REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.17 OF 2000

(AN APPEAL ARISING OUT OF THE DECISION OF S.O. OMWEGA R.M. DELIVERED ON THE 4TH NOVEMBER 1999 IN BUSIA PROBATE & ADMINISTRATION CAUSE NO.3 OF 1996)

MANDARE NYONGESA WAKHUNGU ……..APPELLANT

VERSUS

EDWARD OTORO ……..RESPONDENT

J U D G M E N T

1. This Appeal arises out of the decision of The Resident Magistrate sitting at Busia in P & A No.3 of 1996 (**Re estate of Mandare Akhudu**) dated 4th November 1999 in which he dismissed objection proceedings taken out by the Appellant. The proceedings relate to the Estate of Mandare Akhudu who died intestate on 12th July 1984.
2. In the Probate and Administration Court, the Respondent Petitioned for Letters of Administration intestate on 15th January 1996. The Respondent obtained Grant of Letters intestate on 24th September 1996. But prior to their confirmation, the Appellant filed an objection to the making of the Grant to the Petitioner and contemporaneously petitioned for a Grant by way of a Petition. The Appellants position was that he was the elder son of the Deceased and equally entitled to the Deceased's estate.
3. Upon hearing the evidence on both sides, the Trial magistrate dismissed the objection and concluded:-

> **"The objector's objection is thus dismissed with court costs. The petitioner herein (sic) to be granted letters of administration to administer the estate of the deceased Mandare Wahudu. As the family had talked and agreed the three younger sons namely Aloys Mandare, Fredrick Mandare and Taabu Mandare to share the plot equally. The plot is at Murende market and Wabwire Mandare who was given plot No.16 at Matayos by his late father to inherit it."**

4. That decision aggrieves the Appellant who raised the following 5 grounds of Appeal:-

1. **"THAT the learned Trial Magistrate erred in law and in facts in dismissing the appellants objection in the presence of overwhelming evidence that the appellant was entitled to a share out of the deceased's land parcel title number BUKHAYO/MATAYOS/934.**
2. **THAT the Learned Trial magistrate erred in law and in facts in holding that land parcel title number BUKHAYO/MATAYOS/946 was purchased by the deceased in presence of overwhelming evidence that the same did not form part of the deceased's estate.**

3. **<u>THAT</u> the Learned Trial Magistrate erred in law and in facts by making a ruling whose effect distributed the estate of the deceased alleged beneficiaries when the issue in dispute was in respect of the gr(sic) grant of Representation.**
4. **<u>THAT</u> the Learned Trial Magistrate erred in law and in failing to making afinding (sic) that the Respondent did not obtain consent from the co-beneficiaries allowing him to file the petition for grant of letters of administration.**
5. **The ruling handed done down by the Learned Trial Magistrate was against the evidence adduced."**

As will emerge shortly the success of this Appeal rests on the sole question; Whether land parcel Bukhayo/Matayos/946 was a property advanced by the Deceased to the Appellant during the lifetime of the Deceased.

