



In re Estate of the Wasere Ogasia Omanje (Deceased) (Succession Cause 120 of 2015) [2023] KEHC 19596 (KLR) (27 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 120 OF 2015**

JN KAMAU, J

JUNE 27, 2023

**IN THE MATTER OF THE ESTATE OF THE WASERE OGASIA OMANJE (DECEASED)
IN THE MATTER OF ANNULMENT AND CANCELLATION OF GRANT**

BETWEEN

RICHARD OKETCH UMANI PETITIONER

AND

ROBERT OTIENO OMANJE OBJECTOR

RULING

Introduction

1. On December 18, 2019, the objector herein filed a notice of motion application dated December 17, 2019 in which he sought orders that the certificate of confirmation of grant dated July 11, 2016 and letters of administration intestate in respect of the estate of the deceased issued to the petitioner herein be nullified since some of the deceased children were not included in the succession process. He also prayed for the rectification of the register of land in Siaya in respect of parcel number North Gem/Lundha/1200 (hereinafter referred to as the “subject property”) and a fresh succession process.
2. In its ruling dated July 29, 2021, this court ordered that the prayer for revocation/annulment of the grant be heard by way of *viva voce* evidence as both the petitioner and the objector claimed to have been the biological sons to the deceased and making it difficult to determine who between them was telling this court the truth.
3. The matter proceeded for hearing on November 21, 2022. All the witnesses adopted their witness statements as their examination-in-chief.
4. The petitioner’s written submissions were dated February 10, 2023 and filed on February 9, 2023 (sic) while those of the objector were dated January 19, 2023 and filed on February 9, 2023. This ruling



herein is based on parties' evidence on trial and the said written submissions which they relied upon in their entirety.

Legal Analysis

5. The objector submitted that the petitioner herein concealed material information and lied to the area chief, North Gem Location who in turn misled this court that the deceased left no immediate beneficiary apart from the petitioner. He was categorical that the petitioner was not related to the family of the deceased and that the letter from the chief and affidavits he presented to this court were fraudulent.
6. He pointed out that he had furnished the court with a letter dated September 20, 2019 from the Chief, North Gem Location which proved that the letter the petitioner relied upon in the succession cause was fraudulent. He added that the petitioner also failed to explain why his name was "Umami" and not his father's name.
7. He contended that the *Law of Succession Act* provides for disclosure of material facts and that the local chief's letter was the key confirmation of the beneficiaries in a succession matter. He argued that where the information in the letter of the chief was fraudulent and facts concealed, then the grant had to be annulled. He added that the petitioner used the grant to transfer the titles of the estate to himself in a blatant waste of the estate.
8. He invoked rule 73 of the *Probate and Administration Rules* and the case of *Ibrahim v Hassan & Charles Kimenyi Macharia, interested party* [2019] eKLR without indicating which holding he was relying upon and urged the court to revoke the grant that was issued to the petitioner.
9. On his part, the petitioner invoked section 66(a) and (b) and 76 of the *Law of Succession Act* and submitted that according to the chief's letter that was dated March 9, 2020, it was clear that he was the only remaining son to the deceased and that the said letter stated that the objector was his cousin. He argued that although the objector claimed that the area chief was misled, he failed to adduce evidence to controvert what was stated in the aforesaid letter. He asserted that the objector did not ask the court to issue any summons to the Chief of North Gem Location to come and shed light on the contents of the letter and that no other witness deposed an affidavit to confirm the allegations that the objector made.
10. He was categorical that there was no obligation to issue a notice to the objector before he took out the letters of administration and that he should not have been included in the application for the grant. In that regard, he placed reliance on the case of In the matter of the estate of *Gamaliel Otieno Onyango* succession cause No 126 of 2016 (eKLR citation not given) where it was held that the application for letters of administration had followed what was stated in the chief's letter which letter did not include the objector's name and hence there was no sufficient evidence upon which the court could conclude that the grant should be revoked.
11. It was therefore his case that the objector had not made out a case for the revocation or variation of the grant that was issued to him. He urged the court to dismiss his application.
12. When he was cross-examined, the objector told this court that the deceased was his uncle. He admitted that his own father left him land parcel North Gem Lundha/1286 measuring approximately 1.55 hectares and that he was the sole beneficiary of the said land. He added that he later subdivided that land and was the registered owner of the North Gem Ludha/1707 measuring approximately 0.83 hectares. He stated that the land he had was not sufficient but that he had not come to court to grab other people's land. On re-examination, he testified that he was in court to salvage the deceased's estate as



