testified that the issue was investigated, and the Government officials agreed with the deceased's claim hence compensation in equal shares. Dw2 explained that the deceased was illiterate and had no wife or children and people tended to take advantage of him.

17. Dw3 **Christopher Wambua Ndikuli** a step-brother to the Appellant gave evidence that further corroborated that of the Respondent. His evidence was that the deceased brothers held the land in question in equal shares. He denied any suggestions that their father held a bigger share of the land.

18. An application was made before the Lower Court to visit the site to view the situation on the ground. Although the Lower Court visited the site, it failed to record its observations. However, other than noting the features on the land, the visit did not assist the court in any way in the distribution of the estate. None of the parties was therefore prejudiced by the failure by the trial court record the proceedings of the scene visit.

19. Having re-evaluated the evidence on record, I am in agreement with the trial magistrate's judgment that the two brothers held the land in question in equal shares. There was no cogent evidence to support the Appellant's claim. Any other subdivisions of the suit land after the death of the deceased amounted to intermeddling with the property of a deceased person contrary to section 45(1) of the Laws of Succession which stipulates as follows:

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

It is noted that there is no appeal on the distribution of the deceased's half share to the beneficiaries.

20. For all the above stated reasons, I find no merit in the appeal. The appeal is dismissed with costs.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 23rd day of April 2015.

.....

B. THURANIRA JADEN

JUDGE