



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.695 OF 2014

IN THE MATTER OF THE ESTATE OF:

ROBERT ODHIAMBO OGIRA----- DECEASED

AND

IN THE MATTER OF AN OBJECTION TO MAKING OF A GRANT

BARRACK OKETCH AMWATA.....OBJECTOR/PLAINTIFF

VERSUS

EUNICE AOKO OTULA.....1ST PETITIONER/DEFENDANT

IRENE AKINYI AMUNGA 2ND PETITIONER/DEFENDANT

JUDGMENT

1. Upon the death of **ROBERT ODHIAMBO OGIRA** on 10/02/2013 at **KASIMBA** village, **EUNICE AOOKO OTULA** (1st Defendant) and **IRENE AKINYI WAMUNGA** (2nd Defendant) petitioned for grant of letters of administration of his estate in their capacity as widow and sister respectively. They proposed that the assets belonging to the assets were to be distributed as follows:-

- WEST KASIPUL/KASIMBA 1593 was to be shared equally between the two proposed administrators.
- EUNICE AOKO ATULA was also to get west kasipul/kasimoba 1594, 1595 AND 1599 whole share.
- IRENE AKINYI WAMUNGA was to get WEST KASIPUL/ KASIMBA 1596

2. However when the matter came up for confirmation of the grant **BARRACK OKETCH AMWATA** (Plaintiff) objected to the making of the grant saying he had purchased parcel No. **WEST KASIPUL/ KASIMBA 1593** measuring 100 x 33 metres, which was a sub-division of land parcel No **WEST KASIPUL/KASIMBA 1420**. In support of this, the plaintiff relied on a sale agreement between himself and the deceased where the parcel was sold to him at a sum of Ksh 680,000/- and which was paid in six instalments. He claims that the petitioners were fully aware of the state of affairs yet did not include him as a beneficiary of the estate.

3. The 1st petitioner disputes this claim saying her husband never disposed off any of his parcels during his lifetime and annexed a search certificate showing that as at 29/01/2013 that parcel was still registered in her husband's name. She contends that after her husband's demise, the plaintiff fraudulently

subdivided parcel No **WEST KASIPUL/ KASIMBA 1420** to create parcels No **WEST KASIPUL/ KASIMBA1593-1596**, and the consent to effect such subdivision was obtained 3 months after the deceased's demise and there is no way her husband could have subdivided the land from the grave. She also points out that despite the agreement stating that the purchase price was Kshs 680,000, the total amount paid as per the installments was actually Kshs 690,000/-. She further questioned the authenticity of that sale agreement saying one witness by name **DON NYAGWETHA** did not even append his signature to the agreement and in the year 2012 M-pesa did not accept transactions of Kshs 90,000/- as claimed.

4. The plaintiff in response insisted that the deceased received the total purchase price and in his further affidavit he explains that the payments Kshs 160,000/ which deceased received and sined for to acknowledge receipt, Kshs 140,000/- deposited in the deceased's bank account on 14th February 2012 vide the bank slip annexed to make a total payment of Kshs 300,000/-. Later on he made payments of:-

- Kshs 30,300/- on 23/01/2013
- Kshs 30,200/- on 18/10/2012
- Kshs 10,100/- on 05/09/2012
- Kshs 50,000/- on 09/05/2012
- Kshs 30,000/- on 31/05/2012
- Kshs 40,250/- on 18/04/2012
- Kshs 20,000 on 16/03/2012

5. Further that since he needed the original title document for purposes of transfer, he met the deceased at KCB Oyugis Branch on 03/12/2012 and withdrew the sum of Ksh 169,250/- which he handed over to the deceased thereby completing the transaction. He thereafter engaged a surveyor who drew the maps and submitted them for mutation to the Lands office to effect subdivision of the deceased's land.

6. The matter proceeded by way of viva voce evidence where the plaintiff reiterated the contention about being a bona fide purchaser and that the deceased died before he could effect transfer. He also stated that there was a problem as to where the deceased was to be buried and the family requested through the area assistance chief that the plaintiff gives them a bit of land to bury him. The plaintiff consented and even financed the construction of a house for the deceased and that is why the deceased ended up being buried on a 70x100 portion.

7. CARILUS JOAN NYAGWETH (PW2) a Surveyor with Olweny and Associates Surveyors told this court that he had known the objector as a friend and a client for whom he had done some work in the past. He confirmed subdividing land belonging to the deceased in 2011, after the deceased had requested him to find him a buyer. He is the one who got the plaintiff and after final payments had been completed in his presence, he surveyed the plot.

8. It was PW2's evidence that the deceased signed the mutation forms on 03/12/12 and he submitted them at the Land Registry on 28/01/2013. The subdivision resulted in parcel 1593-1596.

9. On cross examination PW2 confirmed that he did not sign the sale agreement, but was insistent that he witnessed payments made to the deceased for the purchase.

10. Both PW1 and PW2 stated that at the time of the transaction, the parcel was vacant and the deceased lived in Kitui, but had come to Nyanza during the time of transaction.

11. Both Eunice and Irene deny knowledge of any sale of land and Eunice (1st defendant) told the court that currently she lives on the disputed parcel along with some other people who purchased the land. It was her contention that whenever the deceased sold land, he would inform her and she would be present during such transaction and get to know the purchasers.

12. Irene Achieng (DW2) stated that her brother would always tell her about his land transactions, yet in this particular one he never mentioned a thing.

13. Both defendants say that the only purchaser they are aware of is one YUSUF.

14. Although both parties were to file written submissions, I only received those by the Respondent.

15. Whereas the Respondents' counsel submits that the suit property was always family award by the Deceased and the 1st defendant – no such claims were made by the defendants, and indeed the annexed search certificate dated 19th June 2014 showed that **ROBERT ODHIAMBO OGIRA** was the registered owner.

16. With great respect I am afraid counsel has gone off at a tangent and embarked on giving evidence in the written submissions. This is totally out of place – issues of the asset being matrimonial property were never raised in the evidence of any of the witnesses. I think the issue here is very simple.

a) Should parcel NO.1593 be included in the assets for distribution in the estate of ROBERT ODHIAMBO OGIRA?

b) Should a purchaser be included as a beneficiary to the estate of a deceased vendor?

17. The plaintiff alludes to a sale agreement entered into with the deceased – of course many questions arise:-

a) Was this agricultural land, and therefore subject to the consent obtained from the Land Control Board.

b) Is the agreement a valid one in the absence of a signature by one witness named DON NYAGWETHA?

c) What about the fact that the Chief (who was purportedly a witness) did not sign the agreement nor testify to confirm the veracity of its contents.

18. In my mind these are issues which ought to be addressed before the Environment and Land Court and not a family court.

19. As regards the status of the Objector in this matter, I agree with the Respondent's counsel that **Section 29** of the **Law of Succession** sets out persons who are recognized as dependants. These are:-

Section 29. *For the purposes of this Part, "dependant" means -*

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

20. The plaintiff does not fall into this category. I am keenly aware of a popular view that is now trending in the High Court to the effect that a purchaser ought to be included in the list of beneficiaries on the basis of being a liability. While I respect that view, I do not think it applies in this instance case where transfer had not been effected and the transaction documents raise more questions than answers. I hold the view that the scenario presented here is best addressed by the Objector filing a suit against the administrators of the estate seeking specific performance of the incomplete agreement i.e. transfer of the asset.

21. I therefore find that the Objection has no merit and is dismissed.

Delivered and dated this 28th day of June, 2017 at Homa Bay

H. A. OMONDI

JUDGE