



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CASUE NO. 839 OF 2006

**IN THE MATTER OF THE ESTATE OF EDWARD OMUSINDE OTONG'O.....
(DECEASED)**

AND

IN THE MATTER OF YONAM WAKHU OMUSINDE.....PETITIONER

AND

IN THE MATTER OF LIVINGSTONE NAMAYI OMUSINDEOBJECTOR

J U D G M E N T

Introduction

1. From the papers filed herein the deceased Edward Omusinde Otong'o died on 01/07/1985 at the age of 79 years. He was survived by Yonam Wakhu Omusinde (the petitioner) Ramadhani Mashere Mutuli, Livingstone Namayi Omusinde and Sophia Okutoyi Indeche, all sons and daughter of the deceased respectively. The deceased left behind one parcel of land namely L.P No.Marama/Inaya/760, measuring 3.88Ha or thereabouts.

2. On the 14/03/2007, the Petitioner was issued with the Grant of Letters of Administration Intestate, form P&A 41 and by the summons for confirmation of Grant filed in Court on 15/12/2009. The Petitioner proposed to distribute the deceased's estate as follows;-

- i) Yonam Wakhu Omusinde - 1.2Ha
- ii) Ramadhani Mashere Mutuli - 0.7 Ha
- iii) Livingstone Namayi Omusinde – 0.9 Ha
- iv) Sophia Okutoyi Indeche - 1.0Ha

3. In the summons for confirmation the Petitioner stated that “there are no other dependants known to the estate of the deceased.”

The Objection

4. On 12/06/2012, Livingstone Namayi Omusinde filed summons for revocation or annulment of Grant on the single ground that the Petitioner left out one brother one Hassan Omusinde (deceased) who had children who were beneficiaries of the estate of the deceased. The Petitioner opposed the objection and

denied that he had left out Hassan Omusinde from the distribution of the estate of the deceased. The petitioner contended that the share of the estate of the deceased intended for Hassan Omusinde was given to his sister Sophia Okutoyi by Hassan Omusinde himself before he (Hassan) died. The Petitioner also stated that Hassan's only child was a daughter who was married and had no interest in the estate of the deceased. The Petitioner urged the court to dismiss the objection. There is filed in Court on 30/05/2011 a letter of consent dated 21.04.2008 by Beatrice Maloba Ambalo daughter of Hassan Angaa. In the Consent letter, Beatrice Maloba Ambalo says she consents to the Petitioner taking out Grant of Letters of Administration Intestate to the estate of the deceased.

5. By consent of both parties received in Court on 12.10.2010 before Lenaola Judge, the Grant of Letters of Administration Intestate issued to the Petitioner on 14.03.2007 were revoked and fresh grant was issued in the joint names of the Petitioner and the Objector. The parties were then ordered to file separate affidavits on distribution and justification thereof.

6. The Petitioner thereafter filed a fresh summons for confirmation of Grant dated 29.11.2010 proposing similar distribution of the estate of the deceased. Livingstone Namayi Omusinde protested to the mode of distribution vide this affidavit of protest dated 28.02.2011. He proposed to distribute the deceased's estate as follows:-

- i) Yonam Wakhu Omusinde – 3.23 acres
- ii) Ramadhani Mashere Mutuli – 3.23 acres
- iii) Livingstone Namayi Omusinde – 3.23 acres

The Petitioner argued each of the beneficiaries is entitled to an equal share of the estate of the deceased. In his affidavit of protest, Livingstone stated at Paragraph 7 thereof that the deceased left behind 2 sons, a grandson by the name of Ramadhani Mashere Mutuli Indeche, Fanice Wanga and Dinah Omukele all of whom were said to be married and living comfortably in their own homes.

7. Somewhere along the way this cause was dismissed but was later reinstated, hence these proceedings which went to hearing through viva voce evidence with Yonam Wakhu Omusinde as plaintiff and Livingstone Namayi Omusinde as defendant.

The Petitioner's case

8. The Petitioner testified and stated that the deceased had 3 wives;- Donaa Werimo, who had 4 sons and 3 daughters; Janepher Olubui who had 3 sons and 3 daughters. PW1 does not mention the 3rd wife but stated that the deceased left behind 2 parcels of land and by the time he (deceased) died, he had already shared out, the land among the beneficiaries that two of deceased's wives were given their own shares.

9. Ramadhani Mashere Mutuli, PW2 testified that he was grandson to the deceased. He was s/o Melzedeck Mutuli Omusinde, and that his uncle Hassan was deceased, but left one daughter, Beatrice Maloba. He also testified that Yonam Wakhu Omusinde and Livingstone Namayi Omusinde were from one mother. He asked the Court to divide the land equally.

10. Sophia Okutoyi Indeche gave evidence as PW3 and told the court that the land in dispute was to be shared among Hassan Omusinde, Melzedeck Mutuli, Yonam Wakhu and Livingstone Namayi. She confirmed that she had been allocated the share meant for Hassan and that before the deceased died he had already shared out the land in accordance with PW1's proposals. Beatrice Maloba, PW4 corroborated the evidence given by PW1- PW3 and added that the share for Hassan should be shared jointly between herself and PW3.

11. Mokhola Benjamin Oketch also testified as PW5 in support of the petitioner's case. He stated that before the deceased died, he had divided his estate amongst his children. PW5 stated that he did not understand why the two brothers were fighting. He also stated that the deceased gave a part of his estate

to Sophia Okutoyi which portion was to be shared with Beatrice. PW6 was Ibrahim Mango Shiyono and according to this witness, it was Livingstone who was causing problems in the family. He testified that the deceased shared out his estate to his children, including a portion to Hassan. That the portion for Hassan was eventually given to Sophia by Hassan himself before he (Hassan) died. Further, PW6 stated that the reason why Livingstone was protesting to the proposed distribution is because he (Livingstone) wanted Sophia's share of the estate of the deceased.

The Defence Case

12. DW1 was Livingstone Namayi Omusinde. He testified that though the deceased's estate had been shared out, the Petitioner and Sophia decided to sell the land; hence his protest. During cross examination, DW1 agreed that before the deceased died, he showed him his own portion of land on which to build. DW2, Ismael Nandwa's evidence was to the effect that the Petitioner sold some of the deceased's estate without involving Livingstone. DW3, Festus Omusula testified that by the time the deceased died, he had already shown each of his four sons where to build and to cultivate. DW3 also stated that the share for Hassan had been given to Sophia and that the dispute between the Petitioner and Livingstone was over the portion of land given to Sophia. In cross examination, DW3 stated that both Sophia and Hassan's daughter were married.

Issues of Determination

13. Upon analysis of the whole evidence adduced in court, there are 2 issues for determination;- a) whether the deceased had shared out his land among his sons, and (b) whether Sophia and Beatrice were entitled to a share of the deceased's estate.

Analysis and Determination

Whether the Deceased had shared out his land before death

14. Regarding this issue, there is evidence from both sides that the deceased had shared out his land among his sons before he died. One of the sons was called Hassan, who also died but before Hassan died, he gave out his share of the deceased's estate to his sister Sophia. When Sophia testified, she told the court that she was willing to share this portion of land with Hassan's daughter Beatrice Maloba who testified as PW4. Beatrice Maloba also testified that she was willing to share with Sophia the land that had been given to her (Sophia) by Hassan. I therefore find and hold that the deceased had indeed shared out his land amongst his sons.

Are Sophia and Beatrice entitled to a share of the Deceased Estate?

15. Regarding this issue Section 38 of the Law of Succession Act, Cap 160 provides that where an intestate has left a surviving child or children, and subject only to sections 41 and 42 of the Act, the net intestate estate shall devolve upon the surviving child, if there be only one, or shall be shared equally among the surviving children. It is clear that the Act does not make a distinction between male and female children. It only mentions a child or children. The Constitution of Kenya, 2010 at Article 60(1) provides that "Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles;-

- A
- b
- c
- d
- e.....

f. Elimination of gender discrimination in law, customs and practices related to land and property in land; and

g

16. So, in line with the above provision and in keeping with the evidence adduced in Court both Sophia and Beatrice are entitled to a share of the deceased's estate. The share that will go to these two is the one initially meant for Hassan.

Conclusion

17. Having carefully considered all the evidence on record and considering the law, I find no merit in the protest filed by Livingstone. Accordingly, the estate of the deceased, being land parcel No. Marama/Inaya/760 shall be shared out as follows;

- a) Yonam Wakhu Omusinde - 1.2Ha
- b) Ramadhani Mashere Mutuli - 0.7 Ha
- c) Livingstone Namayi Omusinde – 0.9 Ha
- d) Sophia Okutoyi Indeché - 0.5Ha
- e) Beatrice Maloba - 0.5Ha

18. As regards costs each party to these proceedings shall bear their own costs.

Orders accordingly.

Judgment delivered dated and signed in open court this 7th day of September, 2016

RUTH N. SITATI

JUDGE

In the presence of;-

.....present in person.....Petitioner

.....Present in personProtestor

.....Solomon LagatCourt Assistant