



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT SIAYA**

**CIVIL APPEAL NO. 13 OF 2017**

**JACKIM ONYANGO MISEWE.....1<sup>ST</sup> APPELLANT**

**JOHN OGOLA OLOO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**BERNARD OTIENO ODHIAMBO.....1<sup>ST</sup> RESPONDENT**

**MARY AKINYI ODHIAMBO.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling dated 25<sup>th</sup> July 2017 of*

*Hon. C. Okore, SRM in Siaya PM Succession Cause No. 6 of 2016)*

**JUDGMENT**

1. This appeal arises from the Ruling dated 25th July 2017 by Hon. C. Okore, SRM in Siaya PM Succession Cause No. 6 of 2016. The ruling was in respect of an application dated 20<sup>th</sup> July 2017 seeking for the revocation of GRANT of letters of administration intestate issued to **Jackim Onyango Misewe** on 12/5/2016 and that a fresh grant be issued in favour of **Bernard Otieno and Mary Akinyi Odhiambo**. The application also sought for rectification of the grant by expunging the name of the petitioner **Jackim Onyango Misewe**.

2. This being a first appeal, this court is obliged by section 798 of the Civil Procedure Act to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See **Sielle & Another vs Associated Motor Boat Company Ltd and Others [1968] EA 123**,

3. Revisiting the evidence before the trial court, the application for revocation of the grant was heard by way of *viva voce* evidence wherein both parties in total called ten witnesses to support their respective positions on whether or not the 1<sup>st</sup> Appellant herein **Jackim Onyango Misewe** who was the petitioner had the right to petition for grant of letters of administration in respect of the estate of the deceased **John Kodee Imbogo** and or whether he could be the administrator of the estate of the deceased **John Kodee Imbogo** as he was merely alleging to be a purchaser which claim the Respondents also disputed.

4. The Respondents herein were objectors. The 1<sup>st</sup> Objector testified and stated that according to the family tree which he produced in evidence as an exhibit, he and the 2<sup>nd</sup> Respondent were closer relative to the deceased than the 1<sup>st</sup> appellant who was not and that the 2<sup>nd</sup> appellant was not related to the deceased. He stated that he was a grandson to the deceased John Kodee Imbogo and had already obtained a grant in respect of his estate, which was confirmed vide Siaya PM Succession Cause No 284 of 2016 on 4<sup>th</sup> April 2017 which he also produced as exhibits. He stated that albeit the appellants herein claimed to have purchased the land from the deceased, the agreements were not signed by any witnesses and that the deceased's signature on the agreements was forged because I never agreed with the one on his identity card copy produced as exhibit. He had also placed a restriction on the said **title East Gem/Kagilo/956**.

5. The second respondent herein testified as Objector No. 2 and stated that the deceased John Kodee was a brother to her father-in-law and that she was a wife to Pascal Odhiambo. She stated that the appellants herein were stealing land of the deceased yet they were not related to him. She stated that the 1<sup>st</sup> Respondents herein Bernard Otieno Odhiambo was her first born son. She denied that the land of John Kodee was ever sold. In cross examination she stated that she was wife to the nephew of the deceased while the 1<sup>st</sup> appellant was a distant cousin to the deceased. On being questioned by the 2<sup>nd</sup> appellant she stated that the land in question was left in her care after John Kodee died in 1992. She denied obtaining a fake death certificate for the deceased and stated that she had the original burial permit for the deceased. She stated that the wife to the deceased died. She denied knowing if the 2<sup>nd</sup> appellant had bought the land from the deceased.

6. Austin Onyango Nyangao testified as a witness to the objectors and stated that the objectors were the closest relatives of the deceased and that the appellants herein had fraudulently obtained a grant in respect of the deceased's estate. In cross examination he stated that his father

was a blood brother to the 2<sup>nd</sup> appellant and that although he was related to the 1<sup>st</sup> appellant he had gone to court to tell the truth that the 1<sup>st</sup> appellant was a thief. He maintained that the 2<sup>nd</sup> appellant never bought the deceased's land

7. Margaret Akinyi Okech testified as Objector witness 4 and stated that her late husband was blood brother to the 1<sup>st</sup> appellant. She maintained that the appellants and respondents were not the closest relatives to the deceased and that they had stolen the land which they should relinquish to the closest surviving relatives being the objectors. She claimed that the 1<sup>st</sup> appellant had sold all his land. She denied the suggestion by the 2<sup>nd</sup> appellant that the deceased sold to him the land in question and stated that the appellants herein had obtained a grant fraudulently.

