



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 765 OF 2009

IN THE MATTER OF THE ESTATE OF ANDERIKUS AGWANGA KWAGA (DECEASED)

BETWEEN

PATRICIA AUMA AYIEKO.....OBJECTOR

AND

VITALIS NGWIYE AGWANGA.....PETITIONER

JUDGMENT

Introduction

1. **ANDERIKUS AGWANGA KWAGA** (*hereinafter referred to as deceased*) died sometimes on 02nd January, 1975. Deceased's estate comprised of **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407**(*hereinafter referred to as the suit property*).
2. Both **PATRICIA AUMA AYIEKO** (*hereinafter referred to as the Objector*) and **VITALIS NGWIYE AGWANGA** *hereinafter referred to as the Petitioner*) were appointed joint administrators and were issued with grant of letters of administration on 16th October, 2008.
3. Both parties claim entitlement to the estate in their capacities as grand daughter and son respectively and having failed to agree on the mode of distribution, the court directed that the matter be head by way of *viva voce* evidence.

Objector's case

4. The Petitioner stated that his father Alfred Otiaro Agwanga was son of deceased's 1st wife whereas the Respondent was son of deceased's 2nd wife. It was her evidence that during his life time, deceased gave **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372** to Respondent's mother's house and caused it to be registered in the joint names of the Petitioner and his brother Maurice Tawo Onginjo and retained the *suit land* for the benefit of her grandmother's house. She asserted that each of the 2 wives established their homes in their respective parcels of land and that the *suit land* was therefore not available for distribution to the house of deceased's 2nd wife.
5. **PW2 BARRACK ODERO**, stated that the deceased who was his cousin had 2 wives Leonida and Odhoch. It was also his evidence that deceased owned two parcels of land which are **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372** which he gave to Leonida, Respondent's mother's house and **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407** where he settled the Objector's grandmother Odhoch.
6. **JOHN GWADA** said that the deceased was known to him. He stated that deceased had settled his wife 2nd wife Leonida Mumbo, Respondent's mother, on **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372** and his 1st wife Agnes Odhoch, the Objector's grandmother on **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407**. He also stated that he knew the Objector's father, Alfred Otiaro, son of the deceased and his first wife Agnes Odhoch. He additionally told court that Alfred Otiaro had two other children Odhiambo and Ouma, who were married and are deceased.

Petitioner's Case

7. **VITALIS NGWIYE AGWANGA**, the son of the deceased confirmed that he was step-brother to Objector's father Alfred Otiaro. He told court that **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372** which is registered in the joint names of himself and his brother Maurice Tawo Onginjo was given to them by the deceased. It was his evidence that both of deceased wives were settled on **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407** to which he was also entitled to. He additionally stated that he had no objection to the Objector's claim. **DW2 PAUL OCHIENG ONGINJO** a cousin to the deceased stated that the Objector's claim was genuine but that she had refused to have an out of court settlement.

8. **BENTA ACHIENG OMONDI** (deceased's daughter) stated that her mother died when she was young and that she was the only child of the deceased and born in Kano but her father had informed her that he had a parcel of land in Seme.

Analysis and Determination

9. I have considered the evidence on record and submissions filed on behalf of the Objector and I have deduced only one issue for determination which relates to identification of deceased's beneficiaries to **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407**.

10. The deceased died sometimes on 02nd January, 1975. The deceased had two wives. The search certificate for **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372** demonstrates that it was on 27th July, 1976 which was about 1 ½ years after the death of the deceased registered in the joint names of the Petitioner and his brother Maurice Tawo Onginjo who are sons of deceased's 2nd wife Leonida Mumbo.

11. The Petitioner concedes that **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372** and **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407** now registered jointly in his name and his brother belonged to the deceased.

12. There is no evidence that the house of deceased's 1st wife Agnes Odhoch, the Objector's grandmother has benefitted from deceased's estate.

13. Section 42 of the Law of Succession which provides for previous benefits to be brought into account in the following terms:

Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

14. **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372** measures 1.0 Ha whereas **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407** measures 1.9 Ha. **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407** is 0.9 Ha larger than **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372**. My considered view is that the house of the deceased's 1st wife Agnes Odhoch, the Objector's grandmother is entitled to 1.45 Ha of **Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407** whereas the balance of 0.45 Ha is for the benefit of deceased's 2nd wife Leonida Mumbo, Respondent's mother.

Disposition

15. **In the result, and from the foregoing analysis, the court makes the following orders:**

1) Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407 issued to the objector is hereby cancelled and the Land Registrar Siaya County is directed to revert the title to the name of ANDERIKUS AGWANGA KWAGA (deceased).

2) Since the deceased's 1st house has already benefitted from Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/372 measuring 1.0 Ha, Land Parcel No. SIAYA/EAST ALEGO/MUR-NGIYA/407 measuring 1.9 Ha shall be distributed as follows:

a) 1.45 Ha to the house of the deceased's 1st wife Agnes Odhoch, the Objector's grandmother

b) 0.45 Ha to the house of deceased's 2nd wife Leonida Mumbo, Respondent's mother.

3) Administrators are directed to within 30 days of the date hereof apply for confirmation of the grant supported by a schedule of mode of distribution after ascertaining and determining all beneficiaries from the two houses of the deceased and their respective beneficial entitlement to the deceased's estate

4) Since this is a family matter, each party shall bear its own costs.

DELIVERED AND SIGNED AT KISUMU THIS 17th DAY OF October 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Amondi

For Petitioner/Respondent - Present in person

For Objector/Applicant - Mr. Okero hb for Mr. Ochieng