



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

P & A CAUSE NO.242 OF 2008

IN THE MATTER OF THE ESTATE OF DANIEL ADALA GAUNYA –DECEASED

SOPHIA AKINYI OCHIENGPETITIONER

AND

JOEL AMBUGA ANGORO

PETER KERARIO MAGETAOBJECTORS

TARCICIO MALINGU OUMA

AND

LABAN ONYANGO AMBUGA.....APPLICANT

RULING

1. This decision, which answers the Summons dated 12th September 2011 for Revocation or Annulment of Grant, also determines the entitlement of Tarcicio Malingu Ouma (Tarcicio or the Objector) to the Estate of Daniel Adala Gaunya (Deceased).
2. The Deceased died on 14th March 2001 and left an Estate which comprises of Samia/Wakhungu-Odiado/216 (referred to as The Estate Land or Plot No.216). He died intestate. His wife (Helena Maloba Adala) and daughter (Sofia Akinyi Adala also known as Sophia Akinyi Ochieno) presented this Petition in respect to Letters of Administration to that Estate. Grant was made on 6th May 2009 in favour of the said Petitioners but the Application for its Revocation or Annulment was filed before the said Letters were confirmed. Later on, the 1st Petitioner died and on 15th February 2012 Muchemi J made the following order;

“There is no need therefore to substitute the 1st Petitioner. 2nd Petitioner to pursue the Petition on her own.”

3. It was ordered further by the Court that the Petitioner do file an Application for confirmation of

- Grant stating her proposal on distribution. Notwithstanding some encouragement from the Court that an amicable solution herein be found, the parties were unable to agree and the dispute was narrowed down to whether the Objector deserved any share in the Estate land. That dispute was to be disposed off by way of oral evidence.
4. The Objector is a nephew of the Deceased. The Deceased was blessed with 6 children, 5 daughters and 1 son. The Deceased and the Objector developed a warm and close relationship. This was demonstrated by the frequent visits made to Deceased by the Objector. In addition the Objector would support the Deceased by giving him money every month and buying him food.
 5. It was the testimony of the Objector and one Joseph Ogutu Gaunya (OW2) that the Deceased gave 3 acres of The Estate land to the Objector as a gift. Joseph Ogutu Gaunya is a step-brother to the Deceased. So as to effect the gift, the Chief of Odiado location wrote a letter dated 19th March 1999 (O Exhibit 1) to the Land Control Board Funyula supporting an Application for transfer of that land from the Deceased to the Objector.
 6. The Deceased obtained consent of The Funyula Land Control Board (O Exhibits 3(a) and 3 (b)) on 6th February 2001 to subdivide the land into two portions measuring 1.0ha and 3.8ha. It was also the evidence of the Objector and OW2, that prior to his death, the Deceased asked surveyors to formally excise the portion of land he had gifted to the Objector. If the mutation forms (O Exhibit 4) produced in Court were to be believed the site visit would have been on 7th January 2001.
 7. There was further evidence that title to Plot No.216 was closed on 23rd May 2008 upon subdivision of that land into two parcels. The resultant numbers are 1600 and 1601. Plot 1600 measures 3.8 hectares while 1601 measures 1.0 hectares. Both are still registered in the name of the Deceased.
 8. It was also the evidence of the Objector that he has occupied and used 3 acres in Plot 216 since 1983 and is still in use and occupation thereof. Also in the life time of the Deceased, there was a dispute between the Objector and the Deceased's son by the name Francis Oseno. That dispute went before some elders. One of the findings of the Elders (O Exhibit 2 (a)) was that;

“That Mzee Adala gave the piece of land in dispute to his nephew Malingu legally. That it is his land and has the right to give it to anybody in his favour.” (my emphasis)

