



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

P & A NO.133 OF 2007

CHRISPINUS ANDERA MANGENIPETITIONER

VERSUS

AGNES AUMA ODUOROBJECTOR

RULING

1. The Decision is about the Distribution of the Estate of Joseph Adingo Odindibale (the Deceased) who died intestate on 1st April 1995. He left behind an Estate comprised of land parcel known and described as Bukhayo/Nasewa/1251.
2. The stage for distribution was set by the following consent entered between the parties on 8th December 2011:-

“By consent the grant issued on 22/10/07 and confirmed on 28/07/08 is hereby revoked and an Amended Grant be issued in the joint names of the Petitioner and the Objector. The Petitioner to apply for Confirmation of Grant within 60 days and serve the co-administrator who has a right to respond within 30 days”.

3. The protagonist herein are fronting purchasers’ interest. Agnes Auma Oduor (“Agnes”) is fronting the purchase by her late husband Oduor Ogola Olay. And although she does not have Letters of Administration to the Estate of her Deceased husband, the consent in which she was made a Co-Administrator in this matter hoisted her with the capacity to participate in the Distribution proceedings.
4. The evidence by both sides is straightforward in my view. Agnes and her two witnesses told Court how her late husband bought 3 acres from the Deceased. That purchase was reduced into 3 written agreements. Those of 24/9/89, 1990, 18/9/93 (Exhibits O1, O2 and O3 respectively). The family of late Olayo was shown the land and they settled there. A surveyor was to later formally excise the 3 acres. It turned out, so Philip Maleka Nanzala (DW3) testified, the land that the purchaser had settled on was less than 3 acres. It is said that the surveyor visited the land in 2007 when the main actors had died. The survey precipitated the dispute now before Court.
5. On his part Chrispinus says that he purchased 1½ acres from the Deceased. There were three agreements in respect to the said transaction. Those of 29/10/95, 10/05/98 and 15/05/98. (Exhibit O4, O5 and O6 respectively). It was his evidence that although the area of the land is 5½ acres on the title it is 3½ acres on the ground. That if Agnes was to be given 3 acres then only ½ acre would be available to him. He sees that as the crux of this dispute.
6. From the evidence placed before Court, the late Olayo bought 3 acres from the deceased while Chrispinus 1½ acres. The purchase by Olayo was first in time and was completed before the transaction of Chrispinus which commenced on 29/10/1995. Chrispinus says that the crux of the matter is that the Deceased land on the ground is

3 ½ acres and not 5 ½ acres as indicated in the title. The Deceased therefore sold more land than he actually owned. If that is true then that is the dilemma for this Court to resolve. Fortunately the Law of Equity provides the answer. Where two Equities are equal the first in time shall prevail. The purchase by Olayo was first in time and so interest of his Estate shall prevail.

8. For that reason the Court Orders that the change effected in the register to Bukhayo/Nasewa/1251 on 8.9.2008 be reversed. The Court further Orders that the Government Surveyor does carry out a survey to establish the exact acreage on the ground. Thereafter the County land Register shall rectify the title, if need be, so that the correct acreage is reflected on the register. Both parties herein shall share the cost of this exercise. The Court shall presently summon the County Surveyor and the County Land Registrar to advise on the time required for this exercise.
9. Upon the finalization of the Surveyor's Exercise, the Court shall make its final orders.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 2ND DAY OF OCTOBER, 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR PETITIONER/RESPONDENT

.....FOR OBJECTOR