



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE NO. 143 OF 2015

IN THE MATTER OF THE ESTATE OF RICHARD OTIENO ODONGO (DECEASED)

AND IN THE MATTER OF APPLICATION

BETWEEN

MAURICE OTIENO ODONGO.....APPLICANT/PROTESTOR

AND

MONICA OBADO ODONGO.....RESPONDENT/ADMINISTRATOR

RULING

1. Richard Otieno Odongo (“the deceased”) died intestate on 2nd December 2000 and a grant representation for his estate was issued to Monica Obado Odongo (“Monica”) on 23rd April 2015. At the time of his death the deceased was unmarried and did not have any children. In her affidavit in support of her Petition for letters of administration intestate, the petitioner named William Onyango Odongo and herself as the only surviving beneficiaries of the estate of the deceased. The deceased’s only asset at the time of death was land parcel **KISUMU/NYALUNYA/2550** (“Plot 2550”)

2. By of background, deceased’s family or genealogy is not disputed. Monica was one of the wives of Jacob Odongo Were (“Jacob”) who died in 1966 leaving behind three wives; Achola Odongo, Loice Odanga (“Loice”) and Monica as the third wife. Each house had the following children:

- First house; Eliud Odago (“Odago”) and Gaudencia Juma (deceased)
- Second house; John Otieno Odongo, Margaret Were, Siproza Maina and Jane Awuonda (deceased).
- Third house; William Onyango Odongo (“William”), Maurice Odongo Odongo (“Maurice”) and Richard Otieno Odongo (“the deceased”)

3. Maurice initially lodged an objection but since the grant had already been issued and the dispute concerned Plot 2550, I dismissed the objection and directed Monica to apply for confirmation so that Maurice may lodge a protest on the same terms. On 18th January 2017, Monica applied for confirmation of grant whereupon Maurice filed a protest to confirmation of grant following which I directed that the matter be heard by oral testimony.

4. Maurice deposed and testified that after Jacob’s death, his estate was distributed by Monica. He was given land parcel **Kisumu/Nyalunya/2269** (“Plot 2269”). During the distribution, Odago from the first house and the eldest son in the family, was left out of the distribution as he was away in Mombasa. In 1999, he was very ill and when he returned home and the family agreed that he should settle on Plot 2269 and that Maurice would be compensated with land from the houses of Loice and Monica. Maurice testified although the decision was made he was away in Nairobi, he did not object to it as it involved the family elders.

5. When Maurice returned from Nairobi, John Otieno Odongo, the son of Loice, informed him what had transpired and he gave him a share of his parcel in **Kisumu/Nyalunya/2551** (“Plot 2551”). He was to receive, a share of Plot 2550 which was had been registered in the deceased’s name. However, when the deceased passed away, Monica disregarded what had been agreed in the family. She allowed William to erect his house on the portion he was entitled to and sold off another part.

6. William Were Owuor (PW 2), testified that he was a son of Jacob’s brother and therefore a cousin to the deceased. He confirmed that a meeting was held where it was agreed that Maurice’s share of Jacob’s estate be given to Odago and Maurice would be compensated by being given a portion from Loice’s land, that is Plot 2551 registered in the name of John Otieno Odongo and a further portion from Monica’s land, Plot 2550 registered in the deceased’s name. PW 2 recalled he was present at the meeting which was attended by his father, Johanna Awour Were, Simeon Nyaoro, a cousin, John Otieno Odongo and Monica. PW 2 also testified that following that meeting, Maurice’s land was given

to Odago and a house was constructed for him thereon and that Odago and his wife were buried on that land. PW 2 recalled that after Odago's death and his wife, their son sold the land.

7. Maurice also relied on the statement of Walter Oricho Genga who stated that after Odago's death he purchased land his widow, Julianna and though Maurice signed the transfers as the land was in his name, he gave all the money to Julianna. Unfortunately, Walter Oricho Genga passed away during the proceedings.

8. William (DW 1) told the court that Plot 2550 was supposed to be shared between himself and Maurice but Maurice wanted to keep the whole share for himself. He testified that Maurice had been given Plot 2229 but he had sold it. He recalled that his mother, Monica, wanted Plot 2250 to be shared between her two sons but he now wanted to keep the land to himself. He told the court that when the land was being given to Odago, he was not present at the meetings.

