



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO. 438 OF 2013**

**IN THE MATTER OF THE ESTATE OF THE LATE VITALIS OMACH ONDELE**

**RAPHAEL OKENDO OSURO.....PETITIONER**

**VERSUS**

**BENTA JUMA NYAKAKO.....1<sup>ST</sup> OBJECTOR**

**LEUNIDA ACHIENG OMACH.....2<sup>ND</sup> OBJECTOR**

**RULING**

On 31<sup>st</sup> October 2017 Majanja J. delivered a Ruling on a Summons for Confirmation of Grant.

1. The learned Judge noted that the Estate of the late **VITALICE OMACH ONDELE** alias **PETERLIS OMACH** consisted of four properties, being;

- (a) **KISUMU/KOLUNJE/898;**
- (b) **KISUMU/KOLUNJE/1690;**
- (c) **KISUMU/KOLUNJE/1691; and**
- (d) **KISUMU/KOLUNJE/1929.**

2. At the time, there were persons who were laying claim either as creditors or by virtue of adverse possession. The said claims were, however limited to Parcel No. **KISUMU/KOLUNJE/898** ("PLOT 898"). In the circumstances, the court held as follows;

***"13. Since only property in dispute is***

***Plot 898, I will exclude it from***

***confirmation and issue a partial***

***confirmation for Plots 1690, 1691***

***and 1929 as prayed in the***

***application. All the proceedings***

***relating to Plot 898, in this case,***

***shall be stayed pending resolution***

*of the case filed before the*

*Environment and Land Court.”*

3. On 21<sup>st</sup> September 2020 the Petitioner informed this court that the Environment and Land Court had granted its Judgment in the case of **BENTER JUMA NYAKAKO & 4 OTHERS, ELC NO. 116 OF 2014** (Consolidated with **ELC NO. 160 OF 2014 (O.S.)**).

4. It was the finding of the ELC Court that there was no valid Agreement for sale of land between the deceased and **JAMES OLWANDA NG’ONG’A**. The purported agreement lacked the Particulars such as the identity of the land being sold; the size of the said parcel, and signatures of the parties.

5. It was the further finding of the Court that, because there was no valid agreement for sale between the deceased and James Olwanda, the 2<sup>nd</sup> Defendant in that suit could not pass on what he did not have or own. The learned Judge said;

*“The 2<sup>nd</sup> defendant sold land to the 3<sup>rd</sup>,  
4<sup>th</sup> and 5<sup>th</sup> defendants in 2012, when the  
deceased had died, and he did not have  
powers to dispose of land belonging to  
the estate of the deceased without letters  
of administration.”*

6. It was the considered opinion of the learned Judge that, because the 2<sup>nd</sup> Defendant was not a beneficiary of the estate of the late **VITALIS OMACH**;

*“..... he is a stranger to this estate and  
therefore had no title to pass to the  
defendants whom he purportedly sold  
land to, registered in the name of the  
deceased person.”*

7. Ultimately, the Court ordered the Defendants to vacate the parcel of land **No. KISUMU/KOLUNJE/898**, failing which they would be evicted. The Court also ordered the Defendants to pay General Damages of Kshs 200,000/=.

8. Based upon that Judgment, the Petitioner herein asked this Court to include Plot 898 in the confirmed grant.

9. However, the Objectors drew the attention of the court to the fact that they had filed an application at the Court of Appeal, seeking extension of time to file an appeal.

10. On 21<sup>st</sup> September 2020, I noted that although there was no formal order for stay of execution of the Judgment, it would be in the interests of justice to maintain the status quo until the Court of Appeal had determined whether or not the Objectors would be granted leave to appeal out of time.

11. On 9<sup>th</sup> October 2020, the application by the Objectors was dismissed by a single Judge of the Court of Appeal.

12. On 14<sup>th</sup> October 2020 the Objectors filed a Reference to a full bench.

13. The full bench of the Court of Appeal rendered its Ruling on 5<sup>th</sup> December 2020, dismissing the Objector’s application.

14. The Objectors have intimated that they are giving consideration to the possibility of moving to the Supreme Court. However, as Mr. Athung’a the learned advocate for the Objectors conceded, the fact that his clients were contemplating moving to the **Supreme Court**

cannot be a reason to put this matter on hold.

15. On his part, Mr. Odeny the learned advocate for the Petitioner asked the court to order that **Plot 898** be distributed in line with the Orders made by Majanja J. on 31<sup>st</sup> October 2017.

16. The only matter that was holding up the distribution of **Plot 898**, has now been determined. Accordingly, **Plot 898** is part and parcel of the estate of the deceased herein.

17. I now order that **L.R. NO. KISUMU/KOLUNJE/898** be distributed in accordance with the “*Consent to the Mode of Distribution of Estate*”, which was filed in court on 16th June 2015. Accordingly, the said parcel of land shall be distributed as follows;

*“Equally to Benter Juma Nyakako,*

*Augustine Otieno Otieno, Bonface Omondi*

*Otieno, Albert Otumba Omach, Leunida*

*Achieng Omach and Jared Odhiambo Okumu.”*

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22<sup>ND</sup> DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE