



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

P&A NO.21 OF 2008

IN THE MATTER OF THE ESTATE OF:

SHADRACK ONYANGO.....DECEASED

AND

JUDITH MARTHA ONYANGO

& 2 OTHERS.....PETITIONERS

VRS

ROSELIDAH OLUOCH DUOGO

& 5 OTHERS.....OBJECTORS

RULING

1. This is a Succession dispute on the estate of the late Shadrack Onyango (hereinafter “the Deceased”). The dispute is between two (2) widows of two of the five (5) sons of the late Mzee Angipa Ngutu and their respective children. These are Judith Martha Onyango, the 1st Petitioner, being the widow of the deceased and Roselidah Oluoch Duogo, the 1st Objector, the widow of the late John Duogo Ngutu. At the time they testified before me, the widows were approximately 70 years old. This is their story.

2. Mzee Antipa Ngutu died on 18th July, 1973 and was buried at his ancestral home at South Wanga, Kakamega County. At the time of his death, he had settled with his family on Plot No.122, Naitiri Scheme since 1965. He was survived with his wife, the late Dorris Antipa, four (4) daughters and five (5) sons. The sons were Stephen Odhiambo, Joseph Ochieng, Shadrack Onyango, John Duogo and Paul Owour, respectively. Mzee Angipa Ngutu had been allocated Plot No.122, Naitiri Settlement Scheme, measuring thirty seven (37) acres, by the Settlement Fund Trustees in the early 1960s. However, as at the time of his demise, he had not completed repaying the loan for the said property.

3. Upon his demise, the Director of Settlement Fund Trustees took out Succession Cause No.1 of 1976 at the District Magistrates Court, Kimilili in order to ascertain how the late Angipa was to be succeeded in respect of the said Plot No.122, Naitiri. In that Cause, four (4) witnesses testified. Of relevance to these proceedings are the testimonies of one of his sons, one Shadrack Onyango, the deceased, and Mzee Antipa's widow, the late Dorris Antipa. They told the court as follows:-

“PW3 SHADRACK ONYANGO SWORN AND STATES IN ENGLISH.

I live in Naitiri scheme. Antipa Ngutu was my father and he died in July, 1973 having his plot No.122 of 37 acres. I have paid of the whole loan of Sh.20,000/= on this plot. I paid for it because I wanted my brothers to have a place. The family has suggested that I should be the registered owner of this plot and I look after the interests of my other brothers.

S.L.N. ALUDA DMII

6/3/76

PW4: DORRIS ANTIPA SWORN AND STATES IN SWAHILI

I live at Naitiri scheme. Antipa Ngutu was my husband, He owned Plot No.122/Naitiri. I have 5 sons and 4 daughters. This Plot No.122/Naitiri should be inherited by Shadrack Onyango to look after it as family property. My other sons who should have interest are Stephen Odhiambo, Joseph Ochieng', Shadrack Onyango, John Duogo and Paul Odwour. It is Joseph Ochieng who has a shamba in South Nyanza. Joseph Ochieng' has no right on this plot. Shadrack should be the registered owner of this shamba to look after it in the interest of his brothers.

S.L.N. ALUDA DM III

6/3/76”.

4. On the basis of the testimonies of the witnesses, the court made its decision as follows:-

”IN THE DISTRICT MAGISTRATE’S COURT AT KIMILILI

SUCCESSION CAUSE NO.1 OF 1976

DIRECTOR OF SETTLEMENT..... PLAINTIFF

VERSUS

ANTIPA NGUTU (DECEASED) DEFENDANT

RULING

After having heard the evidence of the family and chief, I am bound to record Shadrack Onyango as the registered owner of Plot No.122/Naitiri. His three brothers namely Stephen Odhiambo, John Oduogo and Paul Odour have interest in this shamba.

