



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 765 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE PITALIS OKELLO ATIENO**

**AND**

**JOSEPH OKELLO OKELLO.....1<sup>ST</sup> PETITIONER**

**BENARD OGINGA OKELLO.....2<sup>ND</sup> PETITIONER**

**AND**

**SAMWEL OWINYO WABORE.....1<sup>ST</sup> PROTESTER**

**GEORGE ODHIAMBO WABORE.....2<sup>ND</sup> PROTESTER**

**JACOB LUCY OTIENO.....3<sup>RD</sup> PROTESTER**

**RULING**

The Petitioners, **JOSEPH OKELLO OKELLO** and **BERNARD OGINGA OKELLO**, filed Summons for Confirmation of the Grant on 11<sup>th</sup> April 2018.

1. They listed the following properties as constituting the Estate of the late **PITALIS OKELLO ATIENO**;

*“(i) Wawidhi “A1”/Adjudication Section 30*

*(ii) Wawidhi “A1”/Adjudication Section 4651*

*(iii) Wawidhi “A1”/Adjudication Section 4629*

*(iv) Wawidhi “A1”/Adjudication Section 4653*

*(v) Wawidhi “A1”/Adjudication Section 4654*

*(vi) Wawidhi “A1”/Adjudication Section 4655*

*(vii) Wawidhi “A”/Adjudication Section 4689.”*

2. The Petitioners suggestion was that parcels numbers **4629, 4653, 4654, 4655** and **4689** be sub-divided into three (3) equal parts, each, and be shared between Joseph Okello Okello; Bernard Oginga Okello and Augustine Okello.

3. In the face of the said suggestion, a protest was raised by the following three persons;

*a) Samwel Owinyo Wabore;*

*b) George Odhiambo Abongo;*

*c) Jacob Lucy Otieno.*

4. Samwel lay claim to the Parcel No. **4654**; George lay claim to Parcel No. **4655**; and Jacob lay claim to Parcel No. **4653**.
5. The three protestors acknowledged that the parcels of land which they were laying claim to, were registered in the name of the deceased, **PITALIS OKELLO ATIENO**.
6. However, they emphasize that the said three parcels of land do not legitimately form parts of the Estate of the late Pitalis.
7. All the protestors are the descendants of the late **WABORE OGOLA**.
8. Samwel says that he inherited Parcel No. **4654** from his mother, **PRISCILA AKOTH WABORE**, who was the wife of **WABORE OGOLA**.
9. George is the son of **JOHN ABONG'O WABORE**, who is a son to **WABORE OGOLA**. Jacob asserts that he inherited Parcel Number **4653** from his late father.
10. All the three protestors have exhibited the particulars of the Succession Causes which they had instituted in respect to the Estates of the persons who they claim to have inherited their respective parcels from.
11. Their said claims emanate from the contention that **PITALIS OKELLO ATIENO** had fraudulently caused himself to be registered as the proprietor of parcels which did not belong to him.
12. The protestors said that **PITALIS OKELLO ATIENO** had colluded with the Land Adjudication officials, leading to his name being registered as the proprietor of the three parcels of land, which did not belong to him.
13. The protestors did acknowledge that the three parcels of land had been subject of protracted litigation.
14. The first dispute was through the **LAND COMMITTEE CASE NO. 257 OF 1986**.
15. It is common ground that the Land Committee ruled against **Pitalis Atieno**.
16. Being aggrieved, Pitalis lodged an appeal to the **ADJUDICATION BOARD**. On 10<sup>th</sup> March 1989, the Board delivered its verdict, in which it set aside the decision which had been rendered by the Land Committee.
17. The Adjudication Board expressly ordered that the three parcels of land, which are also the subject matter of the protest in this case, be registered in the name of **Pitalis Okello Atieno**.
18. According to the protestors;  
  