5. At trial the Respondents case comprised of 7 witnesses. The Respondent (PW1) is the son of the Deceased. The Deceased had three wives. Rose had three sons, Nyongesa (the Appellant), Wabwire (PW3) and Otoro (the Respondent) Philister had three sons as well, Lawrence, Charles and Fredrick. The third wife Fedeles had four sons, Chrispinus, Andrew, Loys and Taabu.
6. The Respondents evidence was that prior to his death the Deceased had two parcels of land. Land described as Bukhayo/Matayos/934 (**Plot No.934**) was the ancestral land. It comprises 20.413 hectares. The other, Bukhayo/Matayos/946 (**Plot no.946**) measuring 10 acres was purchased by the Deceased from the late Wadeke Buluma (**Buluma**). The Deceased, it is said, transferred this land parcel to the Appellant because he wanted the Appellant to move away from home. The reason being that he, the Appellant, had a tumultuous relationship with his wife and this disturbed the peace at the Deceased's home.
7. The purchase transaction between the Deceased and Buluma took center stage at the hearing. It was said to have been witnessed by, amongst others, Peter Omolo Buluma (PW2), Fredrick Musumba Orubo (PW 4), John Agungu Lemuya (PW5) and Mariana Adhiambo (pw7). PW2 is a brother to the seller while PW7 is his widow. It was the evidence of PW2, PW4 and PW5 that the purchase took place in 1965 and witnessed by PW4 and PW5 and that it was reduced into writing. The Court was however not told where that agreement was. As to the purchase price, PW2 said it was ksh.2,700/= which was paid in instalment. PW4 did not testify on this aspect while PW5 merely said that the purchase price was paid in instalments and that he was present when the Deceased paid two heads of cattle. As for the Deceased's wife (PW7) the purchase price was paid both in cash and with four heads of cattle.
8. Simply, the Respondents case was that having been given Plot No.946 as a gift in life by the Deceased, the Appellant would not be entitled to any share in Plot No.934. The Respondents case also sought to explain why the Appellants first wife (Magaret Aoko) was buried on Plot No.934. PW1 and PW4 explained that as Aoko had differences with the Appellant she resided on Plot 934 and not 946 and upon her death she was buried where she had resided.
9. There was also evidence that prior to his death ((PW6) puts this at one week before his death), the Deceased summoned a meeting. One of those called to the meeting was Immanuel Odaba (PW 6). He is the Senior Chief of Bukhayo South location. PW1, PW3, PW4 and PW5 testified that they attended this meeting. Leaving out the less relevant details on what transpired, it was the evidence of the witnesses that the Deceased made it clear that the Appellant was not entitled to any share in plot no.934 as he had already gifted him with Plot No.946. That he then gave the title deed to plot no.934 to PW6 to enable him share that plot equally between his other nine (9) sons. That PW6 still had custody of the title at the time he was testifying in Court on 25/06/98. PW6 testified how he publically informed the Deceased's funeral gathering of this. In a meeting convened by him after the funeral, the Appellant refused to accede to the proposed arrangement.
10. On his part the Appellant testified that he is the eldest son of the Deceased. He also confirmed that there the Deceased had a total of ten sons, him included. That sometime in 1961 he bought a parcel of land from Buluma at a consideration of ks.1000/= and three heads of cattle. He had a written agreement which captured this transaction. That agreement written in the Luhya language and its English translation were produced as exhibits. He says that even Peter (PW2) was a witness to the land sale agreement. It was his testimony that his first wife Aoko was buried on the ancestral land (Plot 934) and that his three sons from that union still reside there.

11. The Appellant denies that the Deceased instructed Chief Odaba (PW6) to share out the Deceased's land. He also stated that PW6 was not given the title deed to hold as a custodian.
12. This being the first Appeal I am obliged to re-evaluate the evidence at trial, assess it and make my own conclusion, remembering, as always, that I did not see or hear the witnesses testify and I must make due allowance for this **Selle –vs- Associated Motor Boat Company Ltd** [1968] E.A.123.
13. Let me first start by addressing the Respondents submission that the Appeal is filed out of time and without leave contrary to Section 79G of The Civil Procedure Act. In addition it is argued that an order for such leave should have been included in the Record of Appeal as required by the provisions of Order XLI Rule 8B (4) (f) of the pre-2010 Civil Procedure Rules. Reference is made to the older version of the Rules because this Appeal was filed in the year 2000.
14. This is an Appeal from the Resident Magistrates sitting at Busia. Under Section 3(1) of The Magistrates Court, a holder of such a Court constitutes The Resident Magistrates Court. Section 50 of The Law of Succession Act is on Appeals to the High Court and this provides as follows:

