



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

SUCCESSION NO. 32 OF 2014

IN THE MATTER OF THE ESTATE OF

DOTO OWINO (DECEASED)

BETWEEN

MILKA ANYANGO OTIENO APPLICANT

AND

KENNEDY OTIENO ODENY PETITIONER/RESPONDENT

RULING NO. 3

1. This matter concerns the estate of Doto Owino (deceased) who died on 7th May 1972. The administration of the estate was contested and on 25th June 2014, I made the following orders;
 - a. The grant of letters of administration issued to **KENNEDY OTIENO ODENY** on 11th September 2012 and confirmed on 20th August 2013 in *Homa Bay Chief Magistrates Court Succession Cause No. 263 of 2012* be and is hereby revoked.
 - b. A grant of letters of administration for the estate of **DOTO OWINO** (deceased) is hereby issued to **KENNEDY OTIENO ODENY & milka anyango otieno**.
 - c. The administrators or any of them shall apply for confirmation of the grant within fourteen (14) days from the date hereof
 - d. In the meantime the status quo regarding **KANYADA/KOTIENO-KATUMA 'A'/1024** shall remain in force pending confirmation of the grant or further order of the court.
 - e. Each party shall bear their own costs.
2. In the ruling, I observed that, *“I have considered the depositions in support and in opposition of the application for revocation and it is apparent that the dispute is whether the deceased in his lifetime distributed part of his property to his sons. Under section 42 of the Act, the court is entitled to take into account the property of the deceased settled in his lifetime for the benefit of any of the heirs and the court in distributing the estate.”*
3. As the issue remaining for determination was distribution of the deceased’s estate, both parties filed summons for confirmation of grant. Milka Anyango Otieno filed the summons dated 6th July 2014. It was supported by her own affidavit sworn on 7th July 2014, a further affidavit sworn on 23rd July 2013 and a further affidavit in support of the mode of distribution sworn on 23rd October 2014. Kennedy Otieno Odeny filed a summons dated 2nd September 2014 supported by his affidavit sworn on 2nd September 2014. I heard oral testimony from Milka Anyango Otieno (PW

- 1), Esther Ayot Ganda (PW 2) and Kennedy Otieno Odeny (DW 1)
4. It is not in dispute that Doto Owino (deceased) had three sons who are also deceased; Jackton Ganda Doto, Samson Otieno Doto and Richard Odeny Doto. Ganda Doto is survived by a wife, PW 1 and two sons, Joseph Otieno Owino Ganda and Tobias Ganda Ganda. Samson Otieno Doto is survived by his wife PW 2 and three sons; Hezron Odhiambo Otieno, Kennedy Magak Otieno and Stephen Yeke Otieno. Richard Odeny Doto is survived by Kennedy Otieno Odeny, the petitioner, Jeremiah Ouma Odeny and Bernard Ochieng Odeny. It is also not in dispute that there is only one piece of land registered in the name of the deceased namely; **KANYADA/KOTIENO/KATUMA 'A'/1024** ("Plot No. 1024").
5. The applicants' case is that Plot No. 1024 was supposed to be divided three parts for each of his sons. Both PW 1 and PW 2 denied that the deceased had any other land and that as wives of the sons of the deceased they resided on Plot No. 1024. They also confirmed that although the wife of Richard Odeny, Christina Odeny, was levirated, she was also buried on the subject land. PW 1 and PW 2 stated that their respective husbands had purchased their own land elsewhere but that they still lived on the deceased's land to which their respective families were entitled. They both denied that DW 1 had the consent or authority of the family to apply for the grant of letters of administration.
6. PW 1 further testified that part of the land had been sold to two purchasers; Walter Akelo Mboro and Bernard Ongir Aoko. As regards the former, she testified that the deceased's wife was sick and in order to cater for her medical expenses the family agreed to sell to him 0.5Ha. A further 0.5 Ha was sold to Bernard Aoko to cater for medical expenses for Joseph Ganda. They therefore proposed that Plot No. 1024 be divided into three equal portions excluding the 0.1 Ha for the two purchasers.
7. Mr Ayayo, learned counsel for the applicants, submitted that the only property of the deceased was Plot No. 1024 and that the same should be distributed equally between the families of the deceased's three sons. He submitted that there was no evidence that the deceased ever had any other properties and that the sale to third parties who had acquired the land should be revoked and the land distributed to the family.
8. The respondent's case was that during the land adjudication of the Kotieno-Katuma 'A' adjudication section and before his demise, the deceased apportioned part of his land namely **KANYADA/KOTIENO-KATUMA 'A'/5** ("Plot No. 5") to Jackton Ganda Doto and **KANYADA/KOTIENO-KATUMA 'A'/1547** ("Plot No. 1547") to Samson Ganda Doto. He then retained Plot No. 1024 in trust for his last born son Richard Odeny.
9. DW 1 testified that after consulting family members he decided to apply for the grant of letters of administration. He obtained the chief's letter which confirmed that he was the grandson to the deceased. He consequently applied for the grant of letters of administration but before the same could be confirmed, the court directed him to get the consent of the other family members to confirm that there was no objection to the grant being confirmed in his favour. He averred that he sought and obtained the consent of Joseph Owino Ganda from the family of Jackton Ganda Doto and Kennedy Magak Ganda from the family of Samson Otieno Doto and thereafter the grant was confirmed. He stated that the family knew that he had applied for grant of letters of administration.
10. Upon confirmation of the grant on 20th August 2013, Plot No. 1024 was apportioned among the children of Richard Odeny; Kennedy Otieno Odeny, Benard Ochieng Odeny and Jeremiah Ouma Odeny with each sharing 0.55 Ha while two purchasers Ezra Omollo and Isaack Kojwang Ogola were allocated 0.13Ha and 0.12 Ha respectively.
11. Upon registration of the certificate of confirmation and consequent subdivision of the property, the register for Plot No. 1024 was closed and the property further subdivided as follows;