8. Liakim Onyango a neighbour to the deceased testified that the deceased was not related to the appellants while Magdaline Abinya testified denying that the appellants were close relatives of the deceased John Kodee.

9. The 1<sup>st</sup> appellant in defence testified that he was a cousin to the deceased and that he was helping the 2<sup>nd</sup> appellant who had purchased the land from the deceased to get his rights. Further, that he was authorized by the Chief to petition for succession of the deceased's estate. He stated that he did not consult the objectors when he petitioned for grant. He admitted that the family tree produced by the objectors was a true reflection of the family of the deceased. He stated that he had his own land elsewhere and was not interested in the deceased's land but that the deceased sold the land to the 2<sup>nd</sup> appellant herein. He stated that he was cousin to the deceased.

10. The 2<sup>nd</sup> appellant testified that the land was now registered in his name and that the deceased was his cousin as their grandfathers are brothers. He stated that he bought the land from the deceased on 13/8/1989 at Kshs 12,000 but admitted that no witness was present to sign the agreement. He stated that he was aware that JJackim had done succession but denied being party to the said succession,

11. Jael Anyango Sanya testified that she knew that John Kodee the deceased sold land to the 2<sup>nd</sup> appellant in 1989 but that she did not sign the agreement as witness.

12. Anjelina Anyango Ogola testified and stated that the deceased sold land to the 2<sup>nd</sup> appellant who is her husband in 1989.

13. The trial court after considering the evidence adduced by both parties and their witnesses held that the appellants herein were not the closest relatives of the deceased and that they had no right to petition for grant of letters of administration intestate in respect of the state of the deceased.

14. The trial court after considering the evidence adduced by the parties and their respective witnesses found and held that the appellants herein had no right to obtain grant in respect of the estate of the deceased. She allowed the objection and revoked the grant issued to the 1<sup>st</sup> appellant and also expunged his name from therein and replaced his name with that of the respondents herein.

15. It is that Ruling made on 25/7/2017 that gave rise to this appeal vide a memorandum of appeal dated 3<sup>rd</sup> August 2017 and filed in court on 8<sup>th</sup> August 2017 setting out the following grounds of appeal:

**1. The learned trial magistrate erred in law and fact y failing to consider and refer to the intricate issues raised in the appellant's response to the subject application dated 20 /07/2017**

**2. The learned trial magistrate erred in law and fact by delivering a ruling against the weight of the evidence tendered.**

**3. The learned trial magistrate misdirected herself on points of law and facts as regards the application before her**

**4. In totality, the appellants herein were never accorded a fair hearing.**

16. The appellants prayed that the ruling dated 25/7/2017 be set aside with costs to the appellants.

17. The Appeal was admitted to hearing on 30<sup>th</sup> January 2018. Directions were given on 6/3/2019 for the hearing of the appeal by way of oral submissions. The appeal was heard on 23<sup>rd</sup> July 2019 but due to the recess and the court diary being congested, judgment was slated for today.

18. On 23<sup>rd</sup> July 2019 the parties' advocates canvassed the appeal orally with Mr. Abande advocate representing the appellants whereas Mr. Ochanyo advocate held brief for Mr. Simiyu for Respondents.

19. In his oral submissions, **Mr. Abande argued challenging the** Ruling of 25/7/2017 and relying on the 4 grounds of appeal. He however first addressed the two issues which his clients as the Respondents had raised in the lower court. Counsel submitted that his clients had obtained a grant of Letters of Administration of the Estate of the deceased as beneficiaries and purchasers.

20. He submitted that orders sought in the application dated 20/4/2017 were for revocation of grant of Letters of Administration interstate. The application also sought rectification of a grant to expunge the appellant's name.

21. He argued that the trial court had no power to expunge the appellant's names without following due process of letting the Respondents apply or petition afresh for a grant including the appellants as beneficiaries by virtue of being liabilities as they were purchasers for value. Counsel blamed the trial court for issuing the grant instantly and failing to ensure that the liability is taken care of.

