



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE 121 OF 2005

RAPHAEL MUKABANA OKUMU -----.....----- DECEASED

IN THE MATTER OF: EDWIN MASIMBA MUKABANA

MARTHA JALENGA ODONDE -----.....----- PETITIONERS

-VERSUS-

DAVID OKUMU OMUSAMIA -----.....----- OBJECTOR

R U L I N G

Coram:

J. W. Mwera J.

Siganga Advocate for the applicant/petitioners

Oyagi for the respondent/objector

Raymond CC.

In this cause the only issue that came to court for determination was the distribution of the estate of the late Raphael Mukabana Okumu who died on 14.6.2003 at a place called Ekero in Butere – Mumias district.

From the record this cause was filed by Edwins Masimba Mukabana jointly with Martha Jalenga Odonde, hereinafter to be referred to as Martha and Edwins. On 25/2/2005 they applied for a limited grant to bring a suit in respect of the estate of the Raphael Mukabana Okumu, the deceased. The summons was under a certificate of urgency and on the same 25.2.2005 a limited grant of letters of administration ad litem issued to the two – Edwins and Martha. Mr. Siganga, Advocate was and is still acting for the two petitioners.

On 14.9.2005 David Okumu Omusamia herein referred to as David (the objector), through M/s Kasamani & Co. Advocates, filed a summons invoking the powers of Rule 44 (P & A Rules) for orders that the limited grant issued to the 2 petitioners be nullified or revoked. The petitioners replied to the summons. There were other affidavits filed in the cause but because it came before this court only on the issue of distribution of the deceased's estate, it remained and the court treated each side in its original state.

It may be added that on or about 23.9.2004 the objector (David) filed an originating summons under the relevant provisions of law seeking orders that the petitioners (Edwins and Martha) do furnish a comprehensive account in respect of the properties of the estate plus any other income etc. It does not appear that fees for that originating summons were paid. A receipt was not easily traced on the file (KSU HCCC 80/04 (O.S)) but be that as it may. The file was consolidated with the subject succession cause and, again as said earlier, in order for the court to hear and it did hear, oral evidence on the issue of the distribution of the deceased's estate whose assets were agreed and shall appear below. The beneficiaries were also agreed to be the four children of the deceased namely:

- i) David Okumu Omusamia - son
- ii) Edwins Masimba Makabana - son
- iii) Martha Jalenga Odonde - daughter
- iv) Claire Akola Osama - daughter.

At the hearing and in submissions the estate in question comprised the following assets with estimate values shown:

- i) Land Parcel No. SOUTH WANGA/EKERO/607 - KSH 670,000/=
- ii) Land Parcel No. SOUTH WANGA/EKERO/500 - KSH 2,495,000/=
- iii) Land Parcel No. SOUTH WANGA/EKERO/592 - KSH 150,000/=
- iv) Commercial Plot No. 3 EKERO MARKET - KSH 1,800,000/=
- v) Shares at Mumias Sugar Company Ltd: While the petitioners put these at 17410 with a value of Ksh 640,000/=, the objector noted 17600 shares worth Ksh 316,800/=
- vi) Money at Kenya Commercial Bank (Mumias) Ksh 300,000/=
- vii) Dividends from Mumias Sugar Company Ltd Ksh 53,091/65
- viii) Rents from Plot No. 3 and SOUTH WANGA/EKERO/500 – 151, 640/=
- ix) Four (4) head of cattle - Ksh 24,000/=.

It may be added however that David (the objector) added two more items which the petitioners did not have in their list but the AGREED list of 2.10.2008 had them:

- a) Cane proceeds from Edwins Mukabana - Ksh 36,478/=
- b) Cane proceeds from David Okumu - Ksh 4,300/=

If nothing much turns on these two items from the review of the evidence, then the court may be minded to let these sums remain with each of the two principal disputants. The list of the 4 beneficiaries and eleven (11) assets was agreed and signed on 2.10.2008. So evidence was taken accordingly.

David Okumu (PW1), the objector told the court that he had two homes – on plots no. EKERO/500 or simply, plot 500, and on EKERO/607. He claimed that their father bought plot 607 while the other was ancestral on which Edwins Masimba (1st petitioner) also has a home. Plot 500 has also a commercial building which, it transpired is operated by PW1. Both their parents were buried here. The land is also agricultural. He would like to share it with Edwins, excluding the 2 sisters (Martha, 2nd petitioner and Claire).

Plot 592 another ancestral plot had PW1's sugar cane on it. No building. He proposes to share it with Edwins Masimba Mukabana.

Plot 607, bought by their father the deceased should also be shared between the two brothers. It is agricultural.

Plot No. 3 Ekeru Market – with shops and houses to rent, should go to him alone – David Okumu, (PW1).

- The proceeds in KCB Account Ksh 300,000/= should be showed among all the four heirs/beneficiaries noted above.

- The same with 17,600 shares at Mumias Sugar co. Ltd – among all the four heirs.

Rents totaling Ksh 151,640/= which came from Plot No. 3 (Ekeru) and the commercial building on plot 500 to be shared among 3 heirs excluding Claire who was said not to be forthright in declaring the actual rentals per month.

