



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
SUCCESSION CAUSE NO.202 OF 2012

WANYAMA MUSOKO.....DECEASED

AND

BENARD WAFULA MUSOKO.....PETITIONER

JUDGEMENT

1. By a Petition dated 29th January, 2013 the Petitioner Benard Wafula Musoko moved the Court for a grant of letters of administration in the Estate of Wanyama Musoko. In the accompanied Form P & A 80 he described himself as the only survivor of the Estate and son to the deceased.
2. I take note that although a consent form was filed in Court, the same had no names, signatures or thumb print meaning that in actual sense no consent was obtained from persons of equal or lesser priority with the petitioner when seeking for the grant.
3. Pursuant to the said Petition a grant was issued to the applicant on the 24th of June, 2013.
4. On the 6th of November, 2013 the Petitioner applied for confirmation of grant and in his supporting affidavit he deponed that the deceased left behind E. Bukusu/N. Nalondo/713 measuring 4.2ha.
Further that out of the said land 3½ acres had been sold. He therefore wanted the property to be shared as follows; to himself a son 6½ acres and to a buyer 3½ acres. No consents were filed either at this stage.
5. An Affidavit of protest dated 11th July 2014 was filed by the 1st Objector Moses Mulati claiming to have bought one acre from Vincent Musoso son of the deceased on 25/1/1995 and having been in occupation since then and yet he was excluded from distribution.
6. In an affidavit of protest dated 6th November, 2014 one William Kituyi Alela, being an administrator of the Estate of Mutoyo Malele Khaemba lay claim on 5 acres stating that his father bought the same from Vincent Musolo on 9/6/1971 and had occupied the same till 1985 when the said Vincent offered an alternative piece of land.
7. On 9th March, 2015, the third Objector Alfred Waliaula Walela supported the affidavit of William Kituyi that their father had purchased land in 1971 and remained in occupation upto 1981.
8. A Supplementary affidavit was filed by the Petitioner making fresh proposals on how to distribute the land subject matter in the following manner;

a) Benard Wafula Musoko – 2 acres

b) Edward Wafula Kisika – 3½ acres

c) Bonface Simiyu Nandasaba - 1 acre

d) Catherine Nasimiyu – 2 acres

9. The matter proceeded by way of viva voce evidence and thereafter parties submitted in writing.

PW1 Objector number 3

William Kituyi testified that his father bought land from the deceased herein being 420 X 38 yards in 1971 and his father did occupy the land and cultivated the same upto 1985.

PW2 Moses Mulati the 1st Objector, claimed that the deceased was a step brother to his father. He claimed to have bought 2 acres from Vincent Musoko a son to the deceased but only paid for 1 acre and was shown his boundary. That he has been cultivating the same but his names and those of the children of the deceased were excluded. He also claimed that the respondent is not a son to the deceased.

10. **The Petitioner was DW1.** He confirmed that he was not a son of the deceased but a nephew. It was his evidence that the portion being claimed by 2nd and 3rd Objectors had been given to the deceased child Benedict Musoko.

He confirmed in cross examination that all deceased sons except Benedict are dead however they left widows and children as follows;

1. James Nyongesa – 1 wife and 13 children

2. Laban Wakhungu – 1 widow 8 children

3. Victor Musoko – 1 wife 1 child

4. Benedict alive.

11. It was his case that in 2010 he bought 1 acre from Benedict and thereafter another from Vincent. Further that one Edward bought 1½ from Vincent and 2 acres from Benedict. He confirmed that the 1st Objector was on the land for 16 years.

It was his evidence also that the deceased land had been shared among his sons as follows;

James Parcel No.711

Laban Parcel No.712

Vincent and Benedict

He confirmed that he had consents of only some members of the family and not all.

