



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.726 OF 2009

**IN THE MATTER OF THE ESTATE OF THE LATE KORINELIA WAFULA CHANJI alias
KORINERI WAFULA CHANJA ---DECEASED**

ROSINA NAWEKULO WAFULA...1ST APPLICANT/RESPONDENT

COLOMBIAN NYONGESA.....2ND APPLICANT/RESPONDENT

VERSUS

NIKASIO MAKOKHA WAFULA.....RESPONDENT/APPLICANT

J U D G M E N T

Background

1. KORINERIA WAFULA CHANJI alias KORINERI WAFULA CHANJI died on the 26th December 1996. Representation to his estate was granted to ROSINA NAWEKULO NAFULA and COLOMBAAN NYONGESA MASINDE both of P.O. Box 12 Nambacha on the 27/11/2009.
2. ROSINA NAWEKULO NAFULA was the 2nd wife to the deceased herein whereas COLOMBAN NYONGESA MASINDE was the deceased's grandson. They applied for confirmation of the grant on the 10/08/2010 and the grant was confirmed on the 8/11/2010 and his estate L.R. No.Bunyala/Nambacha/475 distributed. By Summons for revocation of grant dated 7/04/2011 brought under Section 76(1) of the Law of Succession Act the applicant sought for the revocation of the confirmed letters of administration on the grounds that he was not informed of the proceedings leading to the confirmation of the said grant and that the distribution was done contrary to the wishes of the deceased which distribution denied him access to the lower part of the farm leading to the only source of water and lastly that he expected equal distribution of the estate.

The Application

3. The Summons for revocation of grant is supported by the applicant's own affidavit sworn on 7/04/2011. He depones that in 1986 his father demarcated his parcel of land No.Bunyala/Nambacha/475 into 5 equal parts under supervision of two village elders MUKAKA CHIOLITI and MOSES MAKOKHA OPAYA in the presence of PROTUS WANJALA, PETER MUNITU, SALEH WEKESA, SHABAN WANDATI, JOSEPH MURUTU ONGAYA WANDATI and MUNYECHE MURUTU.
4. He claims that the deceased left the lower part of the land untouched and he anticipated the same would be shared equally amongst the deceased's sons. He claims to have been denied his share of the lower portion by the present sub division as he has no access to the river whereas his brothers

- and other beneficiaries have access. He maintains that with proper distribution all the beneficiaries of the deceased's estate were supposed to have access to the river. He claims that he had been given the smallest portion as compared to his brothers.
5. The application is opposed. COLOMBAN NYONGESA MASINDE filed his replying affidavit on the 12/08/2011 with authority from his co-petitioner ROSINA NAWEKULO WAFULA who was at that time aged 87 years. He depones that prior to the death of the deceased herein in 1996 he (deceased) had in the year 1986 subdivided the parcel of land No.Bunyala/Nambacha/475 to his children who include the applicant/objector herein. He explains that the applicant/objector voluntarily chose to remain at the place where he had settled and it was so agreed. Boundaries were demarcated properly and they still remain to date. He confirms that the deceased retained with a portion at the lower end of the suit property for purposes of grazing his animals. He claims that the portions of land they were given were to be straightened up to the river and that this was done by the elders who straightened the boundaries in the year 2009 in the presence of the applicant/objector. He has annexed copies of minutes marked "CNM1"
 6. The deponent also explains that the widow ROSINA – NAWEKULO WAFULA was also given a portion of the land for her own use and that it is that portion that the applicant wants for himself. He denies the allegations by the applicant that he does not access the river at all since a route was created for him to access the river. He maintains that the applicant has all along been informed of the steps being undertaken in the succession proceedings but he has always wanted to stall and frustrate the same. This he states has culminated in various meetings at the D.O's office at Navakholo which led to the surveyors visit to the suit land to ascertain the respective sizes occupied by the parties to enable confirmation of grant see annexures "CNM (a) and (b)". Thereafter the grant was confirmed.
 7. He maintains that when the deceased distributed his parcel of land there was no objection and therefore the objector should not be heard to allege that the distribution was done contrary to the wishes of the deceased, and that in the circumstances, there is no basis on which the applicant seeks the prayers sought.
 8. The application proceeded by way of oral evidence. The objector was the plaintiff whereas the petitioner was the defendant. Both parties were represented by Counsel. Mr. Munyenato acted for the plaintiff and Mr. Musumba for the defendant. The plaintiff was the only one who testified on his side. He called no witnesses. He told the Court that the deceased had five (5) sons and owned the suit plot herein being L.R. No.Bunyala/Nambacha/475. That out of the deceased's 5 sons, three passed away and there remained BONIFACE NYONGESA and himself.
 9. The plaintiff also testified that before his demise the deceased herein distributed the suit land but left a portion for himself for grazing his cows. This is the portion on the side of the river which the plaintiff says is in dispute. He wants to get a portion of that land, the portion that touches to the river. He explains that when he did a search, he discovered that the said portion was still registered in the name of his father but later the land was transferred and registered in the name of COLOMBAN NYONGESA the grandson to the deceased.
 10. On cross examination by Mr. Musumba the plaintiff confirmed that his father distributed his land and all of them were given the upper part which did not touch the river while the lower part was left for the deceased. He claims that currently he can not access the river and adds that his brother had brought the son on the suit land.

