



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MIGORI

MISC. SUCCESSION CAUSE NO. 323 OF 2015

IN THE MATTER OF THE ESTATE OF JOSEPH ONGALO OGOLO (DECEASED)

AND

TOBIAS MUGA ONGALO.....1st APPLICANT

NASHON OTIENO ONGALO.....2nd APPLICANT

VERSUS

SAMUEL NGWATO ONGALO.....RESPONDENT

RULING

This dispute relates to the estate of **Joseph Ongalo Ogola (deceased)** who died intestate on 10/2/1996. On 23/11/2016 a partial confirmation of grant was issued by J. Mrima to **Tobias Muga Ongalo, Nashon Otieno Ongalo and Samuel Ngwato Ongalo**.

By an application dated 13/3/2020, the two administrators Tobias Muga Ongalo and Nashon Otieno Ongalo filed the summons for Removal of an Administrator and taking of accounts in which they sought the following orders:-

- 1. That this court be pleased to remove Samuel Ngwato Ongalo from the office of Administrators;**
- 2. That the Respondent do furnish to this Honourable Court an account of all the rent received by him from**
 - a) Plot No. Migori / Municipality / XXXX/21 since 2012 when the lease was availed to the administrators;**
 - b) Suna West/Wasweta II / xxx;**
 - c) Muhuru Kadem / Macalder / xxx.**
- 3. Costs of the application.**

Before the application was heard, a Summons for Revocation of grant was filed on 22/7/2020 by one Esther Ochuodho Ongalo, one of the deceased's wives. She seeks the following orders:-

- 1. That the court be pleased to revoke and stay execution of the grant of letters of Administration and any consequential orders emanating therefrom.**
- 2. That the court do grant an order of injunction restraining the respondent's from distributing and administering the deceased's estate.**
- 3. That the respondents their agents and servants be restrained from interfering, disposing, conveying, mortgaging or charging in any manner the deceased's properties that may prejudice the applicant.**
- 4. That any consent order in respect of the mode of distribution of the deceased's estate which was entered between the Respondent and any other interested party filed and recorded in this matter be treated as invalid and fraudulent.**

5. That the distribution of the deceased's estate be done according to the law.

On 27/7/2020, the court directed that both applications be heard together and that they be canvassed by way of written submissions. The court gave time lines for filing of submissions on both applications.

On 17/3/2021, the court was informed that Mr. Ojala who represents Esther Ochuodho the applicant, in the application dated 22/7/2020, had not filed any response to the application dated 13/3/2020.

Similarly **Mr. Obingo** who appears for the respondent, Samuel Ngwato Ongalo did not file any reply to the application dated 13/3/2010 nor did he file a reply to the application dated 22/7/2020.

The firm of Kamau Kuria filed a replying affidavit jointly sworn by Tobias and Nashon Ongalo to the application dated 22/7/2020, on 15/9/2020. They also filed their submissions on both applications on 12/10/2020.

Mr. Ojala filed his submissions in support of the application dated 22/7/2020 on 5/11/2020

Application dated 13/3/2020

In support of the application dated 13/3/2020, Tobias Muga and Nashon Otieno jointly deponed that they were appointed as joint administrators of the deceased's estate together with the respondent, Samuel Ngwato Ongalo as evidenced by the Certificate of partial confirmation of grant dated 23/11/2016. However, Samuel has been intermeddling with the deceased's estate in that he has collected rents from the deceased's plots Migori / Municipality /XXXX/21 since 2012 when the lease was availed to the administrator; Suna West /Wasweta II/xxx and Muhuru Kadem/Macalder/xxx.

This application was not opposed. Under Section 47 of the Law of Succession Act, this court has power to preserve the assets of the deceased's estate if it is being wasted. The Section reads as follows:-

“The High Court shall have jurisdiction to entertain any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient, provided that the High Court may for the purpose of this Section be represented by the Resident Magistrate appointed by the Chief Justice.”

