



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE NO: 508 OF 2002

IN THE MATTER OF THE ESTATE OF

ANERIKO WAWIRE

MUSICHA.....DECEASED

PATRICK WANJALA MUTEBI.....OBJECTOR

VERSUS

GREGORY JUMA WAWIRE..... 1ST PETITIONER

DAVID MUSICHA WAWIRE.....2ND PETITIONER

JUDGEMENT

The objector, Patrick Wanjala Mutebi filed his application dated 5/4/2012 seeking to be enjoined as a liability to the deceased's estate. The matter proceeded by way of oral evidence. The objector's claim is that he bought a portion of land measuring 50 X 100 feet from plot number **BUNYALA/BUDINGA/1119**. He bought the plot from the deceased herein for Ksh 3500/=. The same agreement was recorded in a book that was being kept by the Malaha Market chairman.

The objector further testified that the market chairman's house was burnt and he was killed. The plot is located at Malaha market. The objector constructed a permanent house and some ten semi permanent rental houses which are let out to tenants. He started building in 1982. He used to work in Uganda and was not taken to the land control board. Other people purchased plots from the deceased and were issued with title deeds. The deceased was alive when he built on the plot.

PW2, Ibrahim Nyawanga is a son in law to the deceased. His evidence is that he participated in the survey of plot 1119. The deceased sold about 13 plots. The plaintiff was sold one plot by the deceased referred to as door number 6. The plaintiff has developed a permanent structure that is not complete. He developed the plot in 1980.

David Musicha Wawire testified as DW1. He is the deceased's grandson. His evidence is that the portion of land being claimed by the plaintiff was given to his late father. His father used to work in Nairobi. When his father went to the plot in 1992, he found the plaintiff had built a permanent house and he stopped him. His father died in 1993 and his mother Beatrice Wawire stopped the plaintiff from developing the land. The dispute was reported to the District officer who referred it to the clan. According to DW1, the plaintiff was told to produce his sale agreement but had none. The plaintiff started building on the plot after the deceased had passed on.

DW2, Maende Wefwafwa testified that the deceased was his uncle. The deceased sold land to fifteen people and all of them got their title deeds, the plaintiff entered the land forcefully and the matter was reported to the District officer. The plaintiff offered to give Ksh 150,000 but it was declined the plaintiff started building on the land in 1992 but was stopped. This was after the death of the deceased herein. DW3, Patrick Musicha is an uncle to the deceased. His evidence is that the plaintiff wanted to buy the disputed plot. He entered the plot in 1992. He offered to pay Ksh 150,000/= but the owners declined. The plaintiff has built a house on the plot. He did confirm that the market chairman's house got burnt. He knows PW2 as his brother in law.

The main issue for determination is whether the objector/plaintiff is a liability to the deceased's estate to the extent of 50 x 100 ft plot out of plot number **BUNYALA/BUDONGA/1119**. The plaintiff's evidence is that he bought the plot from the deceased and developed it since 1982. He had no problem with the deceased. He is aware that the deceased sold land to other purchasers. PW2, a son in law to the deceased informed the court that he was aware of the purchase of the plot by the plaintiff.

On the other hand, the petitioner contends that the plaintiff entered the land the land forcefully in 1992. He was stopped and the matter referred to the D.O the plaintiff offered to pay Ksh 150,000 but the family declined it. The petitioner denies that the developments by the plaintiff were done during the deceased's lifetime.

The evidence on record shows that the plaintiff has developed a permanent structure and ten semi permanent mud houses on the plot. It is further established that the land is situated at Malaha market and both parties are in agreement that the deceased sold land to other buyers. From the evidence on record, I am satisfied that the plaintiff bought a plot measuring 50 X 100 ft from the deceased. No suit was filed in court when the plaintiff started to develop the land seeking to stop him from doing so. Indeed, it is the plaintiff who applied to the court to be recognized as a liability when this cause was filed. The report to the D.O seems to have been made after the plaintiff had already developed the land.

It is clear that the plaintiff could not produce any sale agreement as according to him the agreement was recorded in a book kept by the Malaha chairman who was killed and his house burnt. The evidence of PW2 is quite crucial as he was present during the sale of the land to the plaintiff.

In the end, I do find that the plaintiff has proved his claim. He is entitled to a portion of land measuring 50 x100ft out of the suit land. The plaintiff is a liability to the deceased's estate and should be regarded as one of those to benefit from it. Each party to meet his own costs.

Dated, signed and Delivered at Kakamega this 27th day of February 2014.

SAID J. CHITEMBWE

JUDGE