



REPUBLIC OF KENYA



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In re Estate of Joanes Adwanda Oda alias Agwanda Odaa (Deceased) (Succession Cause 25 of 2016) [2023] KEHC 19595 (KLR) (27 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 25 OF 2016**

JN KAMAU, J

JUNE 27, 2023

**IN THE MATTER OF THE ESTATE OF JOANES
ADWANDA ODA ALIAS AGWANDA ODA (DECEASED)**

BETWEEN

SYMPHROSE ATIENO OGEGE PETITIONER

AND

JACOB APIYO 1ST RESPONDENT

JOSHUA ALUGA AWUOTH 2ND RESPONDENT

RULING

Introduction

1. In her Summons for Confirmation of Grant dated 27th November 2020 and filed on 2nd December 2020, the Petitioner herein sought for orders that the Grant of Letters of Administration Intestate of the deceased herein be confirmed.
2. She swore an affidavit in support of the said Summons on 27th November 2020. She averred that she was issued with a Grant of Letters of Administration intestate which was previously confirmed on 27th July 2020. She stated that the Objectors herein filed an application for revocation of the Grant that was allowed on 28th September 2020. She asserted that as directed by court she had now filed fresh Summons for Confirmation of the Grant and was desirous of distributing the capital assets of the deceased.
3. On 14th January 2021, the 1st Objector swore an affidavit of protest against confirmation of the grant herein on his own behalf and on behalf of the 2nd Objector. The same was filed on 15th January 2021.
4. They averred that the Petitioner asked that land parcel number Kisumu/Nyalunya/2421(hereinafter referred to as “the subject property”) be bequeathed to her while being aware that the deceased had



in his lifetime, sold the subject property to them vide Sale Agreements dated 8th August 1992 and 4th June 2006.

5. They asserted that they had been in possession and occupation of the said subject property since 1992 and that in his lifetime, the deceased did not attempt to evict them from the said subject property and/or dispute the aforesaid Sale Agreements. They added that everyone was aware that the deceased had sold them the subject property and that when he died on 24th October 2006, he was buried in a different parcel of land.
6. It was their contention that the aforesaid sale was witnessed by the Area Chief one Elijah O. Omumbo who wrote a letter dated 7th November 2019 enabling them cite the dependants of the deceased to enable them get their rightful share only to find that Petitioner had quietly petitioned the court for letters of administration in 2016 and failed to disclose to the court that they had purchased the subject property as required under Section 51(h) of the *Law of Succession Act* which provides that a mandatory full inventory of assets and liabilities of the deceased estate must be furnished by the Petitioner.
7. They asserted that they fell under the category of the liabilities of the estate as such their rights and interests ought to be protected in so far as the estate of the deceased was concerned. They were emphatic that they were the rightful heirs to the subject property which should be confirmed in their favour and not to the Petitioner.
8. They pointed out that the deceased was survived by his sister and sisters in law who had never made an attempt to evict them from the subject property and that it was only the Petitioner, a niece to the deceased who had made several attempts to evict them from the said subject property by instituting cases against them to wit Kisumu ELC No 71 of 2013, Kisumu CMCC No 77 of 2016 and Kisumu CM ELC No 126 of 2019.
9. On 1st February 2021, when the matter came up for mention to confirm whether the Petitioner had filed her application for confirmation of grant, her advocate confirmed to court that the same had been filed and prayed that the same be heard by way of viva voce evidence. The court directed parties to file and serve their witness statements and the matter proceeded for hearing. At the conclusion of the hearing, the parties filed Written Submissions.
10. The Objectors' Written Submissions were dated 2nd February 2023 and filed on 6th February 2023 while those of the Petitioner were dated 31st January 2023 and filed on 3rd February 2023. This Ruling is based on the evidence tendered by parties and the said Written Submissions which they relied upon in their entirety.

