



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**SUCCESSION CAUSE NO. 800 OF 2014**  
**IN THE MATTER OF THE ESTATE OF**  
**MAGWAR GWADA (DECEASED)**  
**AND IN THE MATTER OF APPLICATION BY**  
**BETWEEN**

**SALINA AKEYO MOLA .....APPLICANT**

**AND**

**CORNELIA ACHIENG GUNDI ..... 1<sup>ST</sup> PETITIONER/ RESPONDENT**

**FREDRICK OUMA OWUOR GUNDI ..... 2<sup>ND</sup> PETITIONER/RESPONDENT**

**RULING**

1. There are two applications before the court for consideration. The first application is a summons for confirmation dated 28<sup>th</sup> October 2015 seeking to confirm the grant issued to Cornelia Achieng Gundi (“Cornelia”) and Fredrick Ouma Owuor (“Fredrick”) on 18<sup>th</sup> November 2014. The grant is in respect of the estate of the Magwar Gwada (“the deceased”) who died on 12<sup>th</sup> December 1979 at Border 1 Location of Nyando District. His only known asset is a piece of land; Kisumu/Border/2444 measuring 4.2Ha (“the suit property”). The petitioners described themselves as the deceased’s son and daughter. They propose that the entire suit property be inherited by Fredrick.

2. There is also the summons for revocation of grant dated 4<sup>th</sup> April 2016 filed by the deceased’s sister in law, Salina Akeyo Mola (“Salina”). She depones that the petitioners failed to disclose that there were other surviving beneficiaries of the deceased who are entitled to land and who would otherwise be disinherited if the grant is confirmed. The thrust of her case was that the suit property was family property and was registered in the deceased’s name to hold in trust for other family members.

3. Counsel for the petitioners, Ms Olango, admitted that suit property was family property which the deceased was holding in trust for himself and his brothers. The family genealogy was also not disputed. The deceased is survived by only one daughter, Cornelia. The deceased had two brothers; the late Thomas Gwada (“Thomas”) and the late Richard Osogo Gwada (“Richard”). Salina is the wife of Richard while Thomas is survived by his widow, Pamela Akinyi Owuor (“Pamela”) and their son, Fredrick.

4. After listening to the parties, the issue for resolution was distribution of the suit property particularly because third parties had settled on the land. In the course of the proceedings, I directed the Deputy

County Commissioner, Nyando District to inquire into the matter, attempt reconciliation between the parties and report to the court on the status of the property. What emerged from the report is that Salina and Joannes Amollo Osogo (“Joanes”), who been adopted by the deceased’s late wife, had sold part of the land to Luke Omulo Omolo, John Adoyo Otieno and Joshua Otieno.

5. John Adoyo Otieno testified that he was approached by Salina to assist her with money to cover her medical expenses as she did not have anyone to assist her. In consideration for the Kshs. 20,000/- he entered into an agreement dated 19<sup>th</sup> March 2012 to purchase 2 acres (0.8Ha) of the suit property. Luke Omulo Omolo testified that when Juliana Gwada, the deceased’s wife died, the family approached him for assistance in organizing the funeral. By an agreement dated 8<sup>th</sup> March 2009, Joanes sold him 2 ½ acres for Kshs. 65,000/-. The Chief, Awasi Location, confirmed that the indeed the family of the deceased approached him when they wanted to sell land to Luke Omulo Omolo. According to the report of the Deputy County Commissioner, the land had been subdivided and each parcel demarcated by sisal plants. The Deputy County Commissioner made the following recommendation regarding the suit property;

- Pamela Akinyi Owuor through her son Fredrick to retain 2.5acres
- The three purchases retain their portion of land as follows; John Adoyo Otieno (2 acres), Luke Omulo Omoloi (2.5 acres), Joshua Obiero (1 acre)
- Selina Akeyo to retain ½ acre where her homestead is.
- Cornelia Achieng be given 2 ¼ acres that are left.

6. From the facts I have outlined, it is apparent that the dispute concerns distribution of the estate hence I shall not deal with the summons for revocation. As the deceased died on 12<sup>th</sup> December 1979, the **Law of Succession Act (Chapter 160 of the Laws of Kenya)**, which came operation on 1<sup>st</sup> July 1981, is not applicable in distributing the estate. **Section 2(1)** of the **Act** provides:

*2. (1) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.*

7. As the deceased was Luo, by virtue of **section 2(1)** cited above, the applicable law in so far as it is not repugnant to justice or inconsistent with any written law is Luo customary law. Customary law is a question of fact and must be proved by evidence (see **Kimani v Gikanga [1965] EA 735**). **Rule 64 of the Probate and Administration Rules also makes provision for the application of African Customary Law in the following terms:**

*Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African Customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination.*

8. The parties did not lead any evidence of the applicable custom and manner of distribution of the suit property under Luo customary law. What is not in dispute is that the only survivors of the deceased and his brothers are Salina, Cornelia and Fredrick. Ms Olang’o submitted that the suit should be shared between the three families equally. In my view, this is an equitable proposition which I am prepared to accept.

9. The issue then is what is the position regarding interested parties who purchased property of the deceased. **Section 2(1)** is clear that the provisions for the **Act** shall apply to administration of the estate in so far as is applicable. In selling part of the suit property to the interested parties, neither Salina nor Joannes had the capacity to sell the property or pass good title. A person can only deal with the estate of a deceased person if a grant of representation is issued to him under the **Act**. In this regard, the Court also has jurisdiction to protect the estate of a deceased person is set out in **section 45** of the **Act** which states as follows:

45. *No intermeddling with property of deceased person*

*(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.*

*(2) Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”*

10. The act of selling part of the suit property to third parties was irregular, unprocedural and contrary to the law. **Section 82(b) (ii)** of the **Act** provides that personal representatives do have the power to sell any asset vested in them and that, “**(ii) no immovable property shall be sold before confirmation of the Grant.**” I therefore find and hold that the purported sale of the property to John Adoyo, Luke Omulo Omollo and Joshua Otieno was null and void for all intents and purposes. I therefore confirm that grant issued to the petitioners on terms that Cornelia Achieng Gondi, Fredrick Ouma Owuor and Salina Akeyo Osogo shall share the suit property in equal shares.

11. That is not the end of the matter as this court is aware of its responsibility to do justice and to promote alternative dispute resolution under **Article 159** of the Constitution. It is clear from the evidence that beneficiaries of the deceased approached the purchasers when they were under distress to assist them meet expenses. These sales were, as I have held, contrary to the law, aided and abetted by the local administration which gave the parties some sense of comfort to the extent that the land was fenced off and divided. In the circumstances, I shall stay the implementation of the court’s decision for a period of six (6) months will afford the parties ample opportunity to negotiate settlement of the dispute if so desired. In default, the administrators will be at liberty to proceed with the distribution of the Estate in accordance with the confirmed Grant. For avoidance of doubt, this ruling does not authorize the forcible eviction of the interested parties from the land they occupy on the deceased’s estate.

12. This decision shall be brought to the attention of the Assistant County Commissioner, Nyando who shall assist the parties reach an amicable solution.

13. There shall be no order as to costs.

**DATED and DELIVERED at KISUMU this 19<sup>th</sup> day of September 2017**

**D. S. MAJANJA**

**JUDGE**

Applicant in person.

Ms Olang’o instructed by Wasuna & Company Advocates for the petitioners.