



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 531 of 2015**

**IN THE MATTER OF THE ESTATE OF ALBERT JOSEPH ABONYO ODERA (DECEASED)**

**BETWEEN**

**COLLINS OTIENO WERE.....OBJECTOR/APPLICANT**

**AND**

**WILLIAM OCHIENG' OWITI .....1<sup>ST</sup> PETITIONER/RESPONDENT**

**MARY ALUOCH ABONYO.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**AND**

**ROSEBELA OWUOR OTIENO.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. **ALBERT JOSEPH ABONYO ODERA (hereinafter referred to as deceased)** died sometimes on 13<sup>th</sup> September, 2003.
2. On 27<sup>th</sup> July, 2011, letters of administration were issued to the Petitioners/Respondents who describe themselves as widow and nephew of the deceased. The grant was confirmed in their favour and a certificate of confirmation of grant was issued on 16<sup>th</sup> September, 2015 in respect **1.25 Ha of Land Parcel No. EAST GEM/LIHANDA/916, 5.54 Ha of Land Parcel No. EAST GEM/LIHANDA/917, 2.0 Ha of Land Parcel No. EAST GEM/URANGA/469 and Land Parcel No. EAST GEM/LIHANDA/660.**
3. By an application dated 23<sup>rd</sup> April, 2015 and filed on even date, the Objector/Applicant applied for revocation of the grant on the ground that Petitioners/Respondents had no claim over **Land Parcel No. EAST GEM/URANGA/469** the same having been sold to him by the Interested Party.
4. The court directed that the dispute be determined by way of *viva voce* evidence.

**Objector/Applicant's Case**

5. **COLLINS OTIENO WERE** stated that **Land Parcel No. EAST GEM/URANGA/469** was not available for distribution to the Petitioners/Respondents for the reason that he bought the whole of it from the Interested Party and was on 22<sup>nd</sup> July, 2013 issued with a title deed.

**Interested Party's Case**

6. **ROSEBELA OWUOR OTIENO** stated that she succeeded **Land Parcel No. EAST GEM/URANGA/469 and Land Parcel No. EAST GEM/LIHANDA/916** which belonged to her brother in law **WELLINGTON OWINO OKWACHA** as shown on the Certificate of Confirmation of Grant issued on 29<sup>th</sup> March, 2004 in **NAIROBI SUCCESSION CAUSE NO. 32 OF 2003**. It was her evidence that she subsequently sold **Land Parcel No. EAST GEM/URANGA/469** to the Objector and that the Petitioners/Respondents had no claim over it.

### **Petitioners/Respondents' Case**

7. At the instance of the court, the parties herein were directed to hold a joint meeting that was to be presided over by the chief to see if the matter could be settled. **PW1 NICHOLAS ODHIAMBO SOGO**, chief East Gem location stated that he held a meeting with the parties on 14<sup>th</sup> November, 2018. He prepared a report of the same date.

8. The report confirms the entry in the green card that **Land Parcel No. EAST GEM/URANGA/469** was registered in the by the deceased and **WELLINGTON OWINO OKWACHA**.

9. The report also shows that the 1<sup>st</sup> Petitioner/Respondent was son to deceased's brother John Owiti Abonyo. The report further shows that the deceased had 3 wives as follows:

#### **1<sup>st</sup> wife**

**JENIFER ACHIENG ABONYO** (deceased)

#### **Children**

- 1) Michael Odhiambo
- 2) David Otieno Abonyo (deceased)

#### **2<sup>nd</sup> wife**

**ROSLIDA ATIENO ABONYO** (deceased)

#### **3<sup>rd</sup> wife**

**MARY ALUOCH ABONYO** 2<sup>nd</sup> Petitioner/Respondent

#### **Children**

- 1) Millicent Atieno Abonyo
- 2) Vitalis Otieno Abonyo
- 3) Charles Oduor Abonyo
- 4) Kevin Omondi Abonyo
- 5) Joyce Odera Abonyo
- 6) Moses Abonyo Abonyo
- 7) Harun Omondi Abonyo
- 8) Albert Abonyo Abonyo

10. The Chief stated that the parties were unable to agree because the Interested Party was un co-operative. He confirmed that the Interested Party and 2<sup>nd</sup> Petitioner/Respondent lived on **Land Parcel No. EAST GEM/LIHANDA/916** and were his immediate neighbours.

11. **WILLIAM OCHIENG' OWITI**, the 1<sup>st</sup> Petitioner/Respondent conceded that he was nephew to the deceased. He stated that the green cards in respect of **Land Parcel No. EAST GEM/URANGA/469** and **Land Parcel No. EAST GEM/LIHANDA/916** show that deceased was entitled to half of each.

### **Analysis and Determination**

12. I have considered the evidence on record, submissions filed on behalf of the parties and I have deduced the following issue for determination.

**Whether deceased's estate comprised of ½ of Land Parcel No. EAST GEM/LIHANDA/916 and ½ of Land Parcel No. EAST GEM/URANGA/469**

13. There is uncontroverted evidence from the green cards in respect of **Land Parcel No. EAST GEM/URANGA/469** and **Land Parcel No.**

**EAST GEM/LIHANDA/916** that the deceased owned ½ of each.

14. The Certificate of Confirmation of Grant issued in respect of **WELLINGTON OWINO OKWACHA's** estate to the Interested Party on 29<sup>th</sup> March, 2004 in **NAIROBI SUCCESSION CAUSE NO. 32 OF 2003** shows that the Interested Party was entitled to the whole of **Land Parcel No. EAST GEM/LIHANDA/916** and to 50% of **Land Parcel No. EAST GEM/URANGA/469**.