> **"50(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final."**

15. Neither the Law of Succession Act or the Rules made thereunder prescribe the time within which an appeal should be filed. And looking at the provisions of Rule 63 of The Probate and Administration Rules, Order XLI of the Civil Procedure Rules is not one of the provisions of the Civil Procedure Rules to be applied in Probate and Administration matters. That said, it is nevertheless my view that an Appeal such as this should be filed without unreasonable delay. What is unreasonable delay must necessarily turn on the unique circumstances of each case. I hinge this view on the provisions of Section 58 of The Interpretation and General Provisions Act which reads:-

> **"58. Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."**

The decision appealed against was made on 4/11/1999. The Appeal was filed on 9/05/2000. This Court is not told by the Respondent that the delay is unreasonable or has in some way prejudiced him. I am unable to uphold that objection also for the reason that it stands on the wrong provisions of the law.

16. To the substance of the Appeal. As earlier stated the singular question to be determined is whether the Respondents established that plot no.946 was a gift given by the Deceased during his lifetime to the Appellant. If it was, then this Court may not have reason to interfere with the Learned Magistrates discretion in failing to make provision for the Appellant in plot no.934. Part lll of The Law of Succession is on provision for Dependants. Section 28 (d) of The Act would then be relevant. In determining whether to make provision for a Dependent, the Court will, inter alia, consider:-

> **"28(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;"**

17. But first I need to make this observation. The Respondents witnesses made reference to a meeting summoned by the Deceased in his ultimate days. There was evidence that the meeting was held one week prior to his death. There was evidence that in that meeting the deceased made known his wishes in respect to the inheritance of his property. More than two competent witnesses who were present at that meeting testified. So that in terms of Section 9 of The Law of Successions Act a valid Oral Will may have been made by the Deceased. But, for reasons, not explained, The Respondent took out Intestate Proceedings. Could this be an admission on his part that there was no Oral Will? Whatever the case, this Court will proceed on the basis of the intestate proceedings as commenced by the Petition.
18. It is common ground that plot no.946 is registered in the name of the Appellant. At the time of the

hearing it was registered under the provisions of The Registered Land Act. The onus fell on the Respondent to demonstrate that it was in fact a gift in life from the Deceased to the Respondent. The evidence of the purchase of the land was provided by PW2, PW4, PW5 and PW7. The Learned Magistrate thought that the evidence was overwhelming, but is that so?

19. Although it was said that the sale transaction was reduced into writing, the written document was not produced in Court. No explanation was given as to its whereabouts and why it could not be availed as an exhibit. This must be compared to the contract produced by the Appellant in support of his case that it was him and not the Deceased who purchased the land. Although doubted by the Petitioners witnesses they were not able to successfully challenge and debunk its authenticity.
20. Another aspect of the Petitioners case that weakened it was the lack of consistency as to the consideration for the sale. Was it ksh.2,700/= as suggested by PW2, or was it partly paid by way of two cows as testified by PW5 or was the purchase paid both in cash and four cows as stated by PW7.
21. I am afraid that given the quality of evidence the Respondent did not, on a balance of probabilities, establish that the Deceased indeed bought Plot No.946 from Buluma. I say this also because even if I were to accept the explanation that the Appellants wife Aoko stayed and was buried on Plot No.934 only because of her strained relationship with the Appellant, it was not explained why the Appellants sons were allowed to stay on that land todate. Was it really the Deceaseds intention not to give any share of Plot No.934 to the Appellant yet he allowed the Appellants children to stay on the land? That does not seem consistent with the Respondents case that the Appellant or his family does not deserve any share in Plot No.934.
22. For the reasons given I would reach a different decision from that of the Lower Court. I allow the Appeal and make the following orders:-

I. **The Ruling of the Learned Magistrate of 4/11/99 is hereby set aside only in respect to plot no.934.**
II. **All the ten sons of the deceased (including the Appellant) shall equally share plot no.934.**
III. **Given that the parties herein are brothers, I order that each bears their own costs of this Appeal and the Lower Court proceedings.**

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF JANUARY 2014.

IN THE PRESENCE OF:

KADENYI ……COURT CLERK

……FOR APPELLANT

…….FOR RESPONDENT