The above Section was considered by the Court of Appeal in **MSA CAPP 145 of 2012 Floris Pierro & Another vs Giancarlo**:

“..... In other words, we are of the firm view that Section 47 of the Act gives the court all embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This Section must be read together with Rule 73 of the Probate & Administration Rules which further emboldens court's jurisdiction to make such orders as may be necessary for the ends of justice to prevent abuse of the process of court. We would imagine such orders would also include injunctive orders.”

The duties and responsibilities of an administrator of a deceased's estate are set out in Section 83 of the Law of Succession Act which are inter alia, that within six months from the date of the grant, to produce in court a full and accurate inventory of assets and liabilities of the deceased and a full and accurate account of all the dealings with the estate. An administrator has fiduciary duties that require him to act honestly and in good faith in regard to the estate. The applicants have alleged that the respondent has failed to render account of the rents received in respect of the three plots since 2012 despite demand. The respondent has not replied to the said allegations and I find that the allegations are deemed to be admitted. For the foregoing reasons I allow the application dated 13/3/2020.

Application dated 22/7/2020

In the affidavit in support of the above application, dated 27/7/2020, Esther deponed that she is one of the surviving widows of the deceased; that the deceased was polygamous, with twenty wives, 100 sons and daughters. She contended that the grant was made without her consent or knowledge; that the grant was obtained fraudulently by making false statements of facts and it was meant to deny her of her property; that the Respondents failed to include the following properties in the assets of the estate:-

North Kadem

a) Okenge 1000 Acres

b) Kanyamkago / Kajulu No. xxx about 8.8 Ha

c) Ndhiwa 50 acres

d) Kiwiro 50 acres

e) Kikongo 50 acres

f) Agulu 50 acres

South Kadem

- a) Owich No. xxx - 50 acres
- b) Owich No. xxx - 60 acres
- c) Owich No. xxx - 50 acres
- d) Owich No. xxx - 60 acres
- e) Owich No. xxx - 60 acres
- f) Owich No. xxx - 20 acres

It is also her case that the plots listed in the application dated 13/3/2020 were not included in the schedule of the deceased's estate and that the Respondents failed to disclose material facts.

In his submissions, **Mr. Ojala** submitted that the applicant being a wife of the deceased ranked in priority to apply for grant of letters of administration but that the Respondents sneaked to court without her knowledge and hence they concealed material facts and omitted to disclose all the beneficiaries.

Counsel relied on Section 76 of the Law of Succession Act in his request for revocation of the grant. It was also submitted that injunctive orders are sought to stop distribution of the deceased's estate because if the exercise proceeds, it is likely to be unfair to some of the beneficiaries; that the respondents have not demonstrated how the deceased's estate is to be distributed i.e. as per Section 40 of the Laws of Succession Act, that is according to the houses.

In his submissions, **Mr. Ojala** urged this court to stay the application dated 13/3/2020 to await the ruling in the application dated 22/7/2020 because the Respondents would be disqualified from being administrators of the deceased's estate. He also urged the court to distribute the estate according to Section 40 (1) of the Laws of Succession Act.

In the joint affidavit sworn by Tobias Muga and Nashon Otieno, it was deponed that the three administrators come from different houses; that the deceased had 20 houses and three homes at Okenge, Mikeyi and Nyarongi/ Owich where the deceased owned agricultural land; that the lands in Mikeyi and Nyarongi / Owich had been adjudicated and titles issued while land adjudication is still on going in Okenge area; that the deceased was also in the process of purchasing some lands in Nyarongi and the said lands were not included in the distribution because the processes were incomplete; that the three of them were appointed administrators on 23/11/2016, and that partial confirmation was preceded by a family meeting on 3/7/2016 to consider the partial distribution; that the applicant was represented by her son Samuel Ngwato as evidenced by the minutes dated 3/7/2016; that the meeting was presided over by John Owuonda Ongal; the purpose of the meeting was particularly distribution of the land which had titles; that a Summons for partial distribution was filed jointly with Samuel Ongalo, the applicant's son; that the applicant's house was to inherit 1/3 of each of the three parcels "Muhuru / Kadem/Macalder / xxx, 143 and 144. It was further deponed that the issues that the applicant has raised in her application are barred by doctrine res judicate as they had been adjudicated upon and the certificate of confirmation operates as the judgment of the court; that the distribution was arrived at through a consent order and the applicant has to prove that it was entered into through fraud, collusion, or like an agreement contrary to public policy or grounds upon which a contract may be set aside; that if this application is granted, then Samuel Ngwato, the applicant's son will not be held to account for the rents he has collected from part of the estate; that the application is an abuse of court process, meant to delay the distribution of the deceased's estate; that the applicant has withheld material facts to the effect that adjudication is still ongoing in South Kadem where sales are incomplete except for parcel xxx which is part of the property for distribution. It is also deponed that the application offends the doctrine of finality and functus officio and what is open to the applicant is to appeal against the partial distribution.

