



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION APPEAL NO. 1 OF 2019

BECKY NYANCHAMA ONYANCHA APPELLANT

VERSUS

LYDIAH ATIENO OGOLARESPONDENT

[Being an appeal from the Ruling of the Hon. R.M. Ndombi, SRM in Kisumu Chief Magistrate's Court Succ. No. 462 of 2017 dated and delivered on 11th February 2019

JUDGMENT

The appeal before me was brought by **BECKY NYANCHAMA ONYANCHA**, to challenge the Ruling which was delivered on 11th February 2019.

1. The appeal was canvassed through written submissions.
2. The first issue that was raised by the Appellant was that learned trial magistrate erred by not finding that by virtue of the fact that the Respondent, **LYDIAH ATIENO OGOLA**, had signed the Transfer document, she had consented to the mode of distribution, based on the asset value or the physical value of the Estate of the deceased.
3. Secondly, the learned trial court was faulted for holding that the Respondent was entitled to the whole matrimonial home, to the exclusion of the Appellant.
4. It is common ground that the Appellant and the Respondent were both co-wives of **FREDRICK OTIENO ADUMBO** (the deceased).
5. Through a Certificate of Confirmation of Grant, dated 19th April 2018, the trial court ordered that the two widows would divide the Estate, equally.
6. The properties constituting the Estate were listed as follows:-

1. Death Gratuity Benefits.

2. Accounts and Bank of Africa Savings.

3. Insurance Benefits, BRITAM.

4. Unpaid Leave Days.

5. Medical Insurance Last Respects.

6. Work Injury Benefits (WIBA).

7. Kisumu/Ojola/2244.

8. Gem/Kajulu/1080.

9. Kisumu/Ojola/5531.

10. *Kisumu/Kanyakwar/Kibos Plot 78.*

11. *Gem/Kajulu/61.*

12. *Gem/Kajulu/1629.*

7. When canvassing the appeal, the Appellant submitted that the trial court ought to have made provision for the four (4) children of the deceased.

8. The Court was also said to have failed to give due consideration to the Law of Evidence, which stipulates how elements of fraud or of misrepresentation should be proved.

9. The Appellant further submitted that the learned trial magistrate erred by granting orders in terms of Prayers 5 and 6 of the application dated 11th October 2018.

10. Effectively, the trial court had ordered that **L.R. KISUMU/OJOLA/5531** be registered in the names of both the Appellant and the Respondent, jointly.

11. As the said parcel of land was registered in the name of the Appellant, it was necessary that that title be revoked first, before the same can thereafter be registered in the joint names of the two parties: That was the effect of granting Prayer 5 of the application.

12. A plain reading of the Certificate of Confirmation of Grant indicates that each of the Specified properties which constitute the Estate of the deceased, was to be divided equally between the two widows.

13. As each of the said widows has 2 children, the effect of the order for equal division of the assets would be to render justice to the children of each of the widows.

14. The issuance of a Certificate of Confirmation of Grant is ordinarily the final substantive order made by the court when handling a Succession Cause. That is because after the court has pronounced the mode of distribution of the Estate of the Deceased, (whether or not the said pronouncement is consensual), the parties only remaining task is to give effect to the Court order.

15. The Respondent has submitted to this court that Matrimonial homes are not available for distribution.

16. Quoting from the decision of the Hon. Lady Justice Maureen Odero, the Respondent said;

“The court will not countenance the eviction of a widow so as to satisfy the wish of any beneficiary for a share.

A life interest remains with the Petitioner’s Respondent and it is only after her demise and/or remarriage that the [matrimonial home] will be distributed to the other beneficiaries.”

17. In this case, there has not been suggestion that there has been an attempt to evict the Respondent or to deprive her of her interest in the parcel of land **Kisumu/Ojola/5531**.

18. The Respondent submitted that;

“It would make nonsense of the vigour attendant to confirmation of a grant, and be a recipe for anarchy and chaos, if administrators can bind themselves before Court, that they will distribute the estate of the deceased in one way and then do the exact opposite once they are at large.”

19. I am in agreement with that view.

20. Indeed, I share the view expressed by Hon. Lady Justice M. Thande In the **MATTER OF THE ESTATE OF JASWANT SINGH BOOR SINGH DHANJAL, MOMBASA HIGH COURT PROBATE & ADMINISTRATION CAUSE NO. 20 OF 2006**, as follows;

“The Law of Succession Act jealously guards and protects estates of deceased persons and has made very specific and clear provisions as to how such estates are to be dealt with.

Any dealings with the estate of the deceased person herein, without the Grant of representation were not only void but illegal.

Similarly, the transfer of the assets of the estate of the deceased, made outside the specific distribution set out in the Certificate of Confirmation of Grant dated 26.4.07 is both void and illegal, having been made contrary to the Law of Succession Act.”

21. In this case the Certificate of Confirmation of Grant dated 19th April 2018, expressly stipulates that the each and every single asset belonging to the Estate of the late Fredrick Otieno Adumbo would be divided equally between Lydiah Atieno Ogola and Becky Nyanchama Onyancha.

22. It is common ground that subsequent to the issuance of the Certificate of Confirmation of Grant the parcel of land **KISUMU/OJOLA/5531** was transferred to Becky Nyanchama Onyancha.

23. I find that the said transfer of that property was inconsistent with the Certificate of Confirmation of Grant.

24. The Respondent has not given any basis for the transfer; and it is definitely not backed by any lawful order of the court.

25. Even if the Appellant had a private agreement with the Respondent, through which it was agreed that Parcel No. **KISUMU/OJOLA/5531** be transferred to the Respondent, such an agreement could not have constituted lawful authority and jurisdiction to have the parcel of land transferred in any manner that was not in accord with the Certificate of Confirmation of Grant.

26. If any person wanted to have the contents of a Certificate of Confirmation of Grant varied, set aside or revoked, he or she must move the court with an appropriate application.

27. It therefore follows that the registration of the 2nd widow as the sole proprietor of **KISUMU/OJOLA/5531** lacked a sound legal foundation.

28. Furthermore, the decision by the trial court, to have that parcel of land registered in the names of the Appellant and the Respondent, as joint Proprietors, is also inconsistent with the Certificate of Confirmation of Grant.

29. Accordingly, I set aside that order and direct that the registration of the Respondent be revoked forthwith, resulting in the parcel of land reverting to the name of the deceased.

30. If the parties herein wish to give effect to the Certificate of Confirmation of Grant, they may proceed to do so.

31. However, if any of the parties is desirous to have any of the properties constituting the Estate of the late Fredrick Otieno Adumbo distributed in a manner that is not in strict compliance with the Certificate of Confirmation of the Grant, she must move the court appropriately.

32. Costs of the appeal are awarded to the Appellant.

DATED, SIGNED and DELIVERED at KISUMU This 2nd day of December 2019

FRED A. OCHIENG

JUDGE