



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 112 OF 2000

IN THE MATTER OF THE ESTATE OF PETER KHASIANI IKHUNYALO-- DECEASED

JOSEPH IKHUNYALO KHASIANI 1ST PETITIONER

PAUL IKHUNYALO KHASIANI 2ND PETITIONER

V E R S U S

ANDREW SHIBACHI IKHUNYALO OBJECTOR

J U D G M E N T

The late **PETER KHASIANI IKHUNYALO** died on the 14.4.1994. His two sons **JOSEPH IKHUNYALO KHASIANI** and **PAUL IKHUNYALO KHASIANI** petitioned this court for letters of administration intestate. A grant was issued to the two on the 28.7.2000. The petitioners filed an application dated 2.10.2003 seeking to have the grant confirmed. A similar application for confirmation of the grant was made on the 3.3.2008. **ANDREW SHIBACHI IKHUNYALO** filed an affidavit of protest against the confirmation of the grant.

The matter proceeded by way of oral evidence. Andrew Shibachi testified that the deceased was his uncle. Sometimes in December 1982 the deceased asked him if he could buy a portion of his land. On 3.4.1983 he met the deceased with his family members including his children and brothers. They agreed to sell him a portion of land measuring **195 feet x 100 feet** which is approximately 1 ¼ acres. The sale price was **KShs.4,000/=** and he paid a deposit of **KShs.1,690/=**. He kept on paying the deceased and on the 17.1.1988 he paid a sum of **KShs.1,070/=** and made the final payment of **KShs.800/=** on the 30.12.1989. All the payments were recorded in a book which he produced in court. Upon payment of the deposit in 1983 he took possession of the portion of land the clerk made a sketch plan. The deceased died in 1990. There was an application to the Ikolomani Land Control Board, but the deceased was sick. His objection is that the petitioners started selling the land to other people and they have not considered him as one of the beneficiaries. The elders deliberated the dispute and they ruled in his favour.

PW2, PIUS SHIVEKA OTUNGA, testified that the deceased was his uncle. The objector bought a portion of land from the deceased and the two petitioners were present. He was involved during the sale of the land and the objector has been using the land since 1983.

The 1st petitioner **JOSEPH KHASIANI** testified that his late father had two sons and seven daughters. He left plotnumber **IDAKHO/SHISESO/975** and he would like to have the land divided equally between himself and his brother, the 2nd petitioner. He knows the objector who is his uncle's son. His late father wanted to sell to the objector a portion of land but the objector went to Nairobi and his father died before any agreement had been made. On the 3.4.1983 the objector made some payment

but it was just meant to be seen by those present that he intended to purchase apportion of the land. The price had not been agreed. The 2nd petitioner **PAUL IKHUNYALO KHASIANI**, testified that he is the deceased's last born and lives on the suit land with his elder brother Joseph. He would like to have the land shared equally with his brother. Their father was sick and the objector made part payment for the sale of a portion of land. They told him to pay the balance but he refused. Although he signed the sale agreement in 1983 he did not know what was happening and their father was sick that time. The objector has been using the land forcefully.

The pleadings show that the deceased was the registered owner of plot number **IDAKHO/SHISESO/975** measuring 5.0 Hectares. The objector indicated that his uncle had financial problems and wanted some money. The deceased requested him to purchase a portion of his land. The objector produced the sale agreement which indicate that parties agreed and the purchase price was **KShs.4,000/=** for a portion measuring **195 x 100 feet**. The original agreement produced in court shows that the two petitioners witnessed the sale transaction and even signed the document. The petitioners' position that the objector only intended to purchase or only paid part payment is not true. The evidence shows that the entire purchase price was paid and therefore the objector's claim is a liability to the deceased's estate. It is clear from the application for confirmation of grant dated 2.10.2003 that some other people bought part of the land. The application includes the names of **KIMANI PROTUS AKHWIBASA (1 acre), RICHARD MUSEVE AKALA (1 acre), PETER MUTEHELI MBAKA (1/2 acre) and GERALD MUKABUTI LUSENO (1 ¼ acres)**. In the second application for confirmation of grant dated 3.3.2008 the two petitioners propose to share the land equally amongst themselves with each getting 2.5 Hectares.

I am satisfied that the deceased sold a portion of land measuring **195x 100 feet** to the objector. The objection is granted. The grant shall be confirmed in the following terms:-

Plot number IDAKHO/SHISESO/975:-

- | | | |
|-------------------------------------|---|---|
| 1. ANDREW SHIBACHI IKHUNYALO | - | 195X100 feet (not more than 1 ¼ acres) |
| 2. JOSEPH IKHUNYALO KHASIANI | - | To share the |
| 3. PAUL IKHUNYAL KHASIANI | - | remainder equally. |

The two petitioners shall be issued with a grant in the above terms. The objector shall meet the expenses of the subdivision that will create his portion of land. Should the petitioner decline to execute the relevant documents so as to enable the objector obtain his share of the land, the Deputy Registrar of the court is hereby authorized to execute all the relevant documents so as to effect the above distribution. Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 26th day of June 2013

SAID J. CHITEMBWE

J U D G E