



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 91 OF 2015

**IN THE MATTER OF THE ESTATE OF THE LATE KERA LONDIARA LWANGU AKA
KEPHA ODIARA.....(DECEASED)**

IN THE MATTER OF REVOCATION OR ANNULMENT OF GRANT

BETWEEN

**JANE AKEYO OTIENOINTERESTED PARTY /
APPLICANT**

**CATHORINA AOKO OTIENOINTERESTED PARTY /
APPLICANT**

VERSUS

**SAMWELANGANO JAVAN (LEGAL REPRESENTATIVE ADMINISTRATOR OF THE
ESTATE OF KERA LONDIARA
LWANGURESPONDENT**

RULING

1. Upon the death of **KERA LONDIARA LWANGU** alias **KEPHA ODIARA**, his grandson **SAMWEL ANGANO JAVAN** petitioned for grant of Letters of Administration and successfully obtained a Certificate of Confirmation of grant. The grant had been issued on 24th June, 2015 and confirmed by 3rd September, 2015 before the lapse of six (6) months.

2. The only asset for distribution was parcel No. **SUNA EAST / KAKRAO/475** which was shared amongst:-

SAMWEL ANGANO JAVAN	-	1.89 Ha
SILUS RUGADIVU LWANGU	-	1.00Ha
DANIEL MAGASU LWANGU	-	1.90 Ha
FILIS NGATIA LWANGU	-	1.00Ha

Subsequently, the subdivision was effected and the beneficiaries now have separate / individual Titles borne out of the original parcel, comprising Titles No

3. The applicants depose that both the petition and the Assistant Chief's letter dated 27th January, 2015 conceals material facts that the applicants herein are equally interested parties to the Deceased's estate.
4. Further, that there is a boundary on the parcel of land that determine the part owned by **KEPHA ODIARA's** family, and the other owned and possessed by the late **OLWENYA's** family including the wives to his late son, being the applicant herein.
5. It is pointed out that the 1st and 2nd applicants have lived in the lower portion of the said land since 1980 and 1967 respectively, and their late husband had even sold part of that land to other Third parties over the years.
6. The applicants also rely on a surveyor's report which confirmed that the applicants were in occupation of the land. It is deposed that the sub-division of the whole land in favour of the Respondents to the exclusion of the Applicants is unjust and unlawful. The applicants say they have nowhere else to call home and the place has serious sentimental significance as their father – in – law and husband 's remains are buried on the said land. They maintain that their occupation should have been factored during the distribution.
7. The applicants therefore pray that this court issues orders preserving the status quo of the estate of **KERA LONDIARA aka KEPHA ODIARA** as at 22/09/15 when no title had been issued over the new subdivisions of the parcel No. **SUNA EAST / KAKRAO/475**.
8. The court is also urged to grant orders restraining the respondent, his agents, servants, representative and relatives from further sub-dividing, disposing, demarcating and / or in any other way adversely to interfere with the said subdivided parcels in a way prejudicial to the applicants.
9. The applicants also pray that the certificate of confirmation issued to **SAMWEL ANGANO JAVAN** on 3rd September, 2015 be revoked. In the alternative applicants pray that the original parcel be subdivided afresh to include the applicants portions.
10. The applicants describe themselves as co-wives of the later **PHILIP OTIENO OLWENY** whose father, the later **OLWEYA OSORIO** sold part of parcel No. **SUNA EAST/KAKRA/475** to the late **KEPHA ODIARA** for one cow.
11. In opposing the application, the Respondent (Petitioner) deposed in a replying affidavit that as a grandson of **KERA LONDIARA LWANGU**, he is the bona fide administrator of the estate, and the asset in question formed part of his grandfather's estate as he had purchased it from **OLWEYA OSORO**, vide an agreement dated 19/07/1961. Pursuant to that agreement the deceased got registered as the owner and subsequently obtained a title deed.

In his capacity as administrator of the estate, he begun the process of succession by distributing the land left by the deceased, including the deceased other grandson. He contends that the applicants have no valid claim over that land.
12. The applicants oppose this saying that even if Kepha bought the entire parcel he held a portion of it in trust for their husband.
13. The application was disposed of by way of affidavits and written submissions, but as at 13/09/16 only the applicant's counsel had filed his submissions arguing that the applicant are entitled to file the summons for revocation of grant as interested parties under Rule 44 (1) of the Probate and Administration Rules and that a survey report indeed confirmed that they were in occupation of part of parcel No. 475 and there is a 50 year boundary existing between the families.
14. The registration of the land in the name of the late Kepha Odiara is termed as mysterious, and that the Respondent feared to disclose to the court the fact about the applicant's occupation.

15. It is also argued that this court has power to grant orders of injunctions, so as to meet the ends of justice. In this regard reference is made to the decision by Lenaola (J) (as he then was) in the case of ESTATE OF ISAKA MUTHEMBWA KITHOME where he stated that the court is under an obligation to decide all questions before it to meet the ends of justice and without undue regard to technicalities and buttresses this by referring to the decision in HCSC NO. 2226 OF 2008 LUCY WANJIKU KIBABA AND ANOR VS. LUCY WANJIKU MUCHENE { 2013}e KLR where the judge stated.

“ Technicalities of procedure in Succession matter are treated less seriously than in civil matters because of the nature of Succession proceedings and the great need to focus on substance with a view to do justice to the parties.”

16. Counsel also invokes the provision of Article 159 (2) of the Constitution of Kenya which enjoins court to administer justice without undue regards to technicalities

17. It is not disputed that the land which formed the assets for distribution in the Estate of Kepha Odiera was and is actually registered in his name- whether he got it registered as a consequences of a barter trade, actual sale or trickery of an undisclosed nature – the parcel is in his name and would thereafter be available in the list of assets for distribution.

18. It is also not disputed that the applicants have been in occupation of a portion of that land for a long period- this was confirmed by the Surveyors report.

19. Was the late Kepha Odiara registered as trustee? That is simply a claim by the applicant – not a single document has been presented to confirm that position. Certainly it is not a prima facie position that any matter touching on land must be filed and determined by the Environment and Land Court because where a party is able to demonstrate that they are beneficiary to the estate and they contest distribution of an assets which is land, it will be filed as Succession Cause. I refer also to practice directions on proceedings in Environment and Land Courts Kenya Gazette Notice No. 5178/2014.

20. However my concerns here is that all that is presented to this court does not portray the applicants as beneficiaries who are surviving the estate of Kepha Odiara. What they claim about him being a trustee or their victims of fraudulent registration, would place them as litigants seeking specific performance- ie that the portion of land they have lived on should be transferred to them either as bone fide owners (which ownership has not been demonstrated) or by virtue of their prolonged occupation under the doctrine of adverse possession.

21. The issue raised by applicants infact revolve around right to occupy and use land as there is nothing presented to boost .the claim on heirs to the estate and I have no doubt in my mind that there is no basis on issuing orders sought whatsoever. This is not a technical aspect, it is factual.

22. Consequently the application be and is hereby dismissed.

DATED, SIGNED and DELIVERED at MIGORI this 11th day of November, 2016

H. A. OMONDI

JUDGE