S.L.N. Aluda DMIII

6/3/76”

5. Pursuant thereto, on 21.05.76, the deceased, in respect of whose estate these proceedings relate, executed a Charge over that property in favour of the Settlement Fund Trustees for Kshs.5,330/= and on 22/06/76, the Fund offered him that property. On the following day, 23/06/76, the Director of the Settlement Fund wrote to the deceased confirming to him that he was the allottee of the said property. On 18th August, 1983, the deceased was registered as the absolute proprietor of that property and was issued with a title in respect thereof. That property was registered as Bungoma/Naitiri/122 (hereinafter “the Suit Property”).The deceased died on 17/03/2006 leaving behind a widow JudithMartha Onyango (1st Petitioner) two sons, Clement Omondi Onyango and Calvin Moses Odhiambo and two daughters, Elizabeth Adhiambo and Violet Grace Awino.

6. On 25th February, 2008, the Petitioners, being the widow and two sons of the deceased, respectively,

applied for the grant of letters of administration for the estate of the deceased. In Form P&A 5, the beneficiaries were disclosed as the widow and the four (4) children of the deceased and the only asset of the deceased disclosed in that form was the suit property.

7. On 16th March, 2009, the Objectors filed an Objection to the grant on the basis that their names had been left out in the list of beneficiaries. The Objectors who are sister-in-law and nephews to the deceased, contended that they had lodged the objection as beneficiaries to the estate of the late John Duogo Ngutu, a brother to the deceased. Later, on 19th June, 2012, they filed a Petition by way of Cross Application for Grant.

8. In the Cross Petition and Objection, the Objectors contended that the deceased held the suit property in trust for his late brothers including, the late John Duogo Ngutu; that the Petitioners had concealed material facts by failing to disclose that the Objectors were also beneficiaries to the estate of the deceased; that the objector's interest in the deceased estate was to the extent of 10 acres.

9. Both the Cross Petition and Objection were heard through *viva voce* evidence. A total of three witnesses testified before me. Roselida Aluoch Duogo, the 1st Objector testified that she was the administrator of the estate of her late husband John Duogo Ngutu who died on 8th June, 1992; she produced a limited grant of letters of administration issued on 10/11/2006 by the Webuye Court; that she was married to the family of the late Mzee Angipa Ngutu in the early 1960's; that the suit property was allocated to her father-in-law, Mzee Angipa Ngutu in the early 1960s; that she and her husband started living on the suit property in 1965 with the permission and direction of Mzee Angipa; that the family used to farm the entire property and Mzee Angipa would use the proceeds therefrom as well as proceeds from milk to repay the loan owned to the Settlement Fund Trustees. She told the Court that while Mzee Angipa was alive, he shared the suit property to his sons as follows:-

- a) **Stephen Odhiambo** - **7 acres**
- b) **Shadrack Onyango** - **10 acres**
- c) **John Duogo** - **10 acres**
- d) **Paul Oduor** - **10 acres**

She produced a copy of the Mutation Form signed by Mzee Angutu on 22/4/71 in support of that contention.

10. She further testified that upon the demise of Mzee Angipa, the family Court at Kimilili ruled that the deceased (Shadrack Onyango) be registered as owner of the suit property in trust for his brothers; that however, upon being registered as such, the deceased failed to share the same to his brothers; that a suit filed by the brothers **NBI HCCC NO.2227 OF 1981 PAUL ANTIPA ODUOR & ANOR -VS- SHADRACK ONYANGO** was dismissed for want of prosecution after her husband fell ill and died; that her husband had constructed on his portion on the suit property where he was buried upon his demise in 1992; that she has erected on the suit property permanent and semi-permanent houses for herself and her children; that she has lived on the suit property since 1965 and that she, her children and grand-children continue to reside on the suit property to-date. She contended that, since the deceased had assumed ownership of the property as trustee on behalf of, *inter alia*, her late husband, she and her children were entitled to inherit his portion.

11. O1W2 was Ben Khaemba. He was aged 80 years at the time he testified. He stated that he knew Mzee Angipa Ngutu as they were neighbours at the Naitiri Settlement Scheme; that he knew that both the Petitioners and the Objectors live on the suit property and that problems arose regarding the suit property only after Mzee Angipa had died. He admitted that those who were allocated land at the Settlement Scheme had to pay for it. He did not know whether Mzee Angipa had paid for his land the same way he, the witness, had paid for his.

12. The Petitioners objected to the Objection and Cross-Petition. Judith Martha Onyango, the 1st Petitioner testified on behalf of the Petitioners. She told the Court that she was married to the deceased on 17/05/1961; that her marriage to the deceased was blessed with six (6) children but two (2) are now deceased; that in 1965, the suit property was allocated to her father in law Mzee Angipa Ngutu but he died before he could pay anything towards the loan for its acquisition; that the deceased urged his brothers to contribute to the repayment of the loan but they declined whereby he single handedly repaid the loan to the Settlement Fund Trustees and became the absolute owner of the suit property; that the deceased initiated the Kimilili Succession Cause No.1 of 1976 with a view to have the heirs of Mzee Angipa Ngutu confirm their interest in the land but they declined.

13. The 1st Petitioner contended that the Objectors have no interest in the suit property as John Duogo did not contribute anything towards its purchase. That the Objectors should inherit the land belonging to Mzee Angipa Ngutu at his ancestral home, being LR No. South Wanga/Musanda/283, South Wanga/Bukaya/290 and South Wanga/Bukaya/301.

14. After the trial, the parties filed their respective submissions which I have considered. Upon analysing the Affidavit evidence on record, the testimony of witnesses and the submissions of counsel, I am of the view that the following are the issues for determination:-

- a) ***Whether this court has jurisdiction to entertain this matter?***
- b) ***Whether the suit property belonged to the late Mzee Angipa Ngutu or the deceased?***
- c) ***Whether the Objectors have any interest in the estate of the deceased and if so, the nature of such interest?***
- d) ***What orders should be made in the circumstances?***

15. The Petitioners contended that this court has no jurisdiction to entertain the application by the Objectors; that the Objector's claim lay with the Environment and Land Court and that the claim should therefore be dismissed. Mrs. Chungu for the Objectors thought otherwise. I agree with Mr. Makokha, Learned Counsel for the Petitioners that jurisdiction is everything. That once a court finds that it has no jurisdiction in a matter, it must down the tools and fold its hands. See **The Owners of Motor Vessel "Lillian S" -vs- Caltex Oil Kenya Ltd [1989] KLR 1.**

16. These proceedings were commenced by the Petitioners by way of a Petition for grant of letters of administration in respect of the estate of the deceased (Shadrack Onyango) on 25/2/2008. On 16/3/08 and 19/06/2012, respectively, the Objectors filed a Notice of Objection and Petition by way of Cross Application for Grant, respectively. All these proceedings were made under therelevant provisions of the Law of Succession Act, Chapter 160 Laws of Kenya. It is all about inheritance of the suit property. The claim of the Objectors in these proceedings was that they are entitled to share in the estate of the deceased as beneficiaries. Both the applications and evidence by the Objectors pointed towards the issue of Succession which is a preserve of the family court which this court is.

17. I am aware that under Article 162 (2) of the Constitution of Kenya and the Environment and Land Court Act, 2012, claims touching on ownership of, working on and/or trespass to land is a preserve of the Environment and Land Court. However, that court's jurisdiction, in my view, does not extend to matters of Succession even if the asset being succeeded or inherited is land. Section 13 (2) of the Environment and Land Court Act, 2012 provides:

"In exercise of its jurisdiction under Article 162 (2) (b) of the constitution, the Court shall have power to hear and determine disputes-

- a) ***relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, valuations, mining, minerals and other natural resources;***

- b) *relating to compulsory acquisition of land;*
- c) *relating to land administration and management;*
- d) *relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and*
- e) *any other dispute relating to environment and land.”*

18. The claim by the Objectors is that, by virtue of the holding by the Kimilili family Court on 6th March, 1976, in the **Succession Cause No. 1 of 1976, Director of Settlement –vs- Angipa Ngutu (deceased)**, the deceased was a trustee of the suit property on behalf of, inter alia, the late John Duogo Ngutu. That by virtue thereof, they are entitled to inherit a portion of the deceased's estate. To my mind, that is a claim under succession. Accordingly, my view is and I so hold, that the Land Court has no jurisdiction to entertain Succession disputes even if they relate to land and that it is this court that is clothed with jurisdiction to entertain the Objector's claim. I reject that objection.

19. There is the issue that there was NBI HCCC No. 2227 of 1981. The only evidence produced before this Court was the decree which showed that, that suit was dismissed for want of prosecution in 1994. Firstly, it is not clear whether that suit concerned the enforcement of the trust created by the Order of the Kimilili Court in the Succession Cause No. 1 of 1976. Secondly, the 1st Objector testified that the suit was dismissed because John Duogo Ngutu fell ill and died thereafter whereby the suit failed to be prosecuted. Thirdly, the trust created in 1976 subsisted and it would be a grave injustice to defeat the same by a technicality. In any event, I doubt if any order of dismissal would be valid having in mind that the case relating to John Duogo had abated as at the time the order was purportedly being made. The fourth reason is what I will later on address in this ruling. I therefore hold that HCCC No.2227 of 1981 does not bar the Objector's claim in these proceedings.

20. The second issue is whether the suit property belonged to Mzee Angipa Ngutu or the deceased. The undisputed evidence on record is that both the Petitioners and Objectors are daughters-in-law and grandchildren of Mzee Angipa Ngutu. They all live in the suit property by virtue of having been wives and children of Shadrack Onyango and John Duogo, both being the deceased sons of Mzee Angipa Ngutu. The evidence showed that the two sons were invited to or were allowed to move into and live in the suit property together with their respective families by Mzee Angipa Ngutu in 1965. Both PW1, O1W1 and O1W2 were in agreement that the suit property was initially allocated to Mzee Angipa Ngutu in the early sixties by the Settlement Fund Trustees; that it is then that his family moved into the suit property. O1W2 told the court that, he and Mzee Angipa Ngutu were neighbours; that he knew Mzee Angipa to be the owner of the suit property and that problems relating to the suit property only arose after Mzee Angipa Ngutu died.

21. On my part, I am satisfied and hold that, from the evidence on record, Mzee Angipa Ngutu was the original allottee of the suit property; that the suit property remained his until he died in 1973 and that his children occupied the suit property in or about 1965 or thereabouts, by virtue of his ownership of the same; that the suit property continued to be his until 1976 when the Director of Settlement Fund Trustees approached the District Magistrate's Court at Kimilili in Succession Cause No.1 of 1976 and sought to know who would succeed Mzee Angipa Ngutu in respect of that property. The court made a decision on 6th March, 1976 that the deceased do succeed Mzee Angipa Ngutu.

22. This now brings me to the issue of the ownership of the suit property by the deceased, Shadrack Onyango. It was the Petitioner's contention that the suit property was previously owned by the Settlement Fund Trustees; that Mzee Angipa Ngutu paid nothing for the suit property; that it is the deceased who sorely paid for it and became the absolute registered proprietor and was issued with the title thereof. The Petitioners produced a Charge dated 21/05/76, a Letter of Offer dated 22/06/76, an Allotment Letter dated 23/06/76 and a Land Certificate dated 18/08/1983 in support of their case. All these documents were indisputably in the names of the deceased. None bore the name of Mzee Angipa Ngutu. On the basis of those documents, one would be right to conclude that the suit property belonged to the deceased.

23. In support of this position, the 1st Petitioner testified, through her witness statement dated 21/03/14, which was adopted as part of her sworn evidence in chief, as follows:-

“12. That upon the demise of my father in law, my husband severally called upon his brothers and requested them to jointly service the loan that the land can be jointly owned by them.

13. That my brother in laws all refused to contribute anything towards the payment of the loan despite the fact that they were in gainful employment.

14. That they all had various reasons and excuses why they should not be involved in the land.

15. That my husband approached the Settlement Fund Trustees who advised him to pay the loan so that they can allot him the land.

16. That he initiated the Kimilili Succession Cause No. 1 of 1976 and asked the heirs of Antipa Ngutu to confirm whether they had interest in the land.

