



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 401 OF 2000

IN THE MATTER OF THE ESTATE OF ANGUSWA SINDABI DECEASED

BETWEEN

AMUCHILWA ANGUSWA SINDABI 1ST PETITIONER

PROTUS OTSIULA LIPANGA 2ND PETITIONER

AND

BERNARD SHITICHI NDITA 1ST OBJECTOR

MUHONGA ANGUSWA ANYONYI 2ND OBJECTOR

J U D G M E N T

The late **ANGUSWA SINDABI** died on the 9.3.1979. A grant was issued to **AMUCHILWA ANGUSWA SINDABI** and **PROTAS OTIULA LIPANGA** on the 5.2.2001. An application for the revocation of the grant was filed on the 7.4.2008 by two objectors namely **PETER NDITA ANGUSWA** and **MUHONGA ANGUSWA ANYONYI**. The matter proceeded to full hearing. On the 10.5.2010 the initial grant was revoked and a fresh one issued to **AMUCHILWA ANGUSWA SINDABI, BERNARD SHITICHI NDITA** and **PIUS SHIMANJARO MUYUNGA** jointly.

The claimant Protas Otsiula Lipanga testified that on the 12.6.2000 he bought a portion of plot number 531 from the wife of Anguswa Sindabi and her children. The wife was called **CLARA MUHENJE ANGUSWA**. Clara's three children Amuchilwa Anguswa, Muyonga Anyonyi Anguswa and Peter Anditi witnessed the agreement. The sale price was KShs.70,000/= and he paid an initial deposit of KShs.30,000/=. He later paid the balance of KShs.40,000/=. He was just buying one acre of the land measuring 88 by 55 feet. The village elder was present and identity card numbers of the witnesses were written on the sale agreement. Peter Anditi had leprosy but he had his fingers thumb printed on the agreement. Clara is now deceased. He paid the last installment on the 13.11.2001 and by then Clara had died. Clara's children received the final balance. Amuchilwa Anguswa was dumb. The land belonged to Amuchilwa Anguswa as Peter and Muyonga had already been given their own land.

PW2 ANDREW MUKABWA testified that he is a retired village elder. He witnessed the sale of the land by Clara Muhenje. He signed the sale agreement as a witness. The first objector was not present but his father Peter Ndita signed the agreement. The second objector was also not present but his father Adriano Anyonyi was present. He was the village elder from the year 2000 to 2007. Clara died on 24.8.2000. The land had been sold in June 2000. The claimant was only buying 82 by 55 feet. **PW3 FRANCIS MUSERE MUTSOTSO** testified that he was the area chief from 1990 to 2003. He knew

the deceased Anguswa Sindabi and he owned plot number **KAKAMEGA/ISUKHA/531**. It is his evidence that the claimant bought a section of the plot and he witnessed the sale agreement. The last installment was paid on the 30.8.2000. Clara had three children namely Anyonyi Anguswa, Ndita Anguswa and Amuchilwa Anguswa. It is the three sons who received the money. Bernard Ndita is the son of Ndita while Muyonge Anyoni is the son of Anyonyi Anguswa. All the children of Clara are deceased. The claimant only bought **82 by 55 feet**.

BERNARD SHITECHE testified as **DW1**. His evidence is that the late Anguswa Sindabi was his grandfather. His father was Peter Anguswa who is deceased. He has no relationship with the claimant Protas Otsiula Lipanga. Pius Muyonga is his cousin who replaced his father Muyonga Anguswa. DW1 replaced his father Peter Andita Anguswa. His further evidence is that the claimant never bought any land from the deceased's children. His father suffered leprosy in 1961 and he had no fingers or identity card. He produced medical documents to that effect. The sale agreement has identity card number and a thumb print. Clara Muhenje was his grandmother and she died on 24.8.2000. His father together with his brothers filed he objection and contended that they wanted to divide the suit land as they are the only children of the deceased. They also claimed that they did not know the claimant. The claimant is not using the land and they are ones using it. The chief used his uncle who is dumb and when they realized that they filed the objection. The claimant used his uncle and obtained the death certificate. Clara was herself about 90 years old. It is not true that his father Peter and Muyonga were given their own land.

DW2 PIUS SHIMANJARO MUYONGA is also a grandchild to the deceased and a son of Amuchilwa. He does not know the claimant and he is not aware that he bought any land. The claimant is not living on the ground. **DW3 LAWRENCE MADEGWA LIKALE** testified that the deceased Anguswa was his uncle and an elder brother to his father. Amuchilwa was dumb although he had gone to school. His is not aware of any sale agreement in favour of the claimant. The deceased and his wife were buried on the suit land. The claimant has never gone to claim the land. The deceased's children also came to court and claimed the land. Ndita died in 2003 while Muhonga died in 2010. Peter and Muhonga were against the objector's claim.

