

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 882 OF 2012

IN THE MATTER OF THE ESTATE OF REMKUWI ONGOMA (DECEASED)

JUDGMENT

1. On the 25th June 2019, I delivered a ruling herein where I consolidated two causes that had been initiated in respect of the estate of the same individual, the deceased herein. The two causes are the instant cause and Kakamega HCSC No. 903 of 2012. I made the instant cause file the lead file. The orders that had been made confirming the grant herein, were also set aside, and I directed that the confirmation application dated 17th November 2015 to be heard afresh.
2. The summons for confirmation of grant of 17th November 2015 had been at the instance of Emmanuel Wanzabasi Musa, who was one of the administrators appointed vide the grant made on 20th November 2014, and issued herein on 27th November 2014, jointly with David Jakongo Murunga. I shall refer to Emmanuel Wanzabasi Musa as the applicant. He describes himself as the only survivor of the deceased, who had died possessed of a property known as E/Wanga/Eluche/667. He identified Leo Okusimba Okech, Asman Idi Were, Tom Wesonga Mukhwaya and David Jagongo Murunga as purchasers. He proposes that the property be shared out equally between the four alleged purchasers.
3. An affidavit of protest was filed in the matter on 29th July 2019, by David Jakongo Murunga, sworn on 30th July 2019. I shall refer to him as the protestor. He describes the applicant as a brother of the deceased, and himself, the protestor, as a nephew of the deceased. He avers that it was the intention of the deceased that the protestor get a half share of his estate. He further avers that the deceased had not sold any part of his estate to anyone before he died, and accuses the applicant of intermeddling with the estate by purporting to sell portions of it to Leo Okusimba Okech, Asman Idi Were and Tom Wesonga Mukhwaya. He proposes that the property be shared equally between himself and the applicant.
4. The applicant has responded to the protest affidavit by filing a further affidavit, sworn on 27th January 2020. He avers that the deceased was his brother. He says that during the filing of the succession cause he, the applicant, and the protestor had agreed to sell an acre of the land to Tom Wesonga Mukhwaya, and he has attached copy of what he says is the sale agreement. He says the money raised was intended for the purpose of applying for letters of administration intestate herein. He avers that that he agrees with the protestor that he and the protestor share three acres equally, after taking into account the one acre sold to Tom Wesonga Mukhwaya.
5. The confirmation application was canvassed by way of *viva voce* evidence, following directions given on 12th February 2020.
6. The applicant told the court that the deceased was his brother and a brother to the father of the protestor. He said that their father only had three sons, who he identified as Luka Omurunga, Remkuwi Ongoma and Immanuel Wanzabasi. He stated that Luka Omurunga was the father of the protestor. The deceased had not married, and did not have children of his own. He died possessed of E/Wanga/Eluche/667. He testified that the father of the protestor had two sons and four daughters, who were all alive, except that one had disappeared. He said that he and the protestor sold a portion of E/Wanga/Eluche/667, to raise money for administration of the estate. He stated that they then agreed to share the estate equally. He proposed that one acre should be given to the buyer, and then the balance be shared equally between him and the protestor. He said that it was the protestor who has built a house on the land for his second wife. He described Leo Okusimba Oketch as his son, Asman Idi Were as his neighbour and David Murunga as his nephew.
7. The protestor confirmed that the deceased and the applicant were his uncles, being brothers of his late father. He also confirmed that the deceased was not survived by either a spouse or children. He confirmed too that he, the protestor, had siblings, the daughters were alive, but the fate of his sole brother was unknown for he disappeared. He said that the said brother, who had disappeared, was mentally unsound. He proposed that the land be shared equally between him and the applicant. He said the alleged sale to Tom Mukhwaya was a lie. He stated that the applicant had lied at confirmation in that he and the others were all buyers, adding that Tom Mukhwaya was introduced at the tail end of the matter. The protestor was cross-examined by the applicant, he stated that his brother, who disappeared, was called Chrysantus Abuti, and he had a wife known as Consolata Abuti, and they had children.
8. The deceased herein died in 1970. That was before the Law of Succession Act, Cap 160, Laws of Kenya, came into force. By dint of section 2(2) of the Law of Succession Act, the estate was for distribution under customary law, and not Part V of the Law of Succession Act. The parties did not attempt to present any evidence on the applicable customary law. It is common ground that the deceased did not have an immediate family of his own, and, therefore, the next in line to inherit should be his siblings. The siblings are the applicant and his late brother, the father of the protestor. As the protector's father is dead, the share due to him should go to his survivors. His survivors are his two sons and four daughters. Under customary law the daughters would not be entitled, so the share ought to go to his two sons.
9. I was told that there was a sale to Tom Wesonga, which was done to raise funds for the succession cause. This cause was initiated on 14th August 2012. The sale agreement lodged herein, as evidence of the transaction that the parties entered into with Tom Wesonga was allegedly entered into on 29th January 2015, some two years and nine months after the succession cause was initiated. It cannot, therefore, be the case that the said transaction was intended for the succession cause. In any event, under section 82 of the Law of Succession Act, immovable property could only be sold after confirmation of grant. The grant herein was confirmed on 27th October 2015, long after the said sale. Clearly the same was unlawful. Secondly, the said sale was not sanctioned by the court. Thirdly, I do not trust the tale that the applicant tells

about this sale, when he lied to the court, in his affidavit in support, when he identified the protestor and Leo Okusimba Okech and Asman Idi Were as purchasers, when in fact they were not.

10. The final orders that I shall make are as follows:

- (a) That E/Wanga/Eluche/667 shall be shared equally between the applicant and the family of the late Luka Omurunga;
- (b) That the share due to the family of the late Luka Omurunga shall thereafter be shared equally between the protestor and his brother Chrysantus Abuti;
- (c) That the grant made herein on 20th November 2014 is hereby confirmed on those terms;
- (d) That a certificate of confirmation of grant shall issue accordingly in those terms; and
- (e) That each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE