



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION APPEAL NO. 1209 OF 2013**

**IN THE MATTER OF THE ESTATE OF**

**PETRO OYUGA OGEMBA *Alias* OYUGA OGEMBA (DECEASED)**

**IN THE MATTER OF ANNULMENT AND CANCELLATION OF GRANT**

**IN THE MATTER OF AN APPLICATION BY: JECKONIA ADUMA OMINO**

**AGNETA WANJERE OYUGA.....OBJECTOR/RESPONDENT**

**VERSUS**

**JECKONIA ADUMA OMINO.....RESPONDENT**

**RULING**

The Petitioner, **JECONIA ADUMA OMINO** has invoked the provisions of **Section 146** of the **Public Health Act** as the foundation of his application dated 21<sup>st</sup> July 2021.

1. Through the said application, the Petitioner sought orders for the exhumation of the body of **JAMES NYAMARE OYUGA** from

the Petitioner's portion of **L.R. NO. SOUTH GEM/RERA/818**.

2. The application is supported with the Petitioner's affidavit which was sworn on 21<sup>st</sup> July 2021.

3. It was the Petitioner's case that he represents the estate of his deceased grandfather, **MBULO OGEMBA**, who was holding in trust,

the whole parcel of land **L.R. NO. SOUTH GEM/RERA/818**.

4. The said Mbulo Ogemba was a brother of **OYUGA OGEMBA**, who is the deceased person whose estate is the subject matter of

this Succession Cause.

5. Although the Petitioner is not a son of Oyuga Ogemba, he took out letters of administration of his estate, after he had filed a citation which recognized that the Widow of Oyuga Ogemba and her children ranked in priority over him.
6. The main reason for taking out the letters of administration was to ensure that the share of the property due to the brother of Oyuga Ogemba, was given to them.
7. Apparently, Oyuga Ogemba was registered as the sole proprietor of the whole parcel of land which had devolved from their father. The reason for that registration is that the elder brother of Oyuga Ogemba had died in the year 1940, prior to the process of land demarcation in the area.
8. Nonetheless, it is said that Oyuga Ogemba was so well aware that the parcel of land belonged to two families, that he sub-divided it into two distinct portions during his lifetime.
9. Each of the two families are said to have occupied their respective portions of the land.
10. However, when **JAMES NYAMARE OYUGA** died, he was not buried on the portion of land belonging to his father. According to the Petitioner, the burial was done on the portion of the land belonging to the father of the Petitioner.
11. It was for that reason that the Petitioner asked the Court to order for the exhumation of the body of James.
12. In answer to the application, the Objector submitted that burial disputes do not fall under the provisions of the **Law of Succession Act**.
13. The Objector also disputed the contention that the burial of James was done on the portion of land belonging to the Petitioner's family. The Objector's position was that James was buried within the "*Family Cemetery*", near the spot where Petro Oyuga Ogemba was buried.
14. The Objector further pointed out that James was buried next to the grave of his late wife.
15. According to the Objector, the Petitioner is not a beneficiary to the estate of the late Petro Oyuga Ogemba *alias* Oyuga Ogemba.
16. In a strict sense, the Petitioner is not a direct beneficiary to the estate of Oyuga Ogemba. He has not made any such claim.
17. However, his claim is based upon the fact that Oyuga Ogemba was the youngest brother of his father, and that the land now registered in the name of the said Oyuga Ogemba was inherited from their father. In effect, Oyuga Ogemba was holding the parcel of land in trust for his family as well as for the family of his late brother.

18. However, the issue regarding whether or not the Petitioner is a beneficiary can only be determined through the pending Protest to the Summons for the confirmation of the Grant.

19. At this stage, it would be premature to state, (as the Objector has done), that the Petitioner is not entitled to a share of **L.R. NO. SOUTH GEM/RERA/818**.

20. As the issue of confirmation of Grant is still outstanding, there is no legal basis upon which the Petitioner's claim of entitlement can be pegged.

21. In any event, a burial dispute does not fall within the province of a Succession Cause. Even the Petitioner appears to have been fully alive to that fact, as his application was pegged on **Section 146** of the **Public Health Act**.

22. The application is lacking in merit, and is therefore dismissed.

23. However, I hasten to add that for as long as the Grant has not been confirmed; the estate distributed; and all appeal structures are finalized, there is no certainty about ownership of the parcel of land in issue.

24. The Petitioner is directed to pay to the Objector, the costs of the application dated 21<sup>st</sup> July 2021.

25. Finally, the parties are directed to move expeditiously, with a view to finalizing the process of administration of the estate.

**DATED, SIGNED at DELIVERED at KISUMU**

This 31<sup>st</sup> day of **January** 2022

**FRED A. OCHIENG**

**JUDGE**



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