



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO 230 OF 1995

IN THE MATTER OF THE ESTATE OF JOSEPH ODINDE ODONGO (DECEASED)

AND

IN THE MATTER OF PETITION BY MARGARET AKUMU ODINDE

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION/ ANNULMENT OF GRANT

MARGARET AKUMU ODINDE.....PETITIONER

AND

LEOTINE ANYANGO MALALA.....OBJECTOR

RULING

1. On 20th November 2020, the Objector herein filed Summons for Revocation and Annulment of Grant dated 24th October 2020. She sought that the Grant of Letters of Administration of the Estate of Joseph Odinde Odongo (hereinafter referred to as “the deceased”) that was issued to Margaret Akumu Odinde on 31st October 1995 and confirmed on 6th June 1996 be revoked and that upon the said order being granted, this Honourable Court be pleased to appoint her as a substitute administratrix of the deceased’s estate in place of Margaret Akumu Odinde.
2. In her Affidavit that she swore on 26th October 2020, she stated that the deceased was her father and that he was survived by three wives, Domtila Ila Odinde (hereinafter referred to as “1st wife”), Mary Odinde (hereinafter referred to as the “3rd wife”), the Petitioner herein and his children. She also filed a Supplementary Affidavit that she swore on 23rd March 2021 on 29th March 2021 reiterating her averments in her Supporting Affidavit.
3. She averred that the Petitioner obtained grant without informing this court that the deceased had a son, Stephen Odongo Odinde (deceased), that he was the deceased’s eldest son, that he died on 30th April 1994 and was survived by three (3) widows and fourteen (14) children who she asserted were entitled to his portion in the estate. She added that the Petitioner also failed to disclose about the deceased’s third wife despite her having been entitled to a share of the deceased’s estate.
4. She asserted that the Petitioner’s omissions were intentional to enable her leave the entire estate of the deceased to her sons who were listed as beneficiaries. She pointed out that both the Petitioner and the 1st wife obtained the deceased’s Certificates of Death. She said that she was the one who had the Certificate of Death that was procured by the 1st wife.
5. She further averred that since the confirmation of grant on 6th June 1996, the Petitioner had failed to distribute the deceased’s estate. She stated that save for parcel number Kisumu/Block 4/43- Tom Mboya Estate which the Petitioner registered in her name on 8th December 2010 and collected rent therefrom for her own benefit and that of her children only to the exclusion of all other beneficiaries, all the parcels of land were still in the deceased’s name.
6. She was emphatic that the Petitioner’s failure to complete administration of the estate within the stipulated period of six (6) months was a breach of the administrator’s duty under the law and that the fact that Petitioner did not seek extension of time to complete administration, it thus rendered the grant useless and inoperative. She added that the Petitioner was now of an advanced age of over eighty (80) years making her incapable of administering the deceased’s estate. It was her contention that there was thus a need to allow alternative administrators distribute the estate of the deceased and in this regard, she proposed herself as the administratrix of the deceased’s estate.

7. She was apprehensive that unless the prayers she had sought were granted, the Petitioner would continue to hold the deceased's property as an absolute proprietor to the detriment of the interests of other dependants. She urged this Court to grant the orders sought and the matter heard for fresh distribution of the estate.

8. On her part, on 13th January 2021, the Petitioner swore a Replying Affidavit and filed on 21st January 2021 in opposition of the Objector's application. She averred that she made truthful statements of fact without any concealment of any material fact and information in her application for letters of administration intestate to the estate of the deceased.

9. She pointed out that all family members were well informed and were aware of the Petition herein and that all beneficiaries had been listed therein. She admitted that the deceased was polygamous with three (3) wives but she was his only surviving wife. She was categorical that the Objector's averment that 3rd wife and Petronila Akongo Odinde were still alive was untrue. She also asserted that the Objector had also failed to list her daughter with the deceased, Julia Adhiambo Odinde.

10. She admitted that it was an error on her part not to have listed Stephen Odongo Odinde (deceased) as a beneficiary but said that at the time of filing the Petition which she did in person, she was under the impression that only surviving dependants were to be listed.