- i. Plot No. 2405 (0.19 Ha) in favour of Kennedy Otieno Odeny and sold to David Owino Odeny.
- ii. Plot No. 2506 (0.26Ha) in favour of Jeremiah Ouma Odeny.
- iii. Plot No. 2407 (0.23 Ha) in favour of Bernard Ochieng Odeny.
- iv. Plot No. 2408 (0.13Ha) in favour of Ezra Achola Omolo.
- v. Plot No. 2409(0.12 Ha) in favour of Isaac Ogola Kojwang.
- vi. Plot No. 2410 (0.35Ha) in favour of Kennedy Otieno and Jeremiah Ouma sold to David Owino Odeny.
- vii. Plot No. 2411 (0.24Ha) in favour of Hezron Odhiambo Otieno.
- viii. Plot No. 2412 (0.35Ha) in favour of Tobias Ganda.

12. The thrust of the respondent's case is that the sons of Richard Odeny were the lawful beneficiaries of the deceased as all his other sons had been provided for. In addition, his learned Counsel, Mr Okoth, submitted, that the estate had already been administered and by reason of **section 93(1)** of the **Law of Succession Act**, the Court could not set aside the titles already issued to the beneficiaries and the other purchasers.

13. The issue in this case is whether the deceased had, in his lifetime, distributed land to his two sons; Jackton Ganda Doto and Samson Otieno Doto leaving Plot No. 1024 to his younger son, Richard Odeny. The deceased died in 1972 and as he died before 1981, which is the year **Law of Succession Act** came into force, under **section 2** of the Act, it is governed not by the Act, but by Luo customary law.

14. PW 1 and PW 1 testified that their husbands purchased Plot 1024 and Plot No. 5 respectively. Mr Ayayo pointed to the green cards which showed that Samson Otieno Doto was first registered 26th May 1994 while Jackton Ganda Doto was first registered on 26th May 1994. PW 1 and PW 2 did not produce any documents to support the allegation of purchase. I have looked at the green cards for the respective parcels attached to the affidavit of DW 1 and their registration is a first registration after adjudication. It is therefore not a coincidence that all the parcels were registered on the same day, that is, 26th May 1994. Furthermore, according to the **Kotieno-Katuma 'A' Registration Section Map**, plots No. 5, No. 1547 and 1024 are contiguous making it more likely that they were part of the same land owned by the deceased.

15. The respondent's case is further fortified by the fact that the children of both houses, Joseph Owino Ganda and Kennedy Magak Otieno filed affidavits in the subordinate court acceding to the application by the respondent for confirmation of the grant of letters of administration for the estate of the deceased's estate. Although Mr Ayayo seemed to suggest to DW 1 that the affidavits could have been forged, it was the applicants' burden to prove that the fact of forgery and the same was not proved at all.

