



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 649 OF 2011

**IN THE MATTER OF THE ESTATE OF THE LATE ALBERT ODONGO ODHUNO
(DECEASED)**

JOASH ONYANGO NYIERO.....APPLICANT

VERSUS

ZACHARY OMONDI ODONGO.....ADMINISTRATOR/RESPONDENT

JUDGMENT

By the Summons for Revocation of Grant dated 2nd August 2016 Joash Onyango Nyiero, the applicant seeks firstly the revocation of the Certificate of Confirmation of the grant issued to Zachary Omondi Odongo on 16th October 2014, and secondly or in the alternative that Zachary Omondi Odongo, the Respondent be ordered to transfer Land LR No. South Ugenya/Yiro/1671 to him. The gist of the application as can be discerned from the grounds on the face of the application and the supporting affidavit is that he, the applicant had purchased this land from the deceased who had transferred it to him and a title deed issued and as such the respondent ought not to have included it in this cause.

In opposition to the Summons the respondent filed a replying affidavit sworn by himself on 5th September 2016 in which he deposes that this property was part of his father's estate; that it belonged to his father who though he had charged it to the Bank repaid the loan fully but died before obtaining a discharge of charge; That the applicant mischievously approached the bank and struck a deal with the Bank to transfer the land to him on the pretext that it was exercising its statutory power of sale.

He further deposes that upon learning what the Bank had done he sued the Bank and the Respondent in **Kisumu Environment & Land Court Case No.155 of 2011/681 of 2015** and in the resultant judgment the Court found that the applicant had not acquired any legal right over the land and the same was still part of the deceased's estate. He deposes that by bringing this application the applicant is appealing the decision of the **Environment & Land Court** through the back door and this Court does not have jurisdiction to entertain his application; That moreover even if the asset is not part of the deceased's estate then the proper application is for rectification of the grant but not for revocation of the grant.

The summons were canvassed by way of viva voce evidence.

In summary the applicant testified that the deceased, the father of the respondent was his cousin; that the deceased was the registered proprietor of **LR South Ugenya/Yiro/167** which he had charged to Kenya Commercial Bank; that when he defaulted the Bank threatened to auction the land and so they entered into a private treaty where they agreed he could buy the land from the deceased at Kshs.85,000/=. Essentially the purchase price was Kshs.15,000/= per acre. He duly paid the purchase price to the deceased and the deceased used the proceeds of the sale to offset the loan. That done, the deceased went

to the Land Control Board and obtained the relevant consent and thereafter executed a transfer of the land to him. However the Bank raised additional charges and they disputed on this as according to the applicant it had not been part of the sale agreement that he would pay these additional charges. According to him he would only pay the costs of the transfer and the stamp duty. The deceased did not pay these charges and so did not obtain a discharge of the charge and the title deed remained with the Bank. However when he died the applicant decided to pay the additional charges which mainly arose from ledger fees and the Bank released the title deed to him. He then went and registered the transfer and obtained a title deed in his name. He contended that the sale agreement and the transfer were executed by the deceased while he was alive and that as at 2010 when this Succession Cause was filed the land was registered in his name but not that of the deceased. He contended that to conceal this from the Court the respondent who was the administrator of the estate used an old Certificate of Search that showed the deceased was still the registered proprietor. He further testified that the respondent was aware of the sale and even approached him with an offer for a refund of the purchase price which he rejected. He conceded that the **Environment & Land Court** in Kisumu determined the case in the applicant's favour and directed cancellation of his title deed. He stated that this was done and the land reverted to the estate of the deceased. He contended that he has now come to this Court to pursue his interest in this asset as directed by the Judge in the **Environment & Land Court** case.

In support of his evidence he produced a sale agreement dated 12th October 1993, a computation of the purchase price, a proclamation of sale, deposit slips and acknowledgements of money signed by himself and the deceased, a Land Control Board letter of consent dated 26th November 1993, a duly executed transfer form dated 31st January 1994 and a title deed in his name, a letter written to him by the respondent, minutes of the meetings between him and the family of the deceased on 19th October 2009 and 1st November 2009 among other documents.

