



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO 14 OF 2020

IN THE MATTER OF THE ESTATE OF JOHANNES OSANO WARIERO (DECEASED)

AND

IN THE MATTER OF AN APPLICATION BY VITALIS OUMA OSANO alias PETER OUMA OSANO

RULING

1. In his Notice of Motion dated 2nd February 2021 and filed on 5th February 2021, the Applicant herein sought orders that Kisumu/Kanyakwar “B”/134 and Kisumu/Kanyakwar “B”135 be struck out from the list of the estate property.
2. He swore an Affidavit on 2nd February 2021 in support of his said application. He was emphatic that the said properties were not ancestral land and hence did not form part of the deceased’s estate who was his father. He stated that during his lifetime, his father had never claimed the said properties. He averred that he exclusively owned Kisumu/Kanyakwar “B”135 while he and his brother Jose Lewis Otieno jointly owned Kisumu/Kanyakwar “B”134. It was his contention that he acquired the said properties in 1975.
3. He pointed out that in 2016 they applied for rectification of names as Kisumu/Kanyakwar “B”134 was being partially acquired by the Government of Kenya to expand Kisumu-Kakamega Highway and that they followed the due procedure provided by the Law. He asserted that he did not sign the P & A forms because the said properties had been included as part of the deceased’s estate when they were not.
4. He contended that if his brother Argwings Osano Muga wanted to claim his parcel of land, then he ought to file his case at the land court. He was categorical that this court only had jurisdiction to deal with property of the deceased and could not deal with property that does not form part of a deceased’s estate.
5. In opposition to the present application, on 12th February 2021, Argwings Muga Osano swore a Replying Affidavit. The same was filed on 15th February 2021. He averred that the Applicant’s averments were not true as his brother Jose Lewis Otieno had distanced himself from the events leading to the acquisition of the suit properties which meant that their ownership did not follow due process as established in law. He pointed out that Title Kisumu/Kanyakwar B/134 was issued in 2016 and there was no information from whom the said suit properties were transferred.
6. He contended that although the Applicant had stated that he acquired parcel number Kisumu/Kanyakwar/B/135 in 1984, there was no documentation in terms of transfer or otherwise that was tendered before court. He was emphatic that Applicant was registered to hold in trust for and on behalf of the children of the deceased as he was the first born the same way Kisumu/Kanyakwar/163 which was registered in the name of the deceased alongside his second-born son, the late Martin Obonyo Osano. He averred that the rectification of names the Applicants and his brother’s names were suspicious as they were done concurrently.
7. He contended that under the Law of Succession Act, a first born holds such a parcel in trust to benefit others whether or not they are in possession or actual occupation of the said land. He added that under Section 28 of the Land Registration Act, 2012 the beneficiary’s name on the title is not final but subject to overriding interests including trusts and customary trusts.
8. He asserted that the Applicant took advantage of the deceased’s old age and his sickly condition preceding his death and unilaterally registered himself as the sole owner of the said parcel even after the deceased erected a house, received visitors including those who paid dowry for his daughters and even stayed on the same land until his passing whereupon his remains and those of his first wife were interred on the said parcel.
9. He stated that although all parcels of land had separate titles, there were no boundaries on the ground. He pointed out that the deceased’s homestead was erected on parcel number Kisumu/Kanyakwar B/135 being their ancestral home for the benefit of all. He asserted that under the normal circumstances, it would have been impossible for the deceased to have been buried on the land belonging to his son, the Applicant

herein, while he had his own. He questioned why the deceased built his homestead and was even buried on the suit properties if indeed the said properties belonged to the Applicant.

10. He pointed out that his intent was not to dispose the Applicant but rather each of the deceased child ought to benefit equally. He was emphatic that this court was clothed with jurisdiction to deliberate on properties involving the deceased but held in trust and not the Environment and Land Court as the Applicant had argued.

11. The Applicant's Written Submissions were dated 14th July 2021 and filed on 16th July 2021 while those of the Respondent were undated and filed on 16th July 2021. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

12. The Applicant submitted that together with his brother, they had annexed a copy of the title deed, green card and adjudication records which clearly showed that they were the first registered owners of the suit properties. He was emphatic that at no time were the suit properties owned by the deceased nor did he have any direct or beneficial interest thereon.

13. He invoked Section 2 (1) and Section 3 of the Succession Act Cap 160 in arguing that this court only had jurisdiction to deal with the deceased estate/free property which he owned as at the time of his death.

14. He placed reliance on the case of **Motor Vessel Lillian vs Caltex Oil (Kenya) Ltd 1989 KLR** in arguing that a question of jurisdiction ought to be raised at the earliest time and that without jurisdiction, a court has no power to take one more step. He therefore urged this court to strike out the said properties from the deceased's estate.

15. On his part, the Respondent submitted that the Applicant did not adduce any evidence to show how he acquired the properties, who transferred it to him and the consideration that he paid for it. He submitted that the parcels of land ought to form part of the deceased's estate as the proper procedure was not followed and thus subject to distribution. He was emphatic that the Applicant held the suit properties in trust for himself as well as his other siblings which was evident from the fact that the deceased was buried there.

16. In this regard he placed reliance on the case of **Peter Gitonga vs Francis Maingi M'ikiara Meru HCCC No 146 of 2000** (eKLR citation not given) where the court held that a trust can be created under customary law and the circumstances surrounding the registration must be looked at to determine the purpose of the registration.

17. He argued that it was an elementary principle among many tribes that a firstborn son would be registered in ancestral property to hold in trust for the rest of the family. In this regard he relied on the cases of **Jason Gitimu Wangara vs Martin Munene Wangara & Others [2013] eKLR**, **Peter Thuo Murugah vs Githinji Waweru [2019] eKLR** amongst several other cases where the courts therein acknowledged that properties could be held in trust for the family and that registration did not relieve such person so registered of his duty as trustee.

18. Although the Green card the Applicant adduced in court showed that he and his brother Jose Lewis Otieno jointly owned Kisumu/Kanyakwar "B"134, he did not demonstrate how he and his brother acquired the suit properties. He did not adduce in evidence, any agreement of sale to show that they purchased the same from Petilis Ouma Osano and Joseph Otieno Osano. Further, the Applicant did not also submit any documents to show how he acquired Kisumu/Kanyakwar "B"135 from Petilis Ouma Osano.

19. Having said so, this court noted that the Adjudication Record dated 13th March 1981 showed that Kisumu/Kanyakwar "B"134 was jointly owned by Peterlis Ouma and Joseph Otieno Osano. It was not clear from the documentation that was presented to this court who these two (2) people were. Notably, the deceased herein was known as Johannes Osano Wariero who bore a common name like Joseph Otieno Osano. The Respondent did not adduce any documentary evidence to show that the properties belonged to the deceased. What he presented in court is a Certificate of Official Search showing that the deceased and Martin Obonyo Osano were the proprietors of Kisumu/Kanyakwar "B" 163.

20. In the absence of any documentation by the Respondent that Kisumu/Kanyakwar "B"134 and Kisumu/Kanyakwar "B"135 belonged to the deceased and for which the Applicant would have been registered as a trustee for all the other beneficiaries, this court was hesitant to find that the two (2) properties belonged to the estate of the deceased herein.

21. This being a matter touching on property that did not form part of the deceased's estate, the dispute was exclusively within the jurisdiction of the Environment and Land Court.

DISPOSTION

22. For the foregoing reasons the upshot of this court's decision was that the Applicant's Notice of Motion application dated 2nd February 2021 and filed on 5th February 2021 was merited and the same be and is allowed as prayed.

23. It is so ordered.

DATED and DELIVERED at KISUMU this 22nd day of November 2021

J. KAMAU

JUDGE