



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 408 OF 2013**

**IN THE MATTER OF THE ESTATE OF ANDERICUS OBONG'O NYARIANYA (DECEASED)**

**BETWEEN**

**PATRICE NYARIANYA ODUNA.....PETITIONER/RESPONDENT**

**AND**

**RISPER ALICE AMOLO OMOLLO.....1ST OBJECTOR/APPLICANT**

**RAPHAEL AKENDO OSURO.....2ND OBJECTOR/APPLICANT**

**JUDGMENT**

**Introduction**

1. ANDERICUS OBONG'O NYARIANYA (hereinafter referred to as deceased) died sometimes on 6th April, 1978.
2. Letters of administration were issued on 4th April, 2016 in favor of the respondent in his capacity as nephew of the deceased.
3. By an application dated 7th April, 2016 filed on 11th April, 2016, the applicants filed a notice of motion under Section 76(d) (ii) of the Law of Succession Act and Rule 44 (1),(2), (3) and (4) and 63 of the Probate and Administration Rules and all enabling provisions of the Law seeking the following orders:

**a) That the Letters of Administration intestate of the estate of ANDERICUS OBONG'O NYARIANYA be annulled or revoked and fresh ones be issued in the names of the applicants and the respondent**

**b) Alternatively, the respondent who is the administrator of the estate of the deceased be ordered to execute/sign mutation forms, transfer forms applied and all other relevant documents for subdivision of land known as L.R. NO. KISUMU/KOLUNJE/868 and for transfer of the resultant parcels numbers in favor of the applicants in execution of Kisumu West District Land Disputes Tribunal file no. 8/2011 which was adopted as a judgment of court in Kisumu Chief Magistrate's Court Land Case No. 7 of 2012 and in default the forms be signed by the Deputy Registrar of this court**

**c) Costs be borne by the respondent**

**Petitioner/Respondent's Case**

4. The petitioner denied that Maurice Otieno Obongo the deceased's step son (who's also deceased) had authority to sell part of *the suit property* to the objectors.
5. The respondent conceded that Kisumu West District Land Disputes Tribunal had issued an order in file no. 8/2011 which was adopted as a judgment of court in Kisumu Chief Magistrate's Court Land Case No. 7 of 2012 that there be a transfer to the objectors of the portions that they had bought but he had not done so. It was his evidence that he sold part of *the suit property* to the family of one Jane India after he was issued with letters of administration.
6. PW2 Jane Anyango Dima, deceased's daughter told court that she had a sister called Mary Odinga and that the Petitioner was her cousin. It was her evidence that after deceased's death, their mother married Mzee Waore and begot their half-brother Maurice Otieno.

## **Objectors/Applicants' Case**

7. **RISPER ALICE AMOLO OMOLLO**, the 1st objector stated that she bought 1.6 Ha of *the suit property* from Maurice Otieno Obongo (now deceased) for Kshs. 78,000/-. In support thereof, she tendered a sale agreement dated 16.5.07 as DXEH. 1. She produced as DEXH. 2 proceedings in Kisumu West District Land Disputes Tribunal file no. 8/2011 in which the tribunal ordered the respondent to transfer to the objectors portions of *the suit property* that they had bought.

8. The 1st objector accused the respondent who is cousin of the seller of disobeyed the tribunal order which was adopted as a judgment of court in Kisumu Chief Magistrate's Court Land Case No. 7 of 2012.

9. **RAPHAEL AKENDO OSURO**, the 2nd objector on the other hand stated that he bought a portion of *the suit property* from Maurice Otieno Obongo (now deceased). In support thereof, he tendered a sale agreement dated 15.1.98 as DXEH. 5. He also produced as DEXH. 8 a ground report by a surveyor showing the portions of *the suit property* that the objectors and the family of Jane India are entitled to.

## **Analysis and Determination**

10. I have considered the evidence on record and submissions in respect thereof. The issue to be decided is whether the orders sought herein are available to the objectors.

11. Section 45 of the Law of Succession Act (hereinafter referred to as *the Act*) provides as follows:

**(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

12. Both objectors have conceded that they bought portions of deceased's land not from the deceased but from one Maurice Otieno. There is no doubt that the said Maurice Otieno did not a grant of representation under this Act authorizing him to take possession or dispose of the property of the deceased. This position is reinforced by section 82(b) (ii) of *the Act* which provides that no immovable property shall be sold before confirmation of the grant.

13. The said Maurice Otieno had no capacity to enter into a sale agreement with the objectors. He was an intermeddler and could not pass a good title to the Objectors who are themselves also intermeddlers and this Court as a court of equity shall not aid the Objectors as they are at fault. (See **Elly Odhiambo Onyuka v Ayub Odhiambo Migwalla [2005] eKLR**).

14. Concerning the order made by Kisumu West District Land Disputes Tribunal in file no. 8/2011 that there be a transfer to the objectors of the portions that they had bought was in my considered view made without jurisdiction. From what I have stated hereinabove, the order though adopted as a judgment of court in Kisumu Chief Magistrate's Court Land Case No. 7 of 2012 is unenforceable.

15. Rule 73 of the Probate and Administration Rules (hereinafter referred to as *the Rules*) provides that:

**"Nothing in these Rules shall limit otherwise or affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"**

16. Arising from the foregoing, the order made by Kisumu West District Land Disputes Tribunal in file no. 8/2011 and the subsequent order in Kisumu Chief Magistrate's Court Land Case No. 7 of 2012 adopting the Tribunal order as a judgment of court is pursuant to the powers of this Court under Rule 73 of *the Rules* set aside.

17. In the result, the objection fails with costs to the Petitioner/Respondent.

**T. W. CHERERE**

**JUDGE**

**DELIVERED AND SIGNED IN KISUMU THIS 14TH DAY OF MARCH 2019**

**F.A.OCHIENG**

**JUDGE**

**READ IN OPEN COURT IN THE PRESENCE OF-**

<b>Court Assistant</b>	- Felix
<b>Petitioner/Respondent</b>	- Present
<b>Objectors/Applicants</b>	- Present