



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 750 OF 2015**

**IN THE MATTER OF THE ESTATE OF PIUS WERE OGADA (DECEASED)**

**AND**

**IN THE MATTER OF REVIEW OF ORDERS ISSUED ON 14TH DECEMBER, 2017**

**BETWEEN**

**EVALINE ATIENO WERE.....1ST PETITIONER/RESPONDENT**

**LINET ACHIENG WERE.....2ND PETITIONER/RESPONDENT**

**AND**

**DOMNIC NYAMEMA GOR.....CROSS-PETITIONER/APPLICANT**

**RULING**

**Introduction**

1. By a judgment dated 14th December, 2017, this court gave the following orders:

1) *The cross-Petitioner's claim over the deceased's estate is unmerited and it is accordingly dismissed*

2) *The grant is confirmed in the following terms.*

*a) Everline Atieno Were shall have a life interest in the whole of:*

*- Land parcel number Kisumu/Pandipieri/1108*

*- Land parcel number Kisumu/ Nyalenda B/391*

*- Land parcel number Kisumu/Nyalenda B/828*

*b) Thereafter, the 3 land parcels, named hereinabove, shall devolve in equal shares to the deceased's children*

*i. Linnet Achieng Were (daughter)*

*ii. Philip Odhiambo Were (son)*

*iii. Sharon Atieno Were (daughter)*

*iv. Phancy Akinyi Were (daughter)*

*v. Dominic Gor Were (son).*

2. Subsequently, a Certificate of Confirmation of grant issued on 14th December, 2017. By an order dated 18th April, 2018, the Certificate of Confirmation was rectified in the following terms:

*1) Land parcel number Kisumu/ Nyalenda B/391 to PHILIP WERE ODHIAMBO*

*2) Land parcel number Kisumu/Nyalenda B/828 to EVERLYNE ATIENO WERE*

*3) Land parcel number Kisumu/Pandipieri/1108*

*i. 1/3 to LINET ACHIENG WERE*

ii. *2/3 to EVERLYNE ATIENO WERE to hold in trust 1/3 for each of ELIZABETH ATIENO WERE and FANCY AKINYI WERE*

**Application**

3. By a notice of motion dated 13th June, 2018 and filed on 14th June, 2018, the cross-Petitioner/Applicant prays for orders that:

**1) The Honourable Court be pleased to review, vary and set aside its order/decreed and judgment made on 14th December, 2017**

**2) Costs of this application be provided for**

4. The application is based on the grounds among others that:

a) There was an error on the Kenya Gazette in that the name of deceased was written as **PIUS OGADA WERE** instead of **PIUS WERE OGADA**

b) The court did not observe Luo customary law relating to inheritance

c) The court ignored the cross-Petitioner's/applicant's witnesses

d) That all the land parcels of the deceased were not included in this cause

e) The court distributed deceased's estate to grandchildren before ownership of the land dispute could be resolved

5. The application is supported by an affidavit sworn by the cross-Petitioner/Applicant on 13th June, 2018 in which he reiterates the grounds on the face of the application. He avers that the respondents were not aware of the existence of *Land parcel number Kisumu/Pandipieri/1108 and Land parcel number Kisumu/Nyalenda B/828* until he mentioned them in his pleadings. He further avers that these two land parcels belonged to one **NJER ADERO** his forefather. The cross-Petitioner/Applicant also filed grounds of opposition dated 4.10.18 in which he

reiterated what is contained in his supporting affidavit.

6. The application is opposed on the basis of a replying affidavit sworn by the 1st Petitioner/Respondent on 31.8.18. She avers that *Land parcel number Kisumu/Pandipieri/1108; Land parcel number Kisumu/ Nyalenda B/391* and *Land parcel number Kisumu/Nyalenda B/828* form part of deceased's estate and were properly distributed to her as his wife and their children.

### **Analysis and Determination**

7. I have considered the notice of motion, the affidavits and grounds of opposition on record and I will endeavour to address each of the issues that the cross-Petitioner/Applicant has raised as follows:

#### **a) There was an error on the Kenya Gazette in that the name of deceased was written as PIUS OGADA WERE instead of PIUS WERE OGADA**

8. The deceased's certificate of death shows that his name is PIUS WERE OGADA. This cause was filed and all documents filed by the respondents are in the name of PIUS WERE OGADA. An error occurred at publication of the cause in the Kenya Gazette and the name was interchanged to read PIUS OGADA WERE.

9. The scope of access to justice as enshrined in Article 48 is very wide. Courts are enjoined to administer justice in accordance with the principles laid down under Article 159 of the Constitution. Article 159 (2) (d) of constitution states that Justice shall be done without undue regard to technicalities. The mix-up in the deceased's name is a technicality that does not go to the substance of this cause and would not be a ground for review.

#### **b) The court did not observe Luo customary law relating to inheritance**

10. No evidence was led regarding the Luo customary law of inheritance. In the impugned judgment, I ruled that the fact that the cross-Petitioner has inherited the deceased's wife does not in law entitle him to also inherit the deceased's estate because to hold otherwise would be to uphold a custom that is repugnant to justice and good order.

**c) The court ignored the cross-Petitioner/applicant's witnesses**

11. In the impugned judgment I analyzed the cross-Petitioner's/Applicant witness, one Sospeter Onyango Onditi and stated that he was of no assistance to court since what he knew about the registration of the land parcels in issue is what he was informed by the cross-Petitioner/Applicant.

**d) That all the land parcels of the deceased were not included in this cause**

12. It is indeed true that the respondents were not aware of the existence of *Land parcel number Kisumu/Pandipieri/1108 and Land parcel number Kisumu/Nyalenda B/828* until the applicant mentioned them in his pleadings.

13. There is no evidence that deceased's estate comprised of any other property other than the three parcels of land that have been distributed. Even if it is discovered that some properties were not included, the omission is lawfully corrected by way of rectification of the Certificate of Confirmation of grant and not by way of nullification of the grant.

**e) The court distributed deceased's estate to grandchildren before ownership of the land dispute could be resolved**

14. The applicant has not demonstrated that there exists any other dispute regarding the deceased's estate other than the one that was determined by this court. The deceased's estate was distributed to his wife and children.

15. Order 45 Rule 1 (1) of the Civil Procedure Rules states Any person considering himself aggrieved (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

16. The cross-Petitioner/Applicant has a right of appeal against this court's judgment dated 14th December, 2017.

He has not demonstrated the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the impugned judgment was passed, or some mistake or error apparent on the face of the record, or any other sufficient reason that would entitle him to an order of review.

**Disposition**

17. From the foregoing analysis, I have come to the conclusion that the notice of motion dated 13th June, 2018 has no merit and it is dismissed with costs to the Petitioners/Respondents.

**SIGNED AND DELIVERED AT KISUMU THIS 20th DAY OF December 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant** - Felix

**Petitioners/Respondents** - Present in person

**Cross-Petitioner/Applicant** - Present in person



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