



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 2548 OF 2000**  
**IN THE MATTER OF THE ESTATE OF NDIYEINE OLE SIMEL (DECEASED)**

E N S.....1<sup>ST</sup> APPLICANT

F M S.....2<sup>ND</sup> APPLICANT

VERSUS

P S N.....1<sup>ST</sup> RESPONDENT

J S N.....2<sup>ND</sup> RESPONDENT

J P N.....3<sup>RD</sup> RESPONDENT

R N N.....4<sup>TH</sup> RESPONDENT

F M K .....5<sup>TH</sup> RESPONDENT

**RULING**

1. The deceased N O S died intestate on 5<sup>th</sup> September 1991. His estate comprised land parcels Kajiado/Olchoro-Onyore/1713 and Kajiado/Olchoro-Onyore/1717, each measuring 182.8 acres, and plot No. 1 Kiserian. The family allowed one of the widows R N N and three of the deceased’s children, J S N (the 2<sup>nd</sup> respondent), P S N (the 1<sup>st</sup> respondent) and J P N (the 3<sup>rd</sup> respondent), to take out letters of administration intestate. The grant was issued on 31<sup>st</sup> July 2001 and confirmed on 19<sup>th</sup> November 2002. The deceased had a son called S S who passed on leaving two daughters E N S (1<sup>st</sup> applicant) and F M S (2<sup>nd</sup> applicant). In the distribution of the estate, each of these applicants was given 10 acres of Kajiado/Olchoro-Onyore 1712. Because they were minors, it was ordered that the 1<sup>st</sup> respondent be registered to hold the 10 acres in trust for the 1<sup>st</sup> applicant until she was of age, and that the 2<sup>nd</sup> respondent be registered to hold the 10 acres in trust for the 2<sup>nd</sup> applicant until she was of age.

2. In the applications dated 22<sup>nd</sup> June 2015 and 24<sup>th</sup> August 2015 the applicants complained that they had

since attained the age of majority and, despite several requests, the 1<sup>st</sup> and 2<sup>nd</sup> respondent had failed to transfer the respective parcels to them. They sought that the trusteeship be terminated to allow them to be given the 10 acres each. The other claim was that the deceased had left motor vehicle [particulars withheld] make Toyota in the control of the 2<sup>nd</sup> respondent, but meant for them, but its whereabouts was not known. They wanted him to be ordered to surrender the vehicle, or pay them its equivalent. Further, they alleged that the 1<sup>st</sup> respondent had in the distribution taken a house that was meant for them. They sought to recover the house. If the two respondents were unwilling or unable to give them the 20 acres, they asked that all the respondents be made to pay them Kshs.35 million being security in default of their not surrendering the land.

3. In the replying affidavit sworn by the 2<sup>nd</sup> respondent on his behalf and on behalf of the 1<sup>st</sup> respondent, he stated that at the time of the confirmation of the grant land parcel Kajiado/Olchoro-Onyore/1713 was said to be about 200 acres. On survey, however, it was found to be 165 acres and therefore each beneficiary suffered a deduction in his/her acreage. It was also considered that the applicants' late father had before his death sold 3 acres (comprised in Kajiado/Ochoro-Onyore/7285) to one Johana Moiko and another 3 acres (comprised in Kajiado/Ochoro-Onyore/7287) to one M W G. This, according to the two respondents, had reduced the applicants' entitlement by 6 acres. Further, 18 acres of the estate (comprised in Kajiado/Ochoro-Onyore/7288) had been sold at Kshs.200,000/= to get Kshs.3,600,000/= which proceeds and gone to develop Plot 1 Kiserian. The development had produced 18 shops which had been shared among the beneficiaries. The applicants had been allowed two shops. The two shops represented four acres. After the 6 acres that their father had allegedly sold, what was left was 10 acres which the two respondents say they were willing to surrender to the applicants for each to get 5 acres. As for the vehicle, the two respondents stated that the same was bought by the 2<sup>nd</sup> respondent from one Elijah Roimen in 1997 for Kshs.70,000/= , and therefore it did not belong to the estate of the deceased.