*“By the time the appeal was being heard, Pitalis Okello  
had since passed on and Otieno Wabore Wabore was  
very sick and bedridden.”*
19. If Pitalis Okello was deceased before the appeal was heard, he cannot have had any influence on the Board.
20. But the protestors insist that the Respondent in the appeal before the Adjudication Board was not accorded an opportunity to be heard.
21. Their case is that the Respondent was never served with either Summons or Hearing Notices, which would then have made her aware that the appeal was coming up for hearing.
22. Of course, if a party to a case is not served with a Notice requiring him to be present at the hearing of the said case, he would have been deprived of the opportunity to be heard, if the hearing proceeded in his absence.
23. It is a fundamental principle of Justice and fairness that a party ought not to be condemned without having been accorded an opportunity to be heard.
24. Therefore, when decisions are made and if they affect the rights of a party who had not been given an opportunity to be heard, it is normally very difficult to justify the sustenance of such decisions.
25. The party who had been denied the opportunity to be heard would be entitled to mount a challenge against the decision in question.
26. Ordinarily such a challenge would be in the nature of an appeal or of an application either for Review or for the setting aside of the

impugned decision.

27. In this case, the protestors have submitted that the registered proprietor, (Pitalis Okello) held the parcels of land in Trust for the protestors.

28. The said protestors acknowledge that;

*“The Court never implies a trust, save in cases of*

*absolute necessity. A party relying on the existence*

*of a trust must lead evidence to prove the same” –*

*per MBOTHU & OTHERS V WAITIMU & OTHERS [1985]*

*K.L.R. 173.*

29. Clearly, therefore, the protestors would need to lead evidence to prove the existence of the alleged trust. It is only by so doing that the protestors could prove their alleged ownership of the parcels of land in question.

30. Even in the case of **RE: ESTATE OF JAMES MUIRURI KAMAU (DECEASED) [2018]eKLR**, the Court noted that when a party wished to prove that the registered proprietor of a parcel of land was holding the said parcel in trust;

*“His capacity as a trustee can be established by way of cogent testimony and/or evidence.”*

31. Assuming that such testimony or evidence were tendered, the court would then make a finding that there was a trust in favour of one or more of the protestors.

32. In effect, such a declaration would constitute a determination as to the ownership of the 3 parcels of land.

33. In the matter before me, the Court was asked by the Petitioners, to grant an order for the confirmation of the Grant. Such an order, if it was made in respect to the properties which the Petitioners have listed as belonging to the late Pitalis Okello Atieno, would imply that the Court was satisfied that the 3 parcels of land which were being claimed by the protestors, did not belong to the protestors. Indeed, such an order would imply that the court had made a determination to the effect that the 3 parcels of land belong to the protestors.

34. At present, the case before me is not the forum at which the issue of the ownership of the 3 parcels of land is to be determined.

35. This court is required to determine the mode of distribution of property belonging to the deceased. When there is dispute concerning the ownership of some assets which had been listed as being a part of the Estate, that dispute must first be resolved.

36. At the moment, there are documents which indicate that 3 parcels of land belong to **PITALIS OKELLO ATIENO**. If that ownership was not disputed, the court could proceed to distribute the Estate, inclusive of the 3 parcels of land.

37. But because ownership is disputed, the court cannot proceed to incorporate the said parcels of land into the catalogue of assets belonging to the deceased.

38. I appreciate that by virtue of the registration as proprietors of the disputed parcels, the deceased is, prima facie, the owner of the said parcels.

39. But it is open to the protestors to lead evidence to try and rebut the presumption of ownership.

40. In the circumstances, I decline to proceed with the process of confirmation of the Grant, for now. Nonetheless, the said application has not been dismissed.

41. Instead, I order that the application for Confirmation of Grant shall be stayed for the next 30 days, to allow the protestors time and opportunity to pursue such litigation as they may choose, with a view to obtaining a substantive determination on the issue of the ownership of the 3 parcels of land.

42. In the event that the protestors fail to get orders, either for a further stay of the proceedings of the application for Confirmation of Grant, or the determination of ownership of the 3 parcels of land, the registered proprietors will be deemed to be the absolute legal owner of the said parcels of land.

43. Costs of the protest shall abide the determination of ownership of the 3 parcels of land. In the event that the parcels are held to be a part of the estate, the protest shall stand dismissed, with costs to the Petitioners.

44. But if the protestors are held to be the bona fide owners of the 3 parcels of land, the protestors shall stand awarded the costs of the

protest.

**DATED, SIGNED and DELIVERED at KISUMU this 7<sup>th</sup> day of November 2018.**

**FRED A. OCHIENG**

**JUDGE**