



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 1226 OF 2014**

**IN THE MATTER OF THE ESTATE OF ALOISE ONDIELO ADERA**

**(DECEASED)**

**BETWEEN**

**CHARLES AKETCH ONYANGO.....1<sup>ST</sup> APPLICANT/OBJECTOR**

**AND**

**HENRIETA ANNA ONDIELO.....PETITIONER/RESPONDENT**

**JUDGMENT**

1. **ALOYS ONDIELO ADERA (deceased)** died sometimes on 28<sup>th</sup> May, 2012.
2. Letters of administration were issued to the Petitioner/Respondent who described herself as widow to the deceased on 26<sup>th</sup> February, 2015.
3. A certificate of confirmation of grant was issued on 11<sup>th</sup> August, 2016 distributing the whole of **LR. KISUMU/CHIGA/3169** to the Petitioner/Respondent and her sons Abraham Ombui Ondieki and Petro Nyanchoga Ondieki and a certificate of title was subsequently issued in their joint names on 03<sup>rd</sup> April, 2017.
4. By an application dated 01<sup>st</sup> August, 2018 filed on even date, **CHARLES AKETCH ONYANGO (Objector/Applicant)** applied for revocation of the Letters of Administration and for cancellation of the transfer in favour of the Petitioner and her two sons and that the same be registered in the name of the Objector/ Applicant and the deceased.

**Analysis and Determination**

5. I have considered the evidence on record, submissions filed on behalf of both parties and the cited authorities and I have deduced the following issues for determination.

**i. Whether the Petitioner/Respondent was married to the deceased**

**ii. Whether a case been made out for revocation of the grant**

6. I will address the issues for determination as hereunder.

**i. Whether the Petitioner/Respondent was married to the deceased**

7. The Petitioner/Respondent stated that her marriage to the deceased was customary. The chief's letter dated 15.12.14 confirms that the Petitioner/Respondent was deceased's widow. Further to the foregoing, the Petitioner/Respondent's ID card issued on 03.02.1997 which was 5 years before deceased died bears deceased's name ONDIELO. Additionally, the Petitioner/Respondent tendered deceased's burial permit and medical bill and receipt that were issued to her.

8. The Objector/Applicant and his witnesses denied that the Petitioner/Respondent was married to the deceased. The Objector/Applicant submitted that the Petitioner/Respondent did not lead any evidence relating to marriage negotiations between her family and deceased's

family, and had no children with the deceased.

9 I have considered the evidence on record and I find that failure by the Petitioner/Respondent to lead any evidence relating to marriage negotiations between her family and deceased's family is not a demonstration that she was not married to the deceased. How else would she have acquired the deceased's name and obtained the deceased's burial permit if she was a stranger to the deceased as alleged by the Objector/Applicant?

10. From the totality of the evidence, I am persuaded that unlike in the case of **In re Estate of Kihara Thatu Gatu (Deceased) [2019] eKLR** cited by the Objector/Applicant, a marriage can be presumed from the relationship between the deceased and the Petitioner/Respondent. The evidence by the Objector/Applicant and his witnesses that the Petitioner/Respondent was not married to the deceased is hence rejected.

ii. **Whether a case been made out for revocation of the grant**

11. Evidence in the form of green cards demonstrate that **LR. KISUMU/CHIGA/2396 which belonged to PIUS ADERA MISANI, father to the deceased and father to Objector/Applicant's father SIMON ONYANGO ADERA was on 10.02.10** partitioned into four portions namely:

**1) LR. KISUMU/CHIGA/3169 was registered in the name of the Objector/Applicant and the deceased.**

**2) LR. KISUMU/CHIGA/3170 was registered in the name of the Objector/Applicant and the deceased and subsequently on 26.11.12 transferred to Fredrick Otieno Odhiambo**

**3) LR. KISUMU/CHIGA/3171 was registered in the name of the Objector/Applicant and the deceased and was subsequently on 21.06.13 partitioned into LR KISUMU/CHIGA/3544 and LR KISUMU/CHIGA/3545 both of which were registered in the name of the Objector/Applicant. LR KISUMU/CHIGA/3545 was on 17.07.18 transferred to Beatrice Akinyi Rakuru**

**4) LR. KISUMU/CHIGA/3172 was registered in the name of the Objector/Applicant and the deceased and subsequently on 20.09.11 transferred to Margaret Leah Othigo**

12. In a family meeting held on 21.09.2010 attended by the deceased and the Objector/Applicant among others, it was agreed that **LR.SUMU/CHIGA/2396** be portioned into two portions for his two sons, one part to the family of SIMON ONYANGO ADERA (Objector/Applicant's father) who was deceased and the second part to the deceased herein but that was not to be.