17. That all heirs and beneficiaries refused to be associated with the land save for my husband.

18. That on 21st May 1976, my husband took charge over the land after having been allotted the same.”

24. Of course the 1st Petitioner lied when she stated in para. 16 of her statement as set out above that it is the deceased who initiated the Kimilili Succession Cause No.1 of 1976. A look at the proceedings that were produced in Court shows that the proceedings were initiated by the Director of Settlement against Mzee Angipa Ngutu (deceased) with a view to establish who was to succeed him. It is thereupon that the deceased was nominated and appointed to be the registered owner of the suit property in trust for his brothers.

25. If however, it is true that the deceased initiated the said Kimilili Succession Cause No.1 of 1976 as is contended by the Petitioners, then there is no doubt in my mind that he must have orchestrated a monumental fraud that he perfected thereafter and which the Petitioners would like to conclude by the present proceedings. I hold so because, the deceased must then have advised the Director of Settlement to file the Succession proceedings at Kimilili so that he, the deceased, will be declared the registered owner of the suit property. I am alive to the fact that he told that court that as at the time he testified, 6th March, 1976, he had already paid the entire loan of Kshs.20,000/= for the suit property. Thereafter, he seems to have set in motion the preparation, execution and issuance of documents that would finally make him the absolute registered owner of the suit property. This is as follows; on 21/5/1976, he purportedly executed a Charge over the suit property for Kshs.5,330/= payable in monthly installments of Kshs.240/= for 40 months in favour of the Settlement Fund Trustees. Letters of Offer and Allotment were issued to him on 22/6/76 and 23/6/76, respectively by the same Settlement Fund Trustees purporting to allocate him the suit property.

26. In particular, the letter of offer dated 23/06/76 stated, inter alia, that:-

“REF: NO.LO/7/122/18

MR. SHADRACK ONYANGO

P. O. BOX 11659

NAIROBI.

Dear Sir/Madam,

RE: OWNERSHIP OF PLOT NO.122. NAITIRI SCHEME

I hereby confirm and certify that you are the allottee of Plot No.122 Naitiri Settlement Scheme and that you have paid a sum of shillings Shs.6,300/= being the full purchase price including Shs.3,300/= in respect of Development Loan together with the necessary legal fees.

The Trustees hereby undertake to transfer the freehold interest in the said plot to you as and when the Director of Survey has completed the survey of your scheme and deed plans, specifying the exact area and boundaries of your plot have been produced.”

27. In their documents filed on 21/3/2014, the Petitioners produced a letter dated 21/4/75 by the Settlement Fund Trustees to its officer in Kitale. Therein, it was communicated as follows:-

” The Settlement Officer (1)

P. O. Box 203

KITALE.

RE: APPENDIX “B”

PLOT NO.122 – NAITIRI SETTLEMENT SCHEME

MR. ANTIPA NGUTU – DECEASED

Mr. Shadrack Onyango who is one of the sons of the above named settler wishes to pay the loans in full in respect of this plot. He has called in this office and has infact paid the sum of shillings Ten Thousand (Kshs.10,000/=) on 16/4/75 towards loan repayment.”

28. Recalling that the deceased had told the family court at Kimilili that as at 06/03/76, he had paid the entire Kshs.20,000/= loan over the suit property, why were the charge, letters of offer and allotment being generated on 21st May, 22nd and 23rd June, 1976 if not for ulterior motive. The above letter dated 21/4/75 confirms that, as at 16th April, 1975, the deceased had paid Kshs. 10,000/-. Why would the Charge be executed one year later for Kshs.5,330/= yet he had already paid a total of Kshs.20,000/= ? In my view, the circumstances and speed at which the Charge of 21st May, 1976 and the Letters of Offer and Allotment were executed and issued is suspect. It has not escaped the Court's mind that the said documents came about shortly after the family Court in Kimilili had ruled that the deceased be registered as owner of the suit property. The deceased had used the ruling that he be registered as owner to be able to obtain the documents he relied on to be registered as absolute owner of the said property.