15. Having said that, I find that the Interested Party's entitlement to **Land Parcel No. EAST GEM/URANGA/469** was 50% and the sale of the whole portion to the Objector did not confer a good title on the Objector on the half that lawfully belongs to the deceased.

16. Concerning **Land Parcel No. EAST GEM/LIHANDA/916**, there is uncontroverted evidence that the Certificate of Confirmation of Grant issued in respect of **WELLINGTON OWINO OKWACHA's** estate to the Interested Party on 29<sup>th</sup> March, 2004 is in my considered view no doubt has an error for the reason that deceased owned half of that land.

17. The issue is whether that error in the Certificate of Confirmation of Grant issued in respect of **WELLINGTON OWINO OKWACHA's** estate to the Interested Party on 29<sup>th</sup> March, 2004 to the Interested Party can be rectified in this cause. I have considered the provisions of Section 3A of the Civil Procedure Act which provide that this court had inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I have also considered the provisions of Section 1A of the Civil Procedure Act which provide that the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

18. Both the Interested Party and the Petitioners before the court have an interest in **Land Parcel No. EAST GEM/LIHANDA/916**. This land parcel was part of the subject matter in **NAIROBI SUCCESSION CAUSE NO. 32 OF 2003** and is also subject matter in this cause. The overriding objectives have been expressed differently and broadly to include the principle to achieve or attain justice, and fairness in the circumstances of each case; reduce costs and delay. From the foregoing, I am convinced that the rectification to reflect the true position in respect of **Land Parcel No. EAST GEM/LIHANDA/916** can rightly be determined in this cause without causing any causing any injustice to any of the parties.

19. Consequently; I find that the Interested Party's entitlement to **Land Parcel No. EAST GEM/URANGA/916** was 50% and the order issued on 25<sup>th</sup> June, 2015 in **SIAYA PMCC ELC 02 OF 2014** purporting to evict the 2<sup>nd</sup> Petitioner/ Respondent from that land, half of which lawfully belongs to her deceased husband, and being the land she occupied even long before the death of the deceased does not have the force of law.

20. As concerns the 1<sup>st</sup> Petitioner's/Respondent's entitlement to deceased's estate, there's evidence that the deceased's was survived by one of his 3 wives **MARY ALUOCH ABONYO**, the 2<sup>nd</sup> Petitioner/Respondent herein and children and that 2<sup>nd</sup> Petitioner/Respondent is therefore not entitled to the deceased's estate.

### **Disposition**

21. 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) ½ of Land Parcel No. EAST GEM/URANGA/469 belongs to the deceased ALBERT JOSEPH ABONYO ODERA**

**1) ½ of Land Parcel No. EAST GEM/LIHANDA/916 also belongs to the deceased ALBERT JOSEPH ABONYO ODERA**

**2) COLLINS OTIENO WERE the objector was only entitled to ½ of Land Parcel No. EAST GEM/URANGA/469 which the Interested Party had capacity to sell to him**

**3) Certificate of title issued to COLLINS OTIENO WERE, the objector, to the whole of Land Parcel No. EAST GEM/URANGA/469 is hereby cancelled and the Land Registrar Siaya County is directed to revert the title to the names of WELLINGTON OWINO OKWACHA and ALBERT JOSEPH ABONYO ODERA and on the basis Grant issued on 29<sup>th</sup> March, 2004 in NAIROBI SUCCESSION CAUSE NO. 32 OF 2003 to subsequently register it in the names of ROSEBELA OWUOR OTIENO and ALBERT JOSEPH ABONYO ODERA. ROSEBELA OWUOR OTIENO will thereafter be at liberty to transfer her half share to COLLINS OTIENO WERE, the objector herein**

**4) ROSEBELA OWUOR OTIENO, the Interested Party is entitled to ½ of Land Parcel No. EAST GEM/LIHANDA/916**

**5) The order issued on 25<sup>th</sup> June, 2015 in SIAYA PMCC ELC 02 OF 2014 purporting to evict the 2<sup>nd</sup> Petitioner/ Respondent from Land Parcel No. EAST GEM/LIHANDA/916, half of which lawfully belongs to her deceased husband does not have the force of law.**

**6) Land Parcel Nos. EAST GEM/LIHANDA/1276; 1277; 1278 and 1279 which are a subdivision of Land Parcel No. EAST GEM/LIHANDA/916 are hereby cancelled and the Land Registrar Siaya County is directed to revert the title to the names of WELLINGTON OWINO OKWACHA and ALBERT JOSEPH ABONYO ODERA**

**7) The Administrators are directed to within 30 days from today's date, proceed to apply for confirmation of the grant in**

favour of the widow MARY ALUOCH ABONYO and deceased's children Michael Odhiambo, Millicent Atieno Abonyo, Vitalis Otieno Abonyo, Charles Oduor Abonyo, Kevin Omondi Abonyo, Joyce Odera Abonyo, Moses Abonyo Abonyo, Harun Omondi Abonyo and Albert Abonyo Abonyo and the family of David Otieno Abonyo (deceased's son who is deceased )after ascertaining and determining their respective beneficial entitlement to the estate

8) The Objector is condemned to pay costs to the Petitioners/Respondents.

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

Petitioners/Respondents - N/A

For Objector/Applicant - Mr. Ondego/Mr. Kowinoh

For the Interested Party - N/A