



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.1 OF 2016

Formerly:

SUCCESSION CAUSE 30B OF 2015

Consolidated with:

Vihiga SPMCC SUCC Cause No. 110 of 1999)

IN THE MATER OF THE ESTATE OF DAVID ESEMELE ODOMBA also known as DAUDI SEMERE (DECEASED)

B E T W E E N:

ROBAI ASIGO ESEMER.....APPLICANT/OBJECTOR

AND

JOSHUA ASENAH ODONGO.....PETITIONER/RESPONDENT /APPLICANT

R U L I N G

1. The Matter now before the Court concerns the Estate of Daudi Semere (Deceased) who passed away on 31st July 1977 in Kegoye Sub-Location. The Succession matter first came before the Courts in 1999, some 22 years later, in the form of a Petition filed by a Joshua Asenah Odongo who claims to be the grandson of the Deceased and one of only two surviving relatives.
2. The said Joshua Asenah Presented a petition in Vihiga as ***Succession Cause 110 Of 1999***. In his Affidavit of Support the Petitioner stated (on oath) that the only surviving relatives of the Deceased were himself JOSHUA ASENAH ODONGO and HENRY CHUNGULI LODENYO, both grandsons of the Deceased. The Petition was Gazetted by the District Registrar naming the Deceased as Daudi Semere. The Death Certificate Serial No 490860, names the Deceased as DAVID ESEMELE ADOMBA The Notice is dated 1st December 1999 and appears in the Gazette of 21st January 2000 meaning that 21 out of the 30 days for responding had passed before it was published.
3. The two Grandsons were interested in inheriting the Parcel of Land known as SOUTH MARAGOLI/KEGOYE/1121. In that regard the Petitioner annexed to his Petition a Letter from an Assistant Chief from Kegoye addressed to the Land Registrar (not the Court) which stated, *"The above parcel of land is within my area of jurisdiction, and that it is between Joshua Asena Odongo ID/0833836 and Henry Chunguli Lodenyo ID/10840493 who hale from my sub-location. The parcel is registered under Daudi Esemere who is Deceased. Please assist them with the succession and at the same time demarcate"*. The Letter is not dated but was received by the PM's Court on 1st December 1999. The suggestion in that Letter is that the Registrar of Lands should register the land in the names of the two grandsons without completing the succession cause in the Principal Magistrate's Court.
4. The Petitioner was granted Letters of Administration on 24th August 2000 in the SRM's Court Vihiga. Thereafter, he made no effort to confirm the grant for a period exceeding 10 years. By the time he decided to make an application for confirmation of the grant, he says the Court file had disappeared. He then made an application for a skeleton file to be opened. That is surprising because, as he was in possession of all the documents, he should have sought reconstruction. Nevertheless it appears a skeleton file was created. He also on 15th November 2012 filed an application for confirmation of the grant.
5. In the meantime one of the Children (and therefore dependant) of the Deceased, his daughter Robai Asigo Esemere discovered that Letters of Administration had been issued and made an application in the High Court for Revocation dated 2nd November 2015. That Application was made in a separate file namely ***High Court Miscellaneous File No 30 B of 2015***. The Lower Court File was called for to be placed with that file. In the meantime the Registry opened a Succession File namely ***Kakamega High Court Succession Cause No 01 of 2016***. All three files were consolidated by an Order of Hon Mr Justice Musyoka made on 22nd January 2020.

6. The Application dated 2nd November 2015 was brought “Under section 76 of the law of Succession Act Cap 160 Law of Kenya and Rule 44 (1) of the Probate and Administration Rules”. That application is seeking “orders that:

- a) This application be certified as urgent and the same be heard *ex parte* in the 1st instance
- b) Pending the hearing of this application *inter partes* there be stay of proceedings in VIHIGA SPM SUCCESSION CAUSE NO. 110 of 1999.
- c) VIHIGA SPM SUCCESSION CAUSE NO. 110 of 1999 be transferred to the High Court at Kakamega for hearing and determination.
- d) The grant of letters of administration *intestate* issued to the respondent *vide* VIHIGA SPM SUCCESSION CAUSE NO. 110 of 1999 on the 24th day of August 2020 and fixed for confirmation on 17th November 2015 be revoked and or annulled”.

7. The Grounds relied upon on the face of the Application were:

- i) The grant was obtained fraudulently by the making of false statements and by the concealment from the court of material particulars and heirs to the cause.
- ii) The proceedings to obtain the grant were improper, irregular and defective in substance.
- iii) The applicant is a biological daughter of the late DAUDI SEMERE and she has been omitted from the proceedings though she occupies and or utilizes part of the deceased’s land – L.R. NO.S/MARAGOLI/KEGOYE/1121 which portion she is entitled to inherit from the deceased to exclusion of the respondent having been given the same by the deceased himself when he was still alive.
- iv) The respondent filed the petition secretly without the knowledge and consent of the applicant yet the applicant ranks first in priority in the matter of seeking letters of administration to the deceased’s estate.
- v) The applicant did not renounce her right to take out letters of administration to the deceased’s estate or give the respondent consent to proceed.
- vi) The principal aim of the respondent is to gain access and inherit the said parcel of land and thereby deny the applicant her rightful inheritance and enrich himself unjustifiably.
- vii) Costs of this application be provided for.

8. In addition the Applicant relies on her Affidavit in Supports. In the Affidavit she states;

1. That the above named DAUDI SEMERE who died on 31st July 1977 was my father and his other children included ELIJAH ODONGO LUDENYO and HERMAN KAMENGELE who are my brothers.

2. That the deceased had the following parcels of land:

- i) L.R. S.Maragoli/Kegoye/550 & 1120 – which he gave to HERMAN KAMENGELE.
- ii) L.R. No.Kakamega/Kegoye/1142 – where he gave to Meshack Ludenyo the father to Henry Chunguli Lodenyo.
- iii) L.R. No.Kakamega/Kegoye/1141 – which he gave to Elija Odongo the father to Joshua Aseana Odongo- the respondent whereon the respondent resides,

Attached herein are copies of the search certificates for title No.s Kakamega/Kegoye/1141 and 1142 respectively marked “RAE 1: and “RAE2”)

3. That the deceased DAUDI SEMERE who is also the owner of land parcel No. S.MARAGOLI/KEGOYE/1121 which at the time of his death was still in his name. **(attached hereto is a copy of the search certificate thereof marked ‘RAE3’)**

4. That before his death my deceased father had given to me half of land parcel No.S.MARAGOLI/KEGOYE/1121 and he had constructed for me a house thereon wherein he left me residing with my children as I never got married and I still use the same.

3. That the deceased DAUDI SEMERE had given the other half of land parcel No.S.Maragoli/Kegoye/1121

4. to Meshack Lodenyo who constructed a permanent house thereon in 1977 with the foundation having been laid by the deceased himself and at the time of the deceased’s death only Meshack Lodenyo and myself were using and residing on the said parcel of land.

5. That I have learnt to my great shock and consternation that my nephew JOSHUA ASENA ODONGO, a son to my brother ELIJA

ODONGO who has L.R. No.Kakamega/Kegoye/1141 without informing me or seeking my consent filed VIHIGA S.P.M. SUCCESSION CAUSE No.110 of 1999 in respect of the estate of the deceased DAUDI SEMERE and directly obtained the grant of letters of administration in respect of the deceased.

8. That after obtaining the grant the respondent has applied for confirmation of grant vide summons scheduled for hearing on 17.11.2015 wherein he seeks to apportion L.R.No. S.MARAGLI/KEGOYE/1121 between himself and HENRY CHUNGULI LODENYO thereby leaving me out and completely disinheriting me. **(attached herein to is a copy of the summons for confirmation of grant and the supporting affidavit, marked 'RAE4')**

9. That the proceedings to obtain the grant vide VIHIGA S.P.M. succession cause No.110 of 1999 are defective in substance, improper and irregular and the main aim of the respondent is to unjustly enrich himself from the estate of the deceased and disinherit me.

10. That I have been advised by Mr.Akwala Advocate which advice I verily believe to be correct, that in view of the foregoing the grant issued to the respondent vide VIHIGA S.P.M. SUCCESSION CAUSE NO.110 of 1999 on the 24th day of August 2000 and to be confirmed on 17th November 2015 issued in error and it was irregular and untenable in law and I therefore seek that it be revoked and a fresh grant be issued to me as I rank first in priority as regards the estate of the deceased herein.”.

9. On 9th December 2015 Hon Lady Justice Sitati, having certified the matter as urgent ordered that “That the court file vide VIHIGA SPM SUCCESSION CAUSE NO. 110 of 1999 be and is hereby ordered transferred to the High Court at Kakamega for hearing and determination”. In addition, the Learned Judge Ordered that the Summons for Confirmation and all other proceedings in the Vihiga file be stayed pending resolution of the Summons for Revocation and listed the Application for an inter partes hearing.

10. On 8th October 2020, Hon Justice Musyoka ordered that the Application dated 2nd November 2015 be heard on 10th December 2020. On 10th December, the Application came before this Court. The Applicant was represented by Counsel Ms Aligula. The Respondent did not appear and nor did Counsel on the Record Messrs Lugardiri. There is no replying affidavit in response to the Application. Nor is there any indication that the Respondent opposes the application.

11. On 22nd January 2020 Hon Justice Musyoka made the following Orders:

(a) That the application dated 2nd November 2015 to be heard on 31st March 2020

(b) That the Deputy Registrar to cause the file on HCMisc 30”B” of 2015 to be put together with this file before 31st March 2020.

12. In the Vihiga File the Petitioner/Respondent made an Application dated 15th November 2012. In that Application he sought orders:

a) That the honourable court be pleased to construct a skeleton file out of the copies issued by the Applicant herein and make it the official court file in this matter

b) That upon granting of prayer (a) above the Honourable Court do allow the applicant file the application for Summons for Confirmation of grant.

c) That the costs of this application be in the cause.

The Application was brought under Section 1, 3A of the Civil Procedure Act

13. In his Supporting Affidavit the Petitioner/Respondent said “That due to an unavoidable circumstance it ordinarily took long for me to make an Application for Summons for Confirmation of Grant as I thought that the case had been finalized after obtaining the grant. He also says he would like the file to be constructed and he be allowed to file an Application for Summons of Confirmation of Grant. However, the Summons for confirmation of grant was filed and it is dated 17th August 2015. In the Affidavit Supporting that Application he states; “That due to inevitable circumstances it has taken this long for me to apply for a certificate of confirmation of grant issued to me on 24th August 2000. He also confirmed that there was no application by dependants pending in any other court, yet there was an objection filed.

14. On 10th December 2020, the Application came before this Court. The Applicant was represented by Counsel, Miss Aligula. The Respondent/Petitioner did not appeal and nor did Counsel on the Record Messrs Lugardiri. There is no replying affidavit in response to the Application. Nor is there any indication that the Respondent is opposing it directly.

15. From the evidence before the Court contained in the three files, it is readily apparent that at the time of the Deceased’s passing, at least two of his offspring were alive. One was the daughter, the Applicant before this Court and the other was the son who reported the death as recorded in the Death Certificate. In the circumstances, the Petition and Affidavit filed by the Petitioner contains false statements to that effect. Similarly, the Assistant Chief’s Letter is equally misleading. In addition it is stated by the Applicant/Objector that the Deceased owned other assets comprising parcels of land. That means that the Petition did not comply with **Section 51(h)** of the **Law of Succession Act Cap 160**.

16. The Applicant/Objector riled an objection. That objection was never heard and the file then disappeared. In the circumstances, the Letters of Administration were allowed to subsist for more than 10 years in the face of an objection. A skeleton file (containing some of the

documents) was constructed and used to file an application for confirmation leading to tandem proceedings in the High Court in Kakamega and the Lower Court in Vihiga.

17. For the reasons set out above, this Court forms the impression that the Petitioner having deliberately misled the Court, sought to benefit from a delay of 10 years before defending or making any application. He is therefore not a fit and proper person to act as an administrator. In addition, he is not first in priority to petition in respect of this Estate. He placed himself in that position without the knowledge and/or consent of the Children of the Deceased and/or a spouse any surviving spouse. For those reasons, this Court has no hesitation in revoking the grant.

The Grant of Letters of Administration issued on 24th August 2000 be and are hereby revoked. Further it is Ordered and Directed that a copy of this Ruling be sent to the ODPP to consider with it gives rise to an appropriate case for prosecution for perjury and/or intermeddling with the Estate. Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at KAKAMEGA on this the 27th day of January 2021

In the Presence of:

Court Assistant: Fred Owegi

Applicant: Ms Aligula

Respondent: No Appearance