29. My take is and I so hold, that the said documents were being generated by the Settlement Fund Trustees at the instance, with the knowledge and/or connivance of the deceased to defeat the trust that had been created by the ruling of the family court at Kimilili on 06/03/76. That court held that, the deceased was to be registered as owner of Plot No.122/Naitiri and his three brothers namely Stephen Odhiambo, John Duogo and Paul Oduor have an interest in the property. There is no evidence that the said order was ever appealed against or ever set aside.

30. I further hold that, it is by virtue of the ruling of the family court at Kimilili in the Succession Cause on the estate of Mzee Angipa Ngutu, that the deceased obtained the authority to pursue and obtain the title for the suit property. I accordingly hold and make a finding that the deceased held title No.Bungoma/Naitiri/122 for himself and in trust for his brothers as ruled by the Court on 6th March, 1976. That is why, even after obtaining the title in 1983, the deceased did not evict the family of the Objectors from the suit property. He only barred that family from farming some portion of that land.

31. I am alive to the fact that the order that created the trust over the suit property was made in 1976

over 30 years ago. However, I also hold the view that, there can be no limitation in effectuating that trust by dint of Section 20 of the Limitation of Actions Act chapter 22 Laws of Kenya which provides:-

“20. None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action-

a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy or.

b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”

32. To my mind, and this is the further reason for my holding that this Court has jurisdiction to entertain the Objector’s claim, the deceased was a trustee of the suit property in favour of his three (3) brothers, John Duogo included. The Objection and Petition by way of Cross application for Grant, is a kin to a claim to establish their interest in the trust property. A Court of law is a Court of justice, which this is. The Court cannot sanction an illegality at the altar of technicality. Article 159(2) of the Constitution of Kenya enjoins this Court to exercise its jurisdiction with a view to do justice. This Court cannot close its eyes to the aforesaid fraudulent acts and allow the deceased, and by extension, his personal representatives benefit from his own illegal acts.

33. Having made a finding that the deceased held the property in trust, it follows that John Duogo had a claim or interest in the suit property. The 1st Objector testified how Mzee Angipa had demarcated the suit property in the portion of seven (7) acres to one son and ten (10) acres to each of his three other sons. She produced a Mutation Form dated 22/4/71 as “RAD 4”. The same was signed by Mzee Andipa Ngutu and an Agricultural Officer. A Surveyor signed that document on 06/5/1971. On that document, there is a diagram how the property was to be subdivided amongst the sons of Mzee Angipa. The share of John Duogo is shown as being 10 acres. This piece of evidence was never challenged by the Petitioners. Accordingly, I hold that the estate of the late John Duogo is a beneficiary of the suit property to the extent of 10 acres.

34. The 1st Objector was appointed the administrator of the estate of the late John Duogo Ngutu on 10/11/2006. The estate of the late John Duogo Ngutu has an interest in the suit property to the extent of 10 acres. My view is and I so hold that, the estate of John Duogo should be represented in the administration of the estate of the late Shadrack Onyango.

35. Accordingly, in view of the foregoing, I allow the objection and cross petition for grant and make orders as follows:-

a) the late Angipa Ngutu was the original owner of the suit property and he had allowed his children and families to occupy the same as from 1965;

b) the late Shadrack Onyango held the property known as Bungoma/Naitiri/122 for himself and in trust for, inter alia, John Duogo Ngutu;

c) the estate of the late John Duogo Ngutu has an interest in the estate of the late Shadrack Onyango to the extent of 10 acres in Bungoma/Naitiri/122;

d) the estate of the late John Duogo Ngutu is a beneficiary in the estate of the deceased herein and should have been indicated as such in Form P&A 5;

e) a grant of Letters of Administration be and are hereby issued to Judith Martha Onyango, Calvin Odhiambo, Clement Omondi Onyango and Roselida Aluoch Duogo as joint administrators of the estate of the deceased;

f) the parties may apply for confirmation of the grant upon agreeing on distribution;

g) the costs of the objection and cross petition are awarded to the Objectors.

DATED and DELIVERED at BUNGOMA this 15th day of July, 2014.

A. MABEYA

JUDGE