Obilo v ROO & another (Civil Appeal 38 of 2017)
[2024] KECA 40 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 40 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 38 OF 2017

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 25, 2024

BETWEEN

LUDOVICO OPIYO OBILO ..... APPELLANT

AND

ROO ..... 1ST RESPONDENT

SKO ..... 2ND RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Busia (Korir, J.) dated 30th November, 2016 in Succession Cause No. 194 of 2015)

JUDGMENT

1. This knotted succession dispute is best understood and resolved by plotting the rather complex family tree of one, Mary Auma Malo ("Mary"). Fortunately, the very careful ruling by the trial judge, Korir, J. (as he then was) dated 30th November, 2016, very patiently unbundled the contours of the family tree.

2. Sometime in the mid-fifties, Mary got married to a man who has only been named in the court records by one name – Malo. Mary and Malo were, unfortunately, not blessed with any children. The marriage did not last too long either because evidence shows that Malo died shortly thereafter.

3. Following the death of her husband, Mary, presumably still a young widow, went to cohabit with a man by the name Zedekiah Oduke (Zedekiah). By the evidence adduced in court, Zedekiah had at least one other wife and children. One of the children by Zedekiah's legally married wife is Clement Oduke (Clement). Clement testified in the trial court on behalf of the appellant.

4. Evidence abounds that Mary cohabited with Zedekiah for quite some time. Unfortunately, yet again, Mary was not blessed with any children out of that relationship. However, while still living in the home of Zedekiah, Mary's younger sister by the name Florence Namude (Florence) came to live with her.

Florence had been married in Uganda but had disagreed with her husband hence her easterly migration back to Busia, Kenya. To be clear, the two sisters now lived in Zedekiah's homestead.

5. While living in Zedekiah's homestead at the instance of Mary, Florence struck a romantic relationship with Zedekiah. She ended up being successful where Mary had not been: the liason with Zedekiah bore three children. One of the children died young but two sons grew to adulthood. They are ROO ("R") and SKO ("S"). R and S are the respondents herein. It is not disputed that R and S spent their early years in Zedekiah's homestead.

6. Before long, however, Florence, the biological mother to R and S, left Zedekiah's homestead and returned to Uganda. Her whereabouts are unknown – at least as far as the court records are concerned although Clement claimed that she re- united with her Ugandan husband. She left her young sons in the care of Mary. Mary raised them as her own. Indeed, both R and S considered Mary their mother and referred to her as such.

7. It would seem that in the interim, while R and S were still minors, the relationship between Mary and Zedekiah unraveled. This brought their cohabitation to an unceremonious end. Mary left Zedekiah's homestead with the two young boys – R and S. It is not disputed that Zedekiah was R's and S's biological father; but neither is it disputed that he did not raise them or seek them out after Mary left his homestead with them. As R and S considered Mary their mother; they most assuredly did not consider Zedekiah their father.

8. With the end of her cohabitation with Zedekiah, Mary returned to the ancestral home of her deceased's husband – R and S in tow. There, Mary found welcome and succour in the person of Isaya Okumu Obilo ("Isaya" or deceased), a brother to her deceased's husband. Isaya is the deceased in this succession saga.

9. Isaya not only took Mary in – the word used by some witnesses is "inherited", a misreading of Luo culture – but also took in R and S. Unrebutted evidence given at the trial showed that Isaya, Mary, R and S lived together as an amalgamated family. They all lived on Isaya's land which, presumably, provided for most of their needs. Isaya raised R and S as his own sons. In turn, they treated him as their father.

10. Death came calling for Isaya on 13th September, 1989. He died intestate. It is not disputed that he had never formally married though he lived with Mary as aforesaid; and neither did he have any biological children though he treated R and S as his children.

11. When Isaya died, it was his brother Ludovico Opiyo Obili (the appellant) who petitioned for letters of administration intestate over the deceased's estate. The succession matter was filed at Busia Senior Resident Magistrate's Court and was instituted as Succession Cause No. 86 of 1992. The appellant was granted the letters of administration intestate on 12th October, 1992, and grant of probate was confirmed on 10th January, 1994. The only asset identified in the grant is the parcel of land known as Samia/Bujwanga/1580 (the "Suit Property"). As it will soon emerge, the actual acreage of the parcel is an issue in these proceedings. The grant identified only two beneficiaries: the appellant and one, Armstrong Freddie Kasuku ("Kasuku"). The latter was described in the succession proceedings as a "purchaser." Kasuku later used the Certificate of Confirmation of grant to obtain the title to the Suit Property in his name.

12. It is not disputed that the appellant informed neither the respondents nor Mary when he petitioned for the letters of administration. In his testimony before the trial court, he explained that he did not view the three as beneficiaries to the estate of his brother, Isaya. Meanwhile, Mary, R and S continued residing on the Suit Property seemingly in blissful ignorance that title had been transferred to Kasuku.

13. Sometime in 2008, it would seem that Mary became aware of the transfer of the Suit Property to Kasuku. She responded by lodging a complaint against Kasuku at Funyula Land Disputes Tribunal. Her claim was that Kasuku had grabbed the deceased's land through fraudulent means. The tribunal ruled that the land belonged to Kasuku by dint of the title he had already processed but ordered him to permit Mary to have a "life interest in the land". The learned judge made a finding that the Land Disputes Tribunal's decision was adopted as a decision of the court in Busia Magistrate's Court Land Disputes Case No. 60 of 2008. The court's decision was never appealed against or otherwise challenged – although, as we will remark later, the proceedings were dripping in obvious lack of jurisdiction as per section 3 of the Land Disputes Tribunals Act, 1990.

14. It is not clear when Mary died but it would appear that she was dead and was buried in the Suit Property by 2014 when Kasuku filed Busia Chief Magistrates' Civil Case No. 161 of 2014 seeking eviction orders against R and S. This is what disturbed the long lull in hostilities that had seemingly existed since 2008 with R and S (and before then, their mother), peacefully occupying the Suit Property.

15. It appears that R and S, at first, tried to resist the eviction suit but failed. Their next port of call was the Probate and Administration Cause whose ruling is the subject of this appeal. This was Busia High Court Probate and Administration Cause No. 194 of 2014. As the learned Judge explained in his ruling, the succession cause was given a new number because the earlier one in which the appellant obtained letters of administration had been filed in the magistrate's court – but the new cause, entailing an application for revocation of the grant at a time when only the High Court could revoke – had to be filed in the High Court.

16. This is how Korir, J. (as he then was) found himself unknotting the family tree as rehashed above. The application before him, brought by the 1st and 2nd respondents was a chamber summons application dated 30th April, 2015. It sought the following orders:

    1. That this application be certified urgent and service be dispensed with in the first instance.

    2. That this Honourable Court be pleased to stay proceedings and subsequent orders of lower court case No. 161 of 2014 pending the hearing and determination of this application.

    3. That this Honourable Court be pleased to revoke and/or annul the grant of letters of administration issued to the Petitioner/Respondent herein on 12/10/1992 and confirmed on 10/1/1994.

    4. That upon granting prayer 3, this Honourable Court be pleased to issue the grant of letters of administration to the Objectors/applicants herein.

    5. That the costs of this Application be borne by the Petitioner/Respondent.

17. Tuiyott, J. (as he then was) had earlier declined to grant prayer 2 on account of non-disclosure of the existence of the eviction suit by R and S. It fell upon Korir, J. (as he then was) to determine prayers 3 – 5. He elected to do so through viva voce evidence during which much of the family history rehashed above came out.

18. During the hearing, the appellant contested the application on two main grounds. First, the appellant contested that the respondents and Mary were beneficiaries to the estate of Isaya. His position was that Isaya died intestate and had neither married nor had any children. The respondents, he sought to persuade the trial court, were the biological children of Zedekiah and Florence. As such, the appellant

argued, the respondents were not entitled to the estate of Isaya. To buttress this point, the appellant called Clement Oduke, the biological son to Zedekiah, as his witness. The tenor of Clement's testimony was the biologically true position that the respondents were, in fact, his half-brothers; and did not, therefore, deserve to inherit from the estate of Isaya.

19. The second major argument by the appellant was that the only asset belonging to the estate of Isaya, namely the Suit Property, was already granted to Kasuku through a court process i.e. the Funyula Land Disputes Tribunal and the suit which adopted its decision. On this point, therefore, the appellant sided with Kasuku that the entirety of the Suit Property belongs to Kasuku since Busia Magistrate's Court Land Disputes Case No. 60 of 2008 adopting the decision of the Funyula Land Disputes Tribunal was never appealed against.

20. In his carefully parsed judgement, the learned Judge rejected both arguments by the appellant. First, as re-told above, the learned Judge agreed with the appellant that the respondents were not the biological sons of Isaya. After tracing the family history, he found unrebutted evidence that Isaya took the respondents in as his own sons and treated them as such. The respondents depended on him for their provisions when younger; and, in turn, when Isaya grew old and sickly, the respondents took care of him. The learned Judge, therefore, concluded that whether the respondents were the biological sons to Isaya or not was immaterial; instead, what matters were the provisions of section 29 of the *Law of Succession Act* which the learned Judge found applicable.

