



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Appeal 183 of 2011**

**JUSTUS ODIMA JAKIM OKELLO**

**alias JUSTO ODIMA JOAKIM OKELLO .....APPELLANT**

**VERSUS**

**FREDRICK OWUOR OMEDO .....RESPONDENT**

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

The respondent was developing plot No.22 at Barding Market within Siaya County Council when on 16/5/08 the appellant filed this suit seeking an injunction to stop the development. He further sought an order to remove off the developed business structures from the plot. The appellant's case was that the plot belonged to his late father JOAKIM OKELLO to whom the Council's predecessor had allocated the same in 1953. He claimed that following the deceased's death he had been paying rent to the Council. The respondent filed a defence denying that the plot belonged to the appellant or to his father. He stated that he was the lawful allottee of the plot. He stated that in 2005 he bought the plot for Kshs.40,000/= from Council. The Council then issued him with a letter of allotment dated 11/1/05. He was allowed to begin to construct on the plot for which he was also paying rent.

The trial court received the evidence of the appellant and his two witnesses JOHN NYOLO (PW2) and JOYCE OGUL OKELLO (PW3), and then the evidence of the respondent. Each side presented its documents to support its case.

In the course of the trial it turned out that the appellant had not taken out letters of administration in respect of the estate of his deceased father by the time he was filing the suit. The grant was issued to him on 10/5/09. The issue that the appellant lacked capacity to sue to protect the estate of the deceased was

successfully taken up by the respondent. The trial court also considered the competing evidence as to ownership of the plot and found for the respondent. These findings were the basis of the appeal.

Specifically, the grounds in the Memorandum of Appeal were as follows:

- a) the court erred in law in determining an issue over a suit of land subject to Land Control Act in which no consent was ever obtained properly without making a declaration to that effect.
- b) the court erred in law in awarding to the respondent orders not prayed for;
- c) the judgment was so vague in so far as it did not quantify the award to the plaintiff and therefore not capable of execution; and
- d) the judgment was against the weight of evidence.

The court was addressed on the appeal by the appellant and MR. OCHIENG for the respondent

I have considered all the evidence that was placed before the trial court. It was quite clear that as of 16/5/08 when the suit was filed the appellant was not a holder of a grant of letters of administration in respect of the estate left by his late father. In his own evidence the plot had been allocated to his late father. It therefore formed part of the deceased's estate. Under section 82(a) of the Law of Succession Act (Cap. 160) it is only the holder of a grant that has powers -

“to enforce, by suit or otherwise, all causes of action which, by virtue of any law, surviving the deceased or arise out of his death for his estate.”

Consequently, the appellant lacked capacity to prosecute the claim. The suit was in that regard incompetent. The ground raised in the Memorandum of Appeal were to that extent beside the point. The trial court ought to have struck out the suit with costs.

It is for these reasons that I dismiss the appeal with costs. The judgment of the lower court is set aside and in its place there shall be an order striking out the suit with costs.

Dated, signed and delivered this 13th day of May 2013

**A. O. MUCHELULE**

**JUDGE**