



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 89 OF 2010**

**IN THE MATTER OF THE ESTATE OF ABISAYE OGUTU ODUMBA(DECEASED)**

**BETWEEN**

**BENTA ACHIENG OMONDI.....PETITIONER/RESPONDENT**

**AND**

**JOHN OREM MARONGO.....OBJECTOR/APPLICANT**

**JUDGMENT**

**Introduction**

1. **ABISAYE OGUTU ODUMBA** (hereinafter referred to as deceased) died sometimes on 01<sup>st</sup> February, 2009. Deceased's estate comprised of Land Parcel No. KISUMU/SEME KADERO/164 (hereinafter referred to as *the suit property*).

**OBJECTORS/APPLICANTS' CASE**

2. **PW1 JOHN OREM MARONGO**, the Objector/Applicant stated that he was brother to YALA MARONGO. He said that the deceased sold his land to YALA MARONGO for Kshs. 4,200/-. He identified acknowledgments receipts of the purchase price as follows:

- 1) 29.9.77 for Kshs. 400/-
- 2) 04.11.77 for Kshs. 1,400/-
- 3) 07.05.79 for Kshs. 1,900/-
- 4) 03.11.80 for Kshs. 140/-
- 5) 08.09. 85 for Kshs. 300/-.

3. **PW2 GILBERT OBONYO ANYINYO**, uncle to the objector and the original objector stated that the deceased was his neighbour up to 1977 when he relocated to Kano. It was his evidence that the original objector had been in occupation of deceased's land since 1986.

**PETITIONERS'/RESPONDENTS' CASE**

4. **ZABLON OTIENO ODUMBA**, brother to the deceased conceded that his mother and siblings moved from *the suit property* in 1980 after their father died but denied that neither his brother nor mother had sold land to the original objector. He stated that the deceased was survived by the Petitioner who was entitled to the whole of her father's estate.

5. **BENTA ACHIENG OMONDI** (deceased's daughter) stated that her mother died when she was young and that she was the only child of the deceased and born in Kano but her father had informed her that he had a parcel of land in Seme.

## **Analysis and Determination**

6. The deceased died intestate and his property that is subject to succession is in terms of Section 34 of the Law of Succession Act Cap 160 Laws of Kenya (**hereinafter referred to as *the Act***) all his free property of which he has not made a will which is capable of taking effect.
7. Section 3 of ***the Act*** defines "**free property**" to mean the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.
8. The issue in question is whether deceased sold his land to the original objector during his lifetime.
9. The search certificate filed on 12<sup>th</sup> April, 2010 demonstrates that ***the suit property*** was registered in the name of the deceased on 26<sup>th</sup> September, 1985.
10. From the foregoing, it is apparent that the deceased could not have possibly sold land that did not belong to him before 1985. This fact is clearly demonstrated by the acknowledgments receipts dated 29.9.77 for Kshs. 400/-; 04.11.77 for Kshs. 1,400/-; 07.05.79 for Kshs. 1,900/- and 03.11.80 for Kshs. 140/- with none bearing the deceased's name nor signature.
11. The Objector upon being cross-examined by Mr. Owuor for the Petitioner indeed conceded that the receipts show that the money was received by Filgona Omedo and not by the deceased. He also conceded that the only document dated 08.09. 85 for Kshs. 300/-that refers to the deceased states that the deceased was to leave his land to YALA MARONGO and not to sell the land to him.
12. From the foregoing, I am persuaded that the Objector has not demonstrated that the deceased sold his land to YALA MARONGO. There is no evidence that the Petitioner was aware of the alleged sale and the holding **Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** and **Re Estate of Moses Wachira Kimotho (Deceased) [2009] eKLR** are therefore irrelevant to this cause.
13. Having found that there is no evidence of sale as between the deceased and YALA MARONGO, the requirement for the consent of the land control board would have been unnecessary and **Daudi Ledama Morintat v Mary Christine Karie & 2 Others [2017] eKLR** ; **Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR** and **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** are similarly immaterial to this cause.
14. Section 38 of ***the Act*** that deals with instances where intestate has left a surviving child or children but no spouse as in this case provides that:

**Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.**

15. Evidence on record has disclosed that the Petitioner is the only surviving child of the deceased. She is not a minor and Sections 41 and 42 of ***the Act*** are inapplicable.

## **Disposition**

16. In the result, and from the foregoing analysis, the court makes the following orders:

- 1) **The objection has no merit and it is disallowed.**
- 2) **The whole of deceased's estate which comprises of Land Parcel No. KISUMU/SEME KADERO/164 shall evolve upon BENTA ACHIENG OMONDI the only surviving child of the deceased**
- 3) **The objector is condemned to pay costs of the objection to the Petitioner**

DELIVERED AND SIGNED AT KISUMU THIS 17<sup>th</sup> DAY OF October 2019.

T. W. CHERERE

**JUDGE**

**READ IN OPEN COURT IN THE PRESENCE OF-**

Court Assistant	- Amondi/Okodoi
For Petitioner/Respondent	- Mr Okeru/Ochieng
For Objector/Applicant	- N/A