



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
(CORAM: CHERERE-J)
SUCCESSION CAUSE NO. 301 OF 2013
IN THE MATTER OF THE ESTATE OF RAKITA AKACH (DECEASED)

BETWEEN

WILSON OLOO OBANYA.....PROTESTOR/APPLICANT

AND

ESTHER NYAPELA ETANDA.....1ST PETITIONER/RESPONDENT

IREEN AKINYI OTIENO.....2ND PETITIONER/RESPONDENT

JUDGMENT

Introduction

1. **RAKITA AKACH (Deceased)** died on 29th September, 1982. His estate comprises of $\frac{1}{2}$ of **LR. EAST GEM/URANGA/405**.
2. According to the chief's letter dated 09.12.13 and filed on 16.12.13, the deceased was married to **DORINA NYAMULO** and **LEONIDA ANYANGO** (both deceased). **DORINA NYAMULO** begot no child and **LEONIDA ANYANGO** was blessed with two children, **ANJELINA ATIENO** and **LUCAS OTIENO RAKITA** (deceased).
3. **LUCAS OTIENO RAKITA** (deceased) married 3 wives and begot several children as hereunder.

1st wife

Margaret Otieno Ogire (deceased)

Children

- 1) David Ochieng -Son
- 2) George Odhiambo - Son
- 3) Joseph Onyango - Son
- 4) Phoebe Achieng - Son
- 5) Dancan Omondi -
Daughte
r
- 6) Mary Auma -

Daughte
r

7) Dorine -
Adhiambo Daughte
r

2nd wife

Esther Nyapera Etande - 1st Petitioner

Children

- 1) Ireen Akinyi - 2nd Petitioner-
Otieno Daughter
- 2) Judith Auma - Daughter
Otieno
- 3) Edward Omondi - Son
- 4) Millicent Atieno - Daughter

3rd wife

Lilian Adeny Bwoto - (deceased)

Children

Harizon Omondi Otieno - Son

4. Letters of administration were issued on 30.05.14 to the Petitioners/Respondents who are daughter-in-law and granddaughter to the deceased respectively.
5. The Petitioners/Respondents on 17.04.19 filed an application for confirmation of the grant to which a protest was filed on 07.05.19 by the Protestor/Applicant mainly on the ground that the deceased's name was erroneously inserted as a co-owner of **LR. EAST GEM/URANGA/405**.
6. The court directed that the dispute be determined by way of *viva voce* evidence.

Protestor/Applicant's Case

7. The Protestor who is one of the sons of OMBONYA MBAI who co-owned **LR. EAST GEM/URANGA/405** with the deceased. In his testimony, the Protestor stated that the deceased and his father were not related and asserted that deceased's name was erroneously inserted as a co-owner of **LR. EAST GEM/URANGA/405** which originally belonged to his grandfather Mbai. It was also his evidence that the deceased's land is

LR. EAST GEM/URANGA/407 and **LR. EAST GEM/URANGA/945** and not **LR. EAST GEM/URANGA/405**.

Petitioners'/Respondents' Case

8. The 1st Petitioner/Respondent told court that the deceased's family was entitled to half of **LR. EAST GEM/URANGA/405** and her evidence was supported by Francis Oketch and Augustine Opindo Oluoch.

Analysis and Determination

9. I have considered the evidence on record, submissions filed on behalf of the Protestor/Applicant and for the Petitioners/Respondents and the gravamen of this Protest revolves around ownership of **LR. EAST GEM/URANGA/405**.
10. There is uncontroverted evidence from the official search filed in court on 16.12.13 that **LR. EAST GEM/URANGA/405** is co-owned by the deceased and **OMBONYA MBAI**.
14. The law on the effect of land registration is to be found at Section 26 of the Land Registration Act, Act No.3 of 2012 which provides THAT:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by

the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

15. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

16. Other than his word, the Protestor did not tender any material before the court to support his assertion that the deceased was registered as a co-owner of **LR. EAST GEM/URANGA/405** fraudulently or through misrepresentation to which he was a party to. Similarly, the Protestor has not demonstrated that the certificate of title in **LR. EAST GEM/URANGA/405** was acquired illegally, unprocedurally or through a corrupt scheme.

17. Consequently, I have come to the conclusion that the law relating to registration of land favours the Petitioners/Respondents as opposed to the Protestor/Applicant.

18. In the result, and from the foregoing analysis, the court makes the following orders:

1) The objection has no merit and it is disallowed with costs to the Petitioners/Respondents

2) Only ½ of LR. EAST GEM/URANGA/405 is available for distribution by the beneficiaries of RAKITA AKACH (Deceased)

3) The Petitioners are directed to within 30 days from today's date ascertain and determine the respective beneficial entitlement to the estate of all the beneficiaries of the deceased listed at paragraph 3 of this judgment.

4) Mention on 30th November, 2020 to confirm compliance with order 3 above and to take a date for the application for confirmation dated 22.03.19 filed on 17.04.19

DATED AT KISUMU THIS 21st DAY OF October 2020

T. W. CHERERE

JUDGE

Court Assistants - Ms. Amondi/Ms. Okodoi

Petitioners/Respondents - Present in person

For Protestor/Applicant - Mr. Orengo for Moses J.A.Orengo Advocate