



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.421 OF 2015

IN THE MATTER OF THE ESTATE OF:

JACTON OLUOCH PACHO.....DECEASED

AND

DAVID OBUNGA OLUOCH.....PETITIONER

VERSUS

MATHEWS OTIENO OLUOCHOBJECTOR

JUDGMENT

1. **JECTON OLUOCH PACHO** died on 27/07/2005 and his son **DAVID OBUNGA OLUOCH** petitioned for grant of letters of administration of his estate. He obtained a letter from Chief **GRACE ATIENO OYUGA** of **KANYAMWA EAST** location dated 17/05/2015 which listed the beneficiaries of the estate as –

- **KOLETER ATIENO – WIDOW**
- **DAVID OBUNGA – SON**
- **MATHEW OTIENO – SON**
- **MARGARET ANYANGO – DAUGHTER**

2. The grant was issued on 20th January 2016. However when it came up for confirmation where **DAVID** proposed that the asset **LR NO. KANYAMWA/KABONYO/KWANDIKU/2460** be confirmed in his favour absolutely, his brother **MATHEW OTIENO** objected.

3. The basis of his objection was that the asset which was registered in their father's name measured 8 acres and **DAVID** had earlier on been given 5 acres of the same parcel, while he was given 5 acres of parcel **NO. KANYAMWA/KABONYO/KWANDIKU/2428**. Further, prior to their father's death **DAVID** (the petitioner) lived in 3 acres of parcel **NO. KANYAMWA/KABONYO/KWANDIKU/2460**, so he cannot propose to inherit the entire 8 acres.

4. He urged this court to find that he is entitled to 1½ acres of parcel **NO. KANYAMWA/KABONYO/KWANDIKU/2460** and the portion to be given to him should be adjacent to the one he already occupies.

5. In response the petitioner stated that indeed their father owned parcel **NO.2460, 2428 and 2429**, but in filing this cause he only listed parcel **NO.2460** which was allocated to him by their late father.

6. He explained that **MATHEW** (the objector) had been allocated No.2428 on 27/06/2002 even before the petitioner as the eldest son, got his allocation. The reason for this was because the objector had put a lot of pressure on their father to give him his share of the land. Parcel No.2429 was sold to **RICHARD OUMA OBONGO** but their father died before effecting transfer.

7. The petitioner contends that before he petitioned for the grant of letters, he approached the objector and Richard (the purchaser) seeking to include in the list of assets the two parcels already assigned to them, but they refused saying they would each file separate succession at their own time.

8. He insists that the issue of distribution of the assets was done by their late father long ago and each one of them was placed in actual occupation of their respective parcel while their father was alive. He urges this court to dismiss the objection.

9. The matter proceeded by way of viva voce evidence where the objector urged the court to intervene so that they could share their father's property in a fair manner. He stated –

“What I know is that our father divided the land giving David 5 acres and 5 to me. He lived on the 3 acres until his death and that is where our mother still lives.”

10. He urges the court to ensure the portion he gets out of 2460 is in alignment with 2428 to make it easy for physical consolidation.

11. PW2 (**JOHN OPIYO OTERE**), a cousin to the two brothers says the plaintiff called him to help them in sharing out their father's land. Both brothers were present and a boundary was marked using sisal plants as directed by the two brothers.

Upon cross examination this witness states:-

“The parcel we were dividing belonged to OLUOCH but I do not know the number.”

12. He was adamant that at the said meeting the defendant never mentioned anything about their father having shared out his land.

13. **CHARLES ARUA GOR** (PW3) whose land borders the parcel in question said in May 2015 PW3 approached him to assist in solving a problem between the two brothers relating to sharing out of their father's land. He explained that the plaintiff claimed his father had given him a small portion and he wanted to negotiate with his brother, because their father was already dead.

14. The objector felt that he ought to inherit the portion where his parents' house stood because according to Luo custom, the youngest son inherits the parents' house.

However the defendant said this would not be possible as he had already constructed on that land.

15. The plaintiff claimed that his father had 3 homesteads, and that he had built on the lower part of the area, which was next to the abandoned homestead known in Dholuo as **GUNDA**. His reason was that the defendant was taking the other abandoned homestead plus the 3rd abandoned homestead which formed part of his land. The defendant agreed to give his brother a portion of the other abandoned home so PW2 and PW3 embarked on marking the boundaries. According to this witness the defendant was digging the holes into which the sisal plants marking the boundary were to be planted. Their other family members were present and upon completion of the exercise, they gathered together, prayed and were satisfied that all was well.

16. After some period, the defendant called the Assistant Chief of **UPPER KABONYO** who then summoned PW3 saying he wanted to confirm the boundary. All he recalls is that the plaintiff got the father's abandoned homestead which measured about an acre.