In their submissions, the Respondent's counsel Kamau Kuria & Co Advocates reiterated the contents of the Replying affidavit. It was emphasized that the partial distribution has been done following a consent order, the same cannot be set aside unless it is done by consent or on terms for setting aside a contract as held in **Flora Wasike vs Wamboko (1982 – 1988 11 KLR 625)**. It can only be set aside on grounds of fraud, collusion or if the consent was contrary to public policy or that the consent was made in ignorance of material facts. It was further submitted that the application is an abuse of the court process because the application is not honest because Samuel Ngwato, one of the administrators is the applicant's son who is benefiting from the estate through rents and this applications is an afterthought after the Respondents filed the application dated 13/3/2020 seeking Samuel Ngwato's removal as an administrator. It was further submitted that the applicant has concealed material facts from the court in that there has been partial confirmation and three parcels that were not distributed are still undergoing adjudication and some in Kadem were incomplete sales except parcel xxx which was included in the confirmation and that the properties mentioned in paragraph 8 were part of the distribution.

On the doctrine of finality, counsel relied on the decision of **Rai v Rai CA 307 OF 2003 and Raila Odinga v IEBC Petition No. 5 of 2013** Supreme Court that the applicant not having appealed the confirmation, cannot be granted the orders.

The deceased died on 10/2/1996 and therefore this estate is governed by the Law of Succession Act which commenced on 1/8/1981. The Law of Succession Act provides for revocation of grant under Section 76 which provides as follows;-

“76. Revocation or annulment of grant

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 –

- a) that the proceedings to obtain the grant were defective in substance;
- b) 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;
- c) that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either –
 - i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii) to proceed diligently with the administration of the estate; or
 - iii) to produce to court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or
- e) that the grant has become useless and inoperative through subsequent circumstances.

Under the above Section, a grant of representation may be revoked based on three general grounds namely :-

1) where the process of obtaining was defective e.g where the person who obtained it was not qualified to be appointed as a personal representative or other procedural requirements were not adhered to or

Where the petitioner used fraud or misrepresentation or concealed material facts.

2) where the grant is obtained procedurally but the administrator went into difficulties during administration of the estate e.g. failure to apply for confirmation or failure to render account etc.

3) where the grant becomes inoperative or useless because of subsequent of the death of the administrator or he becomes bankrupt.

In the instant case, the applicant seems to anchor her application on grounds that the grant was obtained without her consent, was obtained fraudulently and upon concealment of material facts. The first complaint is that the grant was issued without her knowledge. It is not in dispute that the third administrator, one Samuel Ngwato Ongalo, is the applicant's son. The said Samuel is the one sought to be removed as an administrator. He did not respond to this application by his mother. This matter has a long history. In 2013, the applicants son had gone to court alone and had been issued with grant of letters of administration in Succession Cause 49 of 2012 and the grant had been confirmed on 8/4/2014 but Nashon Otieno, the 2nd Administrator applied for its revocation and by consent of the parties, the same was revoked on 6/1/2016. There is no evidence that the applicant was aware of that case.

On 21/7/2016, when the order for partial confirmation was granted by the court, present in court were Mr. Kisera Counsel for Nashon Otieno Ongalo and Samuel Ngwato Ongalo and he held brief for Mr. Odera for Tobias Muga. Beneficiaries present were Owuondo Ongalo, Calvince Ongalo for Elida Otieno Ongalo, Margret Akech Ongalo, James Ongalo representing the brother Isika. These were only six (6) beneficiaries yet there is evidence that the deceased had 20 wives, 10 are deceased but 10 are still alive . He had over one hundred (100) children. Section 66 of the Law of Succession Act, provides for who has preference with regard to who is to take out letters of administration in respect of an intestacy estate. Section 66 provides as follows:-

“66 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.”

