



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.92 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE ANDASHE MUNYETI DECEASED

AND

SIMEON MUNYETI ANDASHE.....PETITIONER/RESPONDENT

VERSUS

JOEL KANGWANA ANDASHE.....OBJECTORS/APPLICANTS

IDDI YAHUMA ANDASHE

J U D G M E N T

Introduction

1. Letters of Administration intestate for the estate of ANDASHE MUNYETI (Deceased) who died intestate on the 14/7/2003 domiciled at Cheptulu sub location were issued to SIMEON MUNYETI ANDASHE the Petitioner herein. On the 26/04/2012 this Court ordered the Petitioner to file and serve the application for confirmation of the grant and the respondents to file replies thereto and serve. On the 23/07/2012 the Court observed that the parties did not agree on distribution and thus ordered that the matter be heard orally. The issue for determination in this case is two-fold distribution of the deceased property and the extent of the estate available.

Plaintiffs Case

2. The Objectors/Plaintiffs herein called three (3) witnesses. PW1 JOEL KANGWANA ANDASHE brother to the Petitioner told the Court that Plot no.Kakamega/Cheptulu/292 where he lives was registered in the names of his mother after their father died. He also testified that at the time of his death, the deceased had 2 plots: 409 and 292 and that the deceased also had 2 wives, the second one being his mother. According to PW1, the deceased had given each of his wives their own parcel of land.
3. It was also PW1's testimony that the Petitioner herein used to live on plot 409 before he (Petitioner) bought his own parcel. According to the evidence of PW1, his mother Peris Andashe had 7 children, 3 daughters and 4 sons; while the first house to which the Petitioner belongs had 2 children, the Petitioner and his only sister. Regarding the size of the two parcels of land, PW1 stated that plot 409 was about 1 acre in size while plot 202 was 4 acres, and Simeon the Petitioner herein is not entitled to inherit any portion of plot 292 and that he himself was not claiming any part of plot 409.
4. During cross examination, PW1 denied a suggestion by Counsel for the petitioner that their late father allowed the petitioner to get a share of plot 292 because the deceased had bequeathed part

- of plot 409 to the Petitioner, and further that the other half of plot 409 which initially belonged to the parties' uncle was given to the Petitioner. PW1 also denied a suggestion that the Petitioner bought plot 409, that half of plot 409 belonged to one Thomas who sold it to the Petitioner and subsequently, the Petitioner combined what he bought with what his father the deceased had given him. PW1 also testified that the Petitioner has no share in plot 292 and that he (PW1) was not aware of any agreement between the Petitioner and the deceased by which the Petitioner allegedly returned the portion given to him by the deceased back to the deceased.
5. PW2 was Iddi Yakuma Andashe. He told the Court that the Petitioner herein lives on a plot of land he bought in Chebara, though initially he lived on plot 409. PW2 also stated that plot 409 was ancestral land which belonged to their grandfather who shared it among his 3 sons including the deceased herein and the deceased's brother Thomas. That the deceased owned 2 plots 409 which was given to his first wife and plot 292 was given to the second wife. PW2 also stated that plot 409 which was meant for the Petitioner was taken by a school and the Petitioner was given land elsewhere, but he did not give details of this parcel of land given to the Petitioner.
 6. During cross examination PW2 stated that his grandfather had 3 sons: Zakayo, Thomas and Benjamin. He also stated that his father bought plot 292. Regarding plot 409, he testified that the same was divided into 3 portions for the 3 brothers and that his uncle Thomas sold his share to the Petitioner while Benjamin did not sell his portion. It was also his testimony that the shares for Zakayo and Benjamin were amalgamated during adjudication.
 7. PW3 PETER AKUNYA told the Court that he knew PW1 and PW2. He also knew their father Zakayo Andashe (deceased). He testified that Zakayo had two (2) wives and had two (2) plots although he did not know the plot numbers. One plot was at Sausi for the 1st wife and the 2nd plot at Shipala was given to the 2nd wife. He said that he was present when the 2nd wife was given the said plot. He told the Court that he lives at Chebara with the Petitioner. That the plot where Petitioner lives was given to the petitioner/defendant and his mother.
 8. On cross-examination he explained that the petitioner/defendants mother was married on the Sausi plot and was also buried there. He confirmed that Thomas sold his land to the defendant/petitioner for him to increase his original plot.

Defence Case

9. DW1 SIMEON MUNYETI ANDASHE told the Court that he lived at Chebara village in Nandi but his original home was Shipala village Chekulo sub location. He explained that the deceased herein was his father. The deceased had two (2) wives and that his mother who was the first wife died in 1938. He listed the names of the children from the 1st wife and the 2nd wife. He further testified that his father left a piece of land Tiriki/Cheptulu/292 and he had proposed that the said land be shared equally between the two (2) houses.
10. He denied having plot no. Kakamega/Serem/209 and also denied that his mother lived on that portion. He produced "D Exhibit 1" and maintained that he bought the said land and he is the 1st registered owner; this is the land registration number Kakamega/Serem/409. To confirm that he bought the said parcel he produced "D Exhibit 2" the Land Registrar's letter dated 19/9/1973.
11. He also claimed that after his father died the entire family of the deceased held a meeting and agreed to share the parcel equally. The said meeting was chaired by the 1st objector/plaintiff and he (petitioner/defendant) was the secretary. He produced the minutes of the said meeting "D Exhibit 3".
12. DW1 further explained that he had been given the title deed for land parcel Kakamega/Cheptulu/292 by his father for safe keeping. He returned the same to his father as shown in "D Exhibit 4". He claimed that he found out that the said land had been transferred in his mother's name but the said transfer was revoked through a Court order "D Exhibit 5". He confirmed that he had a share in his father's land and that plot no.409 was bought by him.
13. On cross examination by Mr. Simasi for the Objector, DW1 explained how the dispute in this case started. He was referred to "D Exhibit 3" and maintained that it relates to the distribution of the deceased estate as between the deceased's two (2) houses. He was again referred to "D Exhibit 4" confirmed that he was the one who wrote the document. He denied adding the last sentence to the said agreement dated 26/07/1999 and maintained that paragraph was written on the same day. He told the Court that the witness to the said agreement died.