9. The Petitioner is a daughter to the Deceased. In her testimony, she told Court that the Objector (her cousin) requested the Deceased for some land to plant sugarcane. Later he requested for more land to plant some food crops instead of sugarcane. The Deceased obliged and the Objector used the land for a long time. This evidence was supported by that of her sister Teresa Anyango Adala (PW3) and Caroline Night Adala (PW 2).
10. The Petitioner and her witnesses acknowledge that the Deceased only gave some land to the Objector. But it was only 1 acre. It was their evidence that after, the death of the Deceased, the Objector extended the land he was using beyond what was given to him as a gift. The evidence of the Petitioner and PW3 was that the Objector invited surveyors to the land a day before the Deceased died to excise what he considered to be his entitlement. That the Deceased did not participate in the survey as he was bed-ridden. Her further complaint was that the Objector has invited and sold land to some third parties.
11. I have heard the evidence of both sides. Some issues are in contention and others are not. It is not in dispute that the Objector enjoyed a warm relationship with his uncle, the Deceased. Even the Petitioner and her witnesses confirmed that the Objector visited the Deceased often and showered him with gifts. It would also not be in contention that the Deceased gifted the Objector with land. The evidence does suggest that The Objector was a dependant within the meaning of Section 29(b) of The Law of Succession Act. The evidence is that the Deceased had taken the Objector as his child. Under that Section Dependants include:-

“29 (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and” (my emphasis)

12. What is in contention is the provision to be made to him. Should it be 1 (one) acre as offered by Petitioner or 3 (three) acres as claimed by the Objector? Although the Petitioner acknowledges that the Deceased gave some land to the Objector, she also said,

“I am ready to give him 1 acre. I heard my father gave him some land. He never mentioned the acreage, he merely showed him where to use.”

The contention of the Petitioner and her witnesses was that the Objector increased his land size after the death of the deceased. But hear the other evidence of PW3,

“The Deceased gave one acre. Tarcisio is still using that land to date but he has extended it beyond what the Deceased gave him. I do not know the acreage of what he is using.”

It would seem to me that the Petitioner and her witnesses are not sure about how much land the Deceased gave to the Objector.

13. In resolving this competing evidence I would fall to what the Deceased did before his death. The Deceased applied and obtained consent for the subdivision of his land into two parcels. 1.0 hectares and 3.8 hectares. The consent was given on 6th February 2001. The evidence is that the 1.0 hectares was to go to the Objector. I find, on a balance, that this was a clear manifestation of the amount of land the Deceased intended to give the Objector, being 1.0 hectares. It is much bigger than the 1 acre offered by the Petitioner yet slightly smaller than the 3 acres claimed by the Objector.

14. Further, I am persuaded that the Deceased took in the Objector as his own child and gifted him with some land. The Objector still uses and occupies that land. Even though the Deceased may have intended to give the Objector 3 acres, the evidence of the Objector is that 1 hectare (2.47 acres) was to be transferred to him. As I understood this dispute, the Petitioners were willing to give the Objector as much land as the Deceased gave him in his lifetime. But to their mind this was 1 acre. The evidence I see is that as the Deceased gave the Objector 1 hectare (2.47 acres). The Objector is entitled to 1 hectare (2.47 acres) and not the 1 acre offered by the Petitioner. For this reason I will allow the confirmation for Grant but with an order that the Objectors share is 1 hectare (2.47 acres).

15. But there is something unsettling! After the Death of the Deceased, the Register to Plot No. 216 was closed and its subdivision resulted into Plots 1601 and 1602. This was on 23rd August 2008. That closure and subdivision was wrongful and unlawful. By then no Administrator to the Deceased's Estate had been appointed. The person who requested for the subdivision, on his own admission, was the Objector. Whatever he thought of the strength of his case, he should not be allowed to get away with his blatant act. For this reason, I do hereby direct that the titles to Samia/Wakhungu-Odiado/ 1600 and Samia Wakhungu-Odiado/1601 be cancelled. All the entries therein shall be reversed and title to Samia Wakhungu-Odiado/216 restored back to the name of the Deceased. This shall be at the cost of the Objector. Thereafter, distribution shall proceed as I have ordered.

16. On costs, the Objector has virtually succeeded in his claim but I have also found him guilty of some wrong doing. For this reason I shall deny him any costs he may have deserved. Each party shall bear their own costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 24TH DAY OF JULY 2013.

IN THE PRESENCE OF:

HILLARYCOURT CLERK

.....**FOR PETITIONER**

.....**FOR OBJECTORS**

.....**FOR APPLICANT**