



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC (O.S) NO. 4 OF 2020

ROSE ACHIENG ODHIAMBO.....APPLICANT

-VERSUS-

MARGARET ODONGO ORUKO.....1ST RESPONDENT

FREDRICK OTIENO OBONYO.....2ND RESPONDENT

MILDRED AKINYI OTIENO.....3RD RESPONDENT

MESHACK ODUOR OTIENO.....4TH RESPONDENT

GEORGE OLUOCH OTIENO.....5TH RESPONDENT

WILFRED MIYAI OTIENO.....6TH RESPONDENT

ELIAS OWINO MARANJE.....7TH RESPONDENT

OBUNA EDWINE.....8TH RESPONDENT

RULING

Rose Achieng Odhiambo (hereinafter referred to as the Applicant) has come to court by way of Originating Summons dated 24/1/2020 seeking orders that 2nd to 8th Respondents are not heirs of the deceased Oruko Angonga and that a declaration that the registration of MARGARET ODONGO ORUKO as the proprietor of LAND PARCEL NO. KISUMU/SIDHO EAST/764, 1799 and 802 was based on an illegality, therefore all subsequent subdivisions, transfers and transactions are void and an order for cancellation of the said registrations to issue. The Land Registrar (Nyando) reo rectify the register by cancelling all the transfers and subdivisions; and the reinstatement of the deceased ORUKO ANGOGA as the registered proprietor of LAND PARCEL NO. KISUMU/SIDHO EAST/764, 1799 and 802. That the Respondents do bear the costs of this Notice of Motion.

The issues raised by the applicant are whether the deceased Oruko Angang'a was the registered proprietor of Land Parcel No. Kisumu/Sidho East/764, 1799 and 802 at the time of his death on 2nd OCTOBER 19937 and whether the deceased die testate or intestate?

Whether a grant of letters of administration to the estate of the deceased has been taken out by any of the parties to these proceedings?

What is the relationship between the Deceased and MARGARET ODONGO ORUKO, the 1st Respondent, and ROSE ACHIENG ODHIAMBO, the Applicant?

What is the relationship between the Deceased and the 2nd to 8th Respondents?

Who are the heirs of the Deceased ORUKO ANGONG'A?

Is the transfer of LAND PARCEL NO. KISUMU/SIDHO EAST/764, 1799 and 802 from the deceased to MARGARET ODONGO ORUKO, the 1st Respondent, in conformity with the Law of Succession Act Cap 160 and Section 61 of the Land Registration Act and

is it in any event, capable in law, of conferring rights of proprietorship to the 1st respondent?

Are the subsequent subdivisions and transfers of the suit properties subject to Section 26 (b) of the Land Registration Act for being obtained illegally?

Have the Respondents contravened Section 45 (1) of the law of Succession Act?

Whether the registration of the Respondents as the proprietors of LAND PARCEL NO. KISUMU/SIDHO EAST/802 and on the parcels derived from the sub divisions of LAND PARCEL NO. KISUMU/SIDHO EAST/764 and 1799 should be cancelled and restored to the name of the deceased ORUKO ANGONG'A as the proprietor.

The application is based on grounds that: -

1. The Applicant is the daughter in law of ORUKO ANGONG'A, being the widow of JAMES ODHAMBO ORUKO, the son of ORUKO ANGONG'A and his 1st wife (SEREINA MBAYI ORUKO).
2. The 1st Respondent is the widow/2nd wife of OURKO ANGONG'A and the Applicant's mother-in-law.
3. The Deceased was, up to the time of his death, the registered proprietor of LAND PARCEL NO. KISUMU/SIDHO EAST/764, 1799 and 802.
4. 1st Respondent without applying for grant of letters of administration caused LAND PARCEL NO. KISUMU/SIDHO EAST/764, 1799 and 802 to be transferred into her name after the death of the registered proprietor.
5. 2nd to 8th Respondent in collusion with the 1st Respondent, having not kinship whatsoever with the deceased by passed all the heirs of the Deceased and fraudulently caused their names to be registered on the deceased's parcels of land.
6. The said subdivisions and registrations have been effected without grant of letters of administration being obtained.
7. The entire chain of transactions was illegal and tainted with fraud, as a result of which the Estate of the deceased has suffered loss which continues to date.
8. The Applicant was previously not aware of the fraud, illegalities and intermeddling, but has moved to court without undue delay upon discovering the said facts.

The Respondents filed a memo of appearance and a preliminary objection that having filed her Originating Summons dated 24th day of January 2020 without holding either a fully or ad litem grant of letters of administration intestate in respect of the estate of the late Oruko Angonga, the applicant had/has no locus standi or capacity, under Section 82 (a) of the Law of Succession Act Cap. 160 of the Laws of Kenya to institute or maintain the instant suit. Therefore, the applicant's said originating summons is fatally incompetent, void ab initio and should be struck out with costs.

I have considered the submissions of the parties on the Preliminary Objection and do find that Order 37 (1) envisages existence of grant of letters of administration intestate in respect of an estate of a deceased person. In this case, there is no grant of such letters of administration in respect of Estate of Oruko Angonga. In absence of such a grant the originating summons is a non-starter because the applicant has not demonstrated that they have the capacity to commence the Originating Summons as it is only in the succession cause that they can be declared to be heirs in the estate of the deceased. The application is not ripe for determination unless and until the succession court determines the heirs to the deceased.

The applicants could only commence the Originating Summons as the executors, administrators of a deceased person or trustees under a trust deed or instrument or as creditors, devisees, legatees, heirs or legal representative of the estate of the deceased. In this case there is no evidence that the deceased estate has been subject to a succession cause. I do uphold the preliminary objection and strike out the Originating Summons with no order as to costs this being a family dispute.

DATED AT KISUMU THIS 4TH DAY OF FEBRUARY, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE