In re Estate of Elonge Otibine Omerekek (Deceased) (Succession Cause 408 of 2011) [2023] KEHC 24176 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24176 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 408 OF 2011

WM MUSYOKA, J

OCTOBER 27, 2023

RULING

1. The deceased herein died on 10th January 1996. There is a letter from the Chief of Angoromo Location, dated 30th May 2011, showing that the heirs of his estate were Christopher Eloge Etyang, Desterio Otwani Eloge and Emmanuel Omuse Eloge. A petition was filed herein, on 15th November 2011, by Christopher Eloge Etyang and Desterio Otwani Eloge, in their capacities as sons of the deceased. They disclosed themselves, and Emmanuel Omuse Eloge, as the survivors of the deceased, and that he had died possessed of South Teso/Angoromo/927. A grant, in those terms, was subsequently issued, to the petitioners, dated 7th February 2012. The grant was subsequently confirmed, on 3rd June 2013, on an application, dated 18th July 2012, and South Teso/Angoromo/927 was shared out between Christopher Eloge Etyang, Desterio Otwani Eloge, Emmanuel Omuse Eloge, Fabian Lubember Ibwaga and Edward Sheunda. A certificate of confirmation of grant was duly issued, dated 3rd June 2013. Desterio Otwani Eloge later died, leaving Christopher Eloge Etyang as the sole administrator, I shall refer to him as such.

2. A summons for revocation of grant was filed herein, on 10th February 2021, dated 9th November 2020, by Emmanuel Omuse Eloge, who I shall refer to as the applicant. He complains that the grant was obtained through a secret process, without the knowledge of family members, the court was misled as most of the beneficiaries were left out of the process, 2 non-survivors of the deceased and non-beneficiaries of the estate were sneaked into the process, and the distribution of the estate was not consented to by the beneficiaries.

3. The applicant avers that he is a son of the deceased, and identifies the children of the deceased as, Christopher Etyang Eloge, Pascalia Amachudang Eloge, the late Anthony Adungosi, the late Desterio Otwane Eloge, Leinita Asale Eloge, Emmanuel Omuse Eloge and the late Peter Otibine Eloge. He asserts that the administrators did not consult the family when they filed the succession cause, and failed to disclose some of the children and survivors of the deceased. He claims that by the time the deceased died, he had already physically distributed the land, and boundaries on the ground were clear. He has attached a letter from the Chief of Angoromo Location, dated 29th October 2020, naming 8 individuals as the children of the deceased.

4. There is a reply on record, *vide* an affidavit of Christopher Eloge Etyang, sworn on 13th April 2021. He avers that the beneficiaries of the estate of the deceased were Christopher Eloge Etyang, the late Desterio Otwani Eloge and Emmanuel Omuse Eloge. He states that he obtained the authority of his brothers to commence the succession proceedings, and he got a letter from the Chief, which outlined the survivors of the deceased, but his brothers declined to contribute money to finance the proceedings. He states that the deceased had demarcated a boundary for each of the sons, and he had decided to sell his portion, to facilitate the succession. He sold the same to Fabian Lubembe Imbwaga and Edward Nabaka Obando. He avers that he filed the succession cause, had the grant confirmed, and the property transmitted. He avers that the applicant signed the forms to facilitate the transmission, and he in fact had the share due to the applicant transmitted to his name, including that of his mother, Kelesanya Akumu. He avers that Paskalia Amachidung was his own sister, and she did not get a share in the estate, as the deceased had only shared out the land amongst the sons. He avers that Anthony Adungosi died without a son, Desterio Otwani got his share, Leonida Asale was not given a share by the deceased, and Peter Adungo died without a child. He asserts that the alleged beneficiaries, who were left out have not sworn affidavits in support of the application, and their authority was not obtained for the purpose of filing the application. It is submitted that the summons for revocation of grant is frivolous, vexatious and an abuse of the court process.

5. Directions were given on 13th April 2021, for disposal of the said application, by way of written submissions. From the record before me, only the applicant filed written submissions, on 9th January 2022, which I have read through, and noted the arguments made.

6. Grants of representation are amenable to revocation under section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Under that provision, the court is given discretion to revoke grants on 3 general grounds, namely challenges with the process of obtaining the grant, challenges around administration of the estate, and where grant has become useless and inoperative.

7. The instant application is founded on the first general ground, where there are challenges with the process of obtaining grant. The applicant is raising issue with the manner the grant was obtained. Under this limb, there are 3 sub-limbs, namely that the grant was obtained through a defective process, or through fraud and misrepresentation, or through concealment of information. A defective process is one where the relevant procedural steps were not fully complied with or there were gaps, or technical challenges. The other 2 are fairly straightforward, where information is distorted, so that the court does not get a full picture of the actual situation.

8. The allegation is that the administrators obtained the grant secretly, meaning without involving the other family members, there was concealment from court of information in terms of who the actual survivors were, and the distribution involved outsiders at the expense of the real beneficiaries. The administrator asserts that he did the succession openly. He had the authority of his brothers, he got a letter from the Chief, and the cause was published in the Kenya Gazette. His response makes certain disclosures. Like that the deceased died a polygamist, and that there were daughters, who he did not disclose in the petition, and provide for, because the deceased himself did not provide for them when he distributed the land during his lifetime. He also discloses that he involved strangers in the devolution, being individuals to whom he sold land, after the deceased died, to raise money for the succession.

9. The deceased herein died on 10th January 1996. That was after the *Law of Succession Act*, the law which governs succession in Kenya, had come into force in 1981. Succession to his estate is, therefore, subject to the provisions of the said law. Section 51 of the *Law of Succession* caters for the process of applying for grants, and more specifically the information or details that ought to go into the application. The deceased herein died intestate, and the relevant provision in section 51 is subsection (2)(g), which

provides that in cases of intestacy, whether total or partial, there should be a disclosure of the names and addresses of "... all surviving spouses, children ... and the children of any child of his or hers then deceased ..."

10. Did the administrators comply with section 51(2)(g) of the *Law of Succession Act*? From the admission by the surviving administrator, there was no compliance. Only 3 of the sons of the deceased were disclosed. Yet, the deceased had other children, daughters, Pascalia Amachudang and Lenita Asale Eloge, who were apparently alive at the time. He also mentions a spouse of the deceased, Kelesanya Akumu, even though he does not make it clear whether she was alive or not. The law required them to disclose all the children and spouses of the deceased, not just the sons, or the individuals that the deceased had allegedly given land to during his lifetime. The process of obtaining the grant herein was defective, to the extent that section 51(2)(g) was not complied with. There was also concealment of matter from the court, to the extent that the court was misled, into believing that the deceased had sons only, and that there were no daughters.

11. As the deceased herein died after 1st July 1981, distribution of his estate was subject to intestacy provisions in Part V of the *Law of Succession Act*. Those provisions do not discriminate against daughters. They cater for all the children of the deceased, both male and female, sons and daughters, married and unmarried. That comes out very clearly in sections 35(5) and 38 of the *Law of Succession Act*, that where the deceased intestate is survived by children only, then the estate is shared equally between the "children." The equality principle in Part V of the *Law of Succession Act* is taken further by Article 27 of the *Constitution* of Kenya, that was promulgated on 27th August 2010, just a year before this cause was commenced on 16th November 2011. That constitutional provision outlaws discrimination based on gender, and it commands that men and women are to be treated equally. There is also Article 2(4) of the same *Constitution*, which provides that any law "... that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

12. The point that I am making is that in the current constitutional dispensation, men and women are to be treated equally. They are to share what their late father owned equally, unless they, on their own volition, opt out of it. The current constitutional dispensation holds that any act which contravenes the *Constitution* is invalid. An act of discrimination, like that which conceals existence of daughters, because they are women, contravenes Article 27 of the *Constitution*, and that makes the act invalid under Article 2(4) of the *Constitution*. The application that the administrators made to court for appointment as administrators, which discriminated against their sisters, who were daughters of the deceased, was discriminatory, and contravened the Constitution, and rendered their application for appointment as administrators invalid, together with their appointment as such administrators, and all the consequential orders and actions thereafter.

