



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

SUCCESSION CAUSE NO. 36 OF 2006

IN THE MATTER OF ESTATE OF:
PEPELA WEKESA NABUKANDA.....DECEASED

BETWEEN

NYONGESA WEKESA PEPELA.....PETITIONER

~VRS~

BEATRICE NANJALA WAMALWA.....INTERESTED PARTY

JUDGMENT

The deceased Wekesa Pepela Nabukanga died intestate on the 24/02/1996 leaving a widow and several children named in this cause. His son Nyongesa Wekesa Pepela petitioned for letters of administration intestate which was issued to him on 10th May 2006. Thereafter, the Petitioner filed an application for confirmation of grant dated 09/01/2007. The affidavit in support of the application for confirmation of grant sets out the shares of the beneficiaries in paragraph 4. Before the grant was confirmed, the Objector Beatrice Nanjala Wamalwa through her counsel J. S. Khakula & Co. Advocate joined in these proceedings as an objector.

The Objector filed her affidavit in protest of confirmation dated 30/07/2007 claiming ownership of the land through a land purchase agreement between her late husband James Wamalwa.

The Objector (PW1) testified that the deceased Wekesa Pepela Nabukanda sold his land to one Joshua Marango in 1971. In 1973, Joshua sold the same land E. Bukusu/N. Sang'alo/860 to James Wamalwa. Joshua Marango had not obtained title in his name. Later on, the parties agreed that an agreement between the deceased who was still the registered owner and Wamalwa should be made. This was done with a view of having the deceased transfer the land directly to Wamalwa. The transfer was not effected due to illness of the deceased. The deceased had moved from Ndengelwa area where the land is situated and went to live at Myanga where he had some land. The deceased died in 1996 before the land was transferred to the objector's husband. John Wamalwa also died in 1997. The Petitioner and his brothers Thomas Makhanu Wamalwa, Hassan Nyongesa and Silas Waswa invaded the land which was occupied by the objector. They put up structures and drove out PW1 from therein. The objector had sugarcane and other crops on the land.

In a suit by the Petitioner Bungoma Chief Magistrate Court Civil Cause No.325 of 2000 the Objector

obtained an eviction order against Thomas Makhanu Wamalwa and his brothers from the suit premises. The eviction was carried out and the petitioner and his brothers evicted from the suit premises. The temporary structures put up by the trespassers were demolished. The petitioner and his brothers invaded the land again later. The objection filed Land Tribunal Case No.18 of 2001 against the sons of the deceased. The tribunal heard the case and gave an award in favour of the Objector. The Petitioner filed this succession cause without notifying the Objector. She learnt of it in 2007 and filed this objection. The objector produced handwritten land sale agreements between her late husband, the deceased and Joshua Marango.

The Petitioner testified that his deceased father never sold the land to the Objector. The Objector failed to produce any valid land agreements before the court in CM CC No.325 of 2001. He argued that had the land been sold as alleged, the transfer in the name of PW1's husband would have been affected. According to the Petitioner, the Objector has never lived on the land and her intention is to deprive the deceased's beneficiaries of their inheritance.

Mr. Khakula for the Objector in his written submissions urged the court to find in the favour of this client.

The Chief of Bukembe Location in his letter dated 03/03/2006 filed by the Petitioner together with the succession pleadings states that the land L.R E. Bukusu/N. Sang'alo/860 which the Petitioner intends to distribute the heirs of the deceased was bought by one James Wamalwa now deceased. It states further that the widow of the deceased Beatrice Wamalwa sued the family of deceased in court in respect of the land and obtained orders in her favour. The Petitioner used this letter to file this cause. From the letter, one may rightly conclude that it was within the knowledge of the provincial administration and the petitioner himself that the deceased had disposed of his legal interest in the land. The petitioner's claim that he was not aware that his deceased father had sold his land cannot therefore be true.

It is not in dispute that the parties have a long standing land dispute relating to the land E. Bukusu/N. Sang'alo/860. The land is registered in the name of the deceased in this case. The rightful beneficiaries in the estate of any deceased person will be his closest surviving relatives where the legal interest has not been transferred to another party. The Objector produced some handwritten land sale agreements in this case. The first one dated 15/8/1971 is between the deceased and Joshua Marango written in Kiswahili language together with its English translation. The purchase price was Ksh.1290/= and the parcel no. is shown as 860. The agreement was witnessed by the "Omukasa" meaning village elder and one Wasike Walubengo. It was made at Ndengelwa area and the parties thumb printed on it.

The second agreement is in Kibukusu language and translated in English. It is dated 24/08/1973 between Joshua Marango and James Wamalwa for sale of parcel no.860. The purchase price of Ksh.1290/= was paid in installments. Parties signed the acknowledgments on the reverse of the agreement on different dates. The agreement was made at Ndengelwa area and witnessed by the village elder of Ndengelwa village. The Petitioner alleged that the agreements were forged but did not explain why he so claimed. PW2 the village elder testified that he witnessed the two agreements between the parties by appending his signature. It is not in dispute that PW2 was the village elder at the material time.

The judgment of the court in CM CC No.325 of 2000 in which the Defendant was one of the deceased's sons Tom Wamalwa was produced by the Petitioner. The court determined the issues of ownership that the land had been sold to PW1's husband and declared the Defendant and his brother as trespassers. An order of eviction was issued against them which was executed accordingly.

I am aware that a succession cause is not the right forum to determine ownership of land. It is a court of

law possessing such jurisdiction. In this case, the Senior Resident Magistrate determined those issues. The Defendant did not appeal against the said judgment. The decision is still valid to date.

The decision of the tribunal in LDT case no.18 of 2001 followed the court case. The tribunal lacked jurisdiction to determine ownership as provided for by section 3 of the Land Disputes Tribunal Act. The decision of the tribunal has no legal force for want of jurisdiction.

The evidence supports the fact that the deceased moved from Ndengelwa to Myanga after selling the land. The buyer sold it to PW1's husband two years later. The deceased agreed to transfer the land directly to the second buyer. The objector explained that the deceased fell sick and her husband was not able to obtain transfer in his name. There is evidence to the effect that the objector and her husband took possession and started cultivating the land from 1973 to the year 2000 when the sons of deceased invaded it and drove her out. All this evidence was laid before the Senior Resident magistrate who entered judgment in favour of the objector. The Petitioner admitted in cross-examination that at the material time, he lived on his father's plot at Lupita no.910. It was also admitted that the petitioner's father was buried at Lupita when he died. The Petitioner admits in cross-examination that he invaded the Objector's land with his brothers because it belonged to his father.

This succession cause was filed without notifying the objector who had already obtained judgment in her favour. It was dishonest of the petitioner to keep the objector out of these succession proceedings. The land E. Bukusu/N.Sang'alo/860 is still in the name of the deceased. However, the legal interest in the land, the possession thereof had passed to the Objector's husband, now deceased. It is only formal transfer that remained to be effected. The Objector is the legal representative of her deceased husband. The land should be transferred to her name as the grant is confirmed in this cause. The Petitioner and the other beneficiaries of the deceased can only inherit the plot indicated as no.910 in P&A 5 and any other property other than E.Bukusu/N.Sang'alo/860.

The objection proceedings are therefore successful. I hereby order that the grant issued is hereby confirmed in terms of the affidavit of the Objector sworn on 30/07/2007. Plot no.910 will be registered in the name of the petitioner.

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F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 7th day of November 2011 in the presence of Mr Khakula Junior and the Objector.

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JUDGE