On his part the respondent testified that the dispute between him and the applicant was settled by the **Environment & Land Court** on 29th June 2016 and that judgment was not appealed. He contended that the applicant approached him in 2008 but he advised him to have a meeting with his uncles to establish his claim to the land and when the applicant did not do so he wrote him the letters which he, the applicant produced here. He contended that by entering into discussions with the applicant they, family of the deceased, upon the advice of elders were admitting there was a debt which they were willing to pay. He testified that he was sixteen years old when his father died and he was not privy to the sale agreement and only became aware of the applicant's claim in 2008. He conceded that his father offset the loan to the Bank through a sub-division of and sale of South Ugenya/Yiro/1613 but stated he was not aware the applicant paid part of the loan to the bank. He stated that by the time the Bank discharged the land to the applicant they were aware his father was dead and hence the reason he sued them. He stated that the judgment of the **Environment & Land Court** still stands as it was not appealed and that he does not understand the Plaintiff's claim in this summons. He further stated that as opposed to the family of the deceased the applicant has never been in occupation of this land. He contended that the applicant being their uncle the family is willing to refund whatever money he may have paid to the deceased. He disputed that the signatures on the documents produced by the applicant belonged to the deceased and stated that this application does not lie and it should be dismissed.

The Advocates for the parties summed up their clients' cases through written submissions which this Court has considered alongside the evidence on record.

It is the finding of this Court that the deceased had in his lifetime sold the asset in issue to the applicant. This is evidenced by the sale agreement, the acknowledgements, the Land Control Board letter of consent, the transfer form and by the conduct of the family of the deceased as expressed in the minutes of the meetings held on 19th October 2009 and 1st November 2009 which the applicant tendered in evidence. Kibunja J found this a fact in his judgment in **Environment & Land Court Case No. 681 of 2016** where he stated:-

“9.c) That considering that the Plaintiff was a minor in 1993 and that he has no documentary evidence or other independent witness to support his contention that the chargor had paid the loan secured with the charge on Parcel 1671, and in view of the fact that the title was not

released and discharge of charge issued by the 1st Defendant, the Court finds that contention by the Plaintiff to be unreliable. That unlike the Plaintiff, the 2nd Defendant has produced a copy of a land sale agreement between him and *Albert Odongo Odhung*, the chargor, for sale of *South Ugenya/Yiro/1671* at Kshs.85,000/=. The 2nd Defendant explained how he paid the purchase price. The Plaintiff and the 2nd Defendant testified that before coming to Court they had discussed the said sale agreement. Both the Plaintiff, and the 2nd Defendant confirmed that the Plaintiff's family had offered to refund the 2nd Defendant the Kshs.85,000/= plus interest of Kshs.20,000/= but that the 2nd Defendant had demanded Shs.2,000,000/= so as to give up his claim over the land. The copies of the minutes of meetings containing the details of the offer made were produced as exhibit. The Court finds the fact that the Plaintiff and his family had expressed their preparedness to refund the purchase price and interest of Kshs.20,000/= to the 2nd Defendant goes to show that the Plaintiff was convinced that the 2nd Defendant and *Albert Odongo Odhuno* had indeed entered into the sale agreement for land parcel *South Ugenya/Yiro/1671* and that the 2nd Defendant had fully paid the purchase price during the lifetime of the vendor the late *Albert Odongo Odhuno*.”(Underlining mine)

Kibunja J further found

“9.e) That the evidence by the 2nd Defendant that part of the purchase price that he paid *Albert Odongo Odhuno* was used to offset the outstanding loan is not only plausible but believable. This is because it offers the only explanation as to why the auctioneers detailed by the 1st Defendant to auction the property did not proceed with the auction. The Plaintiff has not offered any other evidence to rebut that of the 2nd Defendant and his contention that the chargor had paid the two loans using the proceeds of the sale of the parcel 1744 sub-divided from 1613 cannot be verified.”

