



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 438 OF 2013
IN THE MATTER OF THE ESTATE OF VITALICE OMACH ONDELE alias
PETERLIS OMACH (DECEASED)
BETWEEN
BENTER JUMA NYAKAKO
LEUNIDA ACHIENG OMACHAPPLICANTS
AND
RAPHAEL AKENDO OSURO.....PROTESTOR
RULING

1. This matter concerns the estate of Vitalis Omach Ondele who died on 15th June 2016. He left behind one property; Kisumu/Kolunje/898 which is the subject of contention. The petition for letter of administration was filed by Raphael Akendo Osuro who described himself as son of the deceased. The application was objected to by Benter Juma Nyakako and Leunida Achieng Omach who filed an objection to making the grant and a petition by way of cross-application for grant seeking to be granted letters of administration on the ground that the petitioner was a purchaser of the property and that they were direct descendants of the deceased. At any rate a grant of letters of administration intestate was issued on 1st April 2014.

2. What is before the court is the summons dated 15th June 2015 for confirmation of grant issued to Benter Juma Nyakako and Leunida Achieng Omach. In the application they disclosed that the deceased had four parcels of land; Kisumu/Kolunje/898, 1690, 1691 and 1629 (Plots 898, 1690, 1691 and 1629) to be distributed amongst the deceased's family members; Benter Juma Nyakako, Augustine Otieno Otieno, Bonface Omondi Otieno, Albert Otumba Omach and Jared Odhiambo Okumu. I directed that the matter be heard by oral evidence.

3. The case for consideration was relatively straight forward. James Olwanda Ngong'a (PW 1) testified that he knew the deceased and that in 1974 he entered into an agreement to purchase 3 acres of Plot 898 from him. The sale was evidenced by several written documents in which the deceased acknowledged payment of Kshs. 7,000/- which was the agreed purchase price. The instalments were paid between 1974 and 1978. He moved on to the land in 1974 and built on a portion of it. In 1994, he vacated the land after selling it to Raphael Akendo Osuro (PW 2).

4. PW 2 confirmed that he bought the land from PW 1 as it was already demarcated by Euphorbia trees.

He recalled that he bought the land when the deceased was still alive. He told the court that he sold pieces of the land to Japhet Havi Kivai (PW 5) who purchased about an acre, Alfred Nandwa Kabaka (PW 6) who purchased about half an acre and Philip Sikuku Ombima (PW 7) who purchased about one and a half acres.

5. Simeone Okingo Ochola (PW 2) gave a brief history of the suit property. He testified that he was the son of Hezron Ochola who was a cousin to the deceased. He recalled that the Plots 897 and 898 were originally owned by Tinda Oduol. Oduol predeceased his wife, Miriam Kijaro who was disabled and did not bear any children. After his death, Plot 897 was registered in the name Ochola while Plot 898 was registered in the name of the deceased. He further testified that the deceased registered part of Ochola's land measuring about 3 acres as part of Plot 897 which the deceased promised that he would transfer back to his family. He claimed that he has resided on that part over a period of 64 years and is entitled to it by virtue of adverse possession.

6. The Chief of Otenyo Location, Maurice Otieno Nyawina (PW 4), where the subject property is situated testified that he knew that deceased and that he came to live with Miriam Kijaro and that during adjudication, the land was registered in his name. He confirmed that Ochola was also situated on that land. He told that court that PW 1 purchased land from the deceased, resided there for some time and then sold the land to PW 2. He further testified that the problems on the land started when the sons of the deceased died leaving the applicants who refused to co-operate with the purchasers.

7. Benter Juma Nyakako (DW 1) testified on behalf of the administrators. She told the court that her co-administrator Leunida Achieng Omach had passed away on 3rd February 2017. Her position that she proposed to distribute all the land to the deceased's grandchildren as all the deceased's children had passed. She contended that the applicant was not related to the deceased and neither were the purchasers. She denied that she was not aware of the transactions alluded to by PW 1 and PW 2. She affirmatively stated that Plot 898 was registered in the deceased's name. She accused PW 4 of refusing to give her an introduction letter and instead giving to other people to apply for letters of administration. She further accused him of having an interest in the land as he is the one who drew up the sale agreements. She told the court that the purchasers have no right to the property. Wycliffe Okech Achieng (DW 2) testified that he did not sign the consent that enable PW 1 to apply for letters of administration.

8. In his written submissions, counsel for the plaintiff, argued that the main issue is whether the deceased sold part of the land comprised in Plot 898 to PW 1 and whether PW 2 was entitled to part of the land by way of adverse possession.