- the petitioner had told the chief that he was the deceased's son but that that was untrue as he had no connection with him.
13. John Otieno Oloo (hereinafter referred to as "PW 2") testified that he was a neighbour to the objector. It was his testimony that the deceased had two (2) wives but both had no children. He averred that he attended the deceased's funeral but the Petitioner was absent during the said ceremony.
 14. Richard Mola Omoro (hereinafter referred to as "PW 3") testified that the petitioner's parents were Kambus Oketch Umani and Patricia Mbayi Oketch and that he knew the petitioner was their son because he had constructed a house in their home but that he did not have a photograph to prove that allegation. He stated that the deceased had two (2) wives, namely, Pascallia and Jeniffer Ogutu Odongo but that they did not have any children. he further stated that the objector and the deceased were related.
 15. Samson Tom Aruwa (hereinafter referred to as "PW 4"), a Senior Assistant Chief at Nyabeda Sub-location told this court that he knew both the objector and the petitioner as they were his residents. He averred that the subject property was in Ludha sub-location and that the Assistant Chief of the said sub-location was one Maurice Otieno. He stated that the chief who wrote the letter that the objector adduced as evidence was Maurice Otieno Amburo. He explained that he was asked to have a meeting together with Maurice Otieno, two (2) village elders and the objector and petitioner's families but that he did not attend the meeting due to pressure of work.
 16. He stated that the aforesaid letter showed that the closest relative to the deceased herein was the objector. He added that the letter also indicated that the chief had erroneously introduced the petitioner as the deceased's kin yet they were not related.
 17. In his testimony, the petitioner stated that he lived in Lundha Sub-location and that he stayed on the subject property. He testified that the deceased was his father. He explained that he got the name "Umani" from his maternal uncle as his father was away in Uganda when he was acquiring an identity card and it was his uncle "Umani" who assisted him get the same. He further testified that he petitioned for letters of administration herein in 2016 and that the Chief one Naboth Kasanya Opiyo wrote him a letter dated January 19, 2015. He pointed out that the chief introduced him to court and that he petitioned the court in his capacity as the deceased's son.
 18. He tendered a letter dated March 9, 2020 written by the Chief, one Philip Otieno Owuor as his evidence. In his re-examination, he stated that when he filed the petition, nobody objected to the same and that the objector was also aware of the petition as he was his cousin and they did the search together at the Land's Registry. He pointed out that the deceased had two (2) wives and that he was the son of the first wife one Paskalia Obongo Wasere. He said that the other wife was called Jenifer Ogutu Odongo who did not have any child.
 19. Ezekiel Mangwana Digolo (hereinafter referred to as "DW 2") testified that the petitioner was his nephew but stated that he did not know the parcel of land where the petitioner lived.
 20. Peter Nyakure Juma (hereinafter referred to as "DW 3") said that he was the uncle to both the petitioner and the objector and that the petitioner was the deceased's son.
 21. John Okoyo Omanje (hereinafter referred to as "DW 4") testified that the petitioner's parents were the deceased and the late Paskalia Obonyo and that the petitioner was born when he was in Kericho and that they stayed at the deceased's home. He pointed out that the deceased later left for Uganda.
 22. Notably, the petitioner testified that the objector was his cousin. DW 3 also stated that he was an uncle to both the objector and the petitioner. It was therefore clear that both the objector and the petitioner



herein were related. The question of whether or not the petitioner was the deceased's son was a different issue altogether.

23. The petitioner and his witnesses told this court that he was a son to the deceased and Paskalia Obonyo. However, the chief's letter dated January 19, 2015 that the petitioner used to apply for the grant of letters of administration showed that he had been referred to as the deceased's nephew.
24. The said letter was written by one Chief Naboth O. Kasanya who was the Senior Chief North Gem Sub-location in the year 2015. It read as follows:-

“The deceased hailed from Lundha sub-location of North Gem Location within my area of jurisdiction. He was married to the late Paskalia Obonyo Wasere and late Jenifa Ogutu Odongo they had no children...

