



REPUBLIC OF KENYA



**In re Estate of yidha Ngo'ng'o (Deceased) (Succession Cause
75 of 2013) [2024] KEHC 9954 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 75 OF 2013
RE ABURILI, J
AUGUST 8, 2024**

BETWEEN

JOSEPH OKELO ODEYO 1ST PETITIONER

JOHN SIGU KWACH 2ND PETITIONER

AND

DAVID OTIENO OMOLLO OBJECTOR

JUDGMENT

1. This ruling determines the application dated 27th April 2024 in which the objector David Otieno Omollo sought the following orders:
 - i. That the letters of administration issued to the petitioners herein and confirmed on 11.6.2014 in respect to the estate of the late Nyidha Ngo'ngo in so far as land parcel No. Kisumu/Korando/3798 is concerned be set aside and/or rectified accordingly.
 - ii. That this honourable court's order dated 11.6.2014 making land parcel No. Kisumu/Korando/3798 as part of the estate of the late Nyidha Ngo'ngo and distributing it to the petitioners herein be set aside, varied and/or be substituted with one confirming the grant but not including the subject land as part of the estate.
 - iii. That this honourable court do issue an order directing that land parcel No. Kisumu/Korando/3798 was and is not registered in the name of the late Nyidha Ngo'ngo and therefore cannot form part of his estate.
 - iv. That costs of this application be provided for.
2. The application was based on the grounds therein as well as the supporting affidavit deposed by objector on the 25th April 2017.



3. It was the objector's case that at the time of filing the instant petition, the petitioner concealed material facts and misled the court by indicating that land parcel No. Kisumu/Korando/3798 was registered in the name of Nyidha Ngo'ngo and therefore formed part of his estate whereas the said land was registered in the name of the objector.
4. The objector further averred that the concealment was meant to mislead the court, deprive the applicant of his legally acquired land denying him access of ownership and occupation of the same. He further averred that if the orders sought were not granted, he stood to suffer loss and damage.
5. The objector testified as PW7 adopting his witness statement dated 25th April 2017 as evidence in chief and further produced the annexures to his affidavit as P Exhibits 1,2 & 3. The objector prayed that the grant issued be annulled and the title deed for land parcel No. Kisumu/Korando/3798 be removed from the grant as it was already registered in his name from 8th June 1989.
6. In cross-examination, the objector testified that the first entry in the title deed on the 8.6.1989 is the deceased. He further testified that the only witness to the sale agreement was Samuel Okore, that he was given title to the land on the same date of the sale agreement, that he walked to the land registry with the deceased and walked out with the title deed, that the sale agreement between them was made on the 8th June 1989 which was also the date on the transfer of land forms. It was his testimony in cross-examination that he did not have receipts for stamp duty.
7. The objector further testified that he only fenced the land in 2010 but that people brought down the fence. It was his testimony in cross that the deceased was alive in 1989 but that he later learnt that he died in the mid-1990s.
8. In re-examination, the objector testified that the transfer of land forms were executed at the offices of Miruka Owuor Advocates. On a query by the court, the objector testified that the consent to transfer was given before sale of land agreement was entered into.
9. Samuel Okore testified in support of the objector's case as PW6 adopting his affidavit sworn on the 29.9.2017 as his evidence in chief. In cross-examination, he testified that the agreement was written by the District Land Registrar and that they did not have any other witness or an advocate. It was his testimony further that there was a search certificate issued as the purchaser, the objector herein, wanted to know the status of the land.
10. On the other hand, George Orwaru Nyangweso a Land Registration Officer, Kisumu Lands Registry testified as PW1 for the objector and produced copies of adjudication register for land parcel Kisumu/Korando/3798 showing that it originally belonged to the deceased Nyidha Ng'ong'o. He stated that the land has two green cards the first opened on 8th June 1989 and on the same day the land was transferred to David O. Omollo the objector herein and title deed issued but later on 15/7/2006 the title was transferred to Vitalis Okore Samo, Joseph Okello odeyo and John Sigu Kwach. The latter transfers were later expunged on account of alleged forgeries but later, on 4th July 2014, the petitioners herein became registered owners vide this succession cause. he stated that the original green card went missing that is why the second green card was opened. He added that there are two title deed to the land, one held by the objector herein and another held by the petitioners herein.
11. In cross examination, he stated that there were no supporting transfer documents between the original owner and the objector herein.
12. John Ndege the Assistant Chief Korando A Sub location testified that he knew the deceased Nyidha Ngo'ngo who died in 1985 and that he knew he had a wife called mama Sigu. Later he was recalled on 13/10/2023 and he testified acknowledging the letter he wrote on 25/1/2013 for the petitioners



