



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO 82 OF 2010

IN THE MATTER OF THE ESTATE OF TITUS SAWE CHUMO - (DECEASED)

EDWARD CHUMO.....PETITIONER

-VERSUS-

LEAH C. SONGOK.....APPLICANT

JUDGMENT

The applicant (**LEAH SONGOK JELEL**) filed summons by a dependant vide **section 26 of the Law Succession Act** on the 14th February, 2014, seeking:

- i. Injunction to issue against David Sugut (now deceased) and Edwin Chuma (administrators), their brothers and sisters particularly Jane Chelimo, from encroaching, trespassing onto, fencing, intermeddling with Leah's (applicant) quiet possession of the deceased's person's land Tulwet/Tulwet Block 3 (RIRONI)/1**
- ii. Declaration that the said land was given as a gift to the applicant by the deceased and hence she ought to be included as a beneficiary and the property transferred to her upon confirmation of grant.**

The applicant who is the deceased's youngest sister contends that she has remained that she has been in continuous, uninterrupted occupation of the whole said land parcel for a period of over 40 years having moved there on or about 1971 after coming back from Laikipia where there was insecurity. She initially lived in her mother/s house, whilst her 7 children attended school with the deceased's children. The deceased (**TITUS SAWE CHUMO**) provided shelter and maintained her (the applicant) and her children for over 10 years. The 3rd objector called 3 witnesses in support of her case whereas the 1st and 2nd objectors elected not to participate in the matter, the petitioner on the other hand called 2 witnesses.

It is her evidence that in the 1980's, the deceased moved her plus her family to the parcel of land now in contention namely **TULWET/TULWET BLOCK 3 (RIRONI)/1** which he gave her as a gift because she was his sister. A title deed in respect to this land was issued in the year 1992 in the names of the deceased **TITUS SAWE CHUMO** who did not transfer the said piece of land to the applicant. However, he gave her the title for safe-custody intending to effect transfer once he recovered, but this never happened.

The applicant stated that until the death of the deceased, she has all along lived on that parcel of land in quiet, peaceful and exclusive possession and full utilization of the said land for her benefit and that of her family. Moreover, her husband and three of her children have been buried on the said piece of land without anyone raising an objection. She seeks to rely on a purported Nandi culture which states that once an individual buries their family members on the land, it confers a right to own it.

The children of the deceased and especially **JANE CHELIMO** now want the applicant out of the said parcel of land, as demonstrated by the events of January, 2014, when **JANE CHELIMO** went to the applicant's homestead/land and fenced off a portion of the said land parcel. That was confirmed by the said Jane Chelimo who testified as DW1.

In addition, the deceased (**TITUS SAWE CHUMO**) allowed the applicant to pay the consideration to the said piece of land on friendly and/or brotherly terms. In her view, this was clear proof of his intention to bequeath it to her exclusively. Further in the applicant's summons for revocation or annulment of grant and her supporting affidavit dated 8th August, 2018, the applicant relies on annexure 'LJS4' to support her assertion that she was all along paying proprietary rates in regard to the said parcel of land.

BETHWEL KIPKOECH SINGOEI (PW2) who has been the chairman of **Rironi Farmers' Co-operative Society** from 1978 to date testified that the deceased had given the applicant the piece of land in question in 1980, and she has used it to date. It is his evidence that if

the land did not belong to the applicant, custom would not have permitted her to bury her husband and children on that land.

On cross examination he stated that;

“Titus did not sell the land to Leah, if he did, I did not inquire...Titus never told us he sold the land to Leah. All I know is that Leah lives on that land... The deceased gave Leah the land to live on, and cultivate...”

CHIEF JULIUS KIPROP LIMO (PW3) of **TULWET** location also confirmed that the applicant has lived on the land in question, as it had been given to her by her late brother **TITUS**. That in the 29 years when he served as chief, he never saw any of the deceased’s children on that land. He had in the past issued her with burial permits to enable her bury her own family members on the land, although he could not tell under what circumstances the applicant had occupied the land.

