



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION APPEAL NO. 4 OF 2019**

**IN THE MATTER OF THE ESTATE OF PASKALIA JOMBE JOBITA (DECEASED)**

**IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION INTESTATE BY CHARLES OTIENO JOBITA, MICHAEL ODONGO JOBITA, JAMES OMONDI JOBITA (APPLICANTS)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OF ANNULMENT OF GRANT TO**

**CHARLES OTIENO JOBITA, MICHAEL ODONGO JOBITA, JAMES OMONDI**

**BY ROSALIA ODENY JOBITA (OBJECTOR)**

**ROSALIA ODENY JOBITA.....APPELLANT**

**VERSUS**

**CHARLES OTIENO JOBITA.....1<sup>ST</sup> RESPONDENT**

**MICHAEL ODONGO JOBITA.....2<sup>ND</sup> RESPONDENT**

**JAMES OMONDI JOBITA.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The appeal before me arises from the Judgment delivered on 20<sup>th</sup> November 2019.

1. The Appellant has asserted that only one-half of the parcel of land **KISUMU/NYALENDA ‘A’/390** was available for distribution to the beneficiaries of the estate of **PASKALIA GOMBE JOBITA**. She pointed out that the said property was registered in common, in favour of the Appellant and the deceased.
2. Secondly, the Appellant pointed out that there was an existing Court Order pursuant to which the parcel of land **KISUMU/NYALENDA ‘A’/935** was to be divided into 2 equal parts between the deceased and the Appellant.
3. It is common ground that the Appellant, **ROSALIA ODENY JOBITA** was a co-wife to the deceased. The two, who were biological sisters, were wives of the late **CHRISTOPHER HANNINGTON JOBITA**.
4. In respect to those 2 properties particularized above, the Appellant was of the firm conviction that the deceased was only entitled to half of each; and that the other half was hers.
5. Therefore, when the learned trial magistrate distributed those 2 parcels of land to the beneficiaries of the estate of Paskalia, the Appellant held the view that that was wrong as the beneficiaries of the estate of Paskalia were only entitled to share one-half of each of the said properties.
6. Being the first appellate court, I will now re-evaluate all the evidence tendered at the hearing of the application for revocation of the grant of letters which were issued by the trial court on 20<sup>th</sup> July 2016. The said grant was subsequently confirmed on 31<sup>st</sup> August 2017.
7. The trial court made a finding that Paskalia was the first registered owner of Parcel No. 935.

8. Secondly, the trial court observed that although witnesses had made reference to some orders that had been made previously, the said orders were not adduced in evidence.

9. Thirdly, the trial court held that the issue concerning ownership of land was one that ought to be adjudicated upon by the Environment and Land Court. In her considered opinion, issues regarding ownership ought not to be dealt with by the court which was handling a Succession cause.

10. When canvassing the appeal, the Appellant stated that the evidence on record showed that Parcel No. 390 was registered in the name of both **Paskalia Gombe Jobita** and **Rosalia Odeny Jobita**.

11. By dint of the provisions of **Section 49** of the **Land Act**;

*“In any of two or more joint proprietors of any land, lease or charge dies, the registrar shall, on proof of death, delete the name of the deceased from the register by registration of the death certificate.”*

12. Therefore, the Appellant submitted that the interests of Paskalia were extinguished at her death, and that the parcel of land devolved automatically to the surviving proprietor.

13. In their submissions, the Respondents admitted that Parcel No. 390 was registered in the names of both Paskalia and Rosalia. In the circumstances, it was the Respondents’ view that the beneficiaries of the estate of Paskalia were entitled to share the one-half of that property.

14. In the light of the Respondents confirmation about the fact that Parcel No. 390 was registered in the names of Paskalia and Rosalia, the Court needs to determine whether the interests of Paskalia were automatically extinguished upon her demise or if her beneficiaries were entitled to share one-half of the said parcel of land.

15. But even before delving into that issue, the law clearly states that the estate of a deceased person means the “free property” of the said deceased person. And the law of **Succession Act** gives the following definition;

*“Free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”*

16. When a property belongs to 2 or more persons, it cannot be deemed as “free property” for any one of the said owners. None of the registered owners would be competent to solely dispose of the said property during his lifetime.

17. It therefore follows that Parcel No. 390 was not the free property of Paskalia. Accordingly, I find that when that parcel of land was dealt with as if it was a part of her free property, that was wrong.

18. In the case of **ESTATE OF LAURENT AMBEYI MUNALO (DECEASED) 2021 e KLR** Musyoka J. held as follows;

*“It would be a grave error to place property that does not belong to the estate before the distribution court, and any purported distribution of such property would amount to a nullity.”*

19. As Parcel No. 390 was placed before the Court, as constituting one of the properties comprising the estate of Paskalia, that was a grave error.

20. Meanwhile, as regards Parcel No. 935, all the Appellant’s witnesses testified that both the deceased and the Appellant lived in their respective houses, which were built on that property.

21. **DW1, MICHAEL ODONGO JOBITA**, also testified that;

*“At the time father died, the two mothers were staying in that land.....”*

22. He said that although the Appellant’s house was no longer standing on that parcel of land, he had no objection to her rebuilding her house thereon.

23. During cross-examination, **DW1** testified that Paskalia had never purchased any of the properties which were cited as constituting her estate.

24. Furthermore, whilst Parcel No. 390 was 0.2 Hectares, **DW1** said that Parcel No. 935 was about 7.0 Hectares.

25. He also testified that he was aware that the dispute over the land was heard by the Provincial Appeals Committee. And in his view, if the

*“court order is valid, we shall share it, but hope we will be allowed to appeal against it.”*

26. **DW2** said that although their father died in 1969, it was not until 1993 that the title deed for Parcel No. **935** was issued in the name of Paskalia.

27. Nonetheless, **DW2** emphasized that Rosalia had no right to claim any part of that parcel of land.

28. In my considered view, when it is borne in mind that Paskalia never purchased the said parcel of land, (or any other), and as the Appellant lived in a house built on that piece of land, it is curious how Paskalia's children now claim that the land belonged exclusively to them.

29. Courts of law ought never to shy away from making decisions which would open up the Pandora's box. If the facts and the law converge in a manner that the justice of the case demands the opening of the Pandora's box, that is exactly what the Court must do.

30. In this case, I find it very difficult to reconcile the findings of the trial court with what constitutes justice. I so find because Christopher Hannington Jobita left Paskalia and Rosalia living on Parcel **935**. Indeed, Michael Odongo Jobita (**DW1**) said that;

***“Paskalia and Rosalia were settled in one home.”***

31. In those circumstances, it would be unfair to have the land on which the 2 were settled, now being distributed amongst only the children of Paskalia, simply because she got the title of that piece of land, registered in her name.

32. Yet, at the same time, it cannot be ignored that at the time of her demise, Paskalia was the sole registered proprietor of Parcel No. **935**.

33. Both **DW1** and **DW2** said that they could possibly agree to have that parcel of land distributed in such manner as to give to the Appellant a portion thereof.

34. Accordingly, because Parcel No. **390** was not Paskalia's free property, and also because there is a possibility that Parcel No. **935** might end up being distributed differently from how it had been done, the trial court ought to have revoked the grant and the confirmed grant. I therefore allow the appeal, set aside the judgment of the learned trial magistrate, and substitute it with an order annulling the letters of administration made on 20<sup>th</sup> July 2016, as well as the confirmed grant made on 31<sup>st</sup> August 2017.

35. Finally, costs follow the event; and therefore the Respondents will pay to the Appellant the costs of the appeal.

**DATED, SIGNED AT DELIVERED AT KISUMU THIS 18TH DAY OF OCTOBER 2021**

**FRED A. OCHIENG**

**JUDGE**