



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Masime, Gicheru & Kwach JJ A)**

**CIVIL APPEAL NO 146 OF 1990**

**JONATHAN ORENGO OBIAYO.....APPELLANT**

**AND**

**MOSES ONDIEGI OKOTH.....RESPONDENT**

**(Appeal from the Ruling and order of the High Court of Kenya at Kisumu (Omolo, J) dated 2nd July, 1990**

**in**

**HCCC No 138 of 1987)**

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**JUDGMENT**

Jonathan Orengo Obiayo (the appellant ) is the registered proprietor of land parcel title No North Nyakach/Agoro West/721 measuring approximately 1.0 hectare. The said parcel of land was first registered in the appellant's name on 12th September, 1975 following land adjudication in 1972.

The appellant is aggrieved by the decision of the superior court (Omolo J ) made on 10th September 1990 whereby he refused to strike out a plaint filed by the respondent Moses Ondiegi Okoth and gave the said respondent leave to amend the plaint. In the said plaint the respondent claimed the suit land as an heir of his father who had died in 1985; the plaint was filed on 5th August 1987 by the respondent without obtaining a grant of letters of administration to the estate of his father.

By his Chamber Summons filed in Court seeking to strike out the plaint the appellant took two objections to the plaint. First that the respondent personally had no cause of action against the appellant and having not applied for and obtained a grant of letters of administration to the estate of his father the suit was incompetent. Secondly the appellant argued that as the title was a first registration the prayers sought in the plaint were unavailable in view of section 143 (1) of the Registered Land Act (cap 300).

The learned trial Judge appreciated both these objections but thought that to uphold them would be too hard on the respondent. He therefore refused to strike out the plaint and instead allowed the respondent time to amend the plaint to substitute a cause of action based on trust. As regards the first objection the learned Judge held that the grant of letters of administration obtained by the respondent after the filing of the plaint enabled him to maintain the plaint. It is these three decisions that the appellant challenges in this appeal.

Dealing with the first ground of appeal, it is noted that section 82 (a) of the Successin Act (cap 160) empowers personal representatives

“to enforce, by suit or otherwise all causes of action which by virtue of any law, survives the deceased or arise out of his death for his estate.”

This is however subject to any limitation imposed by their grant of letters of administration. Section 80 of the Act provides that a grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.

In view of these provisions the learned trial Judge was clearly in error to hold as he did that the grant obtained by the respondent after the date of filing the plaint was effective to validate the plaint. We therefore hold that the plaint was incompetent and ought to have been struck out. It is therefore, in our view, unnecessary to consider the other grounds of appeal. We allow the appeal, set aside the ruling of the superior court and strike out the plaint with costs of this appeal and in the Court below to the appellants.

Orders accordingly.

**Dated and delivered at Kisumu this 19th day of June , 1992**

**J.R.O MASIME**

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**JUDGE OF APPEAL**

**J.E GICHERU**

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**JUDGE OF APPEAL**

**R.O KWACH**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**