Priority in this case, would have been given to the widows of the deceased to file Succession proceedings and for these deceased wives; representatives from their respective houses.

Rule 26 of the Probate and Administration Rules is relevant, It provides as follows:-

26. Grants of letters of administration

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

The above rule emphasises the need to notify all concerned parties in this case, the widows / beneficiaries of the filing or the intention to file succession proceedings.

The application for confirmation dated 20/7/2016 was supported by an affidavit of the three administrators, Tobias Muga, Nashon Otieno and Samuel Ngwato. At paragraph 3 thereof, they claimed to have been appointed at a family meeting held on 3/7/2016 to administer the estate. They annexed the minutes of the meeting and a list of those in attendance. I note that the applicant's name does not appear in the minutes. There is no evidence that the applicant was notified of the meeting. Even after the applicant applied for confirmation, there is no evidence that they notified the applicant as required by Rule 26 that a consent be filed in terms of Form 38 and an affidavit supporting the claims or renouncing any interests . As things stand, even though the applicant's son was one of the administrators, there is no evidence that she was aware or was notified of the proceedings as required by law.

The applicant has alleged that some of the deceased's properties were not included in the schedule for distribution. I must point out at this stage that though the applicant may not have been informed of the application, she is listed as one of the beneficiaries and indeed in the distribution, some property was allocated to her. The applicant's contention that plot Migori / Municipality XXXX/21, Suna West / Wasweta II / xxx and Muhuru Kadem / Macalder / xxx were not included in the schedule for distribution is not true because they were and in fact her share is part of Muhuru / Kadem / Macalder / xxx.

As regards the other, parcels

Okenge – 1000 acres

Kanyamkago / Kajulu xxx

Ndhiwa 50 acres

Kiwiro 20 acres

Kikongo 50 acres

Agulu 50 acres

Owich xxx, xxx, xxx, xxx, xxx, xxx, the applicant did not provide any evidence to prove that they belong to the deceased. It is not disputed that what was done was a partial confirmation of grant. The 1st and 2nd respondents deponed and indeed the record bears them witness that the partial confirmation was only in respect of the properties with titles. If there are other properties without titles and their status is not established, they will await the final determination of this matter.

The Respondent argued that this application offends the doctrine of finality but in my view, it does not apply. This matter had not been heard and determined on the merits and there was no formal consent on record that would require the court to consider the grounds for setting aside contracts like was held in **Flora Wasike case (supra)**.

Having found that the applicant may not have been aware of the proceedings because she was not notified as required. I hereby grant the application dated 22/7/2020.

In the end, I hereby, make the following orders:

1. The Application dated 13/3/2020 is allowed in the following terms:-

a). That Samuel Ngwato Ongalo is forthwith removed from being an administrator of the deceased's estate;

b). The respondent, Samuel Ngwato Ongalo, to render and furnish accounts of rents received from the plots Migori . Municipality / XXXX/211, Suna West / Wasweta II/xxx and Muhuru Kadem / Mcalder / xxx within sixty (60) days from today's date;

2. The summons dated 22/4/2020, is allowed and I hereby revoke the partially confirmed grant issued on 23/11/2016;

a). There was no proof of fraud and therefore Tobias Muga and Nashon Otieno will remain as administrators of the deceased estate;

b). The estate being so large, parties are allowed time to appoint another administrator to replace Samuel Ngwato Ongalo or the applicant may take his place;

c). The family is allowed sixty (60) days to appoint another administrator, if the applicant is not allowed to be an administrator.

3. Costs will be in the cause.

4. Mention on 28/9/2021.

5. All counsel be notified.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 29TH DAY OF JUNE, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of:

Mr. Munyori for the applicants in application dated 13/3/2010 and for the

Respondents in Application dated 22/7/2020.

Mr. Kisera for Nashon Otieno.

Ms. Nyauke court assistant