14. He also explained that the meeting of 31/07/2003 was only for the Andashe family and he denied the allegation that his father had shared the land before he died. He told the Court that his mother was buried where he was born. He maintained that parcel 409 was his and the objectors are the ones living on plot no.292 and though he does not use it he lived there until 1973 when he bought his own land. He claimed that his house still stands on plot 292.

Submissions

15. M/s WESUTSA & Co. ADVOCATES filed written submissions on behalf of the objector/plaintiff. They submitted that it had been established that the deceased herein had two parcels of land. L.R.No.TIRIKI/CHEPTULU/292 and KAKAMEGA/SEREM/409 and that the deceased married a second wife after the death of his first wife. PW1 testified that parcel No.Kakamega/Serem/409 was ancestral land and when the deceased married the mother to the plaintiff he purchased L.R. No.TIRIKI/CHEPTULU/292. It was also submitted that the deceased shared out the two parcels to his two families. Since the first wife had passed on the deceased caused the ancestral land L.R. No.Kakamega/Serem/409 to be registered in the name of the defendant while L.R. No.Tiriki/Cheptulu/292 was allocated to the family of the plaintiff.
16. In their submissions they disputed the agreement dated 26/07/1999 "D Exhibit 4" and maintained that the same was just an agreement for handing over title and not for purchase of L.R. Kakamega /Serem/409. They further submitted that the last part of the agreement was added by the petitioner/defendant for suit his own selfish ends.
17. They also disputed D Exhibit 3 submitting that some words were just added on the document which did not form part of the original document. They submitted that there is no way the Defendant who has land elsewhere can be allowed to have a share from the parcel belonging to eight brothers and sisters. They maintained that the Defendant does not have a right to parcel No.TIRIKI/CHEPUTUL/292 just like the plaintiffs have no claim to parcel No.Kakamega/Serem/409.
18. M/S ANZIYA & CO ADVOCATES for the petitioner/defendant contended that parcel No.Tiriki/Cheptulu/292 ought to be shared equally amongst the beneficiaries. In their submissions they maintained that land parcel No.Kakamega/Serem/409 belonged to the petitioner/defendant as shown in the green card "D Exhibit 1". They submitted that the petitioner/defendant was the 1st registered owner of the said plot and that there was an agreement produced by the Petitioner duly executed by the objectors other and in the presence of the objectors indicating how the estate was to be distributed.
19. Counsel also submitted that the objectors/plaintiffs did not produce any evidence to show that land parcel No.Kakamega/Serem/409 was part of the estate of the deceased herein and maintained that the only estate to be shared equally amongst the beneficiaries is Kakamega/Cheptulu/292.

Analysis and Findings

20. From the evidence on record the question that arises for determination is whether plot No.Kakamega/Serem/409 is part of the estate of the deceased. The petitioner/defendant has shown the green card "D Exhibit 1" where he is named as the owner of parcel no. Kakamega Serem/409. He claims to be the 1st registered owner of the said plot and avers that he bought the same.
21. PW2 on cross examination stated that his grandfather divided plot 409 amongst his three sons Zakayo, Thomas and Benjamin. That Thomas sold his portion to Simeon (Petitioner) and only two portions, that of Zakayo (deceased) and Thomas were combined during adjudication.
22. This means that Simeon bought a portion of plot 409 from his uncle Thomas and they combined it with that of his father (Zakayo) the deceased herein. It is not clear whether Simeon also bought his father's portion. On cross examination PW3 confirmed that Thomas sold land to Simeon to increase his plot.
23. The petitioner/defendant has shown that plot 409 belongs to him. D Exhibit 1 shows that he is the 1st registered owner of the said plot 409 and he has a title deed for the same. It means therefore that plot no.409 is not part of the deceased's estate.

The Law

24. The prevailing situation in this matter is well captioned under Section 35(5) of the law of Succession Act. The said Section 35(5) states as follows:- **“35(5) Subject to the provisions of Sections 41 and 42 and subject to any appointment or award made under this Section, the whole residue of the net intestate estate shall on the death, or in the case of a widow, re-marriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”**
25. The spirit under the said Section 35(5) of the Law of Succession Act is to afford equal distribution of the estate amongst the children of the deceased. Despite many disputes on whether the distribution ought to be equal or equitable by taking into account issues for instance ages, gender, financial status of the children, the provisions of the law have all along and very clearly envisaged equal distribution for the word used in Section 35(5) is “equally” and not otherwise.
26. What the Court is saying in the preceding paragraphs is that whether the Petitioner/Defendant has his own land elsewhere which he bought for himself, he is still entitled to an equal share of his father’s estate unless he denounces his right to such a share. He has not denounced his right to a share in his father’s estate. Accordingly, I find and hold that the deceased’s estate being L.R No. Tiriki/Cheptulu/292 shall be shared equally among all the beneficiaries of the deceased’s estate, namely all the children of the deceased.
27. In this regard, the Petitioner shall proceed to fix the Summons for Confirmation of Grant dated 27/04/2012 on a date to be taken at the registry.
28. It is so ordered.

Judgment delivered dated and signed in open Court at Kakamega this 5TH day of NOVEMBER 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Elungata h/b for Objectors/Plaintiffs

Mr. Kundu (absent) for Petitioner/Defendant

Mr. Lagat - Court Assistant