It was the petitioner’s (**JANE CHELIMO**) who testified as DW1) evidence on the other hand stated that previously. Her late brother (**DAVID SUGUT**) used the disputed parcel to grow vegetables and maize. He had also erected a small structure which served as worker’s quarter. When he stopped using the land, she took over and used 7 acres out of the 15 acres, while the applicant used the upper part whose acreage she does not know. In 2011/2012 the Petitioner began to lease out the land, but by 2013, she realized that the applicant the crops which were planted thereon. Thereafter it became a battle of wits with each trying to out-do the other in planting crop, and pulling it out in equal measure.

DW1 explained that she had done an informal demarcation of boundaries on the land, but as matters escalated, she reported the issue to the **DO Kesses**, as well as to the police. Not much could be done about her complaint on grounds that a succession cause had not been determined

DW 1 told this court that the applicant had been married in Laikipia, but when she returned in 1969 with her children, DW1-s mother welcomed her, and they even lived together on another parcel. However due to a lot of bickering between the two women, the deceased said the applicant should move out, and that is how she got to occupy the property now in dispute. She denies the assertions that the appellant bought the land, or that it was given to her as a gift, saying that her late father acted out of sympathy and mercy, and gave the applicant the land to use 7 acres, and she states that she has no objection to the applicant being given 7 acres saying, the problem is that the applicant wants the entire 15 acre

It is contended that he deceased had directed his daughter, **JANE CHELIMO** to share the said parcel of land with the 3rd objector wherein her sister utilized half of the said land but in 2016 the 3rd objector forcefully encroached into her sister’s portion of **7.5 acres** and evicted her from the suit property which she had been ploughing. Prior to the encroachment DW1 had fenced her portion but the 3rd objector maliciously destroyed the same and DW1 reported the incident at **Kesses** Police Post. Since then the 3rd objector has been forcefully utilizing the entire land to the detriment of DW1 who is a biological daughter to the deceased who has not been provided for with any other property.

EDWARD KOECH (DW2), a brother to DW1, testified that the applicant did not buy the parcel of land, but was given the same to share with **JANE at 7.5 acres each**. He knows this because he used to plough the two portions for them using his tractor, before the applicant forcefully evicted DW1 in the year 2016. Attempts at a truce, by bringing in a surveyor to mark respective portions, and having DW1 fence her share only aggravated matters

On cross-examination he stated that: **“Our father had said Jane and Leah should share the Rironi property”**

The petitioner/respondent pointed out in the submissions that although the applicant pleaded the law of gifts, at the hearing she abandoned the claim and said that her claim was based on contract. She alleged that she purchased the suit property and paid the deceased but that this is not supported by any documents to proof any payment for purchase to back the claim.

It is argued that the claims made in court by the objector regarding payment to the deceased is an afterthought intended to deny DW 1 her right over the disputed land. This court is urged to consider the provisions under **section 3 of the Law of Contract Act**, contracts relating to disposition of interest in land which must be in writing and signed by all parties to it. In support of this position the respondent relies **on the case of, DAUDI LEDAMA MORINTAT V MARY CHRISTINE KARIE & 2 OTHERS [2017] eKLR held as follows:**

“...The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the Law of Contract Act which the plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of the contract of sale is sound. With respect, that view cannot be correct. The claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable.”

In the case of Silverbird Kenya Limited –vs- Junction Ltd & 3 Others [2013] eKLR which came before me sitting at a different court station (Milimani Environment and Land Court, Nairobi) an application had been made by the 1st defendant to strike out the plaintiff’s suit on the ground that the lease on which it was anchored had not been signed in contravention of Section 3(3) of the Law of Act. In the suit, I stated inter alia:-

“...In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff’s claim against the defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff’s suit must fail for being in contravention of Section 3(3) of the Law of Contract Act,

Cap 23 Laws of Kenya.”

