



REPUBLIC OF KENYA

High Court at Kakamega

Succession Cause 233A of 1989

IN THE MATTER OF THE ESTATE OF KANDIRI OCHIENG[DECEASED]

SAULO ODINGA OCHIDO PETITIONER

V E R S U S

JOSEPH ASWANI OCHIDO OBJECTOR

R U L I N G

This succession cause relates to the estate of the late KANDIRI OCHIENG who died on the 16th July 1971. The petitioner, SAULO ODINGA OCHIDO filed this cause and was issued with a grant of letters of administration on the 25th of March 1996. A certificate of confirmation of the grant was issued on the 19th March 1997 to the petitioner. The petitioner is the grandson of the deceased.

On the 4th of March 2004 STEPHEN OCHIDO KANDIRA filed an application seeking to have the grant revoked for various reasons. Stephen Ochido Kandira is the petitioner's father. Stephen Ochido Kandira died on the 7th of July 2006 and his other son, JOSEPH ASWANI OCHIDO took over the objection proceedings.

Parties agreed to proceed by way of oral evidence. The objector, Joseph Aswani Ochido testified that his late grandfather, Kandira Ochieng had two sons namely:-

- (1) Stephen Ochido Kandira**
- (2) Sylvanus Ochieng Kandira**

According to the objector, their grandfather gave plot number **KISA/MWIKALIKHA/1605** measuring three (3) acres to their late father, Stephen Ochido Kandira. Their uncle, Sylvanus Ochieng Kandira is alive. Their father had five sons namely:-

- (i) Maurice Ochume Ochido**
- (ii) Andrew Munudi Ochido (deceased)**
- (iii) The objector – Joseph Aswani**
- (iv) Eldon Ochido**
- (v) Saulo Odinga Ochido – the petitioner**

The objector's further evidence is that Maurice Ochido was given his plot number 1390 and does not claim any portion of land from plot 1605. The petitioner did the succession without involving them and has himself registered as the proprietor of plot number 1605 in 1997. Upon being registered as the owner, the petitioner send his brothers a demand letter dated 27th January 2004 from his Advocates (Wanyama & Company) demanding them to stop ploughing his plot number **KAKAMEGA/MWIKALIKHA/1605**. The matter was reported to the local District officer and the petitioner agreed to cancel his title and have the land sub-divided. By that time their late father was present. However, the petitioner later changed his mind after he had signed the transfer forms. The transfer forms were produced in support of the petitioner's contention.

In is the objector's further evidence that four brothers have built their houses on plot number 1605 where they live with their families and do not have anywhere to go. The objector is also utilizing plot number 1437 measuring 0.4 acres that was given to him by his late father. The objector would like to have plot number **KISA/MWIKALIKHA/1605** divided equally amongst four sons with each getting 0.75 acres.

SYLVANUS OCHIENG KANDIRA testified as the second witness for the objector. He is the son to the late Kandira Ochieng and a brother to the late Stephen Ochido. It is his evidence that his brother, Stephen Ochido was given 3 acres of land this being plot number 1605 by their father. His brother has five sons. He would like to have the land shared equally amongst the sons. It is his further evidence that his cousin, **MOSES ESHIWANI NGESA** has no interest on plot number 1605 as he was given his own land.

ANDREA SANDE OCHIENG testified as the 3rd witness for the objector. His evidence is that the late Stephen Ochido was his uncle who had five sons. Four sons have built on plot number 1605 and have no other land to go to.

On his part, the petitioner, **SAULO ODINGA OCHIDO**'s testimony is that the late Kandira Ochieng was his grandfather and that the late Stephen Ochido was his father. He lives on plot number 1605 with **MOSES NGESA**. His late father had his own plot number **KISA/MWIKALIKHA/1390** by his grandfather and he had it registered in the names of his son, Maurice Ochido. His prayer is that plot number 1605 be given to him and **MOSES NGESA** his uncle. According to the petitioner, his other brothers live on plot number 1605 and he has not asked them to move.

MOSES ESHWANI NGESA testified as the second witness for the petitioner. His evidence is that he lives with the petitioner in the same homestead. The late Kandira Ochieng was a brother to his father. His father's name was Benjamin. It is his evidence that the rightful inheritor for plot number 1605 is Saulo, the petitioner, and himself. His further evidence is that he was given plot number 1418 by his grandfather which is now in his name. His mother Rael lived on plot number 1605.