16. In his affidavit, DW 1 deposed that the deceased retained plot No. 1024 as his "mondo" which he retained in his name in trust for his last born son. This is consistent with the evidence I have outlined elsewhere in the judgment. I therefore find that the deceased had given his two sons Jackton Ganda Doto and Samson Otieno Doto Plots No. 5 and No. 1547 respectively during the adjudication process and prior to his demise and that Plot No. 1024 was reserved for the third son Richard Odeny. I also find and hold that Kennedy Otieno Odeny, Jeremiah Ouma Odeny and Bernard Ochieng Odeny, the surviving children of Richard Odeny are the persons entitled to Plot No. 1024.

17. Following the confirmation of the grant issued in **Homa Bay Chief Magistrates Court Succession Cause No. 263 of 2012** the respondent proceeded to secure subdivision of the property in accordance with the certificate of confirmation. It must follow then that in fact the estate of the deceased had already been administered by respondent after the grant was confirmed and title issued to the beneficiaries. In the circumstances, the beneficiaries and transferees of the land parcels are entitled to the property protected by **section 93** of the **Law of Succession Act** which states as follows;

93(1) Every person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defects or circumstances whatsoever affecting the validity of the grant.

(2) Where a grant of representation is revoked or varied, payments and dispositions made in good faith to a personal representative under that grant before the revocation or variation thereof shall be a valid discharge to the person making the same, and a personal representative who has acted under the revoked or varied grant may retain and reimburse himself in respect of any other person to whom representation is afterwards granted might have properly made:

Provided that a personal representative who so acted shall account for all payments, dispositions, retentions or reimbursements made by him to the person or person to whom representation is afterwards granted.

18. I am satisfied that by the time the titles were issued on 23rd October 2013, the respondent had the requisite capacity as the holder of the confirmed grant issued by the subordinate court. In the circumstances, the transfers are valid and cannot be set aside. Furthermore, no fraud has been alleged or proved against the respondent or the third parties who have obtained titles.

19. In light of the findings I have made in relation to Plot No. 1204, it is clear that the interests of Walter Akelo Mboro and Bernard Ongiri Aoko cannot be entertained. Unfortunately, the family had no capacity to sell the property and in view of **section 45** of the **Law of Succession Act** which prohibits any person from taking possession of, disposing or otherwise intermeddling with the property of the deceased otherwise than in accordance with the Act. Furthermore, such a transaction was not evidenced in writing nor was it brought out by the family when DW 1 sought to commence administration of the estate.

20. The fears by PW 1 and PW 2 that they would remain landless have been taken care of by DW 1 who made provision for Tobias Ganda, the second son of Samson Ganda after Joseph Ganda had transferred to himself the land owned by his father Jackton Ganda. It is on the land now registered in the name of Tobias Ganda that PW 2, the wife of Jackton Ganda, resides. He also made provision for registration in the name of Hezron Odhiambo Otieno, the son of Samson Ganda, upon whose land PW 1 resides. It is therefore not correct to state that the descendants of the deceased will be left landless by the acts of the respondent. The deceased clearly gave his two older sons parcels of land which were registered in their names after adjudication.

21. I therefore make the following orders:

- a. I declare that Doto Owino (deceased) had prior to his death made provision for his sons, Jackton Ganda Doto and Samson Otieno Doto by giving them *inter vivos* gifts of land.
- b. I declare Richard Odeny Doto and his successors; Kennedy Otieno Doto, Benard Ochieng Doto and Jeremiah Ouma Odeny are the legal beneficiaries of **KANYADA/KOTIENO-KATUMA A/1024**.
- c. That the estate of **DOTO OWINO (deceased)** has now been administered and consequently **Entry No. 5** in the register for **KANYADA/KOTIENO-KATUMA "A"/1024** be and is hereby set aside.
- d. The grant of letters of administration for the estate of Doto Owino (deceased) issued on 3rd July 2014 to Kennedy Otieno Odeny and Millicent Anyango Otieno be and is hereby revoked.
- e. That the order of *status quo* in respect of **KANYADA/KOTIENO-KATUMA "A"/1024** made on 25th June 2014 be and is hereby discharged.
- f. There shall be no order as to costs.

DATED and DELIVERED at HOMA BAY this 26th day of May 2015.

D. S. MAJANJA

JUDGE

Mr Ayayo instructed by Otieno C. O. Ayayo & Company Advocates for the applicant.

Mr Okoth instructed by G. S. Okoth & Company Advocates for the respondent.