



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**SUCCESSION CAUSE NO. 598 OF 2010**  
**IN THE MATTER OF THE ESTATE OF**  
**PIUS ONDIEK SURE (DECEASED)**  
**BETWEEN**  
**AND IN THE MATTER OF**  
**AN APPLICATION FOR CONFIRMATION OF GRANT BY**  
**ENOS MIMBA SURE & JOSHUA OWAGA SURE**

**RULING**

1. This matter concerns the estate of **PIUS ONDIEK SURE** (“the deceased”) of Awasi who died on 1<sup>st</sup> January 2001. As he died without a wife or issue, his brother, **JOSHUA OWAGA SURE** (“Joshua”) applied for the grant of representation for his estate on 23<sup>rd</sup> September 2010 to administer his only property **KISUMU/WAWIDHI A II/829** (“Plot 829”) measuring 0.43 Ha. The grant of letters of administration intestate was issued to him on 23<sup>rd</sup> May 2011. His brother, **ENOS MIMBA SURE** (“Enos”), filed an application to revoke the grant because his interest had not been disclosed. Ultimately the grant issued to Owaga was revoked and a fresh grant issued to both Joshua and Enos on 19<sup>th</sup> December 2011.

2. Enos and Joshua filed a Summons for confirmation of grant dated 25<sup>th</sup> July 2012. By the time, the application for confirmation came up for consideration, Joshua had passed away leaving behind his widow, Margaret Akinyi Owaga. The applicants proposed distribution of Plot 829 into 3 portions as follows;

- Joshua Owaga Sure – A 0.16 Ha.
- Enos Mimba Sure – B 0.16 Ha.
- Syllas Omondi Onyango – C 0.11 Ha.

3. The dispute does not concern the right of Enos and Joshua to inherit the property of the deceased but whether Syllas Omondi Onyango (“Syllas”) is entitled to 0.11 Ha. His claim to that portion is contested by Hellen Jeptoo (“Jeptoo”) and Joshua Ouma Omollo *alias* Oketha (“Oketha”). I took viva-voce evidence and the following facts emerged.

4. Syllas testified that he purchased part of Plot 829 from Enos with the consent of Joshua. After

discussion with the brothers, he took possession of his portion while Joshua commenced succession proceedings. He constructed a house in which he lived with Jeptoo. He told the court that following domestic problems, Jeptoo left him and prevented him from taking over the house which was sooner occupied by Oketha.

5. Jeptoo testified that Enos sold her part of Plot 829 after which she took possession, constructed a house and lived there with Syllas but they later separated. In 2007, she decided to sell the house and started looking for a buyer. She approached Joshua to subdivide the portion she had built on. Joshua surveyed **KISUMU/WAWIDHI A II/830** (Plot 830) and subdivided it into Plots 1014 and 1015. After subdivision, they discovered that there was a mistake in the sense that it was Plot 829, which had the house, that they intended to subdivide and not Plot 830. When they realized this mistake, they entered an agreement dated 4<sup>th</sup> August 2010 in which Joshua agreed to give Jeptoo his portion of Plot 829 in exchange for Plot 1015 he had given to Jeptoo.

6. Oketha testified that Jeptoo intimated to him that she wished to sell Plot 829. He told the court that Jeptoo had been given Plot 1014 by Joshua on which she constructed her house. After he purchased the house, it became clear that he intended to purchase plot 829 with the house but not Plot 1014 which Jeptoo had sold to him. He admitted in evidence that the agreement and transfer documents related to Plot 1015.

7. Joshua's wife, Margaret Akinyi, testified that Enos sold land to Syllas while her husband was still alive although she could not recall which part of the property was sold. Her testimony though, was inconsistent with her affidavit sworn on 29<sup>th</sup> June 2016, in which she stated that she did not accede to the sale and that the proposed distribution of the property would be prejudicial to the beneficial interests of the heirs Joshua's estate.

8. From the facts, I have outlined, the matter in dispute is whether Syllas or Jeptoo purchased part of Plot 829 from Enos or indeed whether Jeptoo purchased the same Plot from Joshua. There is also the issue whether Oketha purchased part of Plot 829 or Plot 1014 or Plot 1015 from Jeptoo. The resolution of these issues calls upon the court to determine the extent to which the court had jurisdiction to determine such a matter under the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the Act")

9. The starting point for consideration of this matter is **section 45** of the **Act** which provides:

*45 (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 effect of this provision is that no one is entitled to intermeddle with the free property of a deceased person and any act of intermeddling which includes taking possession and disposing of the property must be met with appropriate sanctions. Where immovable property is sold such a sale is void. I would quote what the court stated in **Estate of John Gakunga Njoroge [2015]eKLR 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..”

11. Following what I have stated, I hold that neither Enos nor Joshua could sell Plot 826 or part thereof to Syllas or Jeptoo or anyone else before confirmation of the grant. It follows that the only beneficiaries of the deceased’s estate are Enos and Joshua. Syllas is neither a beneficiary of the estate nor a creditor as he did not purchase land from the deceased. Likewise, Jeptoo and Oketha have no cognisable claim to the deceased’s estate in these proceedings.

12. I further hold that this court does not have jurisdiction to entertain the claims by Syllas, Jeptoo and Oketha. In **Jackson Kamau Nthiga v Humprey Kirimi Mbuba & Another Chuka HC Succ. No. 660 of 2015 [2016]eKLR**, the court summarised the position thus;

[14] Ms Rimita referred this court to various decisions on the point. These includes **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 a 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. [Emphasis mine]

13. A court exercising jurisdiction under the **Law of Succession Act** is not empowered to resolve land disputes generally as is the case between Syllas, Oketha and Jeptoo but only to resolve them in so far as they relate to property of the estate. In resolving this case, the court would have to entertain claims against **KISUMU/WAWIDHI A II/830** and its subdivisions; Plots 1014 and 1015 which do not belong to the deceased’s estate. This is not to say that Syllas, Jeptoo and Oketha have no remedy, they entitled to sue the deceased’s successors for what they claim to be their entitlement.

14. The deceased died without wife or issue hence his estate is to be distributed equally between the two brothers in accordance with **section 39** of the **Act**. I allow the Summons for confirmation of grant on terms that **KISUMU/WAWIDHI A II/ 829** shall be shared equally between **Enos Mimba Sure** and **Joshua Owaga Sure**.

15. There shall be no order as to costs.

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of November 2016**

**D. S. MAJANJA**

**JUDGE**

Mr Onsongo instructed by Onsongo and Company Advocates for Enos M. Sure

Mr Njoga instructed by Ouma Njoga and Company Advocates for Margaret Akinyi Owaga.

Mr Yogo instructed by Otieno, Yogo and Ojuro Advocates for Hellen Jeptoo.

Syllas Omondi Onyango in person.