



REPUBLIC OF KENYA

High Court at Kisumu

Succession Cause 161 of 2001

IN THE MATTER OF THE ESTATE OF: MANASSEH OSIAKO NYAWIRADECEASED

AND

IN THE MATTER OF CHRISTABEL J. MICKEYPETITIONER /ADMINISTRATOR

AND

IN THE MATTER OF: RIDAH OCHOCHA MMOCHI &

ALEXANDER OKILA NYAWIRAINTERESTED PARTIES / APPLICANTS

JUDGMENT

The deceased Manesseh Odiako Nyawira had three (3) brothers namely Martin Nyawira, Alexander Okila Nyawira and Nicanor Ochenge Nyawira. All of them were the children of the late Jared Nyawira.

The late Manaseh Nyawira married the petitioner herein Christabel Jane Mike as well as other two (2) women called Gladys Asoya whom he had two (2) children with namely Benta Anindo and Gladys Asoya.

The said Gladys died and the two (2) children are staying with the petitioner . The other lady Lucy left and her whereabouts is not known. The deceased and the petitioner got six (6) children. They are all adults.

The land which is in contention is land parcel number Kakamega / Ebusundi / 433. According to the plaintiffs the suit parcel of land was originally registered in the name of Martin Mmochi Nyawira the eldest brother to the deceased and the husband to the 1st plaintiff. It was the plaintiffs case that the late Martin Nyawira had himself registered as proprietor of the suit land to hold it in trust for and on behalf of his younger brother Nicanor Ochenge Nyawira. Apparently, Nicanor died as well as his wife. There was nobody to inherit the suit property.

According to the plaintiff's it was agreed by the family in the presence of their late mother Miriam Akhasayu Nyawira that the land ought to be divided into three (3) portions. That subdivision exercise was to be undertaken by the deceased herein who was the youngest.

Apparently, instead of carrying out the family wishes the deceased had the land transferred to himself hence the dispute herein.

The defendant / petitioner on the other hand gave different views regarding the suit land. According to her as well as DW2 the land truly belonged to the late Nicanor Ochenge Nyawira originally. However,

by family agreement the land was registered in the names of Martin Nyawira. In the course of time and after Nicanor died Martin had some school fees problems and he decided that he was going to dispose off the land.

According to DW1 and DW2 the deceased herein decided to buy the land instead of it being sold to an outsider. He paid the sum of Kshs. 20,000 to Martin who went ahead to have it transferred to the deceased at Emuhaya Land Control Board. In the premises the defence case is that the land although it belonged to Nicanor was subsequently sold to the deceased.

On cross examination by the plaintiff's counsel the defendant (DW1) stated that the sale agreement was taken by Martin and the deceased. DW2 said that he prepared the sale agreement.

Having heard the parties testify in court as well as their submission the issues that are not disputed include the fact that both the plaintiff and the defendants are related. Further that the suit property was originally meant for Nicanor Nyawira who died and the same was registered in the name of Martin Mmochi Nyawira.

It has been argued that Martin did not sell the suit land to the deceased herein. There is no agreement produced by the parties. One can nevertheless conclude that it would appear that originally and as agreed by the parties the parcels of land belonging to their late father were to be divided as follows:-

- 1) **Kakamega / Ebusundi / 1460 was to be shared between Martin and Alexander equally.**
- 2) **KaKamega /Ebusundi / 1433 to be given to Nicanor Nyawira**
- 3) **Kakamega / Ebusundi /1454 to be taken by Manaseh**

If Martin sold Nicanor's land to the deceased did it extinguish the rights of the plaintiff's herein?.

First of all there is need to interrogate whether indeed the suit land was purchased for the sum of Kshs. 20,000. There is no sale agreement to that effect. The only available legal piece of evidence is the green card Exhibit D2 (c). Under the column of "**consideration and remarks**" it indicate "**Trans. 20,000/=**". This is dated 27th February 1996. Later the title was issued on 15th July 1996

What is interesting is that both PW1 and PW2 do admit that Land Control Board consent was granted by Martin to the deceased. In fact land parcel No. Kakamega / Ebusundu/1454 was transferred the same day that is on 27th February 1996 to the deceased by Martin Mmochi.

Is it therefore a coincident that Martin transferred the two (2) parcels to the deceased on the same day. The column marked as "**Consideration and Remarks**" in green card Exhibit P2 (a) in respect to land parcels No. 1254 is empty. My understanding therefore is that no purchase consideration was paid.

Why did the land office indicate that purchase consideration was paid in respect to parcel No. 1433 and not 1454?. Both were in the names of Martin Mmochi. If indeed there was no consideration paid as the plaintiffs are attempting to persuade this court, then the column on remarks and consideration should have been left blank in both parcels of land.

My finding is further buttressed by the requisite form provided as Form 1 under the schedule to the Land Control Act Chapter 302 laws of Kenya. Paragraph 6 thereof indicates:-

"6(a) Purchase price, if a sale or optionSh....."

My considered finding therefore is that the deceased purchased the suit property from his brother Martin Mmochi Nyawira. Although there was no sale agreement produced the entries in the green card do not lie. The deceased and Martin by no stretch of imagination would have thought that this parcel of land would be disputed at this moment. The Land Registry on the other hand I believe would not have simply

cooked up entries at that particular time.

I am still persuaded that PW1 could be holding the sale agreement if any. She is holding the original title deed for the suit property which according to DW1 were part of the documents the deceased had at the time of his death and which were handed over to her brother in law.

I am further inclined to find in favour of the petitioner by virtue of the fact that all the developments on the suit property were undertaken by her husband and non of the brothers or their wives have laid claim on any of the properties. In fact one would wonder how the deceased would have developed the suit land if indeed he did not have any legitimate claim.

I do not find that the deceased would have held the suit property in trust for the plaintiff. That would have been clearly indicated in the title register and therefore it would be speculative and premature at this juncture to believe the plaintiffs. In any case trust has to be established. The plaintiffs have failed to establish such trust or any intended trust at all.

The evidence of the proceedings at the land Dispute Tribunal is immaterial. In fact the said tribunal did acknowledge that it did not have the requisite jurisdiction to adjudicate over the matter as the same was a subject of succession proceeding at the High Court.

Consequently I shall dismiss the plaintiff / objections application for revocation or annulment of grant. The suit property was lawfully sold and transferred to the deceased. If there was any family interest or trust then the same expired upon this sale. The application is otherwise dismissed with costs

to the defendant/petitioner.

Let the grant be confirmed. The original title deed held by PW1 be returned to the petitioner forthwith.

Dated, signed and delivered at Kisumu this 14th day of November 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

P. J. Otieno for Odeny for the petitioner

..... for the objector

..... for interested party

HKC/aa0