21. Section 29 of the *Law of Succession Act* defines a dependent as follows:

> " 29. For the purposes of this Part, "dependent" means-
>
> a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to this death;
>
> b. such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half- brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
>
> c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

22. After analyzing the uncontested evidence about the relationship between the respondents and Isaya – including how Isaya provided for them and how the respondents, in turn, took care of Isaya when his health failed, the learned Judge concluded that the respondents were dependents for purposes of section 29 of the *Law of Succession Act* in the following terms:

> 23. The question to be answered in this matter is whether the Objectors were legally entitled to a share of the estate of the deceased. The court also needs to determine whether the deceased left behind any property prior to his demise.
>
> 24. An overview of the evidence shows that the Objectors were not the biological sons of the deceased. It is, however, not disputed that Mary Auma took care of them. She even moved back to the home of her first husband with them notwithstanding the fact that Zedekiah Oduke was their father.

25. The Objectors' claim that they took care of the deceased when his health failed has not been rebutted. The deceased who was not married nor blessed with any child took Mary Auma and her nephew under his wings.

26. ....

27. The evidence in this case points to the fact that the Objectors were "children whom the deceased had taken into his family as his own" as per Section 29(b). They were thus the deceased's dependents for all intents and purposes and they ought to have been named as beneficiaries by the Petitioner when he applied to administer the estate of the deceased. In any case, as provided by Section 38 of the *Law of Succession Act*, Cap. 160, the Objectors ought to have been given priority in the issuance of the grant of letters of administration to the estate of the deceased. If there was anything to be inherited from the estate of the deceased, the Objectors and their deceased aunt Mary Auma were entitled to it. It must be remembered that Mary Auma provided succour and comfort to the deceased in his sunset years. The deceased must have appreciated this fact and that is why he never disposed his entire parcel of land as will be seen shortly.

23. The learned Judge next had to deal with the question whether there was any asset for the respondents to inherit anyway in view of the Funyula Land Disputes Tribunal's decision as adopted in Busia Magistrate's Court Land Disputes Case No. 60 of 2008. The learned Judge concluded that evidence showed that there was some remainder of the Suit Property which was amenable to be inherited by the respondents. This was because, the learned Judge reasoned, the Funyula Land Disputes Tribunal had found that Kasuku had only bought part of the Suit Property and not the whole of it. The learned Judge found fortification in his reasoning by the fact that when the appellant filed for letters of administration, Kasuku listed Isaya's estate's liability to him as only 2.5 acres. This meant, the learned Judge reasoned, even Kasuku understood that his claim did not cover the entirety of the Suit Property since the Suit Property is a little more than 3.35 acres. This means that the remaining parcel is available to be inherited by the respondents.

24. It is sufficient, yet again, to quote the learned Judge's reasoning at length on this point:

28. The next question is whether the deceased left anything to be inherited by the Objectors. The Petitioner claims that the deceased had sold his parcel of land to the Interested Party by the time of his death. This is the position he took before this court and this is the position he took before the Land Disputes Tribunal. The Land Disputes Tribunal agreed with him.

29. It is, however, noted by this court that the observations made by the Tribunal do not add up. I will cite two observations made by the Tribunal to demonstrate this fact. The Tribunal found that:

"5) The Court further observes that, that there was a deal of selling and buying between Isaya Okumu and the Defendant, whereby Isaya Okuku agreed to sell five acres of land to the defendant Armstrong Kasuku at the cost of Kshs. 5000/- per acre. This fact was confirmed by village elders such as Senior Chief Clement Oduke, Robert Nyongesa aged 78 years and etc.

6) The court observed that unfortunately Isaya Okuku died before completing the process of transfer. Opiyo Obilo Marko Obilo as the next of kin completed the process of succession. This fact is confirmed by the defendant's witness, Opiyo Obilo and Senior Chief Clement Oduke. This process enabled the defendant, Armstrong Freddie Kasuku to get title deed No. Samia/Bujwanga/1580 –1.34 ha."

30. If the deceased had indeed sold five acres to the interested party how come the Interested Party only managed to process a title deed for 1.34 hectares which is equivalent to 3.35 acres? The Petitioner's case is not helped by the fact that when he applied for letters of administration to the estate of the deceased in 1992, he clearly indicated in Form P&A 5 that the liability of the estate was 2½ acres. The certificate of confirmation of grant issued on 10th January, 1994 shows that the Petitioner was to be the sole heir in respect of L.R. No. Samia/Bujwanga/1580 and the Interested Party was to get 2 ½ acres from the estate. A certificate of official search issued on 22nd June, 1992 shows that the approximate area of L.R. No. Samia/Bujwanga/1580 registered in the name of Isaaya Okuku Obilo was 1.34 hectares. Even assuming that the Petitioner was executing the wishes of the deceased, it is clear that at least ¾ of an acre of the deceased's land was available for distribution to the beneficiaries. I therefore find that whatever claim the Interested Party had in the estate of the deceased there remained some land that was to go to his dependents. I am aware that the Interested Party did not participate in the objection proceedings. However, he will, at the distribution stage, have an opportunity to stake his claim to the estate of the deceased.