DW2 Benedict Wafula son of the deceased confirmed that he got a share of his father's property from the clan and sold the same and wanted to give title to those who had purchased from him. He sold 1½ acres to Benard and Edward 1½ each and he was left with a portion which is either 1 or 2 acres. He further testified that his brother Vincent had 5 acres 2 of which was given to his daughter as Vincent had sold to Alfred Nyongesa. DW2 Catherine Nasimiyu Wesonga is a daughter to Vincent and states that her father gave her land that is now occupied by Moses Mulati. She consented to the Petitioner petitioning the Court. It was also her evidence that her father sold land to Edward 1½ acres and Benard. Moses occupied 2 acres.

12. In their submissions the objectors urged the Court to revoke the grant as the Petitioner concealed the truth to the Court and had not obtained consents from the survivors of the Estate. Secondly that the Court considers the sale agreements and allocate portions sold.

13. In the Petitioner's submission he confirmed that prior to his death the deceased herein had distributed his land being Plot Nos 711-713 to his son, further that in petitioning for the grant he had obtained consent from Benedict and Catherine Nasimiyu representing Plot No.713 he also argues that the late Vincent had no capacity to sell land and in any event there was a dispute between Vincent and the 1st Objector. They are not aware of the claim from the 2nd and 3rd Objector.

14. Having considered the evidence and submissions made the issue for determination are;

i) Whether or not to revoke the grant issued to the petitioner.

ii) Whether there is proof of claim as laid out by the 3 Objectors for consideration In the distribution of the Estate.

15. The deceased herein subdivided his land before his demise to E. Bukusu/N. Nalondo/711, 712 and 713.

He had 4 sons and distributed the same as follows;

i) E. Bukusu/N. Nalondo 711 to James Nyongesa

ii) E. Bukusu/N. Nalondo 712 to Laban Wakhungu and

iii) E. Bukusu/N. Nalondo 713 to Benedict Wafula Wanyama and Vincent Musoko (deceased).

16. No issues arose in regard to E. Bukusu/N. Nalondo 711 and 712. This Petition is in regard to 713. Nothing was said of the other two. Property E. Bukusu/N. Nalondo measures approximately 4.2 ha (10.37 acres). It is not clear though whether the same was to be shared equally between the 2 sons however DW2 in his evidence stated that his brother's share was 5 acres. I therefore take it that the share was to equal between Benedict Wafula Wanyama and Vincent Musoko (deceased).

17. DW2 in his evidence states that he sold 2 portions one to the Petitioner measuring 1½ acres and another portion of same acreage to one Edward Wafula and he wishes to give them titles and he remained with a portion whose acreage he could not ascertain.

DW3 Catherine Nasimiyu claims the portion of 2 acres she claims was occupied by Moses 1st Objector and she is not aware of any sale to Moses. She testified that out of the 5 acres her father sold 1½ acres. Each to Benard and Moses (1st objector).

18. On their part 1st Objector claims 1 acre from Vincent 2nd and 3rd Objector claim from the deceased and not his son Vincent. Their sale agreement indicate sale of land measuring 420 by 380 yards purchased from Wanyama Mosoko and James Nyongesa. It also indicates a balance of more than half the purchase price had not been paid. It is not clear whether the balance was ever paid and why the said buyer ceased occupation in 1985.

19. In order to put this Estate to order which the Petitioner has failed to do in a bid to bring a closure to this long outstanding matter, appoint Catherine Nasimiyu Wesonga and Benedict Wafula Nasimiyu to be co-administrators of the Estate of the deceased together with the Petitioner. A fresh grant will issue accordingly.

20. And since it is not very clear who bought from whom, all those claiming a share of the property known as E. Bukusu/N. Nalondo 713 are directed to file documents in support of their claims for

consideration by the administrators and the Court within 14 days of the date of this judgement.

21. The Court will thereafter pass judgement on the issue of distribution of the Estate.

22. Each party to bear their own costs.

DATED and DELIVERED at BUNGOMA this 4th day of May 2017

ALI-ARONI

JUDGE