9. In the course of the hearing it emerged that Monica had sold part of plot 2550 to one George Ogada Ogada and Judith Anyango Adongo who were also claiming interest in the land. I directed them file affidavits to show how they acquired the property. They filed affidavits which they adopted in evidence.

10. I also summoned Monica (DW 2) to testify. She stated that Maurice had been given his own land which he had already sold. In cross-examination, she admitted that William was given his own and the land which had been inherited by Maurice was given to Odago. She confirmed that Odago and Juliana were buried on that parcel. She also recalled that Julianna sold the land and was paid by Walter Oricho Genga. She stated that when Odago was given the land, she was the one to be compensated with the land which is now registered in the deceased's name. She was adamant that the land belonged to her and her sons could only inherit it when she was dead.

11. The issue in this case is whether Maurice is entitled to part of Plot 2550. Prima facie, distribution of Plot 2550 belonging to the deceased is to be determined by application of **section 39** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)**. It provides that where an intestate has left no surviving spouse or children, then the net estate shall devolve to the parents in order of priority then to the brothers and sisters. Since the deceased did not have any wife and children and his father was dead, Monica, as his mother, was the direct beneficiary of the property.

12. Maurice therefore bore the burden of displacing the provisions of **section 39** of the **Law of Succession Act** by proving on the balance of probabilities that the property was intended for him or had been given to him and Monica was merely a trustee. The totality of the evidence is that Maurice was initially given Plot 2269. I find and hold that Odago, who was a direct beneficiary of Jacob's estate, was left out in the initial distribution and when he returned home provision had to be made for him by allocating him the land that belonging to Maurice. This is confirmed by PW 2 testified who was present during the meeting where the decision was made. Monica was also present at the meeting and she readily accepted the decision. The resolution of this family meeting was given effect. Both William and Monica corroborated the fact that Odago and his wife were buried on the land. PW 2 also gave unchallenged evidence that after the death of Odago, Julianna and their children sold the remaining portion of plot 2269 and went to buy land elsewhere using the proceeds from the sale. Monica confirmed that the land that had been given to Maurice was sold to Walter Genga by Julianna.

13. I accept the protestors case and find that Maurice has proved his claim on the balance of probabilities. He is therefore entitled to half a share in Plot 2550 as a result of losing his inheritance to his step-brother Odago. This is a matter that his mother Monica knew and she expected that her family would be compensated.

14. As regards the purchasers, George Ogada Ogada and Judith Anyango Odongo, the law is clear that the administrator cannot deal in the deceased property without a certificate of confirmation of grant. **Section 45** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the Act") makes it an offence for any person to deal with or take possession of the free property of the deceased unless so authorised by the law or by authority of the court. Where immovable property is sold such a sale is void. I would quote what the court stated in **Estate of John Gakunga Njoroge MKS Succession Cause No. 256 of 2007[2015]eKLR** stated as follows;

[10] A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the Court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act

[15] For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under section 82 (b) Proviso (ii), which provides that: "no immovable property shall be sold before confirmation of the grant."

15. I shall therefore confirm the grant on terms that I have set out above. However, and taking cognizance of the fact that Monica resides on that property and she has sold part of it. She shall retain a life interest on the part that Maurice would be entitled to.

16. I therefore confirm the grant on the following terms:

(a) **Land Parcel KISUMU/NYALUNYA/2550** shall be shared equally between **MONICA OBADO ODONGO** in trust for herself and in trust for **MAURICE OTIENO ODONGO** in equal shares.

(b) The land shall be subdivided in such a way that the parcel for **MAURICE ODHIAMBO** shall exclude such part as occupied by the purchasers. In this respect the parties shall be at liberty to apply for further orders.

(c) There shall be no order as to costs.

DATED and DELIVERED at KISUMU this 19th day of March 2018.

D. S. MAJANJA

JUDGE

Mr Orengo, Advocate for the applicant.

Monica Obado Odongo and William Onyango Odongo in person.