24. Aggrieved by the decision of the High Court, the appellant filed a Notice of Appeal dated 8th December, 2016, and a Memorandum of Appeal dated 18th April, 2017, in which he raised six (6) grounds of appeal. These are that the learned trial judge erred in: holding that the respondents had priority over the appellant in petitioning for grant of letter of administration of the estate of the deceased; fact in equating Mary Auma to the wife of the deceased; failing to appreciate that Mary Auma had no legal interest in the deceased land; failing to appreciate that the appellant petitioned for grant of letters of administration solely for the purpose of transferring the deceased's land to the purchaser; law in holding that the respondents were dependents of the deceased; and failing to consider the evidence of the appellant's witness, Clement Oduke Malo and as a result coming to the wrong conclusion.

25. Consequently, the appellant prayed that the appeal be allowed with costs, and orders of the High Court be set aside.

26. However, in an application dated 18th October, 2018, Fredrick Obilo Opiyo, sought to be substituted in place of his father, Ludovico Opiyo Obilo, the appellant who died on 11th November, 2017. The application was made in accordance with Rule 99 of the Court of Appeal Rules. The said application was not opposed by the respondents and was therefore allowed by this Court (P.O Kiage, JA) on 9th March, 2023, with the effect that Fredrick Obilo Opiyo has been substituted for Ludovico Opiyo Obilo, the appellant.

27. During the virtual hearing of the appeal, learned Counsel Mr. Juma appeared for the appellant, whereas there was no appearance for the respondents even though they were served with the hearing notice as attested by the affidavit of service sworn by Benjamin Adeya Egesa on 1st September, 2023. The appellant had filed written submissions which he relied on entirely. The respondents did not file any written submissions.

28. In his submissions dated 29th September, 2022, the appellant contended that the main issue for determination was who between the appellant or the respondents, who are the maternal nephews of Auma, has priority to administer the estate of the Deceased. In this regard, he argued that had the learned judge taken time to peruse the affidavit of the appellant's witness, Clement Oduke Malo, at pages 38 to 40 of the record of appeal and the evidence of Auma in the proceedings before the Land Dispute Tribunal at paragraphs 20 to 30 of the record of appeal and her evidence in cross examination at page 42 paragraphs 15 to 30 of the record of appeal; he would have come to a different conclusion. According to the appellant, the contents in the highlighted pages in the record of appeal were to the

effect that, at no point did Auma ever claim that she was married to Isaya and all through her evidence, she referred to Isaya as her brother-in-law; which was in tandem with the averments of Clement Oduke Malo as stated in his affidavit.

29. Secondly, the appellant argued that the evidence of Clement Oduke Malo, as stated in his affidavit was not challenged, and in addition, the appellant's averment in his replying affidavit that the respondents went to live with Auma after the death of the Deceased was corroborated by a similar evidence of Clement Oduke Malo at paragraph 20 page 40 of the record of appeal. The appellant further argued that the respondents went to reside with Auma after the Deceased death, with the motive to inherit the Deceased estate. Therefore, it was not true that the respondents looked after the Deceased until he died.

30. Lastly, the appellant argued that the learned judge erred in equating Auma as a wife or dependent of the Deceased; and that the respondents having only showed up after the Deceased death, could not qualify as his dependents.

31. During the plenary hearing of the appeal, the Court asked Mr. Juma the exact portion of the Deceased's land that Kasuku was awarded by the Land Disputes Tribunal. Counsel's answer was that Kasuku was awarded the whole of the Deceased's land and there was an agreement that he (Kasuku) volunteered to buy two (2) acres for each of the respondents. However, the respondents defied the decision of the Land Disputes Tribunal and trespassed into the Deceased's land in 2014; where after Kasuku filed a suit to evict them and succeeded. Counsel stated that in any event, the respondents proceeded to apply for confirmation of grant of letters of administration after the impugned High Court order which is the subject of this appeal. Thus, Kasuku filed an affidavit of protest in the High Court and all parties who include Kasuku and the respondents have already filed their evidence in the High Court, which matter was due for hearing on 28th September, 2023, to confirm whether all parties have filed their submissions. Therefore, as this appeal subsists, the respondents are also pursuing their application for confirmation of grant of letters of administration of the Deceased estate as per the impugned High Court order.