4. The applicants swore a supplementary affidavit to deny the claims in the replying affidavit. Their case was that prior to the distribution of the estate, the acreage of land parcel Kajiado/Ochoro-Onyore/1712 had been confirmed, and therefore the alleged survey that reduced the acreage was a ploy to disinherit them. In any case, they stated, if there was a survey that had reduced the acreage the respondents were duty-bound to go back to court to have the certificate of confirmation amended and/or rectified to reflect the new shares. Secondly, it was the applicants' case that their father (who died in 2000 and not in 1998 as had been alleged by the respondents) had sold only 3 acres to one John Masine Moiko, and that that was acknowledged in the certificate of confirmation. The alleged sale to Margaret Wanjiku Gathigi was denied, and the same had not been shown in the certificate. They (the applicants) asked for their 10 acres each. They were silent on the issue of the shops.

5. Mr. Ayieko represented the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The other respondents and the applicants were not represented. The court was addressed on the applications by the parties.

6. The grant in respect of the deceased was confirmed on 19<sup>th</sup> November 2002. That was when the estate was distributed. The applicants' father may have died in 1998, or 2000. Either way, that was before the grant was confirmed and the estate distributed. The applicants were minors, and the 1<sup>st</sup> to 4<sup>th</sup> respondents were the administrators of the estate of the deceased. If the applicants' father had sold any land prior to his death, this was information within the respondents' knowledge which ought to have been factored in the confirmation of the grant. It was not. Instead, the 1<sup>st</sup> and 2<sup>nd</sup> respondents each agreed to be registered to hold 10 acres in trust for the applicants. If the survey revealed less acreage which affected what each beneficiary was going to get, the matter was not brought to the attention of the court to vary each beneficiary's interest. As things stand, the certificate of confirmation which was issued has not been amended or varied. The factual and legal position is that the 1<sup>st</sup> respondent is registered to hold 10 acres in trust for the 1<sup>st</sup> applicant and the 2<sup>nd</sup> respondent is registered to hold 10 acres in trust for the 2<sup>nd</sup> applicant. Each applicant is now an adult. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were registered under **section 84 of the Law of Succession Act (Cap 130)** to be trustees for the applicants. A trust is defined in **Black's Law Dictionary, 9<sup>th</sup> Edition at page 1947** to mean:-

**“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settler) for the benefit of a third party (the beneficiary).”**

7. It is trite law that a trustee is given the legal title to the trust property, but is obliged to act for the good and benefit of the beneficiary (**C.A.A. –V- R.P. and DP.V. [2014]eKLR**). The trust is automatically terminated when its purpose is fulfilled, or when the purpose becomes illegal, impossible, impractical, or contrary to public policy. In this case, the trust was supposed to terminate when the applicants attained the age of majority. That time came and has passed. The respondents are therefore under a legal duty to convey the trust property to its owners. These are the reasons why I allow the application and order the 1<sup>st</sup> respondent to immediately transfer 10 acres to the 1<sup>st</sup> applicant, and the 2<sup>nd</sup> respondent to immediately transfer 10 acres to the 2<sup>nd</sup> applicant.

8. In the petition filed for grant of letters of administration of the estate, the deceased was not shown to be the owner of motor vehicle registration number [particulars withheld] and therefore no claim can be legitimately made by the applicants over the same. Secondly, the sale of the deceased 18 acres comprised in Kajiado/Olchoro-Onyore 7288 to get Kshs.3,600,000/= to build shops was an arrangement outside the trust that was created in the confirmation of grant. The applicants cannot have the said two shops and insist on the 10 acres each at the same time. If, therefore, any shops have been given to them (the applicants) they should be surrendered upon their getting 10 acres each as ordered above.

9. I dismiss the application in respect of the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents. In respect of the two applications, I ask that, because this was a family dispute, each party bears own costs.

**DELIVERED AND SIGNED this 18<sup>TH</sup> day of JULY 2016.**

**A.O. MUCHELULE**

**JUDGE**