I introduce the only closest relative to apply for the grant letters of administration this deceased's estate as named below:-

1. Richard Umani Oketch-nephew -adult..”

25. Based in the documentary evidence that was presented to this court, it concluded that the petitioner was not the deceased's biological son. It was, however, apparent that both the petitioner and the objector were cousins and hence nephews to the deceased. Notably, the petitioner had referred to the objector as his cousin.
26. Having found that both the petitioner and the objector were not the biological sons of the deceased, the court had to determine the question as to who between them was closest to the deceased in terms of the degree of consanguinity and affinity because it was not clear from the evidence that was adduced in court as to how they ranked in order of priority to apply for letters of administration. Indeed, their relationship to the deceased was not clear. It appeared that they both evaded the issue of how exactly they were related to the deceased.
27. Suffice it to state that since they were cousins, the court deemed them to have ranked the same in order of priority for purposes of applying for the letters of administration to the deceased's estate.
28. Having said so, bearing in mind that the deceased was said not to have had children, a fact that was confirmed in the Chief's letter dated January 19, 2015 that the petitioner used to apply for letter of administration, the next persons in the line of consanguinity who could have applied for the grant of letters of administration were the deceased's parents.
29. The position of the law is that if both his parent were dead, it was the deceased's brothers and sisters who would have been next to apply for the grant of letters of administration intestate. If they were dead, this would have to be done by his half brothers and half sisters and if those too were dead, the application would have to be made by the children of his half brothers and sisters and if all the above were dead, other relatives who were nearest in consanguinity with him up to the sixth degree would have been next in line to apply for the said grant of letters oaf administration intestate.
30. This order of who can apply for a grant of letters of administration intestate is well set in section 39 (1) and (2) of the [Law of Succession Act](#) cap 160 (Laws of Kenya). The same states as follows:-
 1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-
 - a. father; or if dead



- b. mother; or if dead
 - c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”
31. Further, the *Law of Succession Act* gives the court discretion to determine the person or persons to whom the grant of letters of administration shall be issued. Section 66 of the *Law of Succession* provides that:-

“Preference to be given to certain persons to administer where deceased died intestate. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- a. surviving spouse or spouses, with or without association of other beneficiaries;
 - b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part v;
 - c. the public trustee; and
 - d. creditors:
- Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”
32. Having critically analysed the evidence that was adduced in court, this court formed the opinion that the petitioner was not candid at the time of taking out the letters of administration and when he testified during trial. He did not come to court with clean hands as he indicated in the petition for letters of administration that he was taking out the letters of administration intestate in his capacity as a son to the deceased contrary to the chief’s letter that was dated January 19, 2015 that indicated that he was a nephew to the deceased.
33. Notably, section 76 (b) of the *Law of Succession* states that:-

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case (emphasis court).

34. In view of the fact that the said grant of letters of administration intestate was obtained fraudulently by the making of a false statement or by concealment of the fact that there were other relatives to the deceased, this court was satisfied that there was sufficient evidence to persuade it to revoke the grant of letter of administration intestate that was issued on June 23, 2015.



35. Considering that both the petitioner and the objector did not allude to any other beneficiaries in their testimony, this court was apprehensive to pronounce that they were the only beneficiaries to the deceased's estate. It was therefore necessary that the said beneficiaries be ascertained before a grant of letters of administration intestate could be issued and subsequently confirmed.

Disposition

36. For the foregoing reasons, the upshot of this court's decision was that the objector's notice of motion application dated December 17, 2019 and filed on December 18, 2019 was merited and the grant of letters of administration intestate that was issued on June 23, 2015 be and is hereby revoked forthwith. In addition, the certificate of confirmation of grant dated July 11, 2016 be and is hereby set aside and/or vacated.

37. As the relationship between the objector and the petitioner and/or their exact relation with the deceased herein was not clear to this court from the evidence that was adduced and they had also not made any reference to other beneficiaries to the deceased's estate, the petitioner and objector be and are hereby directed to provide their separate schedules of the deceased's beneficiaries, if any, to enable the court exercise its final discretion as to the person or persons to whom a grant of letters of administration to the deceased's estate will be issued as provided in line with section 66 of the [Law of Succession](#).

38. As the land in question falls within the jurisdiction of the Siaya High Court, it is hereby directed that this file be mentioned before the Deputy Registrar of Siaya High Court on July 10, 2023 with a view to placing it before the Presiding Judge of that court for further orders and/or directions.

39. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE 2023

J. KAMAU

JUDGE