9. I note that in fact there is a claim of the property by adverse possession by Simeone Okingo Ochola, Raphael Okendo Osuro, Japhet Havi Kiyai, Alfred Nandwa Kabaka and Philip Ombima Shikuku against Benter Juma Nyakako and Leonida Achieng Omach being **KISUMU ELC Case No. 160 of 2014(OS)** which is still pending. I have reflected on this issue and found as fact that there is evidence that in fact such a claim may be merited, however it is a claim that is more appropriately addressed in the Environment and Land Court.

10. In the case of **Jackson Kamau Nthiga v Humprey Kirimi Mbuba & Another Chuka H.C Succ. Cause No. 660 of 2015 (UR)** the court observed as follows:

*Ms. Rimita referred this court to various decisions on the point these include **Francis Musyoki Kilonzo & Anor v Vincent Mutua Mutiso [2013] eKLR, Nancy Waithira Marete v Catherine Kathoni Marete & Anor [2014] eKLR and Muriuki Musa Hassan v Rose Kanyua Musa & 4 Others [2014] eKLR. The net holding in those decisions was that the jurisdiction of a family court dealing with a Succession Cause is limited. Such court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate. Such a court cannot delve into establishing the validity of a claim such as the one before this court. In the case before this court, there are serious issues that need to be established and/or ascertained by either the lower court or the court which has jurisdiction to entertain a claim to land. That however, does not bar a family court from ascertaining if one is a creditor of an estate.***

In the circumstances of this case, the Interested Party and the Objector have not yet been so determined by a court of law. This court cannot determine their claims in these proceedings.

11. In **Alexander Mbaka v Royford Muriuki Rawi & 5 Others Chuka HC Succession Cause No. 22 of 2016 [2016]eKLR** the court noted that:

To my mind what the court was saying in the said case is that, the role of the family court is well set out in the Act, to ascertain the assets, the liabilities, if any, the beneficiaries and determine the mode of distribution an estate period. It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. That claim is to be considered as a liability to the estate. This court, in my view cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such a right has not yet crystallised. The right must first be shown to have crystallised before the family court can entertain it as a liability in succession proceedings.

12. Although I agree with these sentiments, I think the High Court has jurisdiction under the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** has jurisdiction to address any claims made by creditors to the estate in so far as is possible taking into account the nature and circumstances of each case. Whether the court should proceed to determine these claims would depend, amongst other factors, on the nature of the claim and the remedies available, the parties involved and whether there are other pending proceedings. The parties claiming the property by way of adverse possession are not the protestors although they seem to be claiming the property under him. Claims for adverse possession are pursued by filing a summons under **Order 37 Rule 7(1)** of the **Civil Procedure Rules** which provides that, “An application under section 38 of the Limitation of Actions Act shall be made by originating summons”. Since there already a summons pending where the third parties have lodged their respective claims, I will let it proceed for determination before the ELC which is a specialized court for that purpose.

13. Since only property in dispute is Plot 898, I will exclude it from confirmation and issue a partial confirmation for Plots 1690, 1691 and 1929 as prayed in the application. All the proceedings relating to Plot 898 in this cause shall be stayed pending resolution of the case filed before the Environment and Land Court.

14. In the final analysis and in light of what I have stated, I make the following orders:

(a) Since Leonida Achieng Omach is now deceased, the grant issued to her and Benter Juma Nyakako is revoked and re-issued to Benter Juma Nyakako.

(b) A partial confirmation of the grant shall be issued on the following terms:

(i) Kisumu/Kolunje/1690 to Benter Juma Nyakako, Augustine Otieno Otieno and Bonface Omondi Otieno in equal shares.

(ii) Kisumu/Kolunje/1691 to Albert Otumba Omach

(iii) Kisumu/Kolunje/1929 to Estate of Leunida Achieng Omach and Jared Odhiambo Okumu.

(c) Any further proceedings herein in relation to Kisumu/Kolunje/898 are here by stayed for 12 months pending the hearing and determination of **Kisumu ELC 160 of 2014 (OS)** or until further orders of this court.

(d) All the exhibits may be released to the applicants on application to the Deputy Registrar

15. I make no order as to costs.

DATED and DELIVERED at KISUMU this 31st day of October 2017.

D.S. MAJANJA

JUDGE

Mr Odeny instructed by Bruce Odeny and Company Advocates for the Protestor.

Mr Athunga instructed Athunga and Company Advocates for the Administrators/Respondents.