In the present suit there can be no dispute that the plaintiff's suit is predicated on the alleged oral agreement of sale entered into in 2008 as can be deciphered from the pleadings and material placed before the court by the plaintiff. Without placing reliance on that oral agreement, the plaintiff would be without any cause of action against the defendants. The plaintiff under paragraph 3 of the affidavit in support of the application for injunction depones:

“...I paid the defendant kshs.240,000/=, the remainder of kshs.60,000/= I was to pay before an advocate at the time we were to sign and execute the transfer documents, which was never to be.”

The court held that the contract was un-enforceable as it related to a disposition of an interest in land and such a contract ought to have been in writing and signed by the parties to it and witnessed as required under **Section 3(3) of the Law of Contract Act**. 13. In the instant suit, I am satisfied the plaintiff is seeking to effectuate a contract that clearly did not comply with the provisions of Section 3(3) of the Law of Contract Act.

From the above background, these issues are;

- i. Whether the applicant herein Leah Songok Jeles was a dependant of the deceased (Titus Sawe Chumo).**
- ii. Whether the property Tulwet/Tulwet Block 3 (RIRONI)/1 passed by way of gift to the applicant.**
- iii. Whether the petitioner's case has any merit and their prayers sought granted.**

Section 27 of the Law of Succession Act gives court discretion in making orders regarding dependants.

It states;

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provisions for him by way of periodical payments or a lump sum and to impose such conditions, as it thinks fit.”

Section 28 of the act gives guidelines on which factors to consider in making the following order.

These factors are;

- a. The nature and amount of the deceased's property;
- b. Any past, present or future capital or income from any source of the dependant;
- c. The existing and future means and needs of the dependant;
- d. Whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- e. The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- f. The general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

For purposes of section 29(b), dependant is defined to mean;

...Such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death...

This court is urged to be guided by the case of ***Beatrice Ciamutua Rugamba –versus- Fredrick Nkari Mutegi & others, Chuka Succession Cause No. 12 of 2016***. Which held that a dependant under section 29(b) and (c) must prove that he/she was maintained by the deceased immediately prior to his demise, and not harp on the mere relationship that matters.

Has the applicant sufficiently proven dependency on the deceased? I think it has been adequately demonstrated that the deceased acted as his sister's keep in ensuring that she had land to live on and grow crops. In effect he provided maintenance for her, albeit by providing the resources.

The fact that the, does not give her an automatic right to take the entire parcel applicant is only interested in the parcel of land she has lived in all along. The defence in this regard also confirmed to this court that the rest of the beneficiaries have all been provided for.

The court is urged to give the applicant the whole parcel of land to ensure fair and equitable distribution.

Drawing from Cravens Estate 1937 Chancery 423-426 where the court emphasized the conditions essential to a Donation Mortis Causa in the following terms:

...Firstly, a clear intention to give, but to give only if the donor dies, whereas if the donor does not die, then the gift is not to take effect and the donor is to have the subject matter of the gift. Then secondly, the gift must be made in contemplation of death, by which is meant not the possibility of death at some time or other. Thirdly, the donor must part with donation over the subject matter of the donation...

Also that the case of Nourse LJ in Sen –versus- Headbery 1991 Ch. 425 held that the right on gifts in contemplation of death to also apply to land interest.

The Learned Judge restated the law on the requirements of a valid gift in contemplation of death in the following language;

“...First, the gift must be made in contemplation although not necessarily in expectation of impending death and that there must be a delivery of the subject matter of the gift, or the essential indicia of title thereto, which amount to a parting with dominion and not mere physical possession over the subject matter of the gift.”

The case of King –versus- Chiltern Dog Rescue 2015 EWCA CIVIL 581, is cited to demonstrate the Court of Appeal’s definition of ‘**Dominion**’ to mean physical possession of (a) the subject matter or (b) some means of accessing the subject matter such as the key to a box or (c) documents evidencing entitlement to possession of the subject matter.