22. In opposing the appeal, Mr. Ochanyo submitted that the appellants did not follow due process as they could not buy what legally belonged to them as beneficiaries. He submitted that the Respondents provided the court with a family tree showing relationships with the deceased. He relied on **Section 29 of the Law of Succession Act** which provides for who is entitled to petition for grant. He also relied on **Re Estate of Gamaliel Onyiego [2018] eKLR** where the court stated that beneficiaries are stated by the Law of Succession Act.

23. Counsel submitted that the Appellants overlooked the respondents as beneficiaries and when they were caught, they changed tune to claim to be purchasers. He submitted that this appeal lacks merit and urged the court to dismiss it with costs to the Respondents And take into account the fact that the appellants have filed several suits everywhere including in the ELC.

24. In a rejoinder, Mr. Abande submitted that Issues of liability of the estate of a deceased person are to be dealt with in a Succession Cause. He argued that at the point of distribution of estate, liabilities must also be stated and that the court cannot know unless information is given to it.

## **DETERMINATION**

25. Having re assessed and reevaluated the evidence as adduced in the trial court, the issue that I must determine in this appeal is ***whether the trial court erred in revoking a grant which was issued in favour of the 1<sup>st</sup> appellant and in reissuing a grant in favour of the Respondents without taking care of the interests of the Respondents herein as alleged purchasers and or liabilities of the estate of the deceased.***

26. The Respondents herein claimed that according to the family tree which they produced in court as exhibit 1, the Appellant herein was not related to the deceased and therefore he could not benefit from his estate. They denied the claim that the deceased sold the land to the 2<sup>nd</sup> appellant and asserted that the 1<sup>st</sup> appellant fraudulently obtained a grant. They therefore urged the court to cancel the grant issued to the appellant

27. The 1<sup>st</sup> appellant herein testified and stated that him and the deceased were cousins but conceded that he did not consult the objectors OW1 and OW2 who was a son to the deceased's son(grandson) and OW2 who stated that she was a wife to the nephew of the deceased and that the deceased's Land was left under her care.

28. The 1<sup>st</sup> appellant did not dispute the family tree produced by the Respondents which showed that he was not a dependant or direct beneficiary of the deceased's estate. He also stated that he had no interest in the land in question as he had his own land beside the one in question in the succession cause. He stated that he did the succession to assist the buyer who is the second appellant herein, John Ogola who allegedly had a sale agreement with the deceased, to access the land and he stated that the land was now registered in the name of the second appellant John Ogola. He however denied having any such sale agreement and stated that the Assistant Chief nominated him to file succession.

29. The second appellant John Ogola testified that the land was now registered in his name because the deceased was his cousin as their grandfathers are brothers. He also stated that he bought the suit land at Kshs 12,000 on 13/8/1989 and that no witnesses signed the agreement. He denied being party to the succession proceedings filed by the 1<sup>st</sup> Appellant. He stated that the 1<sup>st</sup> appellant was a closer cousin to the deceased than him hence he let him-Jackim file for succession.

30. **Section 66(a)-(d)** provides: -

***“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-***

***(a) surviving spouse or spouses, with or without association of other beneficiaries;***

***(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***

***(c) the Public Trustee; and***

***(d) creditors”***

31. **Part VII**, dealing with making of grants under **Rule 26(1) and (2) of the Probate and Administration Rules** provides: -

***“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.***

***(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”***

32. From the family tree produced and the evidence of the appellants and the respondents and their respective witnesses before the trial court, it is clear that the grandfather of the 1<sup>st</sup> appellant and the deceased's grandfather were brothers because they were both children of Mbimda. The grandfather of Jackim was Onyango while that of John Kodee was Imbogo. Imbogo had two sons Lucas Odee who begot John Kodee,

and Ongoye who begot Celestine OGwilo. The latter beget Stephen Ogwilo and Pascal Odhiambo the father of **Bernard Otieno**. There is no evidence that there is any surviving relative from the house of Lucas Odee. However, Ongoye who was the brother to Lucas Odee is survived by Bernard Otieno the who is a direct descendant of Imbogo unlike the 1<sup>st</sup> appellant and second appellant who descend from another brother of Imbogo called Onyango.

