



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CITATION CAUSE NO. 371 OF 2010

ELDA W. WASICHE CITOR/OBJECTOR/PLAINTIFF

VERSUS

ASHA AUMA OMUSUNGULE..... CITEE/PETITIONER/DEFENDANT

JUDGMENT

1. When the late **JACKSON WASIKE MABONGA** (hereinafter referred to as “**the deceased**”) died on 11/03/2004, he left behind the parcel of land known as N. WANGA/MATUNGU/1359 as his sole estate.
2. After about 6 years from the death of the deceased, the Objector herein ELDA W. WASICHE took out citation proceedings against the Petitioner, ASHA AUMA OMUSUNGULE. The reason for the said citation proceedings was the Objector’s allegation that she had acquired one acre of the deceased’s estate by way of sale and she wanted the succession process initiated so that she would eventually get her share thereof.
3. Unknown to the Objector, the Petitioner had in 2007 already filed a Succession Cause in this Court in respect to the deceased’s estate and obtained a Grant on 16/05/2012.
4. When the state of affairs was discovered, the Court with intent to dispose of the cause directed that the Grant be confirmed. To that end, the Objector filed a Summons for Confirmation on 24/02/2014 and on 10/02/2014 the Petitioner likewise filed a Summons for Confirmation. The Court directed that the confirmation hearing be by way of oral evidence and the Objection was deemed as the Plaintiff whereas the Petitioner was deemed as the Defendant.
5. The crux of the matter was to determine if the Objector was entitled to the said one acre of the deceased’s estate in the cause of the confirmation. The Petitioner denied that the Objector had any entitlement to the estate and instead prayed that the estate be devolved to her of course with the concurrence of her other siblings.
6. The Objector testified and called one witness. It was her case that she had bought the one-acre portion of the deceased’s land from the deceased and that the transaction was reduced into writing before an Advocate which agreement confirmed the receipt of the consideration by the deceased. The Objector’s witness confirmed seeing the said agreement in his office as he was by then the Area Assistant-Chief.
7. The Petitioner reinforced her position by calling two more witnesses. She contended that the agreement was a fraud as the alleged signature which appeared therein was not that of the deceased.

8. As the issue of the one-acre revolved around family members, the Petitioner being the deceased's daughter whereas the Objector was the deceased's brother's wife, the Court summoned the family Chairman who informed the Court that the family opted to leave the matter to Court since the transaction had been undertaken before an Advocate.
9. I have patiently and carefully perused the Court record and intently gone through the parties' testimonies and the exhibits produced during the hearing. During the hearing it emerged that the parties herein had been involved in some proceedings before the Lands Disputes Tribunal over the same issue of the one-acre and that a decision had been reached and judgment entered by a Court of law accordingly.
10. On perusal of the proceedings, I have realized that the issue before me was exactly the same which was laid before the Lands Dispute Tribunal by the very parties herein. It was heard by way of oral evidence, a decision made and thereafter adopted as a judgment of a Court of law. That judgment to date has not been appealed against neither has the same been set-aside.
11. For clarity purposes, the Lands Disputes Tribunal made the following decision thus:-
 - i. ***The Claimant (Objector herein) indeed bought one acre she is planting cane on and should get a title deed for it.***
 - ii. ***Her name (Objector herein) should be included in the Succession Cause when it is done;***
 - iii. ***Costs to costs.***
 - iv. ***Right of appeal within 30 days.***
12. The proceedings and decision of the Lands Disputes Tribunal were produced in the course of the hearing by the consent of the parties herein as Plaintiff's Exhibit 3. During cross-examination of the Objector by the Petitioner's Counsel and even when the Petitioner testified in Court, it was not denied that the proceedings were truly undertaken before the Lands Disputes Tribunal. All parties agreed on this state of affairs.
13. The Petitioner came out forcefully and challenged the alleged Agreement for sale which was entered between the deceased and the Objector. To her, the same was fraudulent as was contrary to law and if anything the same had been breached by the Objector hence could not be enforced. Further the Petitioner contended that the transaction, if at all it took place, was ***void ab initio*** for want of compliance with the Land Control Act and for failure of the parties to obtain consents to subdivide and transfer within the stipulated six months.
14. The two opposing versions were covered at length in the parties' submissions where various judicial authorities were referred to.
15. From the foregone, this Court would then frame the issues for determination as follows:-
 - a. ***Whether the Objector is entitled to the one-acre of the deceased's estate;***
 - b. ***How should the estate be distributed?***
16. **On whether the Objector is entitled to the one-acre of the deceased's estate as she claimed**, I will first of all deal with the issue of the proceedings before the Lands Dispute Tribunal and, depending on the finding, the issue of the validity of the Sale Agreement between the Objector and the deceased.
17. As I stated hereinabove, the proceedings and the decision of the Lands Disputes Tribunal were eventually adopted as the judgment of a Court of Law and in the terms enumerated above including the right of appeal. The said judgment is yet to be set-aside or quashed hence it remains a valid judgment of a Court of law. The proceedings clearly dealt with the issue of whether or not the Objector herein was entitled to the one-acre out of the deceased's estate. Those proceedings were between the Objector and the Petitioner herein. Several witnesses were heard and a decision

