



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Succession Cause 508 of 2003

IN THE MATTER OF THE ESTATE OF MANASE KIDWARO.....DECEASED

AND

SHADRACK KIDWARO.....PETITIONER

VERSUS

FWEBE MANASE.....OBJECTOR

J U D G M E N T

Manase Kidwaro died on the 13th of September 1980. His brother, Shadrack Kidwaro filed this succession cause in 2003 and was issued with a grant of letters of administration intestate on 8th January, 2004. The objector, Fwebe Manase on 24th May, 2004 filed an application to have the grant issued to Shadrack Kidwaro revoked on the grounds that she was not informed about the matter and that all the deceased's heirs were not included. The objector is the deceased's wife.

This matter proceeded by way of oral evidence. The objector's testimony is that the petitioner is his brother in law. The deceased used to live in Maragoli but moved to Kabras in 1970. The deceased and the petitioner had a small portion of land at Maragoli that was sold and the proceeds shared. According to the objector, her husband used his share of the sale proceeds to buy the Kabras land while the petitioner used his share. The objector would like the petitioner to vacate from Plot **South Kabras/Chesero/186** which is registered in the names of the deceased.

SAMUEL KIDWARO (PW2) is the deceased's son. He reiterated the testimony of his mother. He was born in 1960 at Maragoli but moved to Kabras with his parents in 1970. According to PW2 the petitioner joined them at Kabras in 1975 and that the petitioner did not include the deceased's children's names in the petition.

PW3, NATHAN MALOBA MUKONYORE was the chief of South Kabras in 1969. According to him the deceased bought the land in 1969 for himself alone and did not see the petitioner. The deceased bought the land for Ksh 8000/= plus two heads of cattle.

On his part, the petitioner's evidence is that he used to live at Imanda village in Maragoli with his mother and the deceased. The plot was too small and they decided to sell the land in 1969. The land was sold to one WILSON AYUYA KATASI for Ksh 7000/=. After selling the land they left Maragoli and moved to Kabras with his wife and two children. His brother, Manase Kidwaro was the eldest and also moved to Kabras with his wife and five children. The two brothers occupied respective portions of the land and the petitioner was aware that the land was registered in his brother's name. When his brother died, he filed this succession cause so that he could obtain his title deed and give his sister in law, the objector, her portion. According to the petitioner, the land in Maragoli was sold by their mother and it is the sale proceeds that were used to buy the land at Kabras, Plot number **KABRAS/CHESERO/186**.

DW2, WILSON AYUYA KATSI is the purchaser of the Maragoli land. His evidence is that he bought two portions of land from the petitioner's mother, Karen Andesia for Ksh 7000 in 1969. At that time adjudication had not been done. The plots were later adjudicated and title deeds were issued to him as plot SOUTH MARAGOLI/BUYONGA /946 measuring 0.36 Hectares and SOUTH MARAGOLI/BUYONGA/947 measuring 0.37 hectares. He produced a Sale Agreement dated 9/6/1969. According to DW2 the petitioner and the deceased wanted to buy land at Kabras and that the two brothers moved to Kabras in 1970.

DW3, MUSA KEYA LIBWEGE was the assistant chief of Buyonga sub location, Maragoli in 1969. He was a witness in the sale of the land to DW1 in 1969. His evidence is that the land was sold for Ksh 7000/= that was paid in two installments, of Ksh 5000 and 2000 respectively. After the sale of Maragoli land, DW2 went with the two brothers to Kabras where they were buying.

DW4 SAMSON AKINDA ABABU is a cousin to the deceased and the petitioner. His evidence is that the two informed him that they wanted to move to Kabras and they managed to get land and moved to Kabras in 1970. After the deceased's death, there was later a memorial service where it was resolved that the petitioner continue occupying his portion of land while the deceased's family was to occupy its respective portion.

DW5, REUBEN AYANGA ABABU is also a cousin to the deceased. According to PW5, the petitioner's father died and was buried at Maragoli. The deceased and the petitioner had respective plots at Maragoli which they sold and moved to kabras. The petitioner's mother Karen was buried at Kabras and that he used to work with both the petitioner and the deceased in Mombasa.

The main issue is whether the grant issued to the petitioner should be nullified and whether the petitioner is entitled to a portion of plot number SOUTH KABRAS/CHESERO/186 measuring 4.2 Hectares. The objector contends that the petitioner claimed to be the deceased's son when he filed the petition. The petitioner's position is that he is illiterate and that he is the deceased's brother. The petitioner states that he informed the person who prepared the papers for the succession cause that he was the deceased's brother. I do not find that the petitioner's intention was to pretend to be the deceased's son. His explanation is reasonable and the mistake is excusable:

On the 20th January, 2012 the court visited plot number SOUTH KABRAS/CHESERO/186 and was taken round the entire plot by the parties herein. The objector started by showing the deceased's houses and those of his children and the portion occupied and utilized by the deceased's family. On his part the petitioner showed the court the portion he occupies and cultivates, the graves for his late mother and his children and the boundary separating the two properties.

From the evidence on record it is established that the deceased and the petitioner used to live at Maragoli with their mother. The two plots they had in Maragoli were sold to DW2 in 1969 for Ksh 7000/= It is further established that the deceased, the petitioner and their mother moved to plot number SOUTH KABRAS/CHESERO/186 in 1970. The Kabras plot was bought in the name of the deceased but each of the two brothers occupied his respective portion. The objector contends that the Kabras plot was bought by her husband with his own money and that the petitioner squandered his share of the sale proceeds. I am not convinced by that argument. The Maragoli land was sold in 1969. The Kabras land was also bought in 1969. Each of the two brothers had his respective portion of land at Maragoli and that is why

DW2 was issued with two title deeds. It is not explained as to why the deceased did not sell his plot and move to Kabras leaving his brother at Maragoli. Further the objector, his son and DW3 admit that the petitioner has been living on the Kabras plot. Their position is that he went to the plot in 1975. They further admit that the deceased did not chase away the petitioner. That being the case, I do find that the petitioner has a legitimate claim on the portion he occupies at Kabras. I do further find that the Kabras plot was bought with the proceeds from the sale of the Maragoli plots. The selling of the Maragoli plots in 1969 and the purchase of the Kabras plot the same year cannot be held to be mere coincidence. The two brothers agreed to sell the Maragoli plots and buy another land.

The two brothers lived in harmony at Kabras and did not have any differences. The petitioner filed this succession cause so that he could obtain a title deed on his part of the land. I wish to state that I visited the plot and did establish that a boundary does exist separating the portions occupied by the petitioner and the deceased's family.

In the end I do order that the objector's application to nullify the grant is hereby dismissed. The petitioner should file an application to have the grant confirmed and is at liberty to take a surveyor to the site for purposes of establishing the exact acreage of each portion on the ground.

Being a family issue, I will not condemn any party with costs. Each party shall meet his/her own costs.

Dated at Kakamega this 26th day of March, 2012

S.J CHITEMBWE
J U D G E