



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 59 of 2012

LILIAN ACHIENG AMOLLOH.....1ST APPELLANT

EUNICE ANYANGO AMOLLO.....2ND APPELLANT

VERSUS

GREGORY WYCLIFE ODHIAMBO AMOLLOH.....RESPONDENT

J U D G M E N T

The appellants' Memorandum of Appeal is composed of five grounds. The substance of the same is that the trial magistrate erred at the lower court to proceed despite having found that the plaintiff/respondent did not have the requisite capacity to institute the suit.

When this appeal came up for hearing Mr. Odeny's thrust of his submissions centered on the fact that the trial court having found which it did that the plaintiff/respondent had no capacity to sue ought to have struck out the suit instead of granting time the respondent to get letters of administration and secondly to order a status quo.

From the pleadings on record it is not in dispute that the appellants and the respondent are related. The late Ernest Amolloh Odido was their father. The suit land in dispute is land parcel No. 2144 situated at Rabango.

The counsel for the respondent argued that there was no longer any injunctive reliefs as the 14 days lapsed subsequently. Further, he argued that the trial magistrate had invoked section 3A of the Civil Procedure Act in making his findings.

I have perused the entire proceedings. The trial court obviously erred. It is now settled that one cannot inter meddle with the deceased estate without first having obtained the necessary letters of administration from the court be it limited or otherwise.

Once the trial court had discovered this, which it did, it ought to have disallowed the application and strike it. There was no legitimate reason to have ordered a status quo and further that the parties to proceed to apply for letters of administration. The entire suit was a nullity from the beginning.

The provisions of section 3A of the Civil Procedure Act or the "**Oxygen rule**" does not aid a situation where there is an explicit provision of the law. In any case contrary to what the respondent argued the trial court did not refer the same.

The upshot of this is that the appeal must succeed. I was informed by the counsel for the respondent

that the respondents have since applied for the relevant letters of administration. This is to their advantage and can now proceed to seek the relevant orders if this is indeed true.

The appeal is allowed with costs to the applicant. The lower court case No. Siaya SPM 82/2011 is struck out equally with costs to the appellant and any interim orders are hereby discharged.

Dated, signed and delivered this 15th day of October 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

.....for the appellants

.....for the respondent

HKC/va