



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Civil Miscellaneous Application 94 of 2006

IN THE MATTER OF AN APPLICATION BY SITATI KAMBERE AS A CO-ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF SIMIYU MURUNGA (DECEASED)

SITATI KAMBERE.....APPLICANT
VS
AGNES NASAMBU SIMIYU.....RESPONDENT
JUDGMENT

The Plaintiff herein Sitati Kambere *alias* Sitati Khapele brings this action through originating summons dated 13/3/2006 and filed in court on 23/3/2006. The summons petition for orders:

- a) **The deceased Simiyu Murunga only left one parcel of land L.R. number Ndivisi.Ndivisi/116.**
- b) **The said parcel of land be distributed thus:**

1. HOUSE OF SIMIYU MURUNGA SITATI
 - i) **Agnes Nasambu Simiyu (widow)**
 - ii) **Ezekiel Wanyonyi (son)** **-11.1 acres**
 - iii) **Wellington Kitalie Murunga (brother)**

2. HOUSE OF KHAPELE SITATI
 - i) **Sitati Kambere (cousin)**
 - ii) **Simon Sitati Khapele (cousin)**
 - iii) **Patrick Wafula Kaikai Khapele (cousin)** **-11.1 acres**
 - iv) **Moses Mulongo Khapel (cousin)**
 - v) **John Kevei Khapele (cousin)**
 - vi) **Patrick Murumba Wanyama Khapele (cousin)**

The Defendant Agnes Nasambu Simiyu in her replying affidavit sworn on

18th July 2006 opposes the Plaintiff's proposed mode of distribution. According to the Defendant, the house of the deceased which includes herself and her son Ezekiel Wanyonyi should get 11.0 acres, the brother to the deceased Wellington Kitalia gets 8.0 acres and the Applicant and his brothers who belong to the house of Khapele Sitati gets 3.2 acres.

Parties recorded a consent order on the 9th October 2009 to the effect that:

- a) **The affidavit of distribution by the Plaintiff and Defendant herein filed in P&A No.46 of 2000 be deemed as having been filed in this case.**
- b) **The testimony of the Plaintiff and his witnesses and that of the Defendant and his witnesses P&A No.46 of 2000 be adopted in this case.**

The effect of this order is that the court will determine the mode of distribution and give final orders based on the

evidence of their parties and their witnesses in P&A No.46 of 2000.

The Defendant Agnes Nasambu testified that the deceased Simiyu Murunga died leaving only one parcel of land No. Ndivisi/Ndivisi/116 measuring 22.2 acres. The land was inherited from the parents and grandparents of the deceased. Before registration of the land, the brother of the deceased who was the father of the Plaintiff sold a part of his land. The portion he left was taken by the deceased and registered in his name to save it from being sold. The portion of another brother of the deceased Wellington Kitalia Murunga was also combined during registration. The house of the deceased is entitled to 11.1 acres, that of his brother Wellington Kitalia to eight (8) acres and the house of Khapele Sitati to 3.2 acres. The families have been cultivating their parcels of land for many years which are marked with fixed boundaries.

PW2 a cousin to the deceased confirmed the evidence of PW1 that the land is an inheritance and that Khapele Sitati sold his land to third parties leaving a small portion long before registration of land was done. Boundaries on the land were marked by sisal plants. Each family has buried their dead on their respective portions.

The Plaintiff herein in his evidence in P&A No.46 of 2000 had claimed that the deceased had two parcels of land registered in his name being Ndivisi/Ndivisi.116 and Bungoma/Kabisi/527. In this case (O.S) the Plaintiff abandoned the claim on the second parcel as clearly after he discovered that the land was not registered in his name. The Plaintiff testified that the land in issue Ndivisi/Ndivisi/116 was inherited from his grandfather by the deceased and his brothers who include Plaintiff's father Khapele Sitati. The land was all registered in the name of the deceased. The Plaintiff is claiming 11.1 acres but he is not sure how many acres belonged to his father Khapele Sitati. He denied knowledge that his father sold part of the family land but admits that each family ploughs certain portions marked with sisal boundaries.

The Plaintiff's witness DW2 testified that the family land was registered in the name of the deceased but has no idea how much land belonged to the Defendant's father. DW3 testified that the deceased held the land of two families together and that he too did not know what acreage each family was entitled to.

DW4 supported the evidence of registration of the family land in the name of the deceased and said that Khapele Sitati's family are entitled to four (4) acres. He acknowledges that the portions of each family are marked by sisal plants fixed by "**lugogo**" meaning chief.

It is clear from the evidence that is not disputed that the deceased held family land in his name. The Plaintiff claims 11.1 acres which is half portion of the whole parcel. In his evidence and that of his witnesses DW2 and DW3, none of them knows how many acres out of the whole parcel belonged to the Plaintiff's father Khapele Sitati. It is only one witness DW4 who said it was four (4) acres which the clan wanted transferred to the Plaintiff even before the succession was filed. There is evidence to show that the land Ndivisi/Ndivisi/116 does not belong to two families as alleged by the Plaintiff but to three. These include the families of the parties and that of Wellington Kitalia, another brother to the deceased. This person was not a party to this case leading to the conclusion that he was happy with the share the widow of the deceased had proposed for him. The parties and their witnesses all agreed that their respective portions are marked with sisal plants. The Plaintiff and his witnesses except DW4 did not know the acreage of the Plaintiff's father.

On the other hand, the Defendant and her witness gave credible evidence in support of her proposed mode of distribution. All parties agreed that the parcel of each family is marked with sisal plants which existed during the lifetime of the deceased. The Plaintiff did not tell the court the size of the portion his father's family has been cultivating before the succession cause was filed. His witness DW4 said it was four (4) acres which comes close to the acreage of 3.2 acres given by the Defendant. Although the

Plaintiff pleads ignorance that his late father Khapele sold part of the family land, this was confirmed by his witness DW3 who said that Khapele sold part of his land to 3rd parties.

I am convinced that the Defendant's proposed mode of distribution is the one which the three families involved had agreed on during the lifetime of the deceased. The land was registered in deceased's name after demarcation in 1963 which is 47 years ago. The deceased died in 1973. The succession cause was filed in the year 2000. It is evident for over 40 years, the three families have peacefully co-existed on the land and cultivated their respective portions. The rightful heirs of the deceased's estate herein are the Defendant who is the widow and her son Ezekiel Wanyonyi. The widow is a woman of honour because she has recognized the rights of brother in laws and their children in the estate of the deceased. On the other hand, the Plaintiff who is a cousin of deceased wants to claim half of the estate with full knowledge that the land in issue belongs to three families. Yet his claim is not supported by cogent evidence.

It is my finding that the Defendant has proved on the balance of probabilities that her proposed mode of distribution is the right one which will serve the interest of the three families without disturbing the status quo which has prevailed for almost half a decade.

I therefore dismiss the claim of the Plaintiff and order that the grant in P&A No.46 of 2000 be and is hereby confirmed in terms of the Defendant's affidavit sworn on 12/10/2004. Certificate of confirmation of grant to issue.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 8th day of June 2010 in the presence of Mr Ocharo for the plaintiff.

F. N. MUCHEMI
JUDGE