



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

SUCCESSION CAUSE NO. 213 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE KWENA OKONYO (DECEASED)

AND

GABRIEL NGESA MUSUNDI.....PETITIONER/RESPONDENT

VERSUS

BARNABA NYADAWA P. NDUBI.....OBJECTOR/APPLICANT

RULING

[Summons for Revocation of Grant dated 10th September, 2013]

1. Through the summons for revocation of grant dated 10th September, 2013 the Applicant, Barnabas Nyadawa Ndubi, prays that the letters of administration issued to the Respondent, Gabriel Ngesa Musundi, on 1st December, 2009 in respect to the estate of the deceased Kwena Okonyo (hereinafter referred to as Kwena) be revoked. He also asks to be appointed an administrator of the estate in place of the Respondent.

2. The dispute in this matter revolves around L.R. No. Marachi/Elukhari/1058 which was an asset in the estate of Kwena at the time of his demise. The Applicant claims Kwena died in 1962 whereas the Respondent claims he died in 1984.

3. From the evidence adduced during the hearing of this matter, it emerged Kwena was the son of Musundi Ndubi. His mother died prior to the demarcation of land in the 1960s. Musundi Ndubi had ten wives. The Applicant is the son of the Pius Ndubi who was the son of Musundi Ndubi and Anyiela. The Applicant is therefore the grandson of Musundi Ndubi. The Respondent is the son of Musundi Ndubi and Girigonda Onyiego. The evidence adduced also shows that Kwena died intestate without a wife or children of his own. He was buried in Uganda.

4. The Applicant's case is that during land adjudication, his father Pius Ndubi was tasked with the duty of settling the several houses of Musundi Ndubi. At the conclusion of the exercise and after the family had dispersed, it was discovered that Kwena had not been given a piece of land. After discussions it was agreed that Pius Ndubi should carve out a piece from the land of his mother, Anyiela and give the same to Kwena. This was done and the land registered in the name of Kwena as L.R. No. Marachi/Elukhari/1058.

5. The Applicant's position is that upon the demise of Kwena, the land in question ought to have reverted

back to the house of Anyiela. His view is that the Respondent had no right to inherit the land of his step-brother.

6. The Respondent's case is that Kwena gave him the land prior to his demise.

7. The Applicant testified in support of his application and called Donalis Ndubi and Jacob Nadala Ochieno as his witnesses. They adopted their affidavits as evidence in this matter

8. The Applicant's testimony is that his father Pius Musundi Ndubi, the Respondent and Kwena were all sons of Musundi Ndubi from different mothers. It is the Applicant's evidence that his paternal grandmother Anyiela Musundi had her matrimonial home on the parcels of land registered as Marachi/Elukhari/1053-1058 whereas the mother of the Respondent had her matrimonial home on L.R. No. Marachi/Elukongo/652. It is his evidence that the mother of Kwena died many years ago and her matrimonial home was not known. Further, that in the late 1950s or early 1960s Kwena relocated to Uganda where he worked most of his adult life.

9. The Applicant avers that during the land adjudication exercise each wife of Musundi Ndubi was allocated land where their husband had established matrimonial homes for them. It is his evidence that after the allocation it was established that Kwena who was in Uganda had been overlooked in the allocation of land. He was summoned from Uganda and after a meeting held by the family of Musundi Ndubi and the elders it was resolved that the house of Anyiela which was headed by the eldest son who is the Applicant's father would surrender parcel number 1058 to Kwena.

10. The Applicant avers that although the land was shown to Kwena he never took possession. Instead, his grandmother and father continued using the land as before. Further, that no title deed was issued in the name of Kwena.

11. It is the Applicant's case that between 1968 and 1973 there was instability in Uganda but Kwena never came back to Kenya like other Kenyans. An emissary was sent to Uganda by the family of Musundi Ndubi and it emerged that Kwena had died between 1968 and 1973 but the cause of death or his burial site could not be established. With this information a mock burial was conducted for Kwena. Thereafter they continued using the parcel of land in question.

12. It is the Applicant's case that on 12th March, 2010 he received a letter from the Respondent as the administrator of the estate of Kwena informing him that he was in possession and occupation of family land and requiring him to vacate it. Annexed to the letter were the title deed in the name of the Respondent and the confirmed grant issued herein. It was then that he filed Busia H.C. ELC No. 19 of 2010 [O.S.]. It is the Applicant's averment that the Respondent opposed his case asserting that he was the only surviving beneficiary of the estate of the deceased Musundi Ndubi. As he was waiting to prosecute his case he was served by the Respondent with pleadings in Busia H.C. ELC No. 65 of 2013.

