



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO. 3 OF 2019 (APPEAL)**

**IN THE MATTER OF THE ESTATE OF FREDRICK ADERO ODIERO – DECEASED**

**AND**

**MONICA AKOMO OLAYO .....1<sup>ST</sup> APPELLANT/APPLICANT/OBJECTOR**

**STEPHEN OLANG’O ONGOYA .....2<sup>ND</sup> APPELLANT/APPLICANT/OBJECTOR**

**VERSUS**

**EZEKIEL ODIERO ADERO.....RESPONDENT/PETITIONER**

**JUDGMENT**

On 6<sup>th</sup> October 2019 the learned trial magistrate dismissed the Objector’s application which was seeking the revocation of the Grant that had been confirmed on 6<sup>th</sup> June 2018.

1. Being dissatisfied with the said Ruling, the Objector, **MONICA AKOMO OLAYO** and the Interested Party, **STEPHEN OLANG’O ONGOYA** filed an appeal before this Court.

2. The Memorandum of Appeal raised the following grounds of appeal;

**“1. The learned Trial Magistrate erred in both law and fact in arriving at a decision which was not only manifestly unjust but also against the weight of the evidence on record.**

**2. The Learned Trial Magistrate grossly misdirected himself in treating the evidence on record before him superficially and consequently coming to a wrong conclusion on the same.**

**3. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable in the law of revocation of the grant and the relevant authorities.**

**4. The Learned Trial Magistrate erred in not considering the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.**

**5. The analysis of the evidence as per the ruling is extremely wanting in material respects.**

**6. The Learned Trial Magistrate misapprehended the evidence on record to a material degree resulting in him arriving at a wrong conclusion.**

**7. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.”**

3. On the basis of those grounds of appeal, the Appellants urged this Court to set aside the Ruling of the learned trial magistrate.

4. The subject matter of this appeal is a piece of land **L.R. NO. KISUMU/ KARATENG/884** (“*the suit property*”). The Appellants had brought proceedings for the revocation of the confirmed Grant, which had given the suit property to the Respondent, **EZEKIEL ODIERO ADERO**.
5. The trial court held that the Respondent (“*Ezekiel*”) was not under any duty to specifically inform or even involve the Appellants in the process of the succession of the Estate of **FREDRICK ADERO ODIERO**.
6. The reason for that decision was that the Objectors and the Interested Party, (*who are the Appellants herein*) were not the dependants of the deceased.
7. And when the trial court found that the suit property formed part and parcel of the estate of the deceased; and because Ezekiel had followed all the requisite processes leading up to the issuance and also the confirmation of the Grant, the Appellant’s application (for revocation of the Grant) was dismissed.
8. In challenging the decision of the trial court, the Appellants have now submitted that Ezekiel had deliberately misled the court, by concealing the fact that the suit property belonged to the 1<sup>st</sup> Appellant.
9. It was the Appellants’ case that the copy of the death certificate which Ezekiel used when he instituted the succession cause was fraudulent.
10. The Appellants pointed out that whilst the death certificate used by Ezekiel indicated that his father **FREDRICK ODIERO ODERO**, died on 20<sup>th</sup> July 2014, the correct position was that Fredrick died on 7<sup>th</sup> February 1994.
11. Secondly, the Appellants pointed out that Fredrick had exchanged the suit property with **L.R. NO. KISUMU/KARATENG/888** which had been registered in the name of Monica’s husband, **JOSHUA OLAYO SEE**. In effect, the Appellants were saying that whilst Fredrick was the registered proprietor of the suit property, he had given that property to Joshua; and in exchange, Joshua gave to Fredrick the Parcel **No. 888**.
12. The Appellants pointed out that it is because Fredrick had taken over Parcel No. **888**, that both Fredrick and his wife were buried on that parcel of land.
13. In the meantime, as Joshua had taken up the suit property, it was the reason why Monica had utilized the said property for over 40 years.
14. If the Respondent was allowed to retain Parcel No. **884**, the Appellants pointed out that that would result in him having 2 properties, whilst the Appellants would be left with nothing.
15. In answer to the appeal Ezekiel reiterated that the Appellants were strangers to the estate of his late father, Fredrick.
16. He also denied that his father had exchanged the suit property for Parcel No. **888**.
17. In that respect, I note that the Appellants had made it clear that at the time when Fredrick and Joshua exchanged the 2 parcels of land, Ezekiel was still a minor. Ezekiel did not respond to that assertion.
18. Ezekiel’s position was that the purported sale of a portion of the suit property, by Monica to Stephen Olang’o Ongoya, constituted intermeddling with the free property of Fredrick.
19. However, Ezekiel went on to state as follows;

**“3)That the sale agreements between the 1<sup>st</sup> Appellant and the Second Appellant on land parcel No. Kisumu/Karateng/884 were made before the death of my father Fredrick Adero Odiero.”**
20. If, as the Respondent has said, the sale of the (whole or part of) suit property was conducted prior to the death of Fredrick, that transaction could not have constituted intermeddling with his estate.
21. The Respondent submitted that the Appellants had misrepresented themselves in the estate of the deceased, since they have no relationship with the deceased.
22. I have given careful consideration to the case of the Appellants but I failed to find any place where they asserted that they were relatives of the deceased, and that their claim to the suit property was founded upon such relationship.
23. At all material times, the 1<sup>st</sup> Appellant said that her late husband had exchanged his parcel of land with the suit property.
24. It is my finding that the Respondent never disputed the assertion that the Petition was founded upon quicksand! He did not answer to the

issue concerning the date when the deceased passed away.

25. It is not possible that the deceased died on 7<sup>th</sup> February 1994, and again died on 20<sup>th</sup> July 2014.

26. Therefore, it is entirely possible that the very foundation of the Petition was a lie. I so hold because a Certificate of Death is a fundamental document in a Succession Cause. Without proof of death, proceedings for succession of the estate of a deceased person cannot commence.

27. Accordingly, when the Appellants have cast doubt on the authenticity of the Certificate of Death which the Respondent utilized in the Petition for Grant of Letters of Administration, I hold the considered view that the proceedings founded upon the impugned document cannot stand scrutiny.

28. In the result, and in order to allow the **Environment & Land Court** time to determine the question concerning ownership of the suit property, I allow the appeal and revoke the Certificate of Grant which was issued to the Respondent.

29. Consequent upon the revocation of the Certificate of Grant, it follows that the Certificate of Confirmation of Grant lacks any leg to stand on.

Therefore, the said Certificate of Confirmation of Grant is also hereby revoked.

30. Costs of the appeal are awarded to the Appellants, and shall be payable by the Respondent.

31. The Respondent will also pay to the Appellants, the costs of the application dated 23<sup>rd</sup> October 2018.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF JULY 2021**

**FRED A. OCHIENG**

**JUDGE**