



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO. 554 OF 2013**

**IN THE MATTER OF THE ESTATE OF THE LATE RAPHAEL TAGO OCHILO *Alias* TAGO OCHILO**

**AND**

**IN THE MATTER OF AN APPLICATION BY PERES AGUTU ONGOGO & ABSALOM ODUOR.....PETITIONER**

**AND**

**IN THE MATTER OF OBJECTION BY WILBERFORCE OCHIENG.....OBJECTOR**

**AND**

**IN THE MATTER OF AN APPLICATION BY JULIUS OLOO**

**TAGO *Alias* JULIUS OLOO TAGO INTERESTED PARTY**

**RULING**

The application dated 12<sup>th</sup> October 2020 was filed by **JULIUS OBONYO TAGO *alias* JULIUS OLOO TAGO**, who sought to be enjoined to this case as an Interested Party.

1. Secondly, the Applicant sought the setting aside of the 2 consent orders which were entered into on 18<sup>th</sup> March 2015 and on 14<sup>th</sup> October 2015 respectively. According to him, the said 2 consent orders were both endorsed as orders of the court on 14<sup>th</sup> October 2015.
2. It was the Applicant's case that she had purchased the property **L.R. NO. EAST UGENYA/RAMUNDE/698** from the Petitioner **PERES AGUTU ONGOGO**.
3. However, as a direct consequence of the 2 consents, the grant issued to Peres Agutu Ongogo was revoked, and thereafter the suit property was divided between **PERES ONYANGO** and **ABSALOM ODUOR**.
4. Although the Applicant allegedly purchased the property from the Petitioner, the Respondents have asserted that, pursuant to **Section 82 (b) (ii)** of the **Law of Succession Act**, no immovable property which is a part of the estate of a deceased person shall be sold before confirmation of the grant. Therefore, the alleged purchase was described as unlawful.
5. Furthermore, the Petitioner, who had allegedly sold the property to the Applicant, has now disowned the thumb print through which she executed the Sale Agreement.
6. **It** was the submission of the Respondents that if the Applicant had any claim, the same cannot be against the estate of the deceased; and that therefore, the Applicant ought not to be enjoined to this succession cause. In that regard, the Respondents relied on the decision in **MURIUKI MUSA HASSAN Vs ROSE KANYUA MUSA & 4 OTHERS (2014) eKLR**. In that case the learned Judge held that the Interested Party had no claim directly or otherwise against the estate of the deceased. The Court said;

***“Their claim, if any, can only be adjudicated upon in another forum and only against Muriuki Musa Hassan.***

*The interested party has no cause of action against the deceased's estate.*

*The matter before this court is a succession cause, and in such cases the court deals with issues to determine who are the beneficiaries of the deceased's estate; the properties that comprise the deceased's estate; the mode of distribution to be adopted when distributing the properties that comprise the estate of the deceased to the dependants of the deceased."*

7. I am in concurrence with my learned brother on his pronouncement on the scope of a succession cause.

8. But I also note that in authority cited by the Respondents, the Court was determining an application in which the persons who had allegedly purchased some land from the Petitioner, had taken part in the proceedings in their capacities as *"Interested Parties."*

9. Secondly, I note the following comment about the Petitioner from whom the interested parties had allegedly purchased a portion of land;

*"That in any event Muriuki Musa Hassan is entitled to a share of the deceased's estate, and he will definitely be interested in the interested parties interest, so as to legitimize the sale of the land to the interested parties."*

10. Thus, whereas the Court held that the sale by the Petitioner could possibly be legitimized through the actions of the Petitioner, who was a beneficiary to the estate of the deceased;

11. In contrast, the Petitioner in this case has already disowned the alleged sale transaction between her and the Applicant.

Therefore, it would be most unlikely that the said Petitioner could take any steps that might legitimize the sale.

12. In my understanding, the claim by the Applicant is identifiable. It is a claim by an alleged Purchaser. And if he were to prove his claim, that would imply that the portion of land which he had purchased could no longer form part of the free property that would be available for distribution to the beneficiaries of the estate of the deceased.

13. In the circumstances, if the Applicant was not accorded the opportunity to put forward his own case, with a view to persuading the Court that he has a legitimate interest in the suit property, the said property may be placed beyond reach, before he had had a chance to have his say.

14. On 25<sup>th</sup> July 2019 this Court delivered a Ruling on an application for revocation of the Grant that had been issued to Perez Agutu Onyango and Absalom Oduor. At paragraph 24 of the said Ruling, I held as follows;

*"I also find that it is only a person who has a legal right to receive a benefit from the Estate of a deceased person who can say that he was disenfranchised if he was denied such an entitlement."*

15. The Applicant deems himself as a person who is entitled to that which he purchased from the Petitioner. Whether or not the said claim would be successful is not for me to decide at this stage. But I am convinced that the Applicant is entitled to an opportunity to put forward his claim, so that the Court may consider it. And the only way that he may be accorded a hearing is if he was enjoined to these proceedings.

16. Accordingly, I order that the Applicant be enjoined to the proceedings as an interested party.

17. On the issue concerning the setting aside of the two consent orders, I find that the said consents had the effect of directly impacting the Applicant, yet he was not a party.

18. In the case of BOARD OF TRUSTEES NATIONAL SOCIAL

SECURITY FUND Vs MICHAEL MWALO (2015) eKLR the Court of Appeal held as follows;

*"A Court of law will not interfere with consent judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court."*

19. In my considered opinion, it is definitely contrary to the policy of the Court to have two or more parties enter into a consent which would affect the rights of a person who was not a party to the said consent.

20. In so saying, I am not concluding that the Applicant has a right to the portion of land which he had allegedly purchased. All I am saying, at the moment, is that the Applicant ought to have been either party to the consent, or he ought to have been accorded a hearing before orders were given which have a direct impact on his claims.

21. As the Applicant was not party to the 2 consents, and because the said consents had a direct bearing on his claim, he was

condemned unheard. Therefore, the 2 consents, and the orders endorsing them are hereby set aside.

22. Costs of the application are awarded to the Applicant, and shall be paid by the Respondents.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF NOVEMBER 2021**

**FRED A. OCHIENG**

**JUDGE**