



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO.1121 OF 2013**

**IN THE MATTER OF THE ESTATE OF: OTUGO OGUOK OGUOK alias OTWAGO OGUOK –  
DECEASED**

**AND**

**IN THE MATTER OF AN APPLICATION BY DENNIS OKOTH OOKO ....APPLICANT**

**AND**

**IN THE MATTER OF AN OBJECTION BY: GABRIEL OGUTU KACHERO**

**JULIUS OWINO WANDERA.....OBJECTOR**

**J U D G M E N T**

1. The late **OTUGO OGUOK OGUOK** died on 16.2.82 intestate . He was married to one **MARY NYAMBOGO** who has since passed on. He owned land parcel No. **WEST ALEGO/SIGOME/URANGA/104**. He did not have children.
2. After he died the respondent herein **DENNIS OKOTH OOKO** who claims to be the deceased's grandson took out letters of administration which was granted and confirmed on 9/7/14 by this court. Immediately he began subdividing the parcel of land into various portions. This prompted the application to pursue the objection proceedings which apparently had not been exhausted at the time of confirmation.
3. This court ordered that the matter do proceed by way of *viva voce* evidence. The objector Gabriel Kachero testified and told the court that the deceased was his grandfather having stayed with him since 1976. At the time of his death he was staying in the suit property. Infact he went ahead to state that he took care of the deceased's wife who suffered from leprosy until the day she died. He said that they had agreed that the petitioner would take out letters of administration and sub-divide the parcel of land so as he could get his portion.
4. He further argued that the deceased was a grandfather to the petitioner as well as himself. He said that the petitioner did not stay in the land. He said that the petitioner had sold portion of land to ROSELIDA, among other people who were already occupying the land.
5. **PW2 CHARLES OTIENO OOKO** testified in favour of the objector. He said that the deceased was his grandfather and all along he knew that the objector stayed in the suit parcel of land and the petitioner had other parcels of land. He was aware that the petitioner had sold land to ROSELIDA, TERESA and OCHANDA.

6. **PW3 ELIZABETH ADHIAMBO OKUMU** is the deceased's in-law. The objector was her in-law. She testified that as far as she was concerned the objector has been staying in the suit property.

7. **PW4 STEPHEN OUMA OKUMU** testified too that the deceased was his grandfather and DENNIS was his brother. He said that the objector has all along been staying in the land while DENNIS was living elsewhere. He claimed that Dennis registered himself as proprietor of the land before they agreed as a family. He wants the land to be divided between STEPHEN OKUMU, DENNIS, VICTOR OKUMU, STEPHEN ODUOR, SAMSON OOKO, MAURICE, CHARLES OKOTH and GABRIEL

8. At the close of the plaintiff's case, the defendant (applicant) testified that indeed the deceased was his grandfather. He claimed that the letter written by the chief was legitimate. He said that the deceased was a brother to his father – Odida. Odida gave birth to 3 children who included one Cleophas. The deceased gave the land to Cleophas who in turn gave the land to him. He denied selling the land to anybody as alleged by the objector. He said that Cleophas sold the land to Roselida and Teresa as well as one Meshack.

9. On cross-examination he said that the objector had lived in the land for along time but not No.106. He said that the objector came into the land in 2006. He confirmed that he did not live in the shamba.

10. **DW2 MICHAEL OOKO ODIDA** said that he referred to the deceased as his father. He said that Cleophas Otieno was his brother. He said that Cleophas gave the land to Dennis who was to divide the land among deceased's grandson. He said that it was Cleophas who took care of the deceased's wife prior to her death in the year 2002.

11. **PW3 MESHACK OUKO OPONDO** claimed that the deceased was his grandfather. He said that the deceased left the land to Cleophas who in turn left it to Dennis, the appellant. He said that he was not averse to the objector getting a portion of the land he has built on.

## **DETERMINATION**

12. There is no doubt that the deceased died childless. The objector as well as the applicant herein together with their witnesses in one way or the other are related. They essentially claim that the deceased was their grandfather. It appears from the evidence on record that there was some understanding at the chief's place that the petitioner would take out succession proceedings and thereafter have the land subdivided to the rest of the beneficiaries.

13. It is also clear that the petitioner has never stayed on the parcel of land. On the contrary there is sufficient evidence that the objector Gabriel has been staying on the land whether from 1976 or 2006.

14. In terms of succession therefore and taking into consideration Section 29 of the Succession act it appears that both the objector and the applicant are entitled to inherit the land. There is no evidence however to show that one Cleophas left the land to the applicant (Dennis) so as to subdivide it to the rest of his siblings. If there was such an arrangement then the same was void and illegal.

15. Although there is no evidence of sale by Dennis of the suit property it appears from the annexures to his replying affidavit dated 18/3/15 that the land has been sub-divided into 7 portions and the names appearing as per the receipts from Jooyato Land Surveyors are those of Roselida Achieng Owuor, Meshack Ooko Opondo (DW3), Boniface Ochieng and Teresa Akoth Oduor. It is therefore unclear how they acquired interest in the land as the applicant deny having sold land to them.

16. I do find therefore that the real issue is to ascertain the rights of the objector – Gabriel in this estate. From the evidence adduced I do believe that indeed he has been on the suit land for along time. It was confirmed by all the witnesses that he has been staying on the suit property. The rest of the claimants including Dennis have not denied this. It even appears that he stayed in the suit property even before the death of the deceased's wife and one Cleophas.

17. In the premises, I do find his claim legitimate. What then should be the portion of the land entitled to him? None of the parties including the objector ascertained their entitlement. Even the rest of the beneficiaries (grandchildren) suggested by the witnesses were able to ascertain how much portion they expected.

18. This land ought to be divided among the ascertained beneficiaries of the deceased, namely the grandchildren. I find that the only person who has been able to establish a direct claim on the suit property in terms of occupation and usage is the objector.

19. However he is not the only beneficiary. To be fair to him, and taking into consideration that he has built on the land and stayed for long and taking into consideration that the rest of the beneficiaries have land elsewhere I do order that he is entitled to four 1.6 hectares out of the said 10 acres or thereabouts of the parcel of land. The portion should be excised from the section in which he has been occupying.

20. The rest of the portion of the land shall revert to the petitioner Dennis Okoth Ooko who shall proceed to distribute it to the rest of the beneficiaries to the estate. Apparently the 2nd objector Julius Owino Wandera did not file any documents nor turn up to testify in court

21. In conclusion the grant issued on 9.1.13 by the Senior Resident Magistrate Siaya and confirmed on 9.7.14 is hereby revoked and fresh grant issued to Dennis Okoth Ooko and Gabriel Oguko Kachero.

22. Land parcel No. West Alego/Sigome/Uranga/106 measuring 4.8 hectares be divided as follows:

- a. **1.6 hectares to Gabriel Oguto Kachero.**
- b. **3.2 hectares to Dennis Okoth Ooko who shall hold it in trust for the other beneficiaries. He shall be at liberty to distribute to the rest of those beneficiaries once they agree.**
- c. **In the event of any disagreement the said beneficiaries be at liberty to apply to the court.**
- d. **Each party shall bear their respective costs.**

**Dated, signed and delivered this 15th day of December, 2015.**

**H. K. CHEMITEI**

**J U D G E**

**IN THE PRESENCE OF:**

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