13. It is the Applicant's evidence that the Respondent intentionally misled the court by concealing very important information about the status of parcel number 1058. According to the Applicant, at the time the Respondent commenced these proceedings the parcel of land had reverted back to his family. The Applicant asserts that the Respondent misled the Court that he is the only surviving child of Musundi Ndubi whereas two sons and several daughters of Musundi Ndubi were still alive.

14. Upon cross-examination on the contents of his affidavit, the Applicant told the Court that parcel number 1058 was registered in the name of Kwena in 1966.

15. In his affidavit sworn on 28th October, 2014 Donatus Ndubi avers that L.R. No. Marachi/Elukhari/1058 falls within the area comprising parcel numbers 1053 to 1058 which were allocated to Anyiela, the grandmother of Applicant. It is his evidence that Kwena used to stay at the home of the father of the Applicant whenever he came home from Uganda.

16. The evidence of Donatus was that when it was discovered that Kwena had been left out of the land

adjudication process, the Applicant's grandmother and father were asked by elders to give land to him. The land given to him was registered as Marachi/Elukhari/1058 but he never took possession of the land. Donatus denied the Respondent's claim that Kwena had given him the land.

17. The evidence of Jacob Nadaba Ochieno as conveyed through his affidavit sworn on 28th October, 2014 was to the effect that their grandfather Musundi Ndubi distributed land to his wives in different villages. The Applicant's grandmother was settled at Nango village, Elukango sub-location whereas the mother of the Respondent was settled at Sikura village, Lugulu sub-location.

18. Jacob averred that whenever Kwena came to Kenya from Uganda he would stay at the home of the Applicant.

19. According to Jacob, during the land adjudication process Kwena was in Uganda. His father and the father of the Applicant later realized that Kwena had not been allocated land but it was too late to reconvene the large family of Musundi Ndubi as it had dispersed. It was then agreed that the father of the Applicant gives part of his land to Kwena. The land given to Kwena was registered as L.R. No. Marachi/Elukari/1058. According to Jacob, this piece of land was part of parcels No. Marachi/Elukhari/1053 to 1058 which were registered for the house of the grandmother of the Applicant.

20. It was Jacob's averment that his father cultivated the land in question during the time that the Applicant's father worked in Mombasa. After the Applicant's father retired, he came and stopped his father from working on the land and he obliged.

21. It was Jacob's evidence that in 1976 a house was constructed for Kwena and funeral rites conducted after it was confirmed that he had died and had been buried in Uganda.

22. The witness averred that at no time did the Respondent or his mother cultivate the land in question.

23. Upon cross-examination by the Respondent, Jacob stated that Kwena used to live with the father of the Applicant whenever he visited from Uganda and at no time did he live with the Respondent. He denied the Respondent's claim that Kwena gave the land to him. He stated that Kwena died before the father of the Applicant.

24. In his affidavit of 17th January, 2014, the Respondent averred that the home of the mother of Kwena was established next to the home of the Applicant's grandmother in Elukari sub-location whereas his mother's home was established in Elukongo sub-location. He avers that before land registration the mother of Kwena died and Kwena went to live at their home. At that time they cultivated the land given to Kwena's mother which was subsequently registered as L.R. No. Marachi/Elukhari/1058 in the name of Kwena.

25. His case was that the land allocated to the Applicant's grandmother was registered in the name of his father as L.R. No. Marachi//Elukari/1057. It was his averment that the share given to his father was registered in his name as L.R. No. Marachi/Elukongo/652.

26. It was the Respondent's case that in 1980 Kwena went to look for employment in Uganda. In early 1984 he sent word to him that he was very sick in Uganda. He went to Uganda with Charles Kwena Atogo and Stanislaus Ndubi Othieno where they found Kwena who was very sick. It was then that Kwena told them that in case he died he (the Respondent) should take his land (parcel number 1058). Kwena died immediately upon their return to Kenya and they went back to Uganda where they buried him.

27. Upon coming back to Kenya they put up a hut on Kwena's land and performed customary burial rites. It was his averment that the Applicant's father who worked with Kenya Railways resided in Mombasa up to the time he was transferred to Nairobi where he retired in 2005 or early 2006.

28. It was the Respondent's evidence that the father of the Applicant died in 1983 a year before Kwena

died in 1984. The Respondent averred that it was only after the Applicant retired that he invaded Kwena's land claiming that the land bordered their land and the Respondent came from another sub-location.