The applicant’s court urges tis court to find that, the guiding principles for purposes of making gifts in immovable property is to effect the transfer by registering the gift or in any way delivery of dominion as held by Lord Jackson in the above case, and find in favour of the applicant.

ANALYSIS

The 3rd objector alleged that the deceased gifted her that parcel of land known as **TULWET/TULWET BLOCK 3(RIRONI)/1** measuring 5.75 ha by the deceased. In her testimony however she claimed that her claim was based on contract having purchased the said parcel of land from the deceased but failed to produce any documentary evidence. It is not clear what her claim is pegged to, was it a gift or was she a purchaser?

It is not in issue that the deceased is the registered owner of the suit property in issue and that the 3rd objector was not utilizing the entire land until 2016 when she meted violence on DW1. David Sugut used the land as a grazing field at some point whereas DW2 even ploughed the said land for the benefit of the objector and her sister, DW 1 and each party was peacefully occupying her respective portion. I concur with the respondent that there is no evidence of purchase or loan repayment tendered.

It is not in issue that the said parcel of land was registered under the name of the deceased even after his death. The 3rd objector’s claim to have been gifted the said parcel of land is contested as untenable, and at worst amounts to an imperfect gift and the same cannot be amended by law. The basis for this submission is that the said title was in the name of the deceased and no consent of the Land Control Board nor transfer was effected by the objector.

The prevailing situation herein is almost on all fours with what arose in the case of Margaret Muthoni Kariuki & another v Nelson Kibuchi Murage & 2 others [2016]eKLR which held as follows:

“.....Indeed this Court is satisfied that the only thing the plaintiff has done on the suit land is develop it as there is evidence that she has been selling tea to the KTDA (see her annexures MMK 5). What is clear is that at some point, the 1st defendant said he wanted to give her the suit land and there was even an attempt to sell it to the plaintiff at Ksh.2,000,000 in December 2013 but the 1st defendant reneged from that offer. By her own supporting affidavit in paragraph 20, she admits that the 1st defendant “betrayed” and “mis-used” her. The truth of the matter however is that if the 1st defendant really wanted to gift her the suit land, he had to comply with both the substantive law and statutory procedures relating to transfer of agricultural land which clearly the suit land is. That would of course require the necessary Land Control Board consent and thereafter the disposition would have to be effected by a transfer in the prescribed form as provided under Section 43(2) of the Land Act which provides:-

“A proprietor may transfer land, a lease or a charge to any person (including himself or herself) with or without consideration, by an instrument in the prescribed form”

The 1st defendant merely made an oral promise and when the plaintiff tried to get him to sign an agreement and even went with him to a Bank in Nyahururu so she could pay him Ksh.1,500,000, he, to quote her own amended plaint at paragraph 5L, “disappeared without informing her”. Clearly the 1st defendant had no intention of gifting the plaintiff the suit land”.

I draw from HALSBURY’s LAWS OF ENGLAND 3rd EDITION VOLUME 18 at page 396, as follows:-

Where a gift vests merely in a promise (written or verbal) or unfulfilled intention, it is incompetent and imperfect and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it.

Clearly the 3rd objector did not enter into any formal agreement or attend the Land Control Board for purposes of obtaining the requisite

mandatory consent, so even if the court were to adopt her position that the same was a gift, then the same was incomplete but she qualifies as a dependant to be included in the list of distribution.

The applicant's contention that she has lived on the land for 40 years does not entitle her to the property under the inheritance law, but she may find refuge in the environment and Land Court by considering a claim against the administrators of the estate for adverse possession. Since only two people contest this property, both being dependants of the deceased, I consider it fair and just to order that the said property be shared equally between the two at 7.5 acres each. I make no orders on costs.

Delivered and dated this 12th day of February 2020 at Eldoret

H. A. OMONDI

JUDGE