



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 123 OF 2019

JARED ODHIAMBO AIM.....1ST APPELLANT

RONALD REAGAN ODHIAMBO.....2ND APPELLANT

JOHN OKOTH NUNDA.....3RD APPELLANT

MARK ARODI MADUK..... 4TH APPELLANT

CASHETH AIKO OKIWI.....5TH APPELLANT

VERSUS

JOHN OPANDE ONGARO.....RESPONDENT

[An appeal from the ruling and decree of Senior Principal Magistrate

Hon. Patrick Olengo), at the Nyando in Succession Cause No.163 of 2016 as consolidated with ELC Case No. 107 of 2018 delivered on 13th June 2019]

JUDGMENT

The appeal before me arises from the Ruling dated 13th June 2019. By the said ruling, the learned trial magistrate dismissed the Appellants' application for the revocation of the Grant which had been issued to the Respondent.

1. The learned magistrate stated that;

“The gist of the Application is that the grant herein was issued without involving the Applicants herein who had purchased part of the land forming part of the estate of the deceased DOMINICUS ONGARO OBAP Alias ONGARO OBAP and as such they are beneficiaries of the estate.”

2. The Summons for Revocation or Annulment of the Grant is dated 19th December 2018. Upon its face, the following are the grounds upon which the said summons was based;

“1. THAT the Grant was obtained fraudulently on reliance upon false statements calculated to deceive/ mislead, non-disclosure or concealment of important matter that could have guided the process.

2. THAT the proceedings making the grant were defective in substance as they were trained by false affidavits sworn by the Respondent herein and a suspected collaborator who has proceeded to obtain a title deed in respect of the estate despite robust objections from beneficiaries of the deceased.

3. THAT the Respondent, who is the Administrator herein, has continued after due notice and

after being cautioned by the Office of the Chief, to intermeddle with the estate of the deceased despite not having legal authority or power to transfer ownership of the property of a deceased person.

4. THAT the Administrator herein has acted in bad faith right from the time he misled the Office of the Chief that he was the ONLY beneficiary of the deceased, to the time he purportedly transferred the estate to a suspected collaborator at an undisclosed sum of money.

5. THAT after being put on notice by the County Administration through the Office of the Chief, that his intermeddling with the estate of the deceased amounted to an illegality punishable under the law, the Respondent herein is reportedly in hiding as evidenced by his failure/refusal to attend court for inter-partes hearing in respect of ELC Suit No. 107 of 2018 in which the Applicants herein have sought, among other orders, a prohibitory injunction in respect of land parcel No. KISUMU/BORDER/697 which forms the estate of the deceased.”

3. From the above-cited grounds, the Appellants made no reference to themselves as beneficiaries of the estate. Secondly, there was no assertion, in the said grounds, that the Appellants had not been involved in the process leading to the issuance of the grant.

4. The learned magistrate agreed with the Respondent, that;

“..... the Applicants are not dependants of the estate. The Applicants can only be termed as creditors to the estate, forming part of the liability of the estate.”

5. Nowhere in the summons for revocation of the grant did the Appellants assert that they were dependants of the estate.

6. The trial court concluded thus;

“The Applicants should sue the estate of the deceased to reinforce their rights, if any.

They are not dependants and therefore cannot apply for the revocation of grant on the ground that they were not involved in the Succession process.”

7. The Respondent has submitted that the grant of Letters of Administration were rightfully granted to him. His said submission is founded upon **Section 38** of the **Law of Succession Act**, which provides as follows;

“Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child if there be only one, or shall be equally divided among the surviving children.”

8. As the Respondent acknowledges the intestate would devolve upon the surviving child, if there be only one, or shall be shared equally among the surviving children.

9. In this case, the Respondent swore an affidavit in support of his Petition for letters of administration. At paragraph 4 of the said affidavit he deponed that he was the **ONLY** dependant who had survived the deceased, **DOMINICUS ONGARO OBAP**.

10. However, the Appellants’ assertion was that the Respondent had concealed material information, concerning the existence of his sisters.

11. When the Respondent swore his Replying Affidavit in answer to the summons for revocation, he disclosed the existence of his 2 sisters, **SANTEL AWUOR ONGARO** and **EVERLINE ACHIENG**.

12. The Respondent explained that his sisters had donated their “powers” to him, through a *Power of Attorney* dated 5th September 2016.

13. The Appellants have expressed doubts about the said *Power of Attorney*, in the light of the fact that the same was only registered on 14th December 2018.

14. However, for the purposes of the appeal before me, I am not called upon to make any determination about the validity or

otherwise of the *Power of Attorney*.

15. The important point is that the Respondent was not an only child of the deceased. But in his affidavit in support of the Petition he described himself as the **ONLY** surviving child.

16. I find that the said deposition was factually inaccurate. Therefore, it constituted either deceit on the part of the Respondent or concealment of a material fact.

17. It matters not that the Respondent's sisters may possibly have consented to the transfer of the estate to the Respondent, at the time of confirmation of the Grant; because pursuant to **Section 76 (b)** of the **Law of Succession Act**;

“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 –

.....

(b) that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case.”

18. **Section 76** makes it clear that the grant may be revoked or annulled at any time; and the court could do so either of its own motion or on an application.

19. The Respondent has submitted that the Appellants lacked the requisite *locus standi* to bring the application, because they were not dependants.

20. The same said **Section 76** expressly stipulates that an application for revocation or annulment of a grant may be made by “*any interested party.*”

21. Pursuant to **Section 51 (2) (g)** of the **Law of Succession Act** stipulates that every application for a grant;

“..... in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.”

22. In the case of **IN THE MATTER OF THE ESTATE OF AGWANG WASIRO Alias ACHWANG WASINO, HIGH COURT SUCCESSION CAUSE NO. 859 OF 2015**, (Kakamega), Musyoka J. stated as follows;

“Section 51 (2) (g) requires the petitioner to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms.”

23. As the Respondent herein had failed to disclose all the surviving children of the deceased, he was in breach of that statutory provision.

24. On that basis alone, the trial court ought to have revoked the grant.

25. The Respondent noted, in his submissions, that the Appellants had asserted that they bought portions of the land constituting the estate of the deceased, prior to his death. Therefore, he wondered why the shares purchased when the deceased was alive had not been transferred to the Appellants.

26. The Succession Cause is not the proper forum for determining whether or not any of the alleged sales were valid.

27. And in this case, it has been disclosed that the Appellants had instituted separate proceedings at the Environment and Land Court, to pursue their claims for the parcels which they had bought.

28. The Respondent submitted thus;

“Further, an applicant in an application for nullification or revocation or grant must demonstrate his or her interest in the estate of the deceased.”

29. That is exactly what I understood the Appellants to have done; even though their claims had not yet been determined by the appropriate court.

30. In conclusion, I find that the Respondent had concealed material information from the court when he filed the Petition for letters

of administration. Therefore, I allow the appeal, set aside the dismissal of the summons for revocation; and I substitute it with an order revoking the grant which had been issued to the Respondent.

31. As the appeal is successful, I award the costs thereof, together with the costs of the summons for revocation, to the Appellants.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF APRIL 2021

FRED A. OCHIENG

JUDGE