Legal Analysis

11. The Objectors invoked Section 3 and 26 of the *Law of Succession Act* and submitted that what was available for distribution of a deceased's estate was the net estate after taking away his or her liabilities. They asserted that being creditors to the estate they had priority over the estate and that their interest took precedence over any other right in the estate.
12. In that regard, they placed reliance on the case of *Johnson Muinde Ngunza & Another vs Michael Gitau Kiarie & 12 Others* [2017]eKLR where it was held that the *Law of Succession Act* recognises the purchaser's rights and the case of *Mpatinga Ole Kamunye vs Meliyo Tipango & 2 Others* [2017]eKLR where it was held that under Section 71 of the *Law of Succession Act*, the court had to satisfy itself that the beneficiaries of the estate were the legitimate beneficiaries of the estate, that the net estate for distribution was available for distribution after settling all liabilities. They added that the shrine the



- Petitioner claimed to have built was built several years after the deceased had died and hence she had no right to build it there.
13. In this respect, they relied on the case of *In the Estate of Joseph Mutua Munguti (Deceased)* [2018] eKLR where it was held that according to Section 3 of the Act, “estate” means the free property of a deceased person while “free property” in relation to a deceased person means the property of which that person was legally competent to freely dispose during his lifetime.
 14. They further cited the case of *Titus Muraguri Warothe & 2 Others vs Naomi Wanjiru Wachira* Nyeri HCSC No 122 of 2020 (eKLR citation not given) where it was held that the applicants were purchasers for value of a portion of the deceased’s estate and that they were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they had been in continuous and uninterrupted occupation of the suit premises which they had extensively developed over the years.
 15. They argued that the fact that the Petitioner was a nun and was petitioning this court in good faith was far from the truth. It was their contention that she had tried to grab several parcels of land in the region and that they had produced green cards to parcel numbers 2056, 2058, 2420, 2424 and 2419 to demonstrate her appetite for land. They pointed out that she had grabbed parcel number 2420 that belonged to Rosalia Ondu and the deceased herein because she transferred it to herself without listing it as part of the deceased’s assets.
 16. They submitted that she did not produce any evidence to invalidate the Sale Agreements they produced in court and that the claim that the deceased was incapacitated at the time of the Sale Agreements and/or the consideration were not issues that could be dealt with at this stage. They were emphatic that illness was not incapacity.
 17. They further submitted that the Petitioner moved into the subject property in 2018 which was ten (10) years after the deceased died and that she trespassed to land not belonging to her. They pointed out that the Petitioner was not the only niece of the deceased as she had brothers and sisters who had equal rights to the land but were never part of the process. They added that the Petitioner was entitled to her father’s parcels of land and could succeed her father. They urged the court to confirm the estate in their favour.
 18. On her part, the Petitioner submitted that the deceased was not survived by any children, siblings or parents. She pointed out that the deceased had one brother Morris Ogege who was her father. It was her contention that according to Section 39(1)(c) of the *Law of Succession Act* the children of the siblings of the deceased were eligible to be the rightful beneficiaries of the estate.
 19. She disputed the Objectors’ allegations that they bought the subject property. She argued that in order for them to claim purchaser’s rights under the *Law of Succession Act* they were to demonstrate that they paid the entire purchase price during the lifetime of the deceased, that they began or made efforts to transfer the property in their respective names and that they had had uninterrupted and continuous occupation of the land during the lifetime of the deceased and after the death as was held in the case of *Titus Muraguri Warothe & 2 others vs Naomi Wanjiru Wachira* Nyeri HCSC No 122 of 2002 (eKLR citation not given).
 20. She questioned the deceased’s capacity to enter into the sale transaction. She argued that the subject property was sold at low consideration which did not subscribe to the rules of economics with reference to appreciation and inflation. She blamed the area Chief for allowing the deceased to sell the subject property at such a low price. She added that in view of the fact that the Sale Agreement was made in



the home of one Gordon Okal the parties were not privy to the actual measurement or the portion or section alleged to be sold to the first Objector.

