

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE NO. 684 OF 2011

IN THE MATTER OF THE ESTATE OF: PHILIMONA OBISA LUBANGA

BETWEEN

JOSEPHINE MAKHULUNGU IMBANDU1ST PETITIONER

CONCEPTOR AKOMBE SHIVUKO2ND PETITIONER

AND

PETER ANORESPONDENT

RULING

The application dated 21st June, 2013 seeks orders compelling the Respondent to surrender tractor registration number KAK 383K Mersey Ferguson 290 to the Petitioner as it is part of the deceased's estate. The application is supported by the Petitioners' affidavit sworn on the same date. The Respondent filed a replying affidavit sworn on 30th June, 2014. Counsels for both parties urged the court to make its ruling on the basis of the application and the replying affidavit.

The Petitioners' position is that the tractor in dispute was purchased by the deceased and he died before he transferred it to his name. The Petitioners have annexed a copy of the sale agreement dated 27th July, 2010. The purchase price was Kshs. 550,000. On his part, the Respondent contends that he paid part of the purchase price. According to him he paid Kshs. 120,000 that was deposited in the deceased's account. He has also been paying school fees for two of the deceased's children. The Respondent is a brother to the deceased.

I have read the application, the supporting affidavit and the replying affidavit and the main issue is whether the tractor in dispute is part of the deceased's estate. The sale agreement for the tractor shows that the deceased was buying the tractor for himself. There is no mention of the tractor being bought for the family as alleged by the Respondent. A deposit of Ksh. 300,000 was paid when the agreement was signed on 27th July, 2010. The deceased died on 27th May, 2011. According to the agreement, by 23rd September, 2010, the vendor had received a total of Kshs. 520,000 leaving a balance of kshs. 30,000/-.

At this preliminary stage, its very difficult to conclude that the Respondent paid part of the purchase price. There is no evidence that the deceased and the Respondent had agreed to buy the tractor jointly. There is also no evidence that it is the Respondent who paid the balance of the purchase price. Such evidence can only be availed by way of oral testimony by the vendor of the tractor and witnesses. The fact that the tractor was not included as part of the deceased's estate does not stop the Petitioners from either including it or claiming it.

I do find that there is enough evidence showing that the deceased bought the tractor. Unless that position is disproved, it do find that the tractor is part of the deceased's estate. The tractor to be released to the Petitioners forthwith. The application dated 21st June, 2013 is granted as prayed.

Dated signed this 9th day of January, 2015

Said J. Chitembwe

JUDGE

Dated, delivered and countersigned this 9th day of February 2015.

Ruth Sitati

JUDGE