- saying Joseph Okello was a nephew while John Sigu was a son to the deceased and he reiterated that to the best of his knowledge, the deceased died on 6/2//1985.
13. Simon Osege Orwa, Chief Korando B testified to knowing the deceased and confirmed that he knew John Sigu to be the son to Nyidha, the deceased. h estated that the deceased died in 1996 after the witness was already Assistant Chief
 14. In response to the application, the petitioners jointly swore a replying affidavit on the 27th June 2017 denying the objector's allegations and putting him to strict proof thereof.
 15. It was their contention that they learnt of the objector in 2017 when he started claiming that land parcel No. Kisumu/Korando/3798 belonged to him having never known him prior or even when their father was alive.
 16. The petitioners deposed that on the 9th March 2017, they applied for an official search to confirm status of the land only to learn from the Land Registrar that the land was under investigations. They deposed that the deceased died on the 6th February 1985 during which time, the Green Card was yet to be opened.
 17. It was their case that on the 27.11.2012 the District Lands Registrar Kisumu sought the Adjudication Record forms that were provided on the 29.11.2012 together with the demarcation records showing the suit land was registered in the name of the deceased and they thus proceeded with petitioning for letters of administration over the deceased's estate.
 18. The petitioners deposed that the objector's actions were meant to mislead the court and to deprive them of their land and that if the orders sought were granted they would suffer loss and damage.
 19. The petitioners testified as PW2 and PW1 respectively reiterating the averments in their replying affidavit. In cross-examination, PW2 reiterated that his father was entered in the Green Card on the 8th June 1989. He testified that PW1 was his step brother as their fathers were brothers.
 20. The parties filed submissions.

The Objector's Submissions

21. It was submitted that the petitioners jointly filed the petition in their capacity as sons which was a fraudulent act as Joseph Okelo Odeyo confirmed during the hearing that he was not a son of the deceased and thus the grant was fraudulently obtained. It was further submitted that John Sigu testified that he only became aware of the deceased being his father when he was 13 years old and having never stayed in the deceased's home further evidencing that the petitioners are not sons of the deceased.
22. It was submitted that there was no evidence adduced by the petitioners showing that the signatures in the sale agreement produced by the objector were not of the deceased.
23. The objector further submitted that he produced the title deed to the suit parcel that was issued on the 8th June 1989 and which title, by virtue of Sections 38 and 96 (1) of the [Evidence Act](#) showed that the objector was the valid owner of the suit parcel.
24. Regarding the deceased's death, it was submitted that at the time of his demise, the petitioners were too young, as was confirmed by the chief that the deceased did not die in 1985 thus the information given on the death certificate relied on by the petitioners was inaccurate and false.
25. It was submitted that the deceased lawfully transferred the suit property to the objector long before he died. The objector thus submitted that he had proved his case on a balance of probabilities.



The Petitioners' Submissions

26. It was submitted that the objector sought to rely on a sale agreement that did not comply with the provisions of section 3 (3) of the Law of Contract and further that was drawn after the deceased had died as per their death certificate showing that the deceased died on the 6th February 1985 and that the title deed was issued on the same day the agreement was allegedly entered into by the parties in spite of the fact that the objector testified that the deceased could not read or write.
27. The petitioners relied on the case of *Patrick Tarzan Matu & Another v Nassim Sharrif Abdulla & 2 Others* [2009] eKLR where the court struck out the plaintiff's case where it was found that the contract relied upon was in contravention of section 3 (3) of the *Law of Contract Act*.
28. It was further submitted that the objector's registration was not valid in law on a number of issues not limited to the fact that the land control board consent relied on by the objector was issued on the 21st May 1989 way before the alleged agreement was executed on the 8th June 1989 or the fact that the objector admitted in his testimony that he met the deceased on the date they allegedly signed the agreement and also the fact that the objector failed to produce any receipt as evidence of stamp duty paid.
29. It was submitted that the petitioners were the rightful beneficiaries to the deceased's estate and further that they did not conceal any material fact or mislead the court in relation to the deceased.

Analysis & Determination

30. I have considered the pleadings together with the respective testimonies and submissions by the parties herein. The objector seeks to have letters of administration issued to the petitioners herein and confirmed on 11.6.2014 in respect of the estate of the late Nyidha Ngo'ngo in so far as land parcel No. Kisumu/Korando/3798 is concerned set aside and/or rectified, the order dated 11.6.2014 making land parcel No. Kisumu/Korando/3798 as part of the estate of the deceased set aside and an order directing that land parcel No. Kisumu/Korando/3798 was and is not registered in the name of the late Nyidha Ngo'ngo and therefore cannot form part of his estate.
31. The objector alleges that the deceased sold the suit parcel to him as is evidenced by the title deed dated 8th June 1989, that the petitioners are not sons of the deceased and thus obtained the grant fraudulently.
32. On their part, the petitioners are adamant that they are the beneficiaries of the deceased's estate being his sons, that the agreement for sale of the suit land was entered into after the deceased's death and that that the title deed indicating that the petitioner is the owner of the suit property was not properly obtained and that the objector is out to disinherit them.
33. I have considered the aforementioned in light of which the issue of this court's jurisdiction now arises. I say so because it well settled that jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. See the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1
34. Evidently, if this court finds that it lacks jurisdiction to entertain the objection raised, then there is no point of going to the merit of the objection as presented.



35. The Supreme Court of Kenya in the case of Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011 stated that a court's jurisdiction flows from either the Constitution or legislation or both. In addition, a court of law cannot arrogate jurisdiction to itself.
36. Article 165(3) of the Constitution confers the High Court with jurisdiction and provides:-
- (3) Subject to clause (5), the High Court shall have-
- a) Unlimited original jurisdiction in criminal and civil matters;
37. It is instructive to note that the jurisdiction of this Court is subject to Article 165(5) of the Constitution which provides:-
- (5) The High Court shall not have jurisdiction in respect of matters:-
- a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b) Falling within the jurisdiction of the courts contemplated in Article 162(2).
38. Article 162(2) of the Constitution establishes two specialized courts. One such court is the Environment and Land Court, with exclusive jurisdiction to hear and determine disputes relating to:
- (b) the environment and the use and occupation of, and title to land.
39. To implement Article 162(2)(b) of the Constitution as read with Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act, 2011 and clothes it with jurisdiction under Section 13 as follows:
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
- a) Relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) Relating to compulsory acquisition of land;
- c) Relating to land administration and management;
- d) Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and
- e) Any other dispute relating to environment and land.
40. The Law of Succession Act in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows: -
- The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.
41. Rule 41(3) of the Probate and Administration Rules provides that: -
- Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to



confirming the grant, but subject to the provisions of section 82 of the *Act*, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, Rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

42. In the case of *Priscilla Ndubi and Zipporah Mutiga v Gerishon Gatobu Mbui*, Meru Succession Cause No. 720 of 2013, it was held that:

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

43. Applying the above principles to the present case, it is evident that the bone of contention goes to the ownership of Land Parcel No Kisumu/Korando/3798. Both the objectors and the petitioners claim to be rightful owners of the parcel with the objector asserting to be the registered owner following a sale to him by the deceased while the petitioners dispute the sale and or transfer of the same to the objector and assert that as at the alleged date of sale and transfer in 1989, the owner of the land had died in 1985 as per the death certificate number 046422 via entry number 0041103834 dated 27th September, 2011, a public document filed into court and in both instances, there are documents that give each of the contending parties causes of action which then raises the question of whether or not the property subject of the dispute herein was available for succession or not. There are serious issues of law such as whether consent to transfer could be obtained before sale agreement was reached and whether the sale agreement violated section 3 of the *law of contract Act*.
44. There is however consistent material that John Sigu Kwach was the deceased Nyidha Ng'ong'o's son and he grew up at his maternal grandparent's home after his mother died leaving him a toddler. On the other hand, the evidence available in the file shows that Joseph Okello Odeyo was a nephew and not a son to the deceased Nyidha Ng'ong'o.
45. To determine the above issues on merit, this court must scrutinize the evidence and determine whether the alleged sale and or transfer of the title to the said land to the objector was in accordance with the law or whether the objector has good title to the said land considering the evidence of PW1 the Land Registrar that the land had two green cards and in addition, determine the question of whether the petitioners or any one of them had any right to petition for letters of administration intestate over the said parcel of land No. Kisumu/Korando/3798 noting that the lands registry issued them with search certificate dated 2/1/2013 showing that the land was registered in the deceased's name on 6.4.1990 and not 1989 contrary to what PW1 the Land Registration Officer stated to be 8th June, 1989 as per the title deed held by the objector.
46. Pursuant to Article 165(5) of *the Constitution*, this court lacks jurisdiction in matters to do with the use and occupation of, and title to, land. It is also apparent that when a dispute regarding ownership in respect of the property of a deceased person arises, then the court can set aside the share in dispute to await the outcome of the resolution of the dispute from the court with jurisdiction. In this case, the dispute as to ownership of land can only be determined by the Environment and Land Court. Once the ownership of the suit property is ascertained by the Environment and Land Court, the probate court



may proceed to distribute the said property to the rightful dependants, depending on the decision by the land and Environment Court.

47. Consequently, I find that this court has no jurisdiction to determine the issues raised in the application dated 27th April 2024.
48. My above finding notwithstanding, I observe that on 22nd January 2018, Majanja J (RIP) revoked the grant which was issued to the petitioners herein on 4th June, 2013 and confirmed on 6th June, 2014. This was because of the three contradictory letters from the Chiefs and Assistant Chief, Korando Sublocation filed long after confirmation of grant, raising doubts as to whether the petitioners were ever related to the deceased. On 22.01/2018, the learned Judge directed that the original grant be returned forthwith
49. The grant as issued and confirmed having been revoked by this court, there is nothing left. The objection proceedings proceeded in vain and therefore having found that this court is devoid of jurisdiction to hear and determine the issues raised via objection proceedings, the Summons for revocation of grant are additionally overtaken by events and are hereby struck out.
50. The bona fide beneficiaries of the estate of the deceased are advised to petition for a fresh grant of letters of administration intestate which has other property apart from the one under dispute. For avoidance of doubt, the revoked grant was recalled by the court and therefore any registration by the petitioners of any property of the estate pursuant to the grant that was confirmed but revoked is hereby annulled and cancelled. The title to Kisumu/Korando/2146 to revert to the name of the deceased.
51. Regarding the ownership of the disputed parcel of Land Kisumu/Korando/3798, parties are advised to file suit before the Environment and Land Court to determine the issues of ownership involved which dispute this court has no jurisdiction to entertain. Pending that process, status quo prevailing shall remain with no transactions taking place by any person.
52. Each party shall bear their own costs.
53. This file is accordingly closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

