



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.96 OF 2015

DANIEL OMONDI OWIRA..... 1ST
PLAINTIFF/APPLICANT

SAMSON OKOME MORE.....2ND
PLAINTIFF/APPLICANT

**(SUING AS THE ADMINISTRATORS OF THE ESTATE OF ZEDEKIA OWIRA NYANDENGE
(DECEASED))**

VERSUS

ABISALOM OPIYO
NYAMHOREDEFENDANT

**(SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLS OPIYO ODUOR
(DECEASED))**

AND

MRS. Jael Nyangun Opiyo Matewa1ST
RESPONDENT

CALEB OCHIENG MATEWA.....2ND
RESPONDENT

RULING

1. Daniel Omondi Owira and Samson Okome More, the 1st and 2nd Plaintiffs respectively, seeks to have Mrs. Jael Nyangun Opiyo Matewa and Caleb Ochieng Matewa, the 1st and 2nd Respondents respectively, enjoined into this suit in place of

Absalom Opiyo Nyamhore the Defendant, who is now deceased. The application is based on the three grounds on its face summarized as follows:

- a. That the said Absalom Opiyo Nyamhore died on the 11th December 2015 and was buried on 29th December 2015.
- b. That the suit has survived the deceased, Absalom Opiyo Nyamhore.

c. That the deceased's widow and eldest son, the Respondents, should be substituted as the Defendants herein.

2. The application is also supported by the affidavit of the 2nd Plaintiff sworn on 20th April 2016, inter alia deponing that the suit survived the deceased as it relates to land and that the two Respondents should be substituted as the Defendants.

3. The application is opposed by the two Respondents through their replying affidavits sworn on 1st July 2016 in which they among others depones as follows;

- a. That the deceased, Absalom Opiyo Nyamhore, had in his replying affidavit sworn on 7th September 2015, in answer to the Plaintiffs notice of motion dated 14th August 2015, deponed that, he had wrongly been enjoined as a Defendant in the suit as a personal representative of the estate of **Willis Oduor Opiyo**, deceased. That he was not the next of kin of the deceased nor had he applied to be appointed the administrator of the estate or cited to take out the letters of administration.
- b. The Respondents adopted similar deposition to that of the said Absalom Opiyo Nyamhore, deceased in (a) above and raised a preliminary objection to the entire suit.
- c. That the said Willis Oduor Opiyo has two grown up children namely, Steve Odimo and Brenda Oduor plus a widow named Joice Owade, against whom the Plaintiffs should lodge their claim.

4. The application came up for hearing on the 7th November 2016 when Mr. Olel advocate for the Plaintiffs and the two Respondents made their oral rival submissions.

5. The following are the issues for determination by the court;

- a. Whether the Respondents are the personal representatives of Willis Oduor Opiyo, deceased.
- b. Whether the two Respondents have beneficial interest over the land in dispute that is plot No.2606/Usenge Land Adjudication Section.
- c. Whether the Respondents should be substituted as Defendants in place of Absalom Opiyo Nyamhore, deceased, who had been sued as a personal representative of the estate of Willis Oduor Opiyo (deceased).
- d. Who pay the costs.

6. The court has carefully considered the three grounds on the notice of motion, the affidavit evidence presented by both sides, the oral rival submissions, the pleadings filed and come to the following determinations:

- a) That the Plaintiffs had commenced this suit through the plaint dated 10th April 2015. That they named Absalom Opiyo Nyamhore, who was sued as a personal representative of the estate of Willis Oduor Opiyo (deceased), as the Defendant.
- b) That the pleadings filed by the Plaintiffs in support of their claim, especially paragraph 8 of the plaint, clearly shows that plot No.2606/Usenga Land Adjudication Section was registered in the names of Willis Oduor Opiyo who had died by the time the suit was filed.
- c) That as this court has had occasion to observe in its ruling dated 28th October 2015, in relation to the Plaintiffs notice of motion dated 21st August 2015, there has been no documentary evidence availed to confirm that the said Absalom Opiyo Nyamhore had been appointed under the Law of **Succession Act Chapter 160** of Laws of Kenya to represent the estate of the said Willis Opiyo Oduor. To date no such evidence has been availed.

d) That the Respondents have declined to be enjoined or substituted for the Defendant for the reasons that first, the Defendant had before his death protested being enjoined. Secondly that they do not have any interests over the land in dispute and have not themselves been appointed as administrators of the estate of Willis Oduor Opiyo, whom they deponed is survived by a widow and two grown up children.

e) That the Plaintiffs have not disputed the Respondents deposition that they have no interests over the suit land and that the said Willis Oduor Opiyo is survived by a widow and two grown up children. The Plaintiffs have not disclosed why their claim over the suit land that is registered in the names of Willis Oduor Opiyo cannot be pursued against the legal representatives of his estate.

7. That in view of the foregoing, the court finds that the Plaintiffs have failed to establish the existence of any interests that the

Respondents could be having over the estate of Willis Oduor Opiyo, to justify their being substituted as Defendants in place of Absalom Opiyo Nyamhore, who has since passed on. The notice of motion dated 12th April 2016 is without merit and is dismissed with costs to the two Respondents.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF FEBRUARY 2017

In presence of;

Plaintiffs 1st Present

Defendant Absent

Respondents 2nd Present

Counsel Mr. Mwesigwa for Olel for Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/2/2017

22/2/2017

S.M. Kibunja j.

Oyugi court Assistant

1st Plaintiff present

2nd Respondent present

Olel: Ruling delivered in open court in presence of the 1st Plaintiff, 2nd Respondent and Mr. Mwesigwa for Olel for Plaintiff only.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/2/2017