13. Subsequently, the District Surveyor, Kisumu in a letter dated 16. 02.11 addressed to the Kisumu Lands Registrar clarified that **LR. KISUMU/CHIGA/3169** was to be registered in the name of the deceased and **LR. KISUMU/CHIGA/3170, 3171 and 3172** in the names of the Objector/Applicant and his siblings. As at the time these instructions were given, the Objector/Applicant had already caused his name to appear as a co-owner in all the 4 parcels of land.

14. The foregoing must have informed the deceased's decision to file **WINAM SPMCC MISC. CIVIL SUIT 34 of 2011** in which he prayed for transfer of Objector/Applicant's share in **LR. KISUMU/CHIGA/3169** to himself as directed by the District Surveyor. The court proceedings tendered in evidence demonstrate that the application though served on the Objector/Applicant was not opposed and was allowed by an order dated 07.04.11 directing the Executive Officer of the court to sign the application for consent to the land control board and transfer forms in respect of **LR. KISUMU/CHIGA/3169** on behalf of the Objector/Applicant.

15. The transfer of **LR. KISUMU/CHIGA/3169** to the name of the deceased was however not effected because even as the time of filing this cause in 2014, the said land was still registered in the name of the deceased and the Objector/Applicant.

16. It is worthy to note that the order in **WINAM SPMCC MISC. CIVIL SUIT 34 of 2011** was issued on 07.04.11 long before the deceased died and the Objector/Applicant has to date not challenged its validity.

17. In my considered view, the said court order buttresses the instructions given by the District Surveyor, Kisumu in the letter dated

16. 02.11 addressed to the Kisumu Lands Registrar, that **LR. KISUMU/CHIGA/3169** belonged to the deceased and **LR. KISUMU/CHIGA/3170, 3171 and 3172** to the Objector/Applicant and his siblings.

18. From the foregoing, I find that the grant of representation issued to the Petitioner/ Respondent on the basis that **LR. KISUMU/CHIGA/3169** belonged to the deceased was lawfully made and decline the invitation to revoke it.

19. There is evidence that **LR. KISUMU/CHIGA/3170, 3171 and 3172** also registered jointly in the name of the deceased and the Objector/Applicant have been partitioned and disposed off except for **LR KISUMU/CHIGA/3544**, a partition of **LR. KISUMU/CHIGA/3171** which is still registered in the name of the Objector/Applicant. This was done without recourse to the deceased's representative the Petitioner/Respondent but she has not raised any protest herein for obvious reasons that she has, unlike the Objector/Applicant, opted to only pursue what lawfully belongs to her deceased husband.

20. Section 93 of **the Act** provides that:

**(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any**

subsequent revocation or variation of the grant either before or after the commencement of this Act.

21. Any sale of LR. KISUMU/CHIGA/3169 by the Petitioner/Respondent after the grant was confirmed is valid and protected by Section 93 of *the Act*. (See *Rose Agola Ondoo v Melenia Achola Ondoo* [2016] eKLR).

22. Consequently, it is hereby ordered THAT:

a) The prayer for revocation of Letters of Administration issued to the Petitioner/Respondent on 26<sup>th</sup> February, 2015 is declined

b) the Objection is dismissed with costs to the Petitioner/Respondent

DATED THIS 14<sup>th</sup> DAY OF May 2020

T. W. CHERERE

JUDGE

Court assistants - Ms. Amondi/Ms. Okodoi For Objectors/Applicants - W.Ochuka & Co. Advocates

For Petitioner/Respondent - Omondi, Abande & Co. Advocates

This judgment 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 vide Gazette Notice no. 3137 of 17<sup>th</sup> April, 2020.