The Defendant's Case

11. The defendant called three witnesses. DW1 COLOMBAN NYONGESA MASINDE the petitioner told the Court that the deceased who died in 1996 was his grandfather. He had two wives but the 1st wife died in 1980 and the 2nd wife who also was a petitioner in this case died in 2012. He testified that before his grandfather died he divided the suit land into six (6) plots. This was in 1986, which plots were given to his five (5) sons and the surviving widow by then who was ROSINA NAWEKULO WAFULA. That there was no contest during the distribution which was witnessed by many people among them PROTUS WANJALA MASAI who chaired the distribution session. The deceased demarcated the six (6) plots by planting sisal plants and "Lukhoni" trees. He stated that there is a river nearby and 5 of the plots ran down to the river but the L shaped land did not reach the river. This is the plot that was given to the plaintiff herein.

- That the upper plot was given to him because he specifically asked for it. He (DW1) said he was present during the distribution and he heard the objector asking for a specific portion of land which he was given.
12. DW1 further testified that everything was peaceful after the death of the deceased herein until the year 2009 when they decided to commence succession as a family. He stated that the plaintiff wanted to take the surviving widow's portion of land since she had no child of her own but as a family they did not support his bid. Afterwards with the assistance of the of the local administration they started the process of succession. He also testified of a meeting on the 05/09/2009 chaired by one Aron Makokha at which the Secretary was Peter Nasila Khamala. He said the Plaintiff also attended the meeting as shown by the annexed "DEXhibit 1" which kick started the succession process.
 13. It was further testimony, that it was in 2012 that the objector filed his objection. This was before ROSINA NAWEKULO died. She later died on 16/04/2012 see annexure "DEXhibit 2.". At the time of her death the beneficiaries were in the process of acquiring titles for the various plots, including Rosina's plot No. Bunyala/Nambacha/1926 which was in her names and that of HILTON WAFULA KUDIMA, her grandson. Both the deceased and ROSINA were living with HILTON before they died. Hilton is a son to one of the sons of the deceased. He testified that Rosina swore an affidavit in which she declared HILTON as her heir see "DEXhibit 4". It was the defendant's evidence that he tried his best to have the land surveyed to enable each beneficiary to get their respective title deeds and that during the entire process, the plaintiff did not raise any objection. See the Surveyors Report "DEXhibit 6. He explained that there are several access roads towards the river and that even the objector has access to the river. He has produced a sketch map marked "DEXhibit 7" and letters from land Registrar of Kakamega "DEXhibit 8" and "DEXhibit 9" and explained how the caution which was put by the plaintiff was removed. The defendant maintained that the objector/plaintiff was informed before the succession cause herein was undertaken and that he was aware of the confirmation but did not attend Court. DW1 explained to the Court that HILTON WAFULA is the son of BONFACE NYONGESA WAFULA.
 14. On being cross examined by Mr. Munyendo DW1 explained that before filing the succession cause 3 of the deceased's sons were alive and they all gave verbal consent and chose ROSINA and himself to take out the succession proceedings. He confirmed that the deceased did all the distribution in 1986 and maintained that the plaintiff is objecting because he wanted a portion of Rosina's land. He explained to the Court where the Butuma river was situated and added that the deceased did not leave any free land at the river as grazing field. He reiterated that the objector was given land on the upper side upon his own request, which portion did not extend to the river. He also explained that the deceased built a home for Hilton who is also known as Chanji.
 15. DW2 BROTAS WANJALA MASI testified that the deceased herein was his brother and that in 1986 he sent him a letter requesting him to attend the family meeting at which the deceased divided his land amongst his (5) children and his (deceased's) surviving wife. He stated that he was the chairman for that purpose. He explained that there were 4 sons since one Cosmas Masinde had died and that Colomban the son of Cosmas was given land in place of his late father. He explained that during the distribution the plaintiff was present and he did not object to the distribution which saw the plaintiff being given a portion of the land which did not extend to the river though there is an access road leading to the river. He added that during the distribution the plaintiff was living on the same portion of land where he is now and that the plaintiff specifically requested to remain on the same parcel.
 16. DW2 also testified that the deceased did not leave any free land by the river as he (deceased) lived together with his wife ROSINA and the grand child Hilton. He confirmed that Hilton was the son of BONIFACE WAFULA and he was the one assisting his grandfather and his wife ROSINA. After the death of the deceased he said that they went back and confirmed the boundaries in the year 2009 and had the land surveyed. He explained that the land was surveyed in accordance with the wishes of the deceased and there was no objection by any of the beneficiaries. He also confirmed that ROSINA died in 2012, by which time she was living with HILTON WAFULA and that she left her share of the land to the said HILTON WAFULA. DW2 asked the Court to confirm the distribution as made by the deceased since all the beneficiaries are children of one mother.
 17. On cross examination by Mr. Munyendo for the plaintiff, DW2 reiterated that they distributed the land in 1986 and that he was the session chair while the secretary was Peter Murutu. He also