21. She further questioned the fact that the Objectors failed to procure the necessary consents to ensure that the transfer was done promptly and the fact that the 1st Objector did not make any effort to occupy the said subject property. She questioned the fact that the deceased affixed his signature and left thumb print on the first Sale Agreement and only his left thumb print on the second Sale Agreement. With regard to the Sale Agreement for the 2nd Objector, she argued that it was unclear on whether the Sale Agreement was written on 8th August 1992 or 10th July 2005. She further submitted that none of the witnesses could attest to and affirm to being aware of the money actually paid on 8th August 1992 and 12th August 1998.
22. It was her case that despite the deceased having passed on in the year 2006 the Objectors never took any steps to assert their rights to the said subject property and that they also did not make effort to make their claim in the two (2) matters pending before the Environment and Land Court on their alleged claims. She asserted that under the *Land Act*, parties alleging to have purchased land and had been given title could seek for specific performance and/or refund of the purchase price but that the Objectors herein had chosen a short cut by seeking to enforce such rights in the wrong forum.
23. She contended that she was a nun by profession under the Catholic Church and did not have children of her own and that therefore her action in the matter was to ensure that the deceased's estate was protected from land grabbers and remained in the family of the deceased. She was emphatic that none of her siblings had objected to her mode of distribution and that it was therefore inferred that their silence was a show of acquiescence to the distribution as the same would remain in the deceased's family after her demise.
24. She was categorical that she was the rightful heir to the estate herein and that the Objectors had failed to meet the threshold to claim purchaser's rights and urged the court to dismiss their claim.
25. PW 1 testified that there was a Chapel in the subject property which was commissioned in 2018 after this Petition was filed. She pointed out that she was aware that the Objectors had their homes in the said subject property and that the 1st Objector occupied it in 1992 and that it was the first time the land was bought.
26. She informed the court that the subject property belonged to the deceased who was her uncle. She stated that she had no biological sibling but had step brothers and sisters and that the Petition only mentioned her as the only beneficiary. She admitted that she knew that her step siblings had equal rights like her.
27. It was her case that between 1992 and 2006 she was living in different convents and not on the subject property. She pointed out that the Objectors were digging the subject property in 1992 but were not living there until 2006. She stated that she could not tell if the deceased objected the fact that the Objectors lived in his land.
28. She said that the deceased worked at Chemilil and did not occupy the subject property and neither did he have a home on the said land. She admitted having filed several suits against the Objectors and averred that their Sale Agreements were forged. She, however, stated that she had not filed any report with the police on the alleged forgery. She admitted that she knew one Gordon Okal who was her uncle but had not called him as a witness.
29. On being re-examined, she further informed the court that she did not have an idea of who was using the deceased subject property at the time of his death. She admitted not being a party to any of the



- Sale Agreements. She pointed out that the deceased did not have any children but had a step sister one Monica Juma who was still alive. She stated that it was the Objectors who were occupying the subject property and that she put up the Chapel to commemorate her forty (40) years of sisterhood in 2017.
30. Teresa Akumu (hereinafter referred to as “PW 2”) testified that the deceased was her brother-in-law and the Petitioner was her daughter. She stated that Gordon Okal was her brother-in-law and that the deceased had a house at his home but was not married. She, however, pointed out that she could not recall the parcel number of where the deceased’s house was but further stated that the deceased lived in his father’s land and that that is where he was buried as he had not build his own home.
 31. Seline Atieno Lucia Ogege (hereinafter referred to as “PW 3”) testified that the deceased was her brother-in-law and that she was married to Morris Ogege, the deceased’s brother and she had three (3) children from another relationship namely, Patricia Anyango, Rose Akinyi and Marcellus Odhiambo. She stated that the Petitioner was the first born daughter of her husband and that after getting married to him they had three (3) other children.
 32. The 1st Objector reiterated the assertions he made in his affidavit evidence. He admitted that he did not have a consent to show that the deceased could transfer the subject property to him. He informed the court that the deceased was ailing at the time and that was the reason he sold the subject property. He added that he moved to the said land in September 2006.
 33. He further testified that he was a witness to the Sale Agreement of the 2nd Objector which was done on 8th August 1992. He asserted that the Chief at that time was one Elijah Omumbo (hereinafter referred to as “DW 2”) whom he had called as one of his witnesses. He pointed out that the payment was done in instalments until the final payment was made. He stated that he had attached two (2) cases that had been heard and that the Sale Agreements were endorsed as having been valid. However, he testified that he did not have the Judgment.
 34. He said the Green cards showed that he bought the subject property. He added that he occupied a part of the said subject property and the son of the 2nd Objector occupied the rest of the portion together with the Petitioner who had put up a Chapel. He pointed out that when she came from the Seminary she started transferring the parcels into her name.
 35. DW 2 testified that he was the Senior Chief of Central Kolwa Location and that the deceased was his subject so he understood the family line well. He stated that he was the author of the Sale Agreement that was made on 8th August 1992. He pointed out that at the time, he was not the Chief. He informed the court that he did not write anything on the Sale Agreement on 12th August 1998 but that part of it was done in 2005. He pointed out that the third instalment was made on 10th July 2005. He asserted that his participation in the Sale Agreement was partial as by the time the Sale Agreement was assigned to him, part of it had already been written.
 36. He further testified that the witnesses signed the Sale Agreement in his presence. He pointed out that he was a relative to the Objectors, a fact that he confirmed when he was re-examined and that he only identified the portions of land as he was not a surveyor to measure the size of the land. He admitted that the deceased had a health problem at the time of the Sale Agreement but that that was an Sale Agreement between a willing buyer and a willing seller. It was his case that it was not strange that the subject property fetched Kshs 45,000/=and Kshs 55,000/=.
 37. During his re-examination, he said that the sizes of the parcels of land were not the same. He reiterated that he participated in the third instalment in the 1st Sale Agreement as the 1st Objector wanted to clear the balance of the purchase price. He added that the deceased’s witnesses were known to him and were all alive.



38. The 2nd Objector told this court that he was not related to the deceased but that he purchased a portion of the subject property from him vide a Sale Agreement that was done on 8th August 1992. He added that in 2005 when he completed the payment the current Chief, did the final part of the Sale Agreement. He informed the court that the Petitioner sued him in ELC 71/13 and ELC 126/19 which cases were still pending in court.
39. He asserted that the 1st Objector and his son, one Kennedy Odhiambo Okello, were in occupation of the subject property and that the Petitioner had built a shrine therein. He pointed out that his son built a house on the portion he had bought and moved in in 2019.
40. Meshack Matengo (hereinafter referred to as “DW 4”) testified that he participated in the Sale Agreement of the 1st Objector. He confirmed that the deceased was unwell at the time and that the same took place in the home of one Gordon Okal.
41. Having considered the oral evidence and parties’ Written Submissions herein, it appeared to this court that the main issue for determination was whether or not each of the Objector herein held a valid purchaser’s interest in the estate of the deceased.
42. Section 93(1) and (2) of the [Law of Succession Act](#) provides as follows:-
1. A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this act.
 2. A transfer of immovable property by a personal representative to a purchase shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.
43. The above cited provisions of law have been subject to a myriad of judicial interpretation over time. In [Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike & Another](#) [2013] eKLR the court held that before the appellant therein could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she was a purchaser.
44. The Petitioner contended that the Grant of Letters of Administration Intestate should be confirmed as filed as the Objectors had failed to prove their interest as Purchasers to the estate during the lifetime of the deceased. She further asserted that the Sale Agreements produced by the Objectors were forged documents.
45. On the other hand, the 1st Objector laboured to demonstrate that he entered into a Sale Agreement dated 4th June 2006 with the deceased. The 2nd Objector also confirmed that he entered into a Sale Agreement dated 8th August 1992 with the deceased. The 1st Objector had been in occupation of the subject property since 2006 while the 2nd Objector’s son moved into the land the 2nd Objector purchased portion in 2019 and constructed his house.
46. From the evidence on record, this court noted that the deceased had several surviving beneficiaries who were not listed in this cause. The Petitioner was mandated to list the names of all beneficiaries, particulars of assets left by the deceased, the net value of the estate and the particulars of liabilities left by the deceased in Form P & A 5.



