



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE AND ADMINISTRATION NO.210 OF 2011

IN THE MATTER OF THE ESTATE OF ALFRED OTENGO MURABULA

EDWARD OTENGO MURABULAPETITIONER

DUNCAN OTENGOPROTESTER

RULING

1. The Estate of Alfred Otengo Murabula (the **Deceased**) owns all that parcel of land known and registered as Bukhayo/Bugengi/610. Two of the Deceased sons are not agreed on how that land should be distributed. They are Edward Otengo Murabula (**the Petitioner**) and Duncan Otengo (**the Protestor**).
2. It was the evidence of the Petitioner and his witnesses that, when alive the Deceased had three wives. The first house had two sons, Eliud and the Petitioner. The second had one son, Festo Odunga while the third had one son Duncan (**the Protester**).
3. According to the brother of the Deceased Johnston Oduori Murabula (PW2) and a village Elder Josephat Wafula Masiga (PW3), the Deceased had prior to his death shared out his land to his sons. Each of them settled on their respective land parcels. Two of those sons being Festo and Eliud are now dead.
4. PW2 told Court that Eliud and his wife died without any children. It was his further testimony that Eliud had sold to him 1 ½ acres to enable him bury his wife. Later the Petitioner recovered the land by refunding the purchase price. The 1 acre of that land was later to be sold to one Francisca Anyango Mbingi by the Petitioner. Evidence of the purchase was further given by Francis Mbingi (PW4) who is the father of Francisca. A copy of the sale agreement was produced in Court. The village Elder (PW3) also gave evidence that he was aware of this sale.
5. In respect to Festos' portion, there was evidence by PW3 that Festo had, prior to his death, sold his portion to Mzee Manyuru. The sale was reduced into writing and a copy of the agreement dated 11.3.98 produced in Court. Significantly, Rebecca the mother of the Protestor witnessed that agreement.
6. When the Protestor was invited to testify, he said that his brother Edward had unlawfully sold land to two people. That he had no authority to do so. He protests that he is left with a small portion. It is his desire that the land be shared equally between him and the Petitioner.
7. This Court has heard the evidence presented by both sides. There was evidence from PW1, PW2 and PW3 that prior to his Death, the Deceased had shared out his land between the three homes. PW2 is the brother of the Deceased while PW3 was a village elder. This was not denied by the Protester. In fact in his evidence he said nothing of it. The evidence of PW2 and PW3 was, in my assessment, truthful and candid. This Court believes as they testified that prior to his death the Deceased had settled his family in the manner he wished. Those wishes, in my view, must be respected and given effect by this Court. Even if the law relating to intestacy would have favoured the disruption of that arrangement, this Court would have invoked the provisions of Section 27 of the Law of Succession Act in giving effect to the wishes of the Deceased. That

provision of the Law gives the Court discretion in providing for Dependents not adequately covered in intestacy. In exercising that discretion the Court may give regard to the general circumstances of a case (Section 28 (g)). I have, in the circumstances of this case, reached a decision that the wishes of the deceased must be upheld. They are also other reasons why I reach this decision.

8. There is evidence that two of the Deceased sons are now dead. Eliud who is the blood brother of the Petitioner died without any child. In his lifetime, Eliud sold his portion to PW2 but that land was purchased back by the Petitioner. That land was subsequently sold to Fransisca Mbingi. This Court was told that Francisca is now farming on her portion.
9. In respect to Festo, he sold a portion of his land while alive to Mzee Manyuru. An additional portion was sold to the Manyuru's to offset expenses for the burial of Festo. The family of the Deceased, which included, the Protestors mother recognized this arrangement and approved it by signing the sale agreement as witnesses. Although this Court was told that Festo is survived by one child that child has not raised any complaint in respect to the manner in which the Petitioner wishes to distribute the land.
10. For the Protestor, it is his wish that the land be distributed equally between him and the Petitioner. If his wish was to be granted, then the Court will have treated the estate of the Deceased as having only two beneficiaries. The Court will be proceeding as though Festo and Eliud never existed. The Court will also be overlooking the transactions that these two entered with other third parties. That seems pertinently unfair.
11. For reasons given I am unable to accede to the protest and do hereby allow the summons of confirmation dated 27th June 2012. The distribution proposed in paragraph 5 of the Petitioners affidavit of 27th June 2012 is hereby upheld. The Protestor cannot get more than he would deserve if his two brothers were alive today.
12. There shall be no order as to costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 27TH DAY OF MAY 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR PETITIONER

.....FOR PROTESTER