



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 6 OF 2018**

**N THE MATTER OF THE ESTATE OF DOROTHY AWUOR BOLLO– DECEASED**

**BETWEEN**

**SAMRIJ ONYANGO OCHIENG**

**DILLIAN ONYANGO.....OBJECTORS/APPLICANTS**

**AND**

**GEORGE CHRISTOPHER ONYANGO**

**JOSEPHINE OTIENO.....RESPONDENTS**

**AND**

**CALVANCE ODHIAMBO BOLLO.....INTERESTED PARTY**

**RULING**

1. According to the petition for grant of letters of administration filed on 15<sup>th</sup> February, 2018, the deceased herein, **Dorothy Awuor Bollo**, died on 3<sup>rd</sup> December, 2017. By that petition, the Respondents herein, in their capacities as husband and mother in law respectively petitioned for grant of letters of administration in respect of her estate. In the affidavit in support of the petition, it was disclosed that the deceased was survived by the two petitioners and **Samrijcard Viera Ochieng Onyango**, a son, the 1<sup>st</sup> Objector/Applicant herein.

2. On 22<sup>nd</sup> October, 2018, this Court issued the Grant of Letters of Administration Intestate to the said petitioners. However, by Summons for Revocation of Grant dated 13<sup>th</sup> May, 2019, the Applicants herein moved this Court seeking that the said Grant be revoked on the ground that the same was obtained fraudulently by misrepresenting facts in that the Petitioners disclosed that the deceased had only one son whereas she had another son by the name of **Dillan Juan Owen Onyango**, the 2<sup>nd</sup> Applicant herein. It was further contended that though the 1<sup>st</sup> Applicant was at the time of petitioning for the grant over 18 years, it was stated that he was a minor. It was further contended that some of the properties were wrongly described while others overstated.

3. The Summons were supported by affidavits sworn by the Applicants herein. Apart from reiterating the foregoing, it was deposed that two vehicles listed as forming part of the deceased's estate had already been transferred to one **Queenter Amondi** on 26<sup>th</sup> April, 2016 while one property was wrongly described.

4. In response to the Summons, the 1<sup>st</sup> Petitioner, **George Christopher Ochieng** deposed that **Dillan Onyango** is not a child for the purposes of the Law of Succession Act since he was not lawfully adopted by the deceased hence is not recognised as his child. It was therefore his contention that it was not necessary to disclose his existence. According to him, the 2<sup>nd</sup> Applicant is a child of the late deceased's sister but has his own father though he was taken by the deceased herein. He was however not formally adopted.

5. The 1<sup>st</sup> Petitioner similarly denied the other allegations made by the Applicants as regards the properties of the deceased.

6. On 22<sup>nd</sup> July, 2019, this court directed that the summons be canvassed by way of viva voce evidence and parties were directed to file and

exchange their respective witness. On 17<sup>th</sup> November, 2020, in presence of both counsel for the parties, this Court listed the hearing for 9<sup>th</sup> March, 2021. However, on the hearing date, only the Applicants and the Interested Parties attended Court and the evidence of the Applicants was taken.

### **Determination**

7. I have considered the evidence on record. The affidavits sworn by the 1<sup>st</sup> Petitioner have no probative value since the deponent was not availed for cross-examination. In **Maganlal vs. King Emperor AIR 1946 Nagpur 126** it was held that:

**“The examination of a witness by the adverse party shall be called his cross-examination. The purpose of the cross-examination is to test the veracity of the witness. No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination”.**

8. It follows that the only admissible evidence is that of the Applicants which was however not subjected to cross-examination due to the absence of the Petitioners’ legal representatives.

9. Section 76(a), (b) and (c) of the ***Law of Succession Act*** provides as hereunder:

***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 a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

10. In this case the applicants’ contention is that the petitioners did not disclose the fact that the deceased had another child apart from the 1<sup>st</sup> applicant and that some properties were incorporated in the estate when they did not belong to the deceased at the time of her death.

11. Section 51 of the ***Law of Succession Act*** provides as follows:

***(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.***

***(2) An application shall include information as to-***

***(a) the full names of the deceased;***

***(b) the date and place of his death;***

***(c) his last known place of residence;***

***(d) the relationship (if any) of the applicant to the deceased;***

***(e) whether or not the deceased left a valid will;***

***(f) the present addresses of any executors appointed by any such valid will;***

***(g) 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;***

***(h) a full inventory of all the assets and liabilities of the deceased; and***

***(i) such other matters as may be prescribed.***

12. In this case, the 2<sup>nd</sup> Applicant’s interest in the deceased’s estate was not disclosed.

13. Apart from that the contention that some of the properties did not constitute the deceased’s estate remains unchallenged. According to section 3 of the ***Law of Succession Act***, “estate” means “the free property of a deceased person” while “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, interests had not been terminated.

14. In **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the Learned Judge observed that:

**“This Court’s view before distribution of the estate of the deceased under Section 71 of the *Law of Succession Act Cap 160*; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased’s estate and are available for distribution after settling all liabilities and having the net estate for distribution.”**

15. It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for grant or confirmation thereof.

16. In the premises, I am satisfied that the grant herein was obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case and that further the same was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

17. In the premises the summons for revocation of grant succeeds. The grant issued herein on 22<sup>nd</sup> October, 2018, is hereby revoked. I appoint **George Christopher Onyango** and **Samrijcard Viera Ochieng** as the joint administrators of the estate of the deceased herein. This matter is hereby referred to mediation for the purposes of the distribution of the estate of the deceased.

18. The matter will therefore be mentioned before the mediation registrar on 10<sup>th</sup> August, 2021.

19. There will be no order as to costs.

20. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF JULY, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of the Objectors/Applicants**

**CA Simon**