



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

SUCCESSION CAUSE NO: 519 OF 1998

IN THE MATTER OF THE ESTATE OF ISMAEL BARASA OCHANJI.....DECEASED

JOHN BARASA ISMAIL.....PETITIONERS

VERSUS

JACKSON AINEAH EGESA BARASA.....OBJECTOR/RESPONDENT

JUDGEMENT

The late ISMAEL BARASA OCHANJI died on 28/5/1998. His last born son John BARASA ISMAEL petitioned this court for letters of administration intestate. The first born son JACKSON AINEAH BARASA filed objection to the confirmation of the grant. The matter proceeded to full hearing.

The objector's evidence is that he is the deceased's eldest son. The deceased has seven (7) sons and five (5) daughters. The petitioner filed the petition without consulting other family members. Some of the sons were given their own land. He is seeking to be given 0.4 Ha. out of plot number BUNYALA/BUDONGA/253. He is also seeking to be given one door at plot number 7 MALAHA MARKET. He has a nine (9) Bed roomed House on plot number 255 while his son has a three bed roomed house on that plot. The plot is still charged to a bank. The deceased placed boundaries on plot 255 but the petitioner removed them. He built his house on the land while his father was alive. His father also gave him plot number 243 measuring 1.4 Ha.

The petitioner, John Barasa Ismail testified that his father gave title deeds to all his other children except him. The deceased remained with plot 255 and the Malaha market plot. The objector was given plot number 243 (1.4 Ha.) Wilson was given plot 242 (1.6 Ha.) Elisha was given plot No. 244 (1.5 Ha.) , Festus Barasa plot No: 781 (0.7 ha.) Shem Barasa plot 782 (0.7 ha) , Manase Barasa Plot 873 (1.2 Ha) The petitioner was to inherit plot 255.

The petitioner further testified that in 1993 his father applied to the Lurambi Land Control Board to transfer plot 255 to him. The consent was issued dated 22/11/1993 but the transfer could not have been effected since the objector had charged the property. The objector is occupying about ¼ acre of the suit land and has built a house his elders son has also built a house on the land. The petitioner lives on the land with the parties' mother. He would like the objector to vacate and move to his plot 243. According to him the Malaha market plot number 7 should be given to Wilson as he saved it from the auctioneer's hammer. The objector had taken a loan using the Malaha market plot as security.

DW2 WILSON SIFUNA BARASA is the brother to the parties and the deceased's son. His evidence is that he was given plot number BUNYALA/BUDONGA/242. His father gave all his children their plots

and remained with plot number 255 and the Malaha market plot 255 was to be given to the petitioner.

The objector left his plot number 243 and went to live on plot number 255. The objector took a loan using the Malaha plot as security but did not repay it. The plot was auctioned and he salvaged it the deceased gave him the Malaha plot. A portion of plot 255 was given to the church by the deceased.

LOICE NASWA (DW3) is the parties mother and the deceased's widow. Her evidence is that her husband gave all the sons their title deeds. Plot number 255 was meant to be for the petitioner. She lives on that plot a small portion was given to the Friends Church. The objector moved to plot 253 yet he was allocated his land. He has built a house on the suit land.

Parties herein agreed to file written submission. The totality of the submissions by counsel for the objector is that the objector is entitled to 0.4 Ha out of plot number 253 and one door from the Malaha market plot. On his part, counsel for the petitioner would like the suit land to be distributed to the petitioner and the church.

The evidence shows that the deceased gave all his sons their title deeds except the petitioner. I am satisfied that the deceased intended to transfer plot number 255 to the petitioner. The main issue for determination is how plot number 255 and plot number 7 Malaha Market should be distributed.

With regard to the Malaha market plot, it is clear from the evidence that the same was auctioned due to nonpayment of a loan taken by the objector. Although the objector testified that the loan was taken by the deceased, I do find that it was indeed the objector who took loans for both plot numbers 255 and 7, Malaha market. Since the plot was salvaged by Wilson and the other sons other than the objector are agreeable to Wilson taking the property, I will distribute plot number 7, Malaha market to Wislon Sifuna Barasa.

The next issue is the distribution of plot number 255 the plot is 1.7 Hactares. All the parties are in agreement that a portion of the land was allocated to the Friends Church by the deceased. According to the objector the church was given a plot measuring 11 meters by 10 meters while the petitioner indicated that it is 10 meters by 47 meters.

Since the objector has developed a permanent house on plot 153, it would be unjust to call for the demolition of his house and that of his son from the suit land. I do therefore find that the objector is entitled to a small portion of the suit land where his house and the house of his son are located. I take note of the fact that the objectors plot number 243 is 1.4 Ha, while the suit land is 1.7 Ha. However, I do further find that the objector is liable to pay the balance of the bank loan and should he fail to do so then his property on the suit land should be the first liability to be auctioned to settle the loan. The objector is the one who benefited from the loan.

I will proceed and distribute plot number BUNYALA/BUDONGA/253 as follows:-

1. BUNYALA/BUDONGA/255

- a. JACKSON AINEA & EGESA BARASA - 0.2 HA.
- b. JOHN BARASA ISHMAEL & FRIENDS CHURCH - 1.50 HA.

2. PLOT NO: 7 MALAHA MARKET

WILSON SIFUNA BARASA.

I do direct that the portion meant for the objector shall be restricted to where his houses are located. The petitioner shall curve out the portion meant for the church. LOICE WASWA shall have life interest on the portion meant for JOHN BARASA ISHMAEL. The objector shall settle the bank loan as directed

herein. Each party to meet his own costs.

Dated, delivered and signed at Kakamega this 17th day of September 2014.

SAID J. CHITEMBWE

JUDGE