47. However, in the said Form P & A 5 and the supporting affidavit in support of the Petition for the Letters of Administration Intestate that was sworn by the Petitioner herein, she only listed two (2) beneficiaries and two (2) assets of the deceased. No liabilities were listed therein.
48. In her testimony, the Petitioner admitted knowing that the Objectors had occupied the subject property but did not recognise them as lawful purchasers on the ground that the deceased could not have entered into the said Sale Agreements as he was unwell at the material time and the fact that the subject property was sold at a low price.
49. From the facts of the present case, it was evident that the deceased entered into Sale Agreements with the Objectors herein for the purchase of the subject property. The said Sale Agreements contained the terms and conditions of sale of the subject property and their contents were not controverted by any credible evidence by the Petitioner.
50. This court considered Section 6(1) of the [Land Control Act](#) Cap 302 (Laws of Kenya) which states that such a transaction:-
- “is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”
51. Further, Section 6 (2) of the [Land Control Act](#) provides that:-
- “For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)”.
52. Notwithstanding the above provision of the law, the circumstances of this case were such that the Objectors demonstrated that they paid the deceased the purchase price for the subject property during his lifetime. He alienated the said subject property and allowed them to take possession of the same. They established homes and enjoyed quiet possession on the subject property. He was buried in another parcel of land, a fact that the Petitioner did not controvert.
53. The Objectors’ proprietary rights could not be taken away merely because there was no transfer before the death of the deceased as stipulated in Section 6(1) of the [Land Control Act](#). They acquired equitable constructive trusts. The Petitioner’s averments in her Replying Affidavit that there was no purchaser’s interest and/or that the Objectors had not acquired any proprietary rights over time thus fell by the wayside. She did not also prove her allegations of fraud against the Objectors herein.
54. This court had due regard to the case of [Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri](#)[2014]eKLR where the Court of Appeal held that the appellant’s action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent.
55. The principle of constructive trust in the field of acquisition land is the most recent milestone in our jurisprudence. The trust arises by operation of the law where the circumstances of the case permits giving rise to its existence. The function of the court is to merely declare a constructive trust as a remedy to bar a party from unjustly enriching himself from a land transaction.
56. In the scheme of things as deduced from the pleadings and viva voce evidence from the Objectors and the Petitioner, the Objectors had demonstrated that a constructive trust as a remedy for their claim. The court is mandated to ensure that substantial justice is accorded to all the parties in any matter. In



the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR, the court held that constructive trust and proprietary estoppel would apply as an individual should not receive purchase price and later plead that the sale agreement was void.

57. The Objectors' interests were the kind that could be pursued both in the Environment and Land Court and the High Court by dint of the equitable principle of constructive trust so whichever way one looked at it and hence the Petitioner could not take advantage of the fact that the deceased had not transferred the subject property to them.
58. Indeed, she never adduced any evidence to controvert the Objectors' evidence that they indeed purchased the subject property from the deceased. She did not offer a plausible reason to explain why the deceased was buried in another parcel of land if the subject property still belonged to him at the time of his death. If the deceased suffered any incapacitation, she ought to have demonstrated the same. The mere fact that he was unwell as she had averred did not imply that he had no capacity to contract with the Objectors' herein regarding the subject property.
59. Notably, an administrator to a deceased's estate basically has no land of his or her own unless land and/or an asset has been allocated to him or her. In the same vein, the Petitioner's voice herein was only the voice of the deceased. Her role was to execute and administer the deceased's estate on his behalf. She could not therefore take what the deceased had legally sold to the Objectors herein. That would be a travesty of justice as this was a case of willing seller willing buyer.

Disposition

60. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Summons for Confirmation of Grant dated 27th November 2020 and filed on 2nd December 2020 be and is hereby not allowed. The same be and is hereby dismissed.
61. Accordingly, it is hereby directed as follows :-
 - a. That as the subject property was not available for distribution to the rest of the other beneficiaries, the same be and is hereby alienated to be transferred in favour of the Objectors herein.
 - b. That the Administrator do execute and sign the necessary transfer form to pass title to the Objectors for the subject property within thirty (30) days from the date of this Ruling.
 - c. That in default thereof, the Deputy Registrar High Court Kisumu to execute transfer documents in compliance with this decision which shall be registered by the Land Registrar.
 - d. That further to Paragraph 60 (c) hereinabove, the Objectors to lodge the transfer documents with the Deputy Registrar High Court Kisumu for execution or transfer of the subject property for their benefit.
 - e. Each party to bear their own costs.
62. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE 2023

J. KAMAU

JUDGE