29. The Respondent stated that as a result the family met and gave the Applicant a share of Aginga Musundi's land which was registered as L.R. No. Marachi/Elukhari/1055. According to the Respondent Aginga Musundi had died without a wife or child.

30. On cross-examination, the Respondent admitted that he did not disclose in his petition for the grant that he had brothers and sisters. He also conceded that he did not disclose the many wives of Musundi Ndubi and their children. He denied that Kwena had been overlooked during adjudication thereby leading to allocation of land to him from the share of the Applicant's grandmother.

31. Charles Kwena Atogo and Stanslaus Okoth Ndubi gave evidence that supported the Respondent's case.

32. The issue that needs to be determined in this matter is whether Kwena gave his land to the Respondent prior to his death. The date of death of Kwena is 17th March, 1984 as per the death certificate filed in Court together with the petition for grant of letters of administration. The Applicant did not challenge this evidence and his claim that Kwena died between 1968 and 1973 is unsupported and therefore unfounded. On the weight of the evidence adduced, it is likely that Kwena died in 1984.

33. The Respondent and his witnesses' averment that they travelled to Uganda to bury Kwena did not face any serious challenge by way of cross-examination. Their evidence that the Applicant lived away from his rural home was also not challenged. The Applicant's evidence cannot therefore be relied upon when it comes to the date of the demise of Kwena.

34. The Applicant alleged that the land given to Kwena was carved from his grandmother's land and the same should therefore revert back to his grandmother's household. That argument is not tenable. Once the land was registered in the name of Kwena he became the legal owner and upon his demise the same could only be dealt with in accordance with the Law of Succession Act, Cap. 160. Once the land was registered in the name of Kwena and there being no allegation of fraud, the history leading to its registration is not of much consequence. In any case, the land was given to Kwena as a birthright. He could have sold or done anything else with it if he so desired. The Applicant's assertion that the land reverted back to his grandmother's house after the demise of Kwena is therefore without any legal basis.

35. As already stated, the main question is whether Kwena donated the land in question to the Respondent. The provisions attending the gift of land in contemplation of death are found in Section 31 of the Law of Succession Act which states:-

“31. A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if—

(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that same illness

or danger; and

(f) the intended beneficiary survives the person who made the gift to him:

Provided that—

(i) no gift made in contemplation of death shall be valid if the death is caused by suicide;

(ii) the person making the gift may, at any time before his death, lawfully request its return.”

36. Kwena is said to have been seriously sick and succumbed to his illness a few months after gifting the land to the Respondent. In this case, however, apart from the evidence of the Respondent and his witnesses there is nothing to show that Kwena signed any papers signifying that he had given the land to the Respondent. There is no evidence that he handed over the title deed for the land to the Respondent and neither is there evidence that he passed the possession of the property to the Respondent. The evidence adduced is not sufficient, on a balance of probabilities, to conclude that Kwena did indeed give his land to the Respondent. The Respondent's claim that the land was a gift to him by Kwena is therefore rejected.

37. That leaves the land in question available for disposal in accordance with the provisions of the law governing the disposal of the estate of a person who dies intestate.

38. The parties are agreed that Kwena had no wife or children. It also appears that he had no brother or sister. In the circumstances his living step-brothers and step-sisters and the children of his deceased step-brothers and step-sisters are entitled to a share of the estate.

39. The Applicant being the child of the Respondent's step-brother and the Respondent being a step-brother of Kwena are both entitled to a share of the property in question.

40. The Applicant as well as the Respondent was each entitled to the piece of land left behind by Kwena. They were not the only ones entitled to a share of the estate since all the children of the wives of Musundi Ndubi were entitled to inherit from the estate of Kwena. It is also not disputed that the Respondent failed to disclose to the Court that Kwena predeceased some of his step-brothers and step-sisters. The grant was thus obtained on the basis of concealment from the Court of material information. Such a grant is one for revocation under Section 76 of the Law of Succession Act.

41. The summons for revocation of grant filed by the Applicant herein succeeds. I note that apart from the parties herein, no other member of the family of Musundi Ndubi has stepped forward to stake a claim to the estate of Kwena. In the circumstances, I appoint the Respondent and the Applicant joint administrators of the estate of Kwena.

42. This being a family matter, I direct each party to meet own costs of the proceedings.

Dated and signed at Malindi this 27th day of June, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT

Dated, signed and delivered at Busia this 12th day of July, 2017.

K.W. KIARIE,

JUDGE OF THE HIGH COURT