



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 547 OF 2005

**IN THE MATTER OF THE ESTATE OF: SAMUEL NDALO WAMBARE
.....DECEASED**

AND

**IN THE MATTER OF AN APPLICATION BY: JOYCE PENINA ADHIAMBO
PETITIONER**

VERSUS

**FRANCIS OUMA OUKO
OBJECTOR**

JUDGMENT

The objectors filed the application dated 10th March 2009 praying for the following orders:-

- (i) That this Honourable Court be pleased to direct that the grant of Representation issued to the petitioner herein be annulled and or revoked.**
- (ii) That pending the hearing and determination of this application an order of inhabitation be registered against the titles to land parcel number KISUMU /MANYATTA 'A'/3298 inhibiting any transfer to any third party by the petitioner or any other dealing in the said land by the petitioner.**
- (iii) That the transfer of the title to the parcel herein designated as KISUMU / MANYATTA / 'A'/3298 from the names of the petitioner or any other 3rd party be cancelled and or annulled.**
- (iv) That the costs of this application be provided for.**

The objector herein **Joyce Penina Adhiambo** and **Francis Ouma Ndalo** are brother and sister. The deceased was their father.

That sometime on 7th November 2005 the petitioner took out citation proceedings against the objector herein for purposes of compelling him to take out Letters of Administration on behalf of the estate of their father. The petitioner contents that her reasons for doing this is that the objector was her eldest brother and that she had taken away the deceased estate. Despite being served the objector didn't take out the said letters of Administration consequently forcing the petitioner to do the same. Letters of administration was issued to the petitioner on 12th November 2002. The same was confirmed on 24th October 2008.

Its worthy to note that the said grant confers Land Parcel Number **KISUMU /KASULE / 3332** to

the objector although the names reads **William Ouma Ndalo**. The explanation by the petitioner that this is a typographical error is plausible.

I have read the rival affidavits and submission by the parties herein through their respective counsels. It's apparent that the deceased clearly left the two properties namely **KISUMU /MANYYATTA 'A'/3298** and **KISUMU /KASULE / 3332**. These two are the subject of this succession cause. I have read the objectors affidavit of distribution dated 15th February 2011 especially the annexed Sale Agreements allegedly by the deceased and it is my considered opinion that all those parcels of land are not relevant for the purposes of this current application. Neither the objector nor the petitioner have brought them out as a matter of contention. In the premises I shall confine myself to the two properties in issue.

Its not further in dispute that when the objector sold land parcel number **KISUMU / KASULE / 3332** after the demises of the deceased. As at 30th December 1998 the objector was the registered owner of land parcel number **KISUMU / KASULE / 3332**. This was done without the objector taking out Letters of Administration. This obviously contravened the Succession Act which I shall refer later own.

Its not further in dispute that the objector sold land parcel number **KISUMU / MANYATTA 'A'/ 3298** to **John Onyenyi Lwangu** on 16th March 2006 for a total purchase consideration of Kshs. 300,000/= and to **Solomon Onyango Ouko** for the sum of Kshs. 235,000/=. The two purchases are litigating with the objector in a civil suit. It's further argued by the objector that he used the proceeds from the sale to offset medical and burial bills of his deceased's father and brother. Unfortunately, no such evidence was adduced before me.

Having given the brief historical facts I am inclined to disallow the objector's application for the following reasons:-

- (a) There is enough evidence on record that the deceased indeed seemed to have bequeathed land parcel number KISUMU / MANYATTA 'A'/3298 to the petitioner who was epileptic. Her invalid condition is well admitted and acknowledged by the respondent too. The property was already developed. The issue by the objector that she had matrimonial problems is untenable.**
- (b) The petitioner did all she could to ensure that the properties are equitably divided. Even after failing to take out letters of administration, the petitioner went a head and had land parcel number KISUMU /KASULE / 3332 given to the objector. She actually showed good faith in my opinion.**
- (c) The objector's bad faith is shown by the way he disposed the deceased's parcel of land even prior to getting letters of administration.**

Section 82 (b) (ii) of the Succession Act Cap 160 Laws of Kenya is explicit on this, thus

“.....personal representatives shall subject only to any limitation posed by their grant, have the following power.....

(b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best.....

(ii) No immovable property shall be sold before confirmation of the grant.

Section 45 of the said Act state

45 (i) 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 purposes take possession or dispose of or otherwise inter meddle with any free property of a deceased person”.

Its admitted by the objector that he sold land parcel no KISUMU /MANYYATTA 'A'/3298 in paragraph 14 of his affidavit dated 15th February 2011. The said sale was done without having taken out letters of administration or at worst having the same confirmed. In my opinion the sale was to defeat her sister's claim on the said property.

The deceased had further provided the said property namely KISUMU / MANYATTA 'A' / 3298 as a gift to the petitioner in line with Section 31 of the Succession Act. By virtue of her sickness it would appear that the deceased ensured that she was well taken care of. It must be made clear that there is no distinction between the petitioner and the objector. Both are the children of the deceased. As far as inheritance is concerned they are equal.

The character and attitude therefore of the objector towards the petitioner was to defeat her rights over the estate. The objector has sold the deceased property to two persons who have in fact sued him. In the premises I do find that he has come to court with un clean hands.

The petitioner has already obtained title of land parcel number KISUMU / MANYATTA 'A' / 3298 in her favour on 17th February 2009 after the grant was confirmed. The same should not be disturbed. For purposes of this proceedings therefore I further order that land parcel number KISUMU /KASULE / 3332 be transmitted to the objector. It shall be incumbent upon him to sort out the issues he has with those persons he has sold to.

The upshot finally is that

- (a) The objector's application dated 10th March 2009 is hereby dismissed.**
- (b) Land parcel number KISUMU /MANYATTA 'A' / 3298 remains in the custody of the petitioner.**
- (c) Land parcel number KISUMU / KASULE / 3332 be transmitted to the objector/applicant herein.**
- (d) Costs in the cause.**

Orders accordingly.

Dated, signed and delivered at Kisumu this 26th day of October, 2011.

H. K. CHEMITEI
JUDGE
HKC/aao