33. Under **Part V referred under Section 66(b)**, the persons given priority over an intestate are the surviving spouse and children. That where the intestate has unfortunately left no surviving spouse and children, the provisions of **Section 39 of the Law of Succession Act** stipulate the net intestate shall devolve up to the kindred of the intestate in manner of order of priority.

34. Section 39(1) and (2) provides :

***“39. (1) where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-***

***(a) father; or if dead***

***(b) mother; or if dead***

***(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none***

***(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none***

***(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.***

***(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”***

35. **In my humble view, the 1st Respondent herein Bernard Otieno is the relatives** who is in the nearest degree of consanguinity up to and including the sixth degree, to the late John Kodee and not the appellants. And since the 2<sup>nd</sup> respondent is his mother, both are equally entitled in equal measure in equal shares. It therefore follows that the 1<sup>st</sup> appellant herein was not entitled to petition for grant of letters of administration in respect of the state of the deceased John Kodee.

36. **Section 76 of the Law of Succession Act** provides:

***“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -***

***(i) ... or***

***(ii) to proceed diligently with the administration of the estate; or***

***(iii) ...***

***(e) ...***

37. In the impugned ruling which revoked the grant initially issued in favour of the 1<sup>st</sup> appellant herein, the trial magistrate found that the 1<sup>st</sup> appellant herein offended section 76(b) above by failing to disclose to the court the existence of the two applicants-now Respondents who, in her view, were the relatives in the nearest degree of consanguinity to the deceased as per the family tree which was produced by the Applicants/objectors and that the applicants were the only surviving relatives of the deceased.

38. The appellants claimed that the deceased had sold the land subject of succession proceedings to the second appellant and that the 1<sup>st</sup> appellant was only assisting the second appellant purchaser to get his right since he is related to the deceased. Nonetheless, the 1<sup>st</sup> appellant conceded before the lower court that he was nowhere close to the deceased in the family tree produced in court. He also conceded that the alleged sale of land agreement was not witnessed by any third party.

39. I have perused the alleged sale of land agreement dated 15/2/1990 and 13/8/1989. They are written in Dholuo language and were never translated for the court in any of the two languages of the court being Kiswahili or English.

40. **Section 3 of the Law of Contract Act** provides that:-

*“No suit shall be brought upon a contract for the disposition of an interest in land unless-*

*(a) the contract upon which the suit is founded*

*(i) is in writing*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”*  
*[emphasis added]*

41. **The law requires that a contract for purchase of land or sale of land must be in writing and witnessed. The documents in the name of an agreement for sale of land subject of the succession proceedings allegedly done by the deceased is not attested by any witness and it is in Dholuo language. Accordingly, it is a documents which is not recognized by law and therefore it is no agreement for sale of land or at all. The letters by the Chief claiming to give the appellants the mandate to carry out succession are therefore not sanctioned by law and therefore the claim of having purchased the land subject of the succession proceedings was not sufficiently established before the trial court and neither have the appellants proved that fact before this court.**

42. **In addition, even assuming that the said documents were valid sale of land agreements which I find are not, the law regarding the interest of purchasers in succession matters is Section 93(1) of the Law of Succession Act which provides:**

*“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.”*

43. **The above provision must be read with Section 24 of the Land Registration Act, 2012. No. 3 of 2012** which provides:

*“Subject to this Act—(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”*

44. Although **Section 93 of the Law of Succession Act** as read with **Section 24 of the Land Registration Act, 2012** gives a blanket protection to purchasers, Courts have applied it only in cases where according to the circumstances at hand, the purchaser can be rightly deemed to be *‘a bonafide purchaser for value without notice.’*

45. In **JACINTA WANJA KAMAU v ROSEMARY WANJIRU WANYOIKE AND ANOTHER (2013) E KLR** where the appellant therein unsuccessfully sought protection under **Section 93**, the Court of Appeal at Nyeri stated:

*“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser...”*

46. In **JANE GACHORA GATHETHA VS PRISCILLA NYAMIRA GITUNGU AND ANOTHER (2006) EKLR** where a purchaser claimed that he was not aware of, and was not party to the fraudulent dealings with the title in issue and was therefore not only protected under **Section 93(1)** of the **Law of Succession Act** but also **Section 143** of the **Registered Land Act** (now repealed) the Court of Appeal at Nyeri pronounced itself as follows:

*“We think with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the Superior Court fell into error in reliance of it. The section would only be applicable where firstly there is a transfer of any interest immovable or moveable property. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”*

47. In the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> appellants have not demonstrated that they are **bonafide** purchasers all or part of the succession property namely **East Gem/Kagilo/956**. The Respondents who are the only closest surviving relatives of the deceased John Kodee as per the family tree OExh 1, which fact was not disputed or controverted by any other evidence, had a right to Petition for grant under **Section 66 of the Law of Succession Act** and therefore the trial magistrate did not err in revoking the grant issued in favour of the appellants and reissuing it in favour of the Respondents herein.

48. In my humble view, the 1<sup>st</sup> appellant had no right to purport to carry out succession to protect the interests of the 2<sup>nd</sup> appellant as the 2<sup>nd</sup> appellant could still have cited the closest relatives of the deceased for purposes of succession, to enable him advance his claim if any, to the land which he believed was sold to him by the deceased distant relative. In the instant case, the purported sale was so secretive that not a single witness was present to attest to the sale purported agreement (s) which were never translated in the language of the court before being used in the proceedings in the trial court.

49. It therefore follows that any purported transfer of the subject land in favour of the 2<sup>nd</sup> appellant by the 1<sup>st</sup> appellant was illegal as it

amounted to nothing but meddling in the estate of a deceased person as the 1<sup>st</sup> appellant had no capacity to do so under the law. OW3 Austin Onyango Nyangao whose father was the blood brother to the second appellant made it clear that the 2<sup>nd</sup> appellant had no right to do succession of the estate of the deceased and that only the two Respondents herein were the closest relatives to the deceased who died with **no issue**, had the capacity to petition for grant of letters of administration intestate, of the estate of John Kodee Imbogo.

50. I find no intricate issues which the trial court failed to consider in her judgment. I also find no evidence tendered that would have been favorable to the appellant's case. Neither have the appellants demonstrated that the trial magistrate misdirected herself on the facts or law or that she did not accord the appellants a fair hearing, which latter allegation was not even canvassed at the hearing of this appeal.

51. Additionally, should the appellants feel aggrieved by the decision of the trial court, they still had an opportunity to lodge a claim, with evidence, before the civil court claiming for title to land as purchasers, before the Environment and Land Court, but that is only possible as against the administrators of the estate of the deceased.

52. Furthermore and as was rightly observed by Musyoka J in **Re Estate of G K K (Deceased) [2017] eKLR**, the primary duty of this court in the exercise of its jurisdiction as a probate court "**is distribution of the estate of a dead person.**"

53. Therefore, since the claim by the 2<sup>nd</sup> appellant interested party assisted by the 1<sup>st</sup> appellant who claimed to be nephew to the deceased is that of a purchaser and is based on a sale of land agreements with the deceased dated 15/2/1990 and 13/8/1990, which agreements are not attested and neither are they translated from Dholuo language into the languages of the court, such purported purchaser is not a bonafide purchaser or beneficiary of the estate of the deceased John Kodee Imbogo and therefore such claim should not be entertained in a succession cause.

54. I find and hold that the 2<sup>nd</sup> appellant's interests which cannot be verified at this stage disentitle him to the estate of the deceased and therefore there was no justification for the trial court to consider him as a purchaser or beneficiary as such claim in my humble view cannot even be set aside by this court under **Rule 41(3) of the Probate and Administration Rules.**

55. For all the above reasons I find and hold that the appeal herein as a whole is devoid of any merit and the same must fail. It is hereby dismissed on all grounds. The Respondents shall have costs of this appeal and costs of the trial court to be met by the appellants.

**Dated, signed and Delivered at Siaya this 16<sup>th</sup> Day of October, 2019**

**R.E. ABURUILI**

**JUDGE**

**In the presence of:**

Miss Otieno h/b for Mr Abande for the appellants

Mr. Ooro h/b for Mr. Ochanyo for the Respondents

Respondents Present

Appellants absent

CA: Brenda and Modestar