33. The Court then asked Counsel to clarify what the learned judge pointed out in his ruling with regard to the whole parcel awarded to Kasuku being more than 1.34 hectares. Counsel answer was that along Lake Victoria Bujwang'a, Port Victoria, there are many cases in existence whereby the acreage shown in the titles is much higher than the actual acreage on the ground; which issue has been very common but the same has already been taken up, not only with regard to this matter but also with regard to other files in other cases concerning the land near Bujwang'a Port Victoria area.

34. Having considered the pleadings in the record of appeal, the ruling of the High Court, the appellant's grounds of appeal and submissions and the oral submissions of the appellant, and deploying the standard of de novo review to re-consider and re- evaluate the evidence and come up with independent conclusions which we are obligated under our jurisprudence – see Selle vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123 and Abok James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR - two substantive issues present themselves for determination on this appeal:

    a. First, whether the learned Judge was correct in his conclusion that the respondents were dependents of the deceased under the provisions of section 29 of the *Law of Succession Act*; and

    b. Second, whether there was any part of the Suit Property that was available for inheritance by the beneficiaries of the estate of the deceased in view of the decision of the Land Dispute Tribunal, which was adopted by the lower court in Busia CM Land Dispute Case No. 60 of 2008 (as prescribed under Section 7(2) of the Land Disputes Tribunal Act (Repealed)) which enabled

the appellant to transfer the title of the Deceased land to Kasuku as per the title deed issued to him on 22/2/1994.

35. We begin by noting that while it would appear that the Funyula Land Disputes Tribunal acted in excess of jurisdiction in determining the question of title to the Suit Property, (see Section 3(1) of the Land Disputes Tribunal Act (now repealed)), that question was never taken up by any of the parties to the dispute, and, indeed, the decision of the Tribunal was adopted by the magistrate's court without challenge or appeal in Busia CM Land Dispute Case No. 60 of 2008. That question was, therefore, not before the trial court and neither is it before this Court.

36. The question that is squarely before this Court is whether the learned Judge reached the correct factual and legal conclusions that the respondents were dependents of the deceased under section 29 of the *Law of Succession Act*. We have already set out the provisions of that section and reproduced at length the learned Judge's reasoning on that question. As outlined in the history of the case that we began with in this judgment, we believe that the learned Judge's reasoning cannot be faulted at all. The Judge did a careful analysis of the evidence on record before reaching his conclusion. We agree with the learned Judge that the evidence was uncontroverted that Mary went to live with Isaya together with the respondents after she left Zedekiah's homestead; and that Isaya took them in and provided for them as his family. Indeed, the appellant and his witness seemed to deploy much of their ammunition to demonstrate that the respondents were not the biological children of Isaya. That, however, was never at issue. What was at issue was whether the respondents fitted within the definition of dependents in section 29 of the *Law of Succession Act*. They clearly did. Having come to this conclusion, it follows that the learned Judge was, therefore, correct to rule that the respondents enjoyed priority to petition for letters of administration to the deceased's estate over the appellant who was the brother to the deceased. It was, therefore, legally correct for the learned Judge to revoke the grant issued to the appellant on 12th October, 1992 and confirmed on 10th January, 1994. It was equally correct to appoint the respondents as the administrators of the estate of the deceased.

37. We would similarly agree with the learned Judge's reasoning respecting the second substantive question. By his own admission as contained in the P&A Form 5 filed in the Succession matter, Kasuku indicated that he was only claiming 2.5 acres of the Suit Property as owed to him by the estate of Isaya, the deceased. As the learned Judge correctly concluded, this implied that Kasuku had only purchased that size of land from the deceased. Since the entire parcel of land measured 3.35 acres, it follows that the remainder of the land was available for distribution to the beneficiaries of the estate of the deceased, namely, the respondents. It was, therefore, unlawful for Kasuku to transfer the entirety of the Suit Property to himself: he was only entitled to 2.5 acres of it.

38. In the result, we find that the learned Judge rightfully allowed the respondents' application dated 30th April, 2015, in terms of their prayer 3 and 4 therein which revoked the appellant's grant issued to him on 12th October, 1992, and confirmed on 10th January, 1994. In the circumstances, we find no basis for interfering with the ruling and order of the High Court. Accordingly, we are satisfied that this appeal lacks merit. We hereby dismiss it. Since the respondents did not take part in the appeal, and since this is a family matter, we award no costs in the appeal.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY,2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR