



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 64 OF 2015

IN THE MATTER OF THE ESTATE OF OWINO RACHIER (DECEASED)

BETWEEN

JANES OTIENO OCHIDO.....PETITIONER/RESPONDENT

AND

PATRICK LUMUMBA OMEDO.....OBJECTOR/APPLICANT

JUDGMENT

Introduction

1. **OWINO RACHIER (hereinafter referred to as deceased)** died sometimes on 02nd February, 1975. Deceased's estate comprised of **Land Parcel No. KISUMU/BAR/1072**.
2. Letters of administration were issued on 28th June, 2016 to the Petitioner/Respondent who describe themselves as nephew to the deceased. A certificate of confirmation of grant was issued on 18th April, 2017 in favour of the **JANES OTIENO OCHIDO (hereinafter referred to as the Petitioner/Respondent)** and **AMBROSE ONYANGO OCHIENG**.
3. By an application dated 22nd October, 2018 filed on 25th October, 2018, **PATRICK LUMUMBA OMEDO (hereinafter referred to as the Objector/Applicant)** applied for revocation of the Letters of Administration and the Certificate of Confirmation of Grant on the ground among others that the Petitioner/Respondent had failed to disclose to court that it had been determined in **KISUMU CMCC NO. 27 OF 2011** that the objector's father had bought the whole of **Land Parcel No. KISUMU/BAR/1072(hereinafter referred to as the suit land)**.
4. The court directed that the dispute be determined by way of *viva voce* evidence.

Objector/Applicant's Case

5. **PW1 PATRICK LUMUMBA OMEDO (hereinafter referred to as the Objector/Applicant)**, son and the administrator of the estate of **JAKIM OMEDO AYIEKO** alias **JAKIM (hereinafter referred to as JAKIM)** stated that JAKIM bought the suit premises from the deceased around 1974 and that the family of JAKIM have been in possession since then. He faulted the Petitioner/Respondent for not disclosing that the court had in a judgment dated 18th December, 2014 dismissed **KISUMU CMCC NO. 27 OF 2011** where **AMBROSE ONYANGO OCHIENG (hereinafter referred to as AMBROSE)** had sought to restrain the Objector/Applicant from cultivating the suit land and also found as a fact that the JAKIM had bought the suit property from the deceased.

Petitioners'/Respondents' Case

6. **PW1**, the Petitioner/Respondent stated that the deceased was his uncle and the **Ambrose** the deceased's brother's son. He stated that he was aware of **KISUMU CMCC NO. 27 OF 2011** but stated that **Ambrose** did not inform him of the outcome of the said suit. He stated that he was unaware that the deceased had sold the suit land to JAKIM and denied that JAKIM's family has been in occupation and use of the said land.
7. **PW2 Margaret Adhiambo Ochieng**, mother to the **Ambrose** conceded that she testified in **KISUMU CMCC NO. 27 OF 2011** and told court that the family of JAKIM had been using the suit land for a long time. She asserted that she was unaware of the court's decision in **KISUMU CMCC NO. 27 OF 2011**.

Analysis and Determination

8. I have considered the evidence on record, submissions filed on behalf of both parties and the cited authorities and I have deduced the following issues for determination.

i. Should the Letters of Administration and Certificate of Confirmation of Grant be revoked

ii. Who is entitled to the deceased's estate

9. Section 76 of *the Act* provides as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

10. In Musa Nyaribari Gekone & 2 Others v Peter Miyianda & another [2015] eKLR, the court of Appeal held that:

“The expression “any interested party” as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate.”

11. In my considered view, the interest of the Objector/Applicant who is a son of JAKIM that had bought land from the deceased entitles him to apply for revocation of the grant of representation herein.

12. The deceased died intestate and his property that is subject to succession is in terms of Section 34 of the Law of Succession Act Cap 160 Laws of Kenya (**hereinafter referred to as *the Act***) all his free property of which he has not made a will which is capable of taking effect.

13. Section 3 of *the Act* defines "**free property**" to mean 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.

14. From the evidence on record, the deceased had at the time of his death disposed off his "**free property**" in **Land Parcel No. KISUMU/BAR/1072** to JAKIM, the father of the objector. Clearly, the suit land to which this succession cause relates was not deceased's "**free property**" at the time of his death.

15. Whereas there is no doubt that the Petitioner/Respondent and *Ambrose* are blood relatives of the deceased, they were aware that they did not have a claim over the deceased's estate the same having been disposed off but they elected to conceal this material fact to court at the time of applying to succeed the deceased.

16. I wholly approve of the holding in Kennedy Opiche Olela v William Ogida Ochuodho & Another [2014] eKLR where the court rightfully found that the applicant, as a purchaser, is not a person entitled to a grant of letters of administration under **section 66** of the *Law of Succession Act*.

17. I similarly associate myself with the holding in Ireeri Nyaga v Karani Ngari & Another Embu HC Succ. No. 68 of 2007 [2010] eKLR where it was held that a buyer's or purchaser's recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased's estate. In this case, it is *Ambrose* that sued the Objector/Applicant in KISUMU CMCC NO. 27 OF 2011 and the court determined that the objector's father had indeed bought the whole of **Land Parcel No. KISUMU/BAR/1072**(**hereinafter referred to as *the suit land***). It is on record that the *Ambrose* did not appeal the court's finding.

18. I have considered the findings **In re ESTATE OF JOHN GAKUNGA NJOROGE (DECEASED) [2015] eKLR** cited on behalf of the Petitioner/Respondent and I find that the issue of whether or not the sale by the deceased of his land to the Objector's/Applicant's father complied with Section 7 of the Land Act is a matter that ought to have been litigated in **KISUMU CMCC NO. 27 OF 2011**. This court has no jurisdiction to delve into that issue for the reason that it would amount to sitting on appeal on a matter that has not been appealed.

19. I have likewise considered the finding in **DR. LEONARD KIMEU MWANTHI V RUKARIA M'TWERANDU M'IRIUNGI [2013] eKLR** cited on behalf of the Petitioner/Respondent and I find that the holding in civil case **KISUMU CMCC NO. 27 OF 2011** has not caused any confusion but has to the contrary been of great succor in the settlement of the issue in dispute between the parties herein.

20. I have no doubt that the Letters of Administration were lawfully issued to the Petitioner/Respondent. I am however persuaded that the Certificate of Grant herein was obtained fraudulently by the concealment from the court that the deceased had sold the whole of his land to JAKIM, the Objector's/Applicant's father and that it was therefore not available for the benefit of the Petitioner/Respondent and **Ambrose**. I am not persuaded by the Petitioner's/Respondent's contention that the Objector/Applicant ought to have laid his claim by filing another civil suit against them while the issue of the sale has already been determined in another civil suit by a court of competent jurisdiction. Doing so would in my considered view amount to duplicity of suits and would be *res judicata* and in contravention of Section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya). No doubt such an order will not only increase costs for the parties but would be inconsistent with the overriding objective of the court to facilitate the just, expeditious, proportionate and affordable resolution of cases.

21. In the result, I find and hold that the objection has merit and it is allowed in the following terms:

a) The Certificate of Confirmation of Grant issued on 18th April, 2017 in favour of JANES OTIENO OCHIDO and AMBROSE ONYANGO OCHIENG is hereby revoked.

b) The certificates of ownership to Land Parcel No. KISUMU/BAR/1072 issued to JANES OTIENO OCHIDO and AMBROSE ONYANGO OCHIENG are hereby cancelled and the Land Registrar is directed to revert ownership of Land Parcel No. KISUMU/BAR/1072 to the name of OWINO RACHIER

c) Certificate of Confirmation of Grant shall issue in favour of PATRICK LUMUMBA OMEDO in his capacity as the administrator of the estate of JAKIM OMEDO AYIEKO alias JAKIM and the suit land shall in turn form part of the estate of JAKIM OMEDO AYIEKO alias JAKIM that is the subject matter of KISUMU SUCCESSION CAUSE NO. 1283 OF 2015.

d) The Petitioner/Respondent is hereby condemned to pay costs to the Objector/Applicant.

DELIVERED AND SIGNED AT KISUMU THIS 25TH DAY OF JULY 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Felix

For Petitioner/Respondent - N/A

For Objector/Applicant - N/A