



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO 120 OF 2015

IN THE MATTER OF THE ESTATE OF THE WASEREB OGASIA OMANJE (DECEASED)

IN THE MATTER OF ANNULMENT AND CANCELLATION OF GRANT

BETWEEN

RICHARD OKETCH UMANI.....PETITIONER

VERSUS

ROBERT OTIENO OMANJE.....OBJECTOR

RULING

1. On 18th December 2019, the Objector herein filed Notice of Motion application dated 17th December 2019. He sought for orders that the Certificate of confirmation of Grant dated 11th July 2016 and Letters of Administration intestate in respect of the estate of Wasere Ogasia Omanje (hereinafter referred to as the deceased) issued to Richard Oketch Umani 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 Siaya in respect of parcel number North Gem/Lundha/1200 and a fresh succession process.

2. In his affidavit in support of the said application sworn on even date, he averred that he was the only surviving son and/ or beneficiary of the deceased and that the Petitioner is not his relative. He asserted that the Petitioner lied to the Area Chief North Gem Location to deceive this honourable court that the deceased was not survived by any child yet the deceased was survived by: the following persons namely, Richard Ojwang Omanje (deceased), Joseph Ochieng Omanje (deceased), Robert Otieno Omanje, Risper Achieng Omanje (deceased), Pamela Adhiambo Omanje (deceased) and Alquin Atieno Omanje (deceased). It was for this reason, that the Objector averred that the Grant was fraudulently obtained.

3. On its part, the Petitioner swore a Replying Affidavit on 5th February 2020. The same was filed on even date. He averred that he was the only surviving son/beneficiary of the deceased. He asserted that the Objector was a son to Nashon Omanje Ogasia (deceased) who was a brother to the deceased herein which made the Objector, his cousin. He added that the deceased had two wives Paskalia Obonyo Wasere and Jenipha Ogutu Obonyo who were both deceased. He averred that Paskalia Obonyo Wasere (deceased) was his mother while Jenipha Ogutu Obonyo (deceased) was his step mother but she was not blessed with any child.

4. He further pointed out that the land parcel North Gem/Lundha/1200 (hereinafter referred to as the deceased's estate) was registered in the name of the deceased father while land parcel North Gem/Ludha/1286 was registered in the name of his uncle, Nashon Omanje Ogasia who was survived by one son, the Objector herein. He added that the Objector had since disposed the said parcel of land and as the only surviving beneficiary of Nashon Omanje Ogasia, the same was enough to cater for the Objector.

5. He stated that the deceased died on 3rd April 2007 while his mother and step mother died on 13th April 1982 and on 5th May 2011 respectively. He pointed out that he buried all his parents on the deceased's parcel of land. He added that the deceased took a loan in the sum of Kshs 50,000/= from Kenya Commercial Bank (KCB) and used the title of the said parcel of land as security. He asserted that as the surviving beneficiary, he serviced the said loan and the title was discharged on 6th October 2016.

6. He contended that he used his uncle's name "Umani" while registering for his National Identification Card because his father was away in Uganda at the time. He argued that the Objector's application was bereft of merit and urged this court to dismiss the same.

7. The Objector relied on Section 39 of the Law of Succession Act Cap 160 (Laws of Kenya) which gives the order of ranking by whom letters of administration can be taken out and submitted that having been the deceased's son, he ought to have ranked in priority in taking out

the letters of administration to the deceased's estate.

8. He submitted that in the List of Witnesses that the Petitioner filed, different witnesses referred to him as "adopted son, nephew, biological son" to the deceased. He was categorical that the Petitioner was not the deceased's son which was evident from his name "Umani" and the fact that in his letter, the Chief referred to him as a close relative.

9. He relied on Rule 73 of the Probate and Administration Rules which provides that the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process and thus urged this court to revoke the said Grant of Letters of Administration.

10. On the other hand, the Petitioner relied on Section 76 and Section 66 (a) to (d) of the Law of Succession Act and argued that the Chief's letter dated 9th March 2020 was clear that he was the only remaining son of the deceased while the Objector herein was his cousin and hence the Objector could not rank in priority to him to take out letters of administration. He further argued that although the Objector claimed that the area chief was misled, no other witness had deponed an affidavit to confirm the allegations that were made by the Objector. He was emphatic that the Objector should not have been included in the application of the grant.

11. He relied on the case of **Siaya Succession Cause No 126 of 2016 In the Matter of the Estate of Gamaliel Otieno Onyiego [2018] eKLR** where the court therein revoked a grant of letters of administration because the chief's letter did not include the applicants name.

LEGAL ANALYSIS

12. This court noted that both the Petitioner and the Objector claimed to have been biological sons to the deceased. It was each person's word against the other.

13. This court noted that on 9th February 2020, Cherere J who was seized of this matter directed that the matter be heard by way of *viva voce* evidence. On 10th August 2020, parties informed the court that they had been prevailed upon to settle the matter out of court. The matter was mentioned in court several times and on 30th November 2020, they informed this court that they had been unable to reach an amicable settlement out of court. They then told this court that they wanted to proceed with the hearing.

14. The court directed them to file witness statements and the same were duly filed. On 14th June 2021, the court asked the parties if they would not be giving *viva voce* evidence and they were emphatic that the court ought to rely on the affidavit evidence and the Written Submissions that they filed. This court reserved the Ruling herein based on the said Written Submissions which they relied upon in their entirety.

15. Upon considering the divergent affidavit evidence that both the Petitioner and the Objector relied upon, this court came to the conclusion that this was not a matter that could be determined on the basis of the said affidavit evidence. The truth of who really was the biological son of the deceased could only come out during *viva voce* hearing.

16. For that reason, this court restrained itself from interrogating the merits or otherwise of the present application as the issues raised therein were best left to the Trial Court for hearing and determination.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Objector's Notice of Motion application dated 17th December 2019 and filed on 18th December 2019 could not be allowed as prayed. The revocation/annulment of the Grant will be heard by *viva voce* evidence. Each party will bear its own costs of this application.

18. To progress this matter, it is hereby directed that this matter be mentioned on 8th November 2021 with a view to establishing if directions on hearing of cases during this Covid-19 pandemic period will have been given and/or for further orders and/ or directions.

19. It is so ordered.

DATED and DELIVERED at KISUMU this 29th day of July 2021.

J. KAMAU

JUDGE