Coming to the sugar cane dividends Ksh 53,092/65, all four heirs to share.

PW1 claimed that Edwins received Ksh 1,281,357/= from cane proceeds from plot no. 500. He spent all of it and held a balance of Ksh 36,478/= only, while he himself had from sale of sugar cane ALSO a balance of Ksh 4,300/=. The total of Ksh 40,778/= to be shared by all four.

In cross – examination the court heard that at no time did the clan/family discuss the issue concerning the late Raphael Okumu's estate. PW1 farmed on plot 607 where he has a home. He once lost a daughter-in-law whom he buried on plot 500 but not on condition that he vacates that plot. Their father did not give plot 500 to Edwins before his death. PW1 has a home and workshop there. His relationship with Edwins and Martha was cordial and at no time did he threaten Edwins. They can live side by side if they share all the assets equally. He seemed to deny a consent order entered in KAK. HCCA 15/05 on vacating plot 500. Coming to the four head of cattle, part of the estate, PW1 said that each of the four should get one. And as the eldest son, his total share of the estate working to about 63% was fair. He did not want any of their 2 sisters (Martha and Claire) to get any of the real properties because they were married. They never staked such a claim anyway. All they wanted was to share plot no. 3 Ekeru. He should not be excluded from plot 500 – an ancestral property, at all.

Next was PW1's son Godwin Obongita Okumu (PW2). His evidence was more or less like that of his father (David) except that according to him the market plot no. 3 should be shared between his father and uncle and not to go to the former wholly. PW2 did not agree with item (d) of the consent order in the civil appeal cited above (the appellants were the 2 petitioners plus Claire VS the objector and PW2), which was that the David Okumu should move from plot 500 by December 2005. To PW2, the relations between his father (PW1) and Edwins (1st petitioner) are strained. It was then the turn to hear Edwins Masimba (DW1) and he appeared to have spoken also for Martha the 2nd petitioner.

DW1's story was that David (PW1) was his half-brother and Martha and Claire were his sisters. This witness preferred that his brother take plots no. 607, 592, the commercial building on plot 500 plus the four head of cattle.

Ekeru market plot no. 3 should go to the 2 sisters jointly, while the Mumias Sugar Company shares (17410 the original total) go to Martha.

DW1 further testified that he held the dividends certificate. All was safe. That Claire should retain the Kenya Commercial Bank deposit of Ksh 300,000/= plus the rental income from the properties she had been managing. She had applied some of the rents to maintain the buildings.

As for plot no. 500, DW1 alone should have it. He has a house on it worth Ksh 2.5 M. But David should have the commercial building on this plot which he has always rented out. Not only did the government

take part of plot 500 for a road reserve but the deceased sold 4 parts of it which sales DW1 wishes to honour. It was added that DW1 should take all of plot 500 while PW1 (David) takes plots no. 607, 592 – not only because he has his home on one and he forms the other but also the two cannot live together, their relations being greatly strained with David threatening to do harm to Edwins. DW1 went on to narrate the incidents of rows between the two. That indeed before Raphael died and as early as 1987, he had indicated that David, as the eldest son, move out of the family compound onto plot 607. He did not go but has since built a home there for his second wife. Then plot 592 was given to him in 2002. He farms there. In turn the deceased told DW1 that he would stay on plot 500. He encouraged him to build there and plant trees which DW1 did. Then David's daughter in-law died. He resisted burying her on plot 607. A court case was filed followed by an appeal. The clan then met and agreed to a resolution which included burying the dead woman on plot 500 on condition that David move out of this plot by December 2005 (Exh. D2). Those terms were later made a consent order (Exh D1) in the appeal at Kakamega. DW1 maintained that as he solely occupies plot 500, plots no. 607 and 592 should go to David. He had no intention to share them. This witness said that also plots no. 607 and 592 were ancestral as no. 500. DW1 had told the court that plot 607 was bought. But DW1 explained that this land belonged to an uncle – family land. It was given to an in-law to procure a loan. He defaulted. Then the deceased Raphael rescued it by paying the loan and having the plot revert to the Okumu family. Then it was put in the deceased's name.

The court further heard that Claire was married while Martha had separated from her husband in 1980. She is as good as divorced. She lives with her sickly child with DW1 who supports them.

Coming to the value of the three plots: no. 500, 607, 592, it appeared that after David takes the commercial building on plot 500, that is worth Ksh 750,000/= the portion Edwins would enjoy could be considerably reduced considering that the government road reserve should be allowed for as well as the four buyers. David would enjoy something around Ksh 1.7M including the values of plots no. 607, 592, noted above. After resurveying plot 500, following the excision thereto, if it transpired that Edwins was having an undue advantage, he was ready to pay the excess to the estate.

Shaban Wangatia Okoti (DW2) knew the deceased Raphael – a younger uncle. He lived in the deceased home and knew the litigants herein. The deceased called his three other brothers when David became an adult and gave him plots no. 907 and 592. DW2 was present. As per custom, the younger son Edwins was to have plot 500. David was not happy. When he lost a daughter in-law, it was proposed that PW1 bury her on plot no. 907 where he had built for one of his wives. David refused. Eventually a family meeting agreed that she be buried on plot 500. David had been farming on plot 907 since 1985. The two brothers lived on bad terms. It is time David moved his elder wife to any of his plots no. 907 or 592 and leave Edwins in peace on plot 500 – as their late father indicated in 1982.

In the parties respective submissions, while Mr. Oyagi for the objector reiterated the position as per the evidence, Mr. Siganga similarly held the position of his clients.

In this court's opinion the fairer, more practical and more reasonable way is to distribute the estate of the late Raphael Mukabana Okumu in the following manner:

1.SOUTH WANGA/EKERO/500: It shall go to the 1st petitioner Edwins Masimba. But the objector David Okumu will have the commercial building thereon which he has been operating.

2.SOUTH WANGA/EKERO/592, 607: Both go to the objector David Okumu. He has been farming on both plots which were given to him by their late father. He has his second wife's home on plot 607.

3.EKERO PLOT 3: It shall go to both Martha and Claire. According to David Okumu their sisters are not entitled to any land of their father because they were married. He was probably invoking the customary practice of their community. In this court's opinion married or not these two are entitled to inherit from their father and in any case both sides were agreed that the heirs/beneficiaries of the deceased's were David Okumu, Edwins Masimba, Martha Odonde and Claire Akola. They will thus get plot no. 3 Ekeru market jointly.

4. Mumias Sugar Company Ltd shares – 17410: They all go to Martha Jalenga Odonde. The court was satisfied from the evidence (See PW2 Godwin, DW1 Edwins) that that is a fair bit.

5 & 6. Deposits in KCB – (Mumias) - Ksh 300,000/=: These will go to Claire Akola. She also collected rents from the deceased's property and the court heard that she applied them to maintain the properties. She should keep the money for her own use and benefit comprising the bank deposits and the rents collected from plot no. 3 (Ekeru) and plot no. 500.

6. Four Head of cattle: While David Okumu desired that each of the 4 heirs take one, Edwins was happy to give them all to David, their elder brother. Quite fair. David will have the four head of cattle.

7. Mumias Sugar Company Ltd. Dividends – Ksh 53,091/65. All were agreed that they go to Martha Odonde and this court directs that it shall be so.

8. Cane Proceeds: It was noted here that both David Okumu and Edwins Masimba had farmed the deceased's parcels of land, sold the cane and kept the proceeds. They had balances standing at a total of about 40,000/=. Each one will keep his balance – David Okumu – Ksh 4,300/= and Edwins Masimba – Ksh 36,478/=.

The above was arrived at first and foremost considering

the principle of equity among the four heirs. The court

had values of the properties and cash before it. And

although it should never be forgotten that this court

sitting as it was, is one of "equity and not equality"

everything possible was put into ensuring that the total share of each heir was not outrageously set as to be of a

disadvantage to the other or the rest. For instance as the sons of the late Raphael shared most, if not all of his real property (Plots no. 500, 592, 607), the daughters

jointly enjoy other assets plus Ekeru plot. No. 3.

It was also not lost on the court that David Okumu

and his son Godwin were much less forthright than

Edwins Masimba e.g. on the consent order of 15.4.2005.

because it did not appear favourable to David Okumu

especially as to its item (d). It was a consent court order

in an appeal where he was a party. It was not set aside,

varied or appealed. Part (d) read:

“(d) That the first respondent to move out of no. SOUTH WANGA/EKERO/500 on or before December 2005.”

As noted above the clan /family met when David Okumu lost a daughter in-law – the wife of Godwin Obongita (PW2). He insisted on burying her on plot no. 500 when the rest of the family knew that he was

given plot nos. 592, 607 as the elder son to move to and leave plot 500 to the younger Edwins. This was done during the life time of the late Raphael Okumu and the court was inclined to believe Shaban Wangatia Okoti (DW2), an elderly close relative who said that he was present when the deceased made his views known to his three brothers at a meeting. But to cut the long story short, even after they resolved that David Okumu would bury his daughter-in-law on plot 500 but himself move from it by December 2005, this was followed by the consent order incorporating the same, in order to resolve the burial issue. But he and his son told this court that all that seemed to have been some falsehood or fabrication. The court was of the view that David Okumu and his son (Godwin) were “cooperating” to mislead, misinform or not inform this court at all.

Going by the above, this court directs that distribution of the estate herein follow the format set out above. Each party to pay its own costs.

It may be added that a formal application to succeed the estate of the late Raphael Okumu be filed jointly by David Okumu and Edwins Masimba, with the usual and relevant detail so that the grant is confirmed and formal distribution takes place. That application should be made in the next 45 days so that due process follows. If anyone acts as if to frustrate the process, due application should be filed for appropriate orders. Indeed David Okumu may as well do himself some service if he begun this early to move his son and family from plot no. 500.

Orders accordingly.

Delivered on 10.12.2008.

J. W. MWERA

JUDGE