



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
SUCCESSION APPEAL NO. E5 OF 2020
IN THE MATTER OF THE ESTATE OF JAMES OGONJI ONYANGO (DECEASED)
AND
IN THE MATTER OF AN APPLICATION BY RICHARD ODONGO OGONJI & GRAVIN OTIENO OGONJI
DUNCAN ERIC ONYANGO OGONJI...APPELLANT
VERSUS
RICHARD ODONGO OGONJI1ST DEFENDANT
GRAVIN OTIENO OGONJI2ND DEFENDANT
JUDGMENT

The Appellant, **DUNCAN ERIC ONYANGO OGONJI**, is a son of the late **JAMES OGONJI ONYANGO**. His father had 3 wives, namely **ROSA AUMA OGONJI**; **ROSE ALOO OGONJI** and **JANE ATIENO OGONJI**.

1. **ROSA AUMA** had six children; **ROSA ALOO** had seven children; whilst **JANE ATIENO** had nine children.
2. The family was able to largely agree on the mode of distribution of the assets comprising the estate. However, there was disagreement in respect of one property, **L.R. NO. KISUMU/MUHORONI/957**.
3. It was the Appellant's case that he had purchased that parcel of land from his father, during the lifetime of the father.
4. The circumstances leading up to the said transaction of sale can be traced back to a Loan which James Ogonji Onyango obtained from the **AGRICULTURAL FINANCE CORPORATION**.
5. Apparently, James defaulted in the repayments, resulting in a Demand Notice being issued by the lender.
6. It was the Appellant's case that his father, James, was unable to repay the loan.
7. In the circumstances, James requested the Appellant to redeem the property, by paying-off the loan due to **AFC**.
8. The Appellant agreed to clear the loan, on the understanding that the money he used to offset the loan would be deemed as the purchase price for the land in question.
9. Based upon the said understanding, the Appellant and his father executed a Sale Agreement dated 26th November 2009.
10. It was the Appellant's case that he made payments to the Agricultural Finance Corporation (**AFC**), which cleared the outstanding loan.
11. The Appellant exhibited the Sale Agreement dated 26th November 2009, together with the following documents;

a. Application for Consent of Land Control Board.

b. Transfer of Land.

c. Certificate of Official Search dated 30th September 2009.

12. Based upon those documents, the Appellant submitted that the parcel of land in question had ceased to be a part of the free property of his father.

13. He submitted that;

“..... after the sale of land agreement, the land ceased to become free property of the deceased as it extinguished the rights of the deceased over the said land parcel.”

14. It is well settled that the “*free property*” of a deceased person means the property which that person was legally competent to freely dispose of during his lifetime.

15. It therefore follows that any property which the deceased was not legally competent to freely dispose of when he was alive cannot comprise part of his estate upon death.

16. In this case, the learned trial magistrate held that the land in issue was part of the free property of the deceased.

17. But the Appellant has submitted that;

“The deceased person’s interest in the above land parcel ceased immediately after he sold the land parcel to the appellant.”

18. That brings into play the question about what constitutes the sale of land.

19. The fact that a Sale Agreement had been executed between the Appellant and his father did not, and could not have extinguished the rights of his father, over the land.

20. The Appellant and his father were well aware that there was need for the Land Control Board to give its consent to the transaction. And in order to ensure that that step was taken, they signed the appropriate Form.

21. The Appellant has, correctly stated thus;

“The deceased has shown all indications of having his rights over the parcel of land extinguished, as he had signed consent forms”

22. However, the transaction was not taken to the next stage, which was to present the Consent Forms before the Land Control Board.

23. If the Seller had died within six months from the date when he had signed the consent form, it might have been arguable that it was his premature death which prevented him from completing the transaction.

24. However, in this case, as the learned trial magistrate observed, the Seller died on 20th October 2012, which was almost 3 years after he had signed the consent form.

25. Pursuant to **Section 8 (1)** of the **Land Control Act**;

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.”

26. As the transaction did not go through the prescribed process, where the Land Control Board would have decided whether to grant or reject the request for its consent, the sale was never completed, in law.

27. The Appellant has complained that the Court’s determination was based on a matter which had not been raised by the Respondents.

28. In his view, the learned trial magistrate ought to have inquired from him why the consents had not been obtained, despite the forms being signed by the deceased.

29. The Appellant’s contention was that the lack of consent could not void the sale transaction.

30. **Section 6 (1)** of the **Land Control Act** stipulates that;

“Each of the following transactions –

a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

c. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

31. Accordingly, the Respondents had no onus of proving that the Seller had changed his mind about his intention to sell the land.

32. By express provision of the law, the transaction was void for all purposes.

33. To the extent that the Appellant’s claim was founded upon the sale transaction, I find that the learned trial magistrate was right to conclude that the transaction had become stillborn.

34. I also note that whilst the Sale Agreement cited the amount which was to be paid by the Appellant as being Kshs 304,200/=, the receipts exhibited by the Appellant do not add up to that amount, by my calculations.

35. In the event, the appeal is without merit, and is therefore dismissed with costs to the 2nd Respondent.

DATED, SIGNED AT DELIVERED AT KISUMU THIS 31ST DAY OF JANUARY, 2022

FRED A. OCHIENG

JUDGE