arrived at. The decision stated in very clear terms that the Objector was entitled to the one-acre of the deceased's estate and that she was to be included in the Succession Cause as such a beneficiary. That remains the position to date.

18. The Petitioner in her submissions and in response to the issue of the said proceedings stated as follows:

“...Whereas the applicant herein makes reference to the tribunals’ proceedings, your honour, we submit that the proceedings and the awards of tribunals are null and void as the tribunals lacked jurisdiction to adjudicate on a matter relating to the estate of the deceased’s estate. This honourable court is the proper forum for hearing and determining this matter.”

19. I respectfully do not agree with the Petitioner. That is because despite knowledge that the tribunal lacked any jurisdiction on the matter, the Petitioner did not take any further step since 2006 upto the filing of the submissions, that is for a period of over 9 years. As we are here today, the judgment of the Court remains standing and cannot therefore be wished away. I therefore find that the issue of whether or not the Objector is entitled to one-acre of the deceased's estate having been decided by a Court of law and given that the said judgment stands is *res judicata* in these proceedings. The said issue is therefore not open to re-litigation and/or any further determination in this cause. In fact the Petitioner is estopped in law from any attempt to re-open that matter. **Section 120** of the Evidence Act, Cap 80 of the Laws of Kenya states that:-

“120. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

20. Be that as it is and having found that the issue of the Objector's entitlement to one-acre of the deceased's estate was settled and in the Objector's favour, this Court cannot therefore deal with the aspect of the validity or otherwise of the said land sale agreement. However, I wish to make it clear that had it not been the finding of the Lands Disputes Tribunal on the said issue, this Court would have the legal leg to explore into the validity of the sale agreement.

21. The last issue now pending determination is how the estate ought to devolve. According to the Summons for confirmation by the Petitioner and the consent thereto, it had been proposed that the entire parcel of land known as N.WANGA/MATUNGU/1359 do devolve to the Petitioner. I will therefore order that one-acre of that land shall devolve to the Objector herein whereas the remainder shall be in favour of the Petitioner.

22. In conclusion therefore the estate of the deceased herein shall be distributed as follows:-

- a. ***One-acre out of the parcel of land known as N.WANGA/MATUNGU/1359 be registered in the name of ELDA WESONGA WASICHE;***
- b. ***The rest of the land comprised in N.WANGA/MATUNGU/1359 after compliance of (a) above be registered in the name of ASHA AUMA ONUSUNGULE;***
- c. ***A certificate of confirmation of the Grant shall accordingly issue;***
- d. ***The Land Registrar and the County Surveyor in-charge of the Kakamega County shall ensure that the parcel of land known as N.WANGA/MATUNGU/1359 is duly sub-divided as in (a) and (b) above and be so registered with the issuance of separate Title Deeds;***
- e. ***In undertaking the exercise in (d) above, care should be taken so that the Objector ELDA WESONGA WASICHE gets her one-acre out of the area where she has been occupying and***

cultivating cane all along;

- f. *Each party shall bear its own costs of these proceedings as well as the costs of the distribution of the estate.*

Orders accordingly.

DELIVERED, DATED and SIGNED at KAKAMEGA this 23rd day of July, 2015

A. C. MRIMA

JUDGE

In the presence of

Mr. Getanda for Miss Andia For the Objector

.....For the Respondent

Miss. Selpher..... Court Assistant