17. The witness conceded on cross examination that the defendant showed them a boundary their father had earlier placed, but which he agreed to be destroyed so as to mark a fresh boundary accommodating the plaintiff's request.

18. **BERNARD OKOMO ODUOGI** (PW4) the Assistant Chief of **UPPER KABONYO** sub-location upon request by the plaintiff, visited the disputed land accompanied by village elder **ANTHONY ODOYO AMBOGO** and council elder **CHARLES ARWA**. They found **MZEE TUKIKO** (who was not the Chief's invitee) at the site.

19. The boundary was re-aligned amicably and everyone left on a high note. PW4 explained that at the site they found the elders had already planted sisal to mark the boundary but there was a small portion which was disputed and that is what they re-aligned by planting sisal.

20. However PW4 confirmed that each of the brothers insisted the boundary was to be at a different location. The details of this meeting were not reduced into writing.

21. The defendant was adamant that their father had before his death convened a family meeting and shared out his land, using the trees to mark the boundary. No one raised any objection. However the plaintiff waited until 10 years after their father's death to **"pick a quarrel over parcel No.2460."**

22. He poked holes at the plaintiff's claims that their father left each one of them 5 acres and their mother 3 acres, saying their father had three parcels of land and it is not clear to him where the 3 acres fit. He claims the plaintiff has already sold 3 acres of his share and part of 2460, so he is now left with very little land, which is why he now demands more land.

23. The defendant then stated that actually their father had sold land to **RICHARD OUMA OBONYO** in the year 2002, but when he wanted to go before the Land Control Board the plaintiff objected saying there was no way that transfer could be effected before he got his share of the land.

24. Whereas the defendant insists that their father had given him 8 acres, he conceded to realignment of the boundary using sisal plants to avoid wrangles, especially because the plaintiff is pre-disposed to violent behaviour.

25. There is no dispute that the deceased owned land parcels namely:-

- **KANYAMWA/KABONYO/KWANDIKU/2428 – 2.20 Ha.**
- **KANYAMWA/KABONYO/KWANDIKU/2460 – 8 ACRES**
- **KANYAMWA/KABONYO/KWANDIKU/2429 – 0.80 Ha.**

26. It is also not disputed that by the date of the deceased's demise he had given the plaintiff parcel NO.2428 which measures 2.20 Hectares (approximately 5 acres) and that he had settled the defendant on parcel NO.2460 where his own homestead also stood.

27. Did he bequeath the defendant the entire 8 acres as stated in defence or did he give him 5 acres and assign 3 acres for his wife to use as claimed by the plaintiff.

28. The defendant says due to the aggressive and demanding nature of the plaintiff, their father gave him 5 acres and sealed off any further claims. Unfortunately no one else who was present when this allegedly took place testified. Their mother who was purportedly present chose to keep away from court although the defendant claimed she had sworn an affidavit. Since she did not attend court to confirm that she was the deponent of the contents therein, nor did she attend court to have the contents of the affidavit tested on cross examination, I am inclined to disregard her affidavit.

29. It is significant that the defendant did not deny what PW2 and PW3 said regarding the re-alignment of the boundaries. Yet even without that evidence, the defendant is his own undoing. In court he now turned around to say it was not clear to him which parcel of land the plaintiff wanted the three acres

from. That is a departure from his own affidavit and the later part of his evidence where he stated categorically that his father had sold 2429 to one **RICHARD** and given the plaintiff 2428. It does not need calculus to deduce that the only parcel the plaintiff was referring to is 2460. In any event the plaintiff stated as much.

30. The contested parcel measures 8 acres – the defendant does not include his mother in the equation and it's not clear to me how she will survive once the 1½ acres is given to the plaintiff and the defendant is left with 5 acres plus – who will take in her mother? Under **Section 35** of the **Law of Succession**, their mother has a life interest on immovable assets. What about their sister **MARGARET**? Consequently in all fairness I think the asset **KANYAMWA/KABONYO/KWANDIKU/2460** ought to be shared as follows:-

- **DAVID OBUNGA OLUOCH – 5 ACRES**
- **KOLETA ATIENO OLUOCH – 1½ ACRES (life interest)**
- **MARGARET ANYANGO OLUOCH – 1½ ACRES**

31. The plaintiff already has his 5 acres from 2428 and I think 2429 cannot form part of the assets for distribution as both confirm it was sold to one **RICHARD** who should pursue the administration of the estate to effect transfer.

32. There is no merit in the objection and it is dismissed with costs to the defendant.

Delivered and dated this 18th day of July, 2017 at Homa Bay

H.A. OMONDI

JUDGE