- reiterated that in 2009 he attended a meeting at the deceased's home for confirmation of boundaries in accordance with wishes of the deceased.
18. DW3 BONIFACE WAFULA NYONGESA told the Court that the deceased was his father and that he died in 1996. He had 5 sons with his 1st wife. Before he died he called the elders and one of his brothers and shared out his land among his 5 sons and his 2nd wife ROSINA. He told the Court that the plaintiff herein was his last born brother and was present during the distribution in 1996. He explained that after the death of his father in 1986 they called a family meeting where they decided to take out succession proceedings. He further explained that during that meeting the plaintiff wanted the portion of land which had been given to ROSINA if he was to be part of the succession proceedings. At that time ROSINA was living with her grandson HILTON KUDIMA WAFULA.
 19. He testified that his son was taken by the deceased in the year 1990 and he was the one who was looking after his cattle. He confirmed that ROSINA died in April 2012 after the family had unlawfully decided that ROSINA and COLOMBAN MASINDE be the administrators of the deceased's estate. It was DW3's testimony that in 2009, the clan elders met to confirm the boundaries that were established by the deceased when he carried out demarcation of the land among his sons. He also stated in the process at all parts along the way he (plaintiff) did not make any monetary contribution towards the process.
 20. He explained how the plaintiff put a caution on his father's land three (3) times and how those cautions were removed. He told the Court that after the death of ROSINA the family once again agreed that Colomban should proceed with the succession cause without substituting Rosina. He maintained that the deceased demarcated his land into six (6) portions five (5) of which extended up to the river but the portion that did not touch the river was the defendant's portion which the plaintiff wanted for himself even before the distribution was done. He added that the plaintiff has access to the river.
 21. DW3 further testified that he was present in 2009 when elders came back to demarcate the suit parcel. He also told the Court who Hilton was and explained that Hilton was left with ROSINA's portion. He wants the plaintiff's application dismissed. On cross examination by Mr. Munyendo he re-iterated that his father distributed his land in 1986 and demarcated the same in six (6) parcels five of which extended to the river. He confirmed that every beneficiary was given a portion by the deceased and that this included ROSINA. He denied that the objector's land was at the river. The applicant invites the Court to exercise its jurisdiction under Section 76 of the Law of Succession Act Chapter 160 of the Laws of Kenya which provides for revocation of grant by reasons of the grounds set out thereunder.

Analysis and Findings

22. The applicant has the burden of proving any or all grounds of the grounds affirmatively before the Court can revoke the grant. The applicant herein alleges that he was not informed of the proceedings leading to confirmation and the lodging of these proceedings. From the evidence by PW1 and considering the supporting affidavit dated 7/04/2011 PW1 has not informed this Court that the proceedings herein were done without him being informed. All he has told the Court is that the deceased divided/distributed his land amongst his beneficiaries and he (Plaintiff) was not given a portion near the river. DW1, DW2 and DW3 maintain that the plaintiff was informed of the succession proceedings and that he participated at the time of division and distribution of the deceased's estate and never objected.
23. Though the defendant did not have to prove anything for his case to succeed, I find that the evidence by the defendant is so strong that it completely destroys the plaintiff's contention that the succession proceedings herein were commenced without his knowledge. The defendant has produced sets of minutes of meetings at which the plaintiff was present, including the meeting at which it was decided by the family that the defendant and Rosina were the ones to apply for and take out grant of Letters of Administration intestate to the estate of the deceased herein. There is also evidence showing that after Rosina died, and then family meeting also attended by the plaintiff was held, at which meeting it was decided that there would be no need to substitute Rosina.
24. It is also clear from the evidence adduced by the defence that it is not true that the distribution of

the deceased's estate was done contrary to the wishes of the deceased. Firstly, and it is not disputed by the plaintiff, it is the plaintiff himself who chose the part of the deceased's estate for himself. This is quite different with the other beneficiaries who had to contend with the respective portions given to them by the deceased. Further, the evidence by the defence has firmly rebutted the plaintiff's allegation that he has been denied access to the lower part of the farm leading to the only source of water. The defendant and DW2 both testified and told the Court that though the plaintiff's portion of land does not touch the river, he has more than one access route to the water source at the river. According to the evidence on record, the only reason why the plaintiff brought the objection was because the other family members refused to support him when he wanted to take away for himself the portion of land given to Rosina by the deceased. It is worth noting at this stage that the plaintiff chose for himself the portion of land he wanted and he knew very well at the time of making the choice that the land did not extend to the river source.

Conclusion

25. In conclusion I am satisfied that the plaintiff's summons for revocation of grant dated 07/04/2011 is without merit and is frivolous. The same is premised on the plaintiff's desire for what he perceives as the better portions of the deceased's estate and not on the grounds set out on the face of the Summons. The Summons is therefore dismissed in its entirety. Each party to these proceedings shall bear their own costs.

26. Orders accordingly.

Judgment delivered, dated and signed in open Court today at Kakamega this 21st day of October 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Anziya (absent) but plaintiff present for Objector/Plaintiff

Mr. Musumba and Petitioner absent

Mr. Lagat - Court Assistant