The main issue for determination is whether the claimant bought land from the deceased and is therefore a liability to the estate. This court visited the suit property on the 10.4.2013 and was able to be taken round the land. The plot has been cultivated and nobody lives on that particular portion. The court was informed that it is the objectors who have cultivated the land. The background to this cause is that when the deceased died his son Amuchilwa Anguswa Sindabi and the claimant filed the succession. A letter from the assistant chief dated 19.9.2000 claimed that the two petitioners were the children of the deceased. The same letter indicates Peter Ndita Anguswa and Muyonga Anyonyi Anguswas as witnesses. These are the other two children of the deceased. It is clear that the names were simply written by the assistant chief and the alleged witnesses did not sign.

A grant was issued to the two petitioners on the 5.2.2001 and the estate is given as **KAKAMEGA/MUKULUSU/581**. I have not seen a copy of official search but during the site visit the court was informed that the land is six acres. The claimant's position is that he bought the land and paid the purchase price of KShs.70,000/=. I have gone through the sale agreement produced by the claimant and the evidence on record and I highly doubt that the document was executed by the deceased's children or wife. Indeed it is clear according to the evidence that by 30.8.2000 Clara was deceased and could not have signed the agreement that was endorsed by the chief Muranda location. Although the chief can claim that the agreement was taken to him later after endorsement it is not clear why the said agreement has no specific date as to when it was prepared. The agreement purportedly was done by Petro Asindabi Anguswa who also signed it. The first agreement dated 12.6.2000 was purportedly signed by several witnesses including Clara and her children. There are two thumb prints on the agreement and for Petro Sindabi there is a signature which is simply written as Petro. It is clear from the evidence that Petro Sindabi suffered leprosy and had no fingers. I have seen the treatment notes from Kakamega hospital dated 7.7.1961 indicating that Petro Ndita Anguswa had leprosy. I have also seen his leprosy appointment card from Shiamakhubu Health Unit. It is not clear to me as to how Petro could be able to sign.

On the 24.10.2002 J. J. Mukavale Advocate filed an application for confirmation of the grant. There is a supporting affidavit of Amuchilwa Anguswa Sindabi sworn on the same date. Amuchilwa was a co-petitioner with the claimant herein. Paragraph 8 of the affidavit states as follows:-

THAT to the best of my knowledge, information and belief I do not understand why one PROTUS OTSIULA LIPANGA comes into these proceedings him not being one of the sons of my late father.

It is clear to me that even Amuchilwa Anguswa was not aware that the claimant was to be part of the succession yet a grant had been issued jointly with him. The other two sons of the deceased Peter and Muhonga also swore and affidavit in 2007 indicating that the claimant is a stranger to them. On the other hand the claimant alleges that these same people are the ones who received the final balance of the purchase price. The court was at the site and there is no indication that the claimant has ever used the land. The area assistant chief wrongly included the claimant as a son of the deceased yet he is not. Amuchilwa Anguswa was dumb but the evidence shows that he had gone to school and could read. I do find that he was aware of what he was saying when he swore the affidavit indicating that he was not understanding why the claimant was part of the proceedings. The purported sale agreement is not reliable. No other witness testified in its favour other than the two administration officers who simply endorsed the agreement in the absence of the purported sellers. This is so because the first sale agreement was done on the 12.6.2000 while the chief endorsed it on the 19.6.2000. That shows that he was not present as a witness when the agreement was done. The same chief endorsed a second undated agreement which even has a thumb print of Clara who had died on the 24.8.2000 yet the chief endorsed it on the 30.8.2000 while he was aware that Clara had died.

In the end I do find that the claimant has not proved his case as required and he is not a liability to the estate. The grant issued to the claimant and Amuchilwa Anguswa Sindabi is hereby revoked. A fresh grant shall be issued to the two objectors who shall hold in trust for their own benefit and the benefit of their uncle Amuchilwa Anguswa Sindabi. A certificate of confirmed grant shall be issued to Bernard Shiteche and Pius Shimanjaro Muyonga jointly in respect of plot number **KAKAMEGA/MUKULUSU/531** and shall hold in trust as herein stated. There shall be no orders as to costs.

Delivered, dated and signed at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E