

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1691 OF 2016

IN THE MATTER OF THE ESTATE OF SAMUEL ODHIAMBO OGUK (DECEASED)

RULING

1. The hearing of this matter commenced on 28th January, 2019 with the 1st Administrator Irene Samuel Odhiambo, who is the deceased's 1st wife testifying first. The 1st Administrator called two witnesses in support of her case: her daughter Dr. Faith Oguk testified as PW2 while her son Brian Kerry Oguk testified as PW2. Following their testimonies, the 1st Administrator closed her case.
2. On 4th March, 2019 the 2nd Administrator Dorine Olaka Odhiambo, the deceased's 2nd wife testified in support of her case. At the close of her testimony, her Advocate Mr. Oronga asked the court to issue summons to Mr. Vincent Kanyang'onda as he has been mentioned by both parties. He urged that this was a fact finding exercise and as trustee, Mr. Kanyang'onda would help clarify some of the issues, being the ownership of the Loresho property.
3. The application was opposed by Mr. Kaingu Advocate for the 1st Administrator who submitted that they were not aware that there was a trustee who was involved in the estate in any way. He asserted that facts were before the court and documents had been produced by each of the parties. He urged that the material before the court was sufficient to enable the court render its decision without bringing strangers to the estate and avoid further delay.
4. From the evidence on record and the arguments tendered by both parties, it is not in doubt that Mr. Kanyang'onda is a necessary witness. While a party may argue that summoning him may occasion unnecessary delay, his testimony is vital to ensure that the ends of justice are met.
5. The parties are in agreement that the disputed property was transferred to the deceased's son Brian Oguk by Mr. Kanyang'onda. What is disputed is the basis on which the property was transferred to Brian: whether he solely acquired it from Mr. Kanyang'onda or whether it was transferred to him to hold in trust.
6. It is trite that once a matter is certified ready for hearing, then unless there is a good reason, no new witness statements and documents ought to be produced. Where a party has closed its case, then the other should not be allowed to introduce new documents and witnesses as it may disadvantage the other side that has closed its case. The court can however allow introduction of new evidence if the failure to include it in the first place was bonafide and does not prejudice the adverse party or where prejudice can be mitigated.
7. I note that while the case has reached an advanced stage, the 2nd Administrator has not closed her case. Further, Mr. Kanyang'onda was extensively mentioned by both parties and without his evidence what is left is the word of the 1st Administrator against that of the 2nd Administrator. It is therefore in the interest of justice that Mr. Kanyang'onda is called as a witness to diffuse this stalemate.
8. Taking into account all aspects of this matter, it is my considered view that Mr. Kanyang'onda is a necessary witness whose testimony is key in ensuring that the estate of the deceased is distributed fairly. In any event, both Administrators will have a chance to cross-examine him.

SIGNED DATED and DELIVERED in open court this 13th day of March, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the 1st Administrator.

In the presence of.....Advocate for the 2nd Administrator.