



REPUBLIC OF KENYA



KENYA LAW
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**K'ombudo v Owuor (Civil Appeal 28 of 2020)
[2023] KEHC 1503 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 28 OF 2020**

KW KIARIE, J

MARCH 7, 2023

BETWEEN

OJWANG K'OMBUDO APPELLANT

AND

MOURICE OTUNGA OWUOR RESPONDENT

(Being an appeal from the Ruling and Order in Oyugis Principal Magistrate's Court Succession Cause No. 222 of 2019 by B.O Omwansa- Principal Magistrate.)

JUDGMENT

1. On the August 26, 2020 the trial court delivered a ruling in favour of the respondent. The learned trial magistrate revoked the grant which had been confirmed on August 5, 2020 and ordered that the land parcel number Kabondo/Kodumo/128 revert to the name of the deceased herein. The appellant was dissatisfied and filed this appeal through the firm of S.M. Onyango & Associates Advocates. He raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and in fact in finding that the appellant has not established his claim over parcel of land LR .NO. Kabondo/Kodumo/128 when the evidence adduced pointed out that the appellant is entitled to the above mentioned piece of land.
 - b. The learned trial magistrate erred in law and in fact in finding that the respondent had capacity to institute the suit Oyugis PMCC Succession cause no. 222 of 2019.
 - c. The learned trial magistrate erred in law and in fact by totally disregarding and failing to fully appreciate the evidence and submissions of the appellant.
 - d. The Learned trial magistrate erred in law and in fact by proceeding on wrong principles of both facts and law failing to respond to the issues raised by the appellant and thereby arriving at a wrong decision.



2. The appeal was opposed by the respondent who was represented by the firm of Olando Misare & Associates LLP, Advocates. The respondent contended that the appellant had not acquired right over the parcel of land of the deceased.
3. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanour. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
4. A brief history of this dispute is that on July 15, 2013 the appellant entered into a sale agreement with Masela Asewe Owuor and Moris Otunga Owuor for the purchase of 3 acres to be excised from land parcel number Kabondo/Kodumo/128. At the time of the agreement, the land was still in the name of Joseph Owuor Ong'undi the deceased husband of Masela Asewe Owuor. Paragraph 5 of the sale agreement makes this clear for it states:

That Mrs. Masela Asewe Owuor shall procure letters of administration of her late husband's assets through court of law with the support and agreement of her son Maurice Otunga Owuor.
5. Section 45 (1) of the *Law of Succession Act* provides:

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 purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
6. It is therefore abundantly clear that the sale agreement of July 15, 2013 between the appellant and the respondent and his deceased mother was an illegality. The learned trial magistrate was alive to this fact and said so.
7. Even if we assume that Masela Asewe Owuor did obtain letters of administration later (this has not been claimed) this could not sanitize the illegality.
8. Masela Asewe Owuor died on July 31, 2018. By this time, there was still an outstanding balance of the purported purchase price. Even if the land in issue had been transmitted to her, the appellant could still not stake a claim against her estate on the basis of payments he had made. This was due to the illegality of contract and the fact that his purported right was still inchoate.
9. The upshot of the foregoing analysis of the evidence on record is that the appeal lacks merit. The same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE.

