



**In re Estate of Joseph Odinde Odongo (Deceased) (Succession Cause 230 of 1995) [2023] KEHC 2897 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2897 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 230 OF 1995**

**JN KAMAU, J**

**MARCH 28, 2023**

**IN THE MATTER OF THE ESTATE OF: JOSEPH ODINDE ODONGO (DECEASED)**

**IN THE MATTER OF**

**MARGARET AKUMU ODINDE ..... 1<sup>ST</sup> ADMINISTRATOR**

**LEOTINE ANYANGO MALALA ..... 2<sup>ND</sup> ADMINISTRATOR**

**RULING**

1. In her Notice of Motion dated July 29, 2022 and filed on August 1, 2022, the 2<sup>nd</sup> Administrator herein sought for orders that the court be pleased to revoke and/or cancel the title to land parcel number Kisumu/Block 4/43-Tom Mboya Estate (hereinafter referred to as the “subject property”), presently registered in the name of the 1<sup>st</sup> Administrator so as to allow a fresh distribution of the estate of the deceased.
2. She swore an affidavit on August 1, 2022 in support of the said application. She averred that she was appointed as a 2<sup>nd</sup> Administrator vide a Ruling and Order of this court that was issued on July 26, 2021. She stated that the 1<sup>st</sup> Administrator obtained the Grant herein by intentionally and deliberately making false statement of facts and concealment of material facts and information from this court and that by Summons for Revocation of Grant dated October 24, 2020, the aforesaid Grant was revoked and parties were ordered to return for a fresh distribution of the deceased’s assets.
3. She contended that at the time, the 1<sup>st</sup> Administrator had transmitted the subject property to herself after obtaining the Certificate of Confirmation of the Grant issued on December 23, 1998 and that it was necessary that the said title to the subject property revert to the names of the deceased so as to allow for a fair distribution of the estate.
4. She averred that unless the orders she had sought were granted, the other members of the family would be disenfranchised as the subject property formed part of the estate. She was emphatic that her application met the criteria for the grant of the orders she had sought and that it was only fair that the



application be determined before the Summons for Confirmation of Grant could be heard so that the subject property could be listed among the deceased's properties.

5. In opposition to the said application, the 1<sup>st</sup> Administrator swore a Replying Affidavit on August 17, 2021. The same was filed on August 18, 2022. She averred that there was no ground or basis upon which the title to the subject property could be revoked or cancelled as the same was never acquired fraudulently or illegally. It was her case that the issue of obtaining the Grant fraudulently was now res judicata as the same had already been determined by court in a Ruling that was delivered on July 26, 2021.
6. It was her contention that at the time of the deceased's death, the subject property did not form part of his property that could be legally, completely and freely be disposed under the *Law of Succession Act* and that at the time of his demise, his minimal interest in the subject property was terminated.
7. She added that the deceased was never issued with any certificate of title to the subject property for it to be cancelled or revoked or reverted back to his name and that a look at the Certificate of Lease in the proprietorship section showed that her name was the first and only entry.
8. She stated that the decision in *In Re Estate of Joseph Odinde Odongo (Deceased)* [2021] eKLR did not revoke the grant that was initially issued to her and that this court was now functus officio on the revocation of grant in this cause. She was emphatic that if the 2<sup>nd</sup> Administrator was dissatisfied with the court's Ruling, then she could only appeal to the Court of Appeal.
9. She further contended that the subject property was purchased jointly between her and the deceased as their matrimonial home under a tenant mortgage scheme and that the loan was repaid on monthly basis in the deceased's name. She added that the transactional documents in the said subject property were in the deceased's name in trust for her.
10. She pointed out that between 1975, before the demise of the deceased, and 1989, she fell into arrears of paying rent and was even issued with a thirty (30) days' notice of termination of agreement and repossession but upon paying the arrears in the sum of Kshs 9,000/=, the said notice was revoked and that subsequently, on December 14, 1989, the subject property was discharged and she was issued with a Certificate of Lease in the deceased's name.
11. She pointed out that between 1975 and 2010 she paid land rates in the sum of Kshs 292,975/=, land rent of Kshs 9,910/= plus consent and stamp duty at Kshs 3,100/=. She averred that she effected transfer of the subject property from the Municipal Commission of Kisumu at a consideration of Kshs 50,000/=. It was her contention that she contributed over ninety five (95%) per cent while the deceased's contribution was only a meagre five (5%) per cent.
12. She was therefore emphatic that she had absolute and exclusive proprietary rights in the subject property and that it was within her every right to have the subject property registered in her name and not in any of the rest of properties which were solely purchased by the deceased and which the beneficiaries were entitled to a share. It was her view that in the event the court was to find the subject property formed the deceased's estate, then she would be entitled to a refund of all the expenses she incurred and the contributions she made towards the subject property at an interest before it could be distributed amongst the deceased's beneficiaries.
13. She added that in its decision in *Re Estate of Joseph Odinde Odongo (deceased)* (*supra*) the court had observed that her proprietary rights in the subject property could only be determined by oral evidence.
14. She termed the 2<sup>nd</sup> Administrator's application as ill advised and baseless and urged this court to dismiss the same with costs.



15. On October 17, 2022, the 2<sup>nd</sup> Administrator filed a Supplementary Affidavit. She swore the same on October 13, 2022. It was her assertion that the 1<sup>st</sup> Administrator was being dishonest as all the deceased's three (3) wives lived in the village and that the loans were repaid by rents collected from the tenants living in the subject property and contribution from the deceased's family and not entirely from the 1<sup>st</sup> Administrator as she had alleged.
16. She was categorical that the subject property was transferred to 1<sup>st</sup> Administrator on the strength of the Certificate of Confirmation of Grant that was now revoked. She pointed out that the letters dated April 17, 1974, December 14, 1989 and February 19, 1997 that she had annexed in her affidavit were proof of the facts that she disclosed.
17. She was categorical that the 1<sup>st</sup> Administrator was only driven by the fact that the subject property was a prime property located within the municipality of Kisumu while the other parcels were back in the village and did not attract as much value as the subject property and that it was her intention to disinherit the houses of the other two (2) widows of the deceased.
18. The 2<sup>nd</sup> Administrator's Written Submissions were dated and filed on October 17, 2022 while those of the 1<sup>st</sup> Administrator were dated August 17, 2022 and filed on August 18, 2022. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

### **Legal Analysis**

19. The 2<sup>nd</sup> Administrator submitted that she had filed several documents that confirmed that the subject property belonged to the deceased. She asserted that all the documents, receipts and letters proved that before the 1<sup>st</sup> Administrator was issued with a Certificate of Confirmation of Grant. The subject property was in the deceased's name. The 1<sup>st</sup> Administrator only became a proprietor of the parcel after she obtained a Certificate of Confirmation of Grant and thereafter proceeded to acquire a lease title in the year 2010. She added that the registration of the lease title was done following the allotment by the Municipal Council of Kisumu and at all material times, the subject property remained the deceased's property.
20. She contended that in a letter dated December 14, 1989, by the Kisumu Town Clerk to the Commissioner of Lands which was relied upon by both parties herein, it was stated that the liability of the subject property had been fully paid and that the Title to the said subject property was to be issued to the deceased. She asserted that nowhere was it stated that the Title should to be issued to the 1<sup>st</sup> Administrator. She added that the Form of Transfer dated September 15, 1992 by the Municipal Council of Kisumu also confirmed that the subject property was transferred from the Council to the deceased.
21. She contended that at no time was subject property co-owned by both the 1<sup>st</sup> Administrator and the deceased as she had alleged and that there was no document produced by the 1<sup>st</sup> Administrator to prove this fact even on the slightest balance of probabilities. She further argued that the dispute herein was not res judicata as it had never been determined that 1<sup>st</sup> Administrator was the bona fide owner of the subject property.
22. She was emphatic that the subject property was not a matrimonial house as it was a rental house with income supporting the family. She asserted that this fact was confirmed by the letter dated April 17, 1974 where the Municipality wrote to the deceased informing him that they were aware that that the subject property was occupied by a tenant and not the deceased and another letter dated February 19, 1997 that was addressed to the Directorate of Criminal Investigations by the 3<sup>rd</sup> widow who



- complained of the 1<sup>st</sup> Administrator's mismanagement of the funds of the estate and implored upon the office of the public trustee to take over management and rent collection of the subject property.
23. In that regard, she placed reliance on the case of *Re Estate of Leah Wanguui Nding'uri (Deceased)* [2020] eKLR where it was held that where a grant was revoked, all actions taken by the respondents including the registration of the deceased's property in their names were rendered a nullity. She added that in the case of *Evans Omega Erabutsa vs Wilson Kabi Musa & another* [2022] eKLR where it was held that where a certificate of confirmed grant was revoked, all actions taken on the basis of the said certificate are also cancelled and/or reversed and deemed to have no effect in law.
  24. She urged the court to allow her application as it would serve the purpose of achieving equity or fairness as the law required that all the assets be brought to the table during intestate distribution as there had to be a full disclosure of a deceased's estate of his free property, encumbered and property distributed *intervivos*.
  25. She argued that unless the orders she had sought were granted, the 1<sup>st</sup> Administrator and her family who had already taken the subject property that was valued more than the other properties combined would again return to the distribution table and take more.
  26. On her part, the 1<sup>st</sup> Administrator submitted that the Ruling of July 26, 2021 did not actually revoke the grant issued but only amended the Grant and made the 2<sup>nd</sup> Administrator a co-administratrix and that if the Grant was ever revoked, then a new succession cause ought to have been filed.
  27. It was her case that there had never been a transmission of the property from the deceased to her *per se* and that the Letters of Administration were only used to rectify the transactional name used and not to transmit the property. In this regard, she re-emphasised that the only property that formed part of the estate of the deceased was that property which the deceased was legally competent to dispose of during his lifetime and in which by that time, his interests had not been terminated as was held in the case of *Re Estate of Job Ndunda Muthike (Deceased)* [2018] eKLR.
  28. She invoked Section 2 of both the *Land Act* and the *Land Registration Act, 2012* and argued that an agreement to sale or lease land did not confer any interest in land. She therefore asserted that the agreement that existed between her, the Municipality and the deceased did not confer on her or the deceased any power to dispose of or charge the property until such a time that the subject property was registered either in her name or that of the deceased.
  29. She further cited Sections 24, 25 and 26 of the *Land Registration Act, 2012* and submitted that rights to land could only be conferred by registration and that a certificate of title to land was conclusive evidence of proprietorship.
  30. She reiterated that the subject property was a matrimonial property that she jointly purchased jointly with the deceased. In this regard, she placed reliance on Sections 6(1)(c), 7, 8 and 14 of the *Matrimonial Property Act, 2013* and the cases of *ENK vs MNNN* [2021] KECA 219 (KLR) and *Re Estate of Johnson Njogu Gichohi (Deceased)* [2018] eKLR where the common thread was that a matrimonial property that was purchased jointly did not form part of the free property of the estate of the deceased to be subjected to succession.
  31. It was her argument that the issue herein was *res judicata* as in its Ruling of 26<sup>th</sup> July 2021, the court made a determination on the proprietary status and ownership of the subject property that this was a matter of evidence that was best left for determination by the court upon hearing oral evidence. She submitted that the 2<sup>nd</sup> Administrator ought to have moved the court appropriately instead of filing a new application on a matter and issue that the court had rendered itself on.



32. She further cited the *Civil Procedure Act* Cap 21 (Laws of Kenya) which she asserted governed this court by dint of Rule 63 of the *Probate and Administration Rules 2018* and the inherent powers of this court. She also relied on the case of *Maithene Malindi Enterprises Limited vs Kaniki Karisa Kaniki & 2 others* [2018] eKLR but did not mention the holding she was relying upon therein.
33. In its Ruling of July 26, 2021, the court stated as follows:-
- “... it was not clear to this court if the Petitioner paid the arrears and the land rates merely to save the deceased’s house from being repossessed and that she managed to change ownership of the house after notifying Ministry of Lands that the deceased had passed on. This was a matter of evidence that was best left for determination by the court upon hearing oral evidence of the Petitioner and Objector.”
34. This court fully associated itself with the said finding to the effect that the question of whether or not the 1<sup>st</sup> Administrator lived with the deceased on the subject property as a matrimonial home and/or whether or not that she made substantial contributions towards obtaining the said subject property could not be determined without the parties properly adducing their evidence in court.
35. To make a determination on any of the arguments that were raised by the parties herein would amount to pre-empting the court’s mind as far as the issue for determination herein was concerned. Indeed, a court of equal and competent jurisdiction had already made a decision that the issues herein should be determined by way of oral evidence. This court could not therefore set aside such an order especially because it was made by a court of equal and competent jurisdiction as this one.
36. If indeed the 2<sup>nd</sup> Administrator was aggrieved by the said order, then she could approach the Court of Appeal which had the power and jurisdiction to set aside and/or vacate the said order.
37. The above notwithstanding, this court was of the view that it would be best that this matter be heard and determined once and for all as this matter has been pending since 1995.

### **Disposition**

38. For the foregoing reasons, the upshot of this court’s decision was that the 2<sup>nd</sup> Administrator’s Notice of Motion application dated July 29, 2022 and filed on August 1, 2022 was not merited and the same be and is hereby dismissed. There will be no order as to costs.
39. It is hereby directed that this matter be mentioned on April 17, 2023 with a view to taking directions on the hearing of the matter herein.
40. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF MARCH, 2023**

**J. KAMAU**  
**JUDGE**

