



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**SUCCESSION CAUSE NO. 547 OF 2010**  
**IN THE MATTER OF THE ESTATE OF**  
**OPONDO OGAMA (DECEASED)**

**BETWEEN**

**JOHN OTIENO OGAMA.....APPLICANT**

**AND**

**KHADIJA JEDDA OLUOCH.....RESPONDENT/PETITIONER**

**RULING**

1. This matter concerns the estate of **Opondo Ogama** (“the deceased”) of Kagilo Sub-location, Central Gem Location, Siaya County who died on 12<sup>th</sup> April 1994. The petition for grant of representation of his estate was taken out by his granddaughter, Khadija Jeddah Oluoch (“Khadija”). She stated that she was the deceased’s only survivor and that she was entitled to his only property; **EAST GEM/KAGILO/980** (“**Plot 980**”). The grant of letters of administration intestate was issued on 21<sup>st</sup> October 2010 and confirmed in her favour on 13<sup>th</sup> May 2011. She later sold the land to Josiah Ochieng Onyulo.

2. The applicant, John Otieno Ogama (“John”) moved the court by way of Notice of Motion dated 10<sup>th</sup> April 2012 under **section 76** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** seeking to nullify and set aside the grant issued in favour of Khadija. He also sought an order directing the Land Registrar Siaya to cancel the title deed issued in favour of Khadija and issue it in the name of John and Margaret Ouma Ogama (“Margaret”). The application was supported by John’s affidavit sworn on 10<sup>th</sup> April 2012. The thrust of the application is that Khadija is a stranger and is not related to the deceased in any way and was not entitled to take out the grant of representation of his estate.

3. Khadija filed a replying affidavit sworn on 8<sup>th</sup> February 2013 denying the applicant’s claims. While Chemitei J., heard the testimony of John (PW 1), I took the evidence of all the other witnesses; Margaret (PW 2), Peter Ogama Ouma (PW 3), John Ogama Okumu (PW 4), Kevin Oyoo Ouma (PW 5), Samson Ogama Oloo (PW 6), Simon Okoth Obiero (DW 1), Khadija (DW 2), Dalmas Owuor Oluoch (DW 3) and John Okoth Oreche (DW 4). In addition, the parties adopted their witness statements.

4. After hearing the witnesses, several non-contentious issues emerged from the evidence. The parties in contention are all descendants of Patroba Ogama Oluoch (“Patroba”) who had 2 wives and 5 sons. The first wife Ajula had three sons; Barrack Ogama, Opondo Ogama (the deceased herein) and Joseph Opondo Ouma. The deceased had two children; Alice Ouma and Tom Oluoch (“Oluoch”). Joseph Opondo is the husband to Margaret (PW 2) and the father to Peter Ogama Ouma (PW 3) and Kevin Oyoo

Ouma (PW 5). Patroba's second wife, Gladys, begot two sons; Raphael Oguta Ogama and John who is the only surviving son of Patroba.

5. The applicant's case is that Khadija was not the biological daughter of Oluoch because by the time he married his wife Zainab, she already had Khadija. John told the court that Oluoch came to back to Kagilo after being away for a long time with a wife, Zainab who had a daughter by the name Khadija, who was 13 years old at the time. They stayed there for about 8 months then Zainab left. He further testified that prior to his death, Oluoch had already divorced Khadija's mother, Zainab who returned to her former husband where she later died and was buried in a cemetery. He testified that when Oluoch died Khajida did not attend his funeral. He also stated that Khadija went back to reside with her biological father and only resurfaced to take out letters of administration for the deceased's estate.

6. As regards **Plot 980**, Oluoch testified that the deceased had allowed him and Margaret to cultivate the plot and that they have been doing so since the 1970's. He prayed that the land be given to him and Margaret. When cross-examined about the land, John told the court that although Patroba had 5 sons, he only gave 4 of them land. He expected that as the last born he would inherit **Plot 980**. He also confirmed that Joseph and Barack had been given their own land.

7. Margaret supported John's case. She also testified that Oluoch was married to Zainab and they only stayed together for 8 months before she left. She told the court that by the time Oluoch died, she had been cultivating **Plot 980** for a long time. She admitted in cross-examination that her husband, Joseph had his own land. Margaret son's PW 3 and PW 5 supported their mother and were concerned that **Plot 980** was sold illegally. The deceased's cousin, PW 4, told the court that **Plot 980** was sold without the consent of the family while PW 6 testified that Patroba gave all his sons land except John who was the last born and who was still in school. PW 5 vehemently denied that he knew or saw Khadija attending Olengo Primary School.