PATRICK ASWANI OCHIENG (DW3) testified that plot number **KISA/MWIKALIKHA/1605** belongs to Moses Eshiwani Ngesa. Moses's father was dumb and his mother took care of the land. Moses authorized the petitioner to have the land registered in his name.

From the above evidence, it is established that the late **KANDIRA OCHIENG** was the father of the late **STEPHEN OCHIDO KANDIRA**. Kandira Ochieng is the grandfather of both the objector, Joseph Aswani Ochido and the petitioner, Saulo Odinga Ochido. Plot number **KISA/MWIKALIKHA/1605** was registered in the names of **KANDIRA OCHIENG**. On 25.3.197, the petitioner had himself registered as the proprietor and he was issued with a title deed. This was three days after he had been issued with a confirmed certificate of grant on 19th March 1997.

It is also clear from the evidence that the petitioner filed this succession cause without involving his late father or his brothers. It is the petitioner's evidence that his father was given his land and he sold it. He was also given plot number 1390 measuring about two acres and he decided to register it in his son's name, Maurice Ochido. The deceased herein was his grandfather.

Section 38 of the Law of Succession Act, Cap 160 Laws of Kenya states as follows:-

“38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

The evidence on record shows that when Kandira Ochieng died, his two sons, Stephen Kandira and Sylvanus Ochieng Kandira were alive. Sylvanus testified that he was given his own land and that plot number 1605 was for his brother, Stephen Kandira. It is therefore established that the late Stephen Kandira was the rightful person who was to file the succession cause. The petitioner herein is a grandson. The deceased had other grandsons and there is no proof that the late Kandira Ochieng had given plot number 1605 to the petitioner.

When the petitioner filed this cause, he indicated that he was the deceased's grandson. He did not indicate his brothers as beneficiaries and neither did he include his uncle and friend, Moses Eshwani Ngesa with whom he would like to share plot number 1605. The petitioner's father filed the objection proceedings and correctly so as he was the best person who ought to have filed the succession cause. There is no evidence that plot number 1605 belongs to Moses Eshwani Ngesa as alleged by DW3, Patrick Aswani Ochieng. The plot belonged to the deceased, Kandira Ochieng who was the registered owner before the petitioner secretly had himself registered after he was issued with a confirmed certificate of grant.

I am satisfied that the grant herein was obtained fraudulently and through the making of false statement. The deceased's two sons, namely Sylvanus Ochieng Kandira and Stephen Ochido Kandira were still alive when the petitioner, who is a grandson applied for the letters of administration. There is no evidence that the petitioner was a dependant of the late Kandira Ochieng and even if he were, there were two other beneficiaries who ranked higher in terms of dependency than the petitioner. These are his late father and his uncle Sylvanus Kandira.

In the end, the application dated 4th March 2004 is granted as prayed. The certificate of confirmation of grant issued to the petitioner on 5th January 1996 and confirmed on 19th March 1997 is hereby revoked. The registration of the petitioner as the proprietor of plot number **KISA/MWIKALIKHA/1605** is hereby cancelled and the Land Registrar, Kakamega is hereby directed to restore the above property into the names of the original owner, **KANDIRA OCHIENG**. A fresh grant confirmed grant to be issued to the objector **JOSEPH ASWANI OCHIDO**. The deceased's estate comprising of plot number **KISA/MWIKALIKHA/1605** to be distributed as follows:-

- (i) SAULO ODINGA OCHIDO - 0.75 ACRES**
- (ii) JOSEPH ASWANI OCHIDO - 0.75 ACRES**
- (iii) ENOCK OLINGA MUNUDI - 0.75 ACRES**
- (iv) ELDON OWINO OCHIDO - 0.75 ACRES**

Enock Olinga Munudi should take into account the fact that he shall hold the share of his deceased father, Andrea Munudi Ochido, in trust for his own benefit and for the benefit of his brothers, sisters, mother(s) and other dependant of his father.

In view of the greed exhibited by the petitioner, I do order that he meet the objector's costs of this application.

Delivered, dated and signed at Kakamega this 11th day of October 2012

SAID J. CHITEMBWE
J U D G E