I cannot agree more and would only hasten to add that given the evidence adduced by the applicant who was the 2nd Defendant in the **Environment & Land Court** case the allegation by the Respondent that the signatures on the documents produced in evidence here were not those of the deceased is hollow and cannot be in good faith. The minutes of the meeting held by the family of the respondent on 1st November 2009 and which the respondent was privy to, expressly acknowledged the sale agreement. The statement at paragraph 5 **“that the contract was not binding on any member of the Odongo family except the late and Mr. Joash Onyango Nyiero who were parties to it”** is an admission and recognition of that agreement. At no time either during those meetings or in the **Environment & Land Court** case was the issue of forgery raised. It cannot be raised now.

In the **Environment & Land Court** the Judge was called upon to determine whether the release of the title deed to this land or the discharge of charge to the 2nd defendant, now the applicant arose from the exercise by the Bank of its statutory power of sale. I wholly agree with Kibunja J's finding that the land could not have been sold in furtherance of the Bank's statutory power of sale as indeed it was not. I also find that the chargee having died the Bank could only have released the security to the administrator of his estate but not anybody else. In these proceedings, however, the duty of this Court is to determine whether by the time this asset was devolved to the beneficiaries in this cause, it was the free property of the deceased. This is the Court with the jurisdiction to determine that issue and that would explain Kibunja J's exhortation to the now applicant to pursue his interest with the Administrator of the deceased's estate.

There is no dispute that the deceased died intestate. Section 34 of the Law of Succession Act provides that a person is deemed to die intestate of all his free property of which he has not made a will which is capable of taking effect. Free property is then defined as follows:-

““free property” in relation to a deceased person, means 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;”

It is my finding that the deceased having entered into a sale agreement with the applicant, having received the purchase price; having obtained the consent of the Land Control Board and subsequently executed a transfer of this asset to the applicant he had ceded the ownership of the same to the applicant. The law then and even now gave the registered proprietor of land power to freely enter into such a sale and the fact that the respondent was young could not hinder such discretion. Indeed the Respondent told this Court that the deceased had another parcel of land which he sub-divided and sold. If he sold that one he could sell this one too. The belief expressed in the minutes dated 1st November 2009 (EXB 13) that the contract of sale did not bind the children of the deceased but only the deceased and the purchaser is fallacious. The deceased having sold the property he excluded it from his estate and his heirs can no longer lay claim to it. Indeed even had the deceased been alive he could no longer have freely dealt with the property as he had already transferred it to the applicant. By the time the respondent petitioned for letters of administration into the estate of the deceased this asset was no longer the free property of the deceased and he should not have included it. He should have even made a disclosure of this to the Court. The duties of personal representatives are set out under Section 83 of the Act one of them being

“(d) to ascertain and pay out of the estate of the deceased, all his debts”.

The Respondent being the administrator of this estate, rather than try to upstage the applicant, was obligated under the law to ensure that the sum the deceased owed to the Bank was paid and the discharge of charge issued so that the applicant could register the transfer. Instead he chose to use an old Certificate of Search in order to conceal from the Court material facts concerning the estate. Had the deceased sought the blessings of the Bank to enter into this private treaty perhaps the issue of the Bank charges, which in my finding had nothing to do with the applicant, would have been brought to his notice and he would have settled them together with the loan. There would then have been a discharge of charge and the applicant would have registered his transfer without hindrance. To hold that the deceased even after selling his land still had it would be a travesty of justice. It would be akin to saying that one can eat his cake and have it.

In the upshot this Court is satisfied that **LR Siaya/Yiro/1671** was not the free property of the deceased. However as the confirmed grant involves other assets of the deceased to which there is no dispute and in exercise of the power vested in this Court under **Section 73 of the Probate and Administration Rules** I direct that the confirmed grant be rectified so that **LR Siaya/Yiro/1671** is vested to the applicant. The original Certificate of Confirmation be deposited with the Deputy Registrar of this Court within fourteen days of this ruling and a fresh certificate to issue.

Costs always follow the event but given the circumstances of this case I shall order that each party bear his own costs. It is so ordered.

Signed, dated and delivered at Kisumu this 9th day of March 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Ragot for Kagoya for the Applicant

Mr. Odumbe for Opiyo for the Administrator/Respondent

Court Assistant – Serah Sidera