



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**SUCCESSION CAUSE NO. 477 OF 2009**

**IN THE MATTER OF THE ESTATE OF ALLAN OTIENO OCHOGO (DECEASED)**

**BETWEEN**

**LOICE WANGUI KAMAU.....APPLICANT/PETITIONER**

**AND**

**ESTHER APIYO OCHOGO.....1<sup>ST</sup> PROTESTOR/RESPONDENT**

**ALFRED OCHIENG OPIYO.....2<sup>ND</sup> PROTESTOR/RESPONDENT**

**EVANCE OMONDI OPIYO.....3<sup>RD</sup> PROTESTOR/RESPONDENT**

**RULING**

1. This matter concerns the estate of **ALLAN OTIENO OCHOGO** (“the deceased”) who died on 19<sup>th</sup> December 2005. After his death, **JAMES KAMAU KIMANI** (“Kimani”) cited **ESTHER APIYO OCHOGO** to take out letters of administration for his estate in August 2009. According to the citation, Kimani had purchased part of parcel **KISUMU/NYALUNYA/2295** (“Plot 2295”) from the deceased. In the course of the proceedings Kimani died and his wife, Loice Wangui Kimani, took over his estate having been granted letters of administration ad litem by the court.

2. On 16<sup>th</sup> March 2010, **LOICE WANGUI KAMAU** (“Loice”) was granted leave to file the petition in respect of the deceased’s estate. She filed her petition claiming the 0.19 hectares of Plot 2295 which her husband, Kimani, purchased from the deceased. When Loice applied for confirmation by the summons dated 3<sup>rd</sup> January 2013, a protest was lodged by **ALFRED OCHIENG APIYO** (“Alfred”), **EVANCE OMONDI APIYO** (“Evan”) and **ESTHER ANYANGO OPIYO** (“Esther”). The ground of their protest is that Loice is a stranger as she is not a beneficiary of the deceased’s estate.

3. According to their testimony, Plot 2295 belonged to **JACOB OCHOGO WERE** who begot two sons, **PATRICK APIYO OCHOGO** (deceased) and the deceased. Esther is the wife of Patrick and the mother of Evan while Alfred is the son of the deceased. They contend that though the property was registered in deceased’s name, it was held interest for the family as it was ancestral land. They confirmed that the deceased and his brother were buried on the land and that they reside on the land.

4. This matter at hand is about confirmation of the grant, the issue is not about administration of the estate since it is now clear that the time for lodging an objection under **Rule 17** of the **Probate and Administration Rules** had since passed. The issue for consideration is whether the portion of Plot 2295 claimed by Loice as administrator of the estate of **JAMES KAMAU KIMANI** is part of the deceased’s

estate available for distribution to the beneficiaries.

5. It is clear that notwithstanding that the deceased was trustee for his brother, he was the registered owner of Plot 2295. He had capacity to dispose of the property and from the documents annexed to the affidavit of Loice sworn on 23<sup>rd</sup> February 2016, he sold it to Kimani. Kimani was a bonafide purchaser and as is evidenced from the sale agreement, the mutation forms and the application for Land Control Board Consent. These documents were not disputed by the protestors. I therefore find and hold that, in his life time, the deceased sold 0.19 hectares of Plot 3395 to Kimani and the only step left was to complete the transaction.

6. Mr Mwamu suggested that the transaction was void as the title deed was issued after the transaction was done. In my view this is not correct. The title deed shows that the register was opened on 10<sup>th</sup> July 1991 which was before the transaction commenced and that by the time the deceased was selling the property he was already the registered owner. Moreover, the protestors did not prove that Kimani had notice of the trusts before he consummated the transaction.

7. I therefore grant the summons for confirmation dated 3<sup>rd</sup> January 2013 to the extent that a partial confirmation shall issue in favour of the applicant, Loice Wangui Kamau, for 0.19 Hectares of **KISUMU/NYALUNYA/2295**.

8. As there remains property administered, a grant of letters of administration shall now issue favour of **ALFRED OCHIENG OPIYO, EVANCE OMONDI OPIYO** and **ESTHER APIYO OCHOGO**. They shall apply for confirmation within 60 days.

9. There shall be no order as to costs.

**DATED and DELIVERED at KISUMU this 6<sup>th</sup> day of October, 2016**

**D. S. MAJANJA**

**JUDGE**

Moses J. A. Orengo, Advocate instructed by the applicant.

Mr Mwamu instructed by Mwamu & Company Advocates for the protestors.