8. Khadija (DW 2) testified that she was the only daughter of Oluoch and Zainab. She produced her birth certificate showing she was born on 27<sup>th</sup> February 1985. She told the court that she was educated at Olengo Primary School within Kagilo and completed her KCPE there in 2000. She produced her original report book and KCSE certificate. She recalled that when her father died in 2008, she went home but was told by PW 2 that she did not belong there. Her mother died in 2005 after ailing for some time. Khadija told the court that she tried to involve John and the family in the succession issue but they refused to help her so she approached the Assistant Chief of Kagilo Sub-location, Simon Okoth Obiero (DW 1) to write the letter of introduction to the court. Because of the hostility she faced from the family, she decided to sell the land after confirmation of the grant.

9. DW 1 testified that to his knowledge, Khadija was Oluoch's daughter and that she grew up in the area. He stated in cross-examination that when he called John and his family to attend a meeting to discuss the succession issue, he did not get a response so he went ahead and wrote the letter to the court introducing Khadija. Oluoch's maternal uncle, Dalmas Owuor Oluoch (DW 2), recalled that Oluoch went to work in Mombasa after which they lost touch. He returned in 1996 with his wife Zainab and daughter Khadija and they settled at Kagilo. After a few months, Zainab started ailing and left for Kisumu. Likewise, Oluoch started ailing and went to live with him where he died. DW 2 organised for him to have an Islamic burial at Kagilo. He recalled that before he died, the deceased called Khadija and gave her the details of **Plot 980** and the deceased's identity card number to enable her take the property.

10. DW 4 told that he was involved in community policing in Kagilo. He also knew the Ogama family as they shared the same grandfather. He told the court that he started seeing Khadija in 1996 when she came back with Oluoch and Zainab from Mombasa. He recalled that Oluoch built his home on **Plot 980** while Khadija went to Olengo Primary School with his son and PW 5. He testified that Patroba gave land to all his sons including John and that it is Khadija who was entitled to the deceased's land. He also told the court that since the death of Oluoch, the other members of the family had been hostile to Khadija.

**Sections 107, 108 and 109** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* embody the general principle that the legal burden of proof lies upon the party who invokes the aid of the law and

substantially asserts the affirmative of the issue. The applicant thus bears the burden of proving that Khadija is not the child of Oluoch. It is also well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable.

12. The key witnesses regarding the paternity of Khadija, PW 1 and PW 2 gave evidence limited to the fact that Oluoch and Khadija appeared at Kagilo in 1996 and stayed for 8 months. What they said about the relationship between Oluoch and Zainab appeared to be based on rumour and supposition. I was not impressed by the demeanor which was hostile to Khadija. I also note that PW 5 vehemently denied that Khadija was a student at Olengo Primary despite them being contemporaries. John and his witnesses did not know Oluoch or his prior antecedents very well or if they did they were not disclosing what they knew. On the other hand, Khadija's witnesses, DW 3 and DW 4 gave an account of the fact that Oluoch went to work in Mombasa and returned with a wife and child. There is evidence that Khadija went to school at Olengo Primary School and completed her KCPE there in 2000. I found the testimony of DW 3 most credible because he is the one who was with Oluoch when he died and took it upon himself to ensure that Oluoch was given an Islamic burial. Oluoch had confidence in DW 3 and I accept his evidence that Khadija was the daughter of Oluoch. I am not convinced that the applicant discharged his burden to prove that Khadija was not the daughter of the deceased.

13. I would be remiss if I did not deal directly with the issue of **Plot 980** which is at the heart of this dispute. John supported by Margaret suggested that the land was family land and was to be given to him as Patroba's last born son. When pressed in cross-examination, he told the court that his father, "*wanted [him] to inherit a plot which is not numbered.*" Obviously, **Plot 980** was identifiable and numbered. DW 4's testimony that Patroba's children from the first wife were given land was unchallenged. Barrack was given **Plot 1050**, Oluoch given **Plot 980** and Joseph given **Plot 979**. It was thus not possible, as contended by John and Margaret, for a son of Patroba's first wife to be left without land. All witnesses accepted that when Oluoch came back home he constructed his house on **Plot 980** and was buried there. John did not deny DW 4's assertion that he was given **Plot 924** which he now occupies. From the totality of the evidence, I find and hold that all Patroba's sons were given land on which they settled. At any rate the evidence is inconsistent with the John's assertion that **Plot 980** was family land and that he or any other family member expected to inherit it. I find and hold that **Plot 980** was given to Oluoch by his father, the deceased, and that the other members of the Ogama family cannot lay claim on it as they were well provided for by Patroba. It now belongs Khadija who is the only survivor of Oluoch. Once the grant was confirmed she was entitled to dispose of it and she did so in the face of hostility she faced from the members of Ogama family.

14. The net result of my findings is that Khadija did not conceal any material facts when she applied for grant of representation of the deceased estate or obtain the letters of administration for the deceased's estate fraudulently.

15. The application dated 10<sup>th</sup> November 2012 is dismissed.

16. There shall be no order as to costs.

**DATED and DELIVERED at KISUMU this 5<sup>th</sup> day of December 2016**

**D. S. MAJANJA**

**JUDGE**

Applicant in person.

Mr Odeny instructed by Bruce Odeny & Company Advocates for the respondent.