13. Section 51 of the *Law of Succession Act* should be read together with section 52 of the same Act, which states that a person, who, in making an application for representation, under section 51, makes a statement, which is false in any material particular, is guilty of an offence and is liable to a fine or imprisonment. The statement in the petition, that the deceased was survived by just 3 children, was false in material particulars. It suggested that the deceased had only 3 children, all sons. Yet the administrators knew that the deceased had more than 3 children. He had daughters, who were alive, and who the administrators concealed from the court. The application for representation was, therefore, tainted by criminality, on that account.

14. Section 51 of the *Law of Succession Act* is operationalized by rules of procedure set out in the *Probate and Administration Rules*. The rules governing the processes of applying for and making grants of representation are in Parts III to VII of the *Probate and Administration Rules*. I will only cite one,

which I consider to be the most relevant to these proceedings, and that is Rule 26. That provision states that no grant of letters of administration should be made to an applicant, unless that applicant has given notice of the application to every other person entitled in the same degree with him. An applicant or petitioner, who has equal right to any other person, who is not applying, is required to obtain a renunciation of right or entitlement to apply by that other person, or a written consent of that other person, and file the same together with the petition. The alternative would be, where such a renunciation or consent is not forthcoming, for whatever reason, to file an affidavit, ostensibly explaining why the renunciation or consent is not available. It could be because the whereabouts of the other persons are unknown, or they have failed or refused to cooperate in availing the consent or renunciation.

15. So, were such consents or renunciations or affidavits, as required by Rule 26 of the *Probate and Administration Rules*, necessary? Entitlement or right to administer an estate, in intestacy, is provided for in section 66 of the *Law of Succession Act*. The right or entitlement is hierarchical, in the sense that preference or priority is given to certain classes of people. For the purpose of working out the hierarchy, section 66 has to be read together with Part V of the Act, sections 35 to 39, inclusive. Priority goes to the surviving spouse or spouses, and in their absence to the children. Children herein would mean both sons and daughters, or male and female children, without discrimination or exception. In this case, it would appear that no spouses survived the deceased, hence the persons with prior right to administer the estate herein were the children of the deceased, sons and daughters. The deceased had both sons and daughters, both were, therefore, equally entitled to apply to be appointed administrators of the estate of their father. The effect of Rule 26 is that where any of the sons or daughters of the deceased does not wish to apply for appointment, then those applying must obtain their consents to allow them apply, or must obtain a document where they renounce their right to apply, and where they are not able to get the consents or renunciations from such sons and daughters, then the applicants or petitioners must file an affidavit to explain themselves.

16. I have very closely and scrupulously perused the file of papers, looking to establish whether there was compliance with Rule 26, in terms of filing of renunciations, or consents, by the sons and daughters of the deceased, who were alive then and not applying for appointment, that is to say Emmanuel Omuse Eloge, Pascalia Amachudang Eloge and Leinita Asale Eloge, and I have not come across any renunciation or consent filed by them, under that Rule. Neither have I found any affidavit sworn by the administrators in lieu of those renunciations and consents. There was no compliance with Rule 26 of the *Probate and Administration Rules*. The same is in mandatory terms, and non-compliance with it amounted to a defect in the proceedings, for which the grant obtained in those proceedings is eligible for revocation.

17. The explanation that the surviving administrator gives for leaving out the daughters, is that the deceased had not provided for them. The argument is that the deceased had distributed his property during his lifetime, what is often referred to as inter vivos distribution. What the surviving administrator is suggesting is that the administration herein is designed for the sole purpose of rubberstamping the distribution done earlier by the deceased. That *inter vivos* distribution only favoured the sons, and the daughters did not benefit, ostensibly on account of their gender. Since they did not benefit, and as the administrators were only carrying out the wishes of the deceased, in these proceedings, there was no need to involve the 2 daughters.

18. What would be the legal position regarding that? If the deceased had carried out an *inter vivos* distribution, he would have had obtained the consent of the relevant land control board, to subdivide South Teso/Angoromo/927 into portions equivalent to the number of sons who were to benefit from that scheme, and after that he would have caused mutations to be done, and subsequently registered

in the names of the benefiting sons, after which title deeds in respect of the resultant parcels of land would have issued in the names of the said sons. Apparently, that did not happen. That would suggest that there was no *inter vivos* distribution. Of course, if the process had begun, and stalled at some point before completion, due to the death of the deceased, the court could still have regard to it, subject to the rights of the daughters. There is no documentary evidence herein that the deceased ever approached the land control board, and obtained consent of that board, to subdivide South Teso/Angoromo/927, subdivided that land, and obtained title deeds in the names of his sons. There cannot have been any inter vivos distribution in the circumstances. In any case, if there was one, the administrators would not have come to court for distribution of the land, for these proceedings only become necessary where the deceased had not distributed his property before he died. The fact that these proceedings were mounted is testimony to the fact that no *inter vivos* distribution ever happened as alleged by the surviving administrator.

19. The other thing is about the strangers who were involved in the confirmation process, Fabian Lubembe Imbwaga and Edward Nabaka Obando. The surviving administrator has disclosed that these individuals bought portions of South Teso/Angoromo/927, allegedly to raise money for administration. That would mean that these sales happened after the deceased died, before representation had been granted to anyone. Under section 79 of the *Law of Succession Act*, the assets of an estate vest in the personal representatives. Personal representatives include administrators. The vesting of such property, for administrators, happens upon their appointment as such, that is upon a grant being made to them. The vesting constitutes the grant-holder a legal owner of the estate property, as administrator, in accordance with the transmission law, as stated in the *Land Registration Act*, No. 3 of 2012, and the *Land Act*, No. 6 of 2012. An administrator would exercise rights and powers over the property as an owner would, including that to sell the same. Power of sale of intestate assets is provided for under 82(b) of the *Law of Succession Act*, but there is a proviso, in section 82(b)(ii), immovable property is not to be sold before a grant is confirmed. The combined effect of sections 79 and 82(b)(ii), is that the assets of an intestate vest in the administrator upon his appointment as such, and such an administrator has power to sell such assets, but only after his grant has been confirmed. The other effect is that prior to appointment as administrator, no person has power to sell the property of an intestate.

20. The sales to Fabian Lubembe Imbwaga and Edward Nabaka Obando were done after the deceased died, and before the surviving administrator was appointed as such. The effect of that, when section 79 and 82(b)(ii) is applied to the situation, is that the surviving administrator had no power to sell any portion of South Teso/Angoromo/927 to Fabian Lubembe Imbwaga and Edward Nabaka Obando, as he was yet to be appointed administrator, and South Teso/Angoromo/927 was yet to vest in him. He could only sell the property after his grant was confirmed. These provisions have to be read together with section 45 of the *Law of Succession Act*. That provision outlaws the handling of the property of a dead person by a person who has no letters of administration. It makes it an offence to do so. Selling the property of a dead person amounts to handling such property. Handling it before obtaining a grant to his estate is criminal. That is what the surviving administrator did, when he sold portions of South Teso/Angoromo/927 to Fabian Lubembe Imbwaga and Edward Nabaka Obando. He indulged in criminal activity, as he had no grant, and he had not obtained the permission of any court to conduct the sale. A transaction tainted or contaminated by criminality cannot be valid.

21. I believe what I have discussed so far is adequate to demonstrate that the grant herein was obtained in a process that was defective, and was tainted by fraud, misrepresentation and concealment of matter from the court. The process did not also meet constitutional muster. Such a grant cannot hold, and I hereby revoke the same. I shall not appoint fresh administrators straightaway, instead, I shall allow the survivors of the deceased, and beneficiaries of his estate to choose who they would like to be the administrator of their estate. I shall appoint 3 administrators, who shall exclude Christopher Eloge

Etyang, to represent the sons, daughters and children of the late children of the deceased. The effect of the revocation order above, is the setting aside of the confirmation orders of 3rd June 2013, cancellation of the certificate of confirmation of grant of even date and reversion of South Teso/Angoromo/927 to the name of the deceased. The matter shall be mentioned for appointment of administrators, after which the said administrators shall apply for confirmation of their grant. Costs shall be in the cause. There is 30 days leave, for any party aggrieved by these orders, to move to the Court of Appeal. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 7TH DAY OF OCTOBER 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Okeyo, instructed by Okeyo Ochiel & Company, Advocates for the applicant.

Mr. Christopher Etyang Eloge, the administrator, in person.

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