11. She asserted that the grant of letters of administration was duly published in the gazette in 1995 but no one objected. She stated that she further convened several family meetings with a view to the dependants agreeing on the mode of distribution of the deceased's estate but there was too much animosity. She said that it was for that reason that she never transferred any of the deceased's property into her name for onward transmission to the respective beneficiaries.

12. She said that the property known as Kisumu/Block/4/43 Tom Mboya Estate was registered in her name after the death of the deceased as she purchased the same with the deceased and that it was their matrimonial home. She explained that the house was purchased under a tenant mortgage scheme and the loan was repaid on monthly basis in the name of the deceased.

13. She averred that she made substantial contributions even after the demise of the deceased for over ten (10) years and effected the transfer of the property from the Municipal Commission of Kisumu at a consideration of Kshs 50,000/=. She added that she paid Kshs 292,975/= for land rate from 1975 to 2010, Kshs 9,910/= for land rent and Kshs 3,100/= for consent and stamp duty on the said property.

14. She denied that her advanced age had incapacitated her in any way in administering the deceased's estate. She was emphatic that she had faithfully preserved the deceased's estate and never wasted, sold nor transferred the same.

15. She urged this court to assist in the distribution of the estate to the thirteen (13) beneficiaries she had listed in her Replying Affidavit as she had proposed therein. She pleaded with this court not to revoke the Grant of Letters of Administration as the Objector had not demonstrated any circumstances that had rendered the same useless and/or inoperative. She thus urged this court to dismiss the present application.

LEGAL ANALYSIS

16. Both the Objector and the Petitioner placed reliance on the provisions of Section 76 of the Law of Succession Act Cap 160 (Laws of Kenya) to argue their respective cases.

17. The Objector also relied on Section 51 (2) (g) of the Law of Succession act in explaining that the process of obtaining the grant was attended by glaring irregularities, fraud, misrepresentation, concealment of important information and ultimately the Petitioner failed to diligently administer the estate.

18. She further relied on Section 66 of the Law of Succession Act in arguing that all the deceased spouses and children had equal right to administration, therefore the Petitioner needed to obtain their consents or their renunciation of right to administer or ought to have obtained citations to be issued and served on them, before she applied for representation of the estate.

19. She placed reliance on the case of **Jesse Karaya Gatimu vs Mary Wanjiku Githinji [2014] e KLR** among other cases to explain that she had laid the basis for the revocation of the grant issued herein.

20. She further contended that the Petitioner had an obligation of diligently administering the estate and to produce to court an inventory or account of administration as provided for under Section 76 (d) (ii) and (iii) of the Law of Succession Act but that she had failed to perform her duties as required by Law in Section 83 of the Law of Succession Act. In this respect, she explained that since 23rd December 1998 to date, the Petitioner had failed to distribute the deceased's estate to the beneficiaries.

21. On the other hand, the Petitioner placed reliance on the case of Albert **Imbuga Kisigwa vs Recho Kavai Kisigwa [2016] eKLR** where the court explained that power to revoke a grant is a discretionary power that must be exercised judiciously and there must be evidence of wrong doing for the court to revoke or annul a grant.

22. She submitted that Section 76 (d) as read with Section 83 (e) and (g) of the Act was inapplicable in this case because the said Sections could only be invoked after a due notice had been issued to a petitioner, which had not been issued in this case.

23. She further urged the court to aid in the distribution of the estate by invoking its powers under Rule 37 of the Probate and Administration Rule as read with Sections 35 and 40 of the Law of Succession Act.

24. According to section 76 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—

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;

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 the 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.”

25. An order for revocation of the grant can thus only be given if the aforesaid grounds for revocation had been satisfied. A similar finding was arrived at **In the Matter of the Estate of L A K – (Deceased) [2014] e KLR.**

26. Notably, the Objector did not include Julia Adhiambo Odinde in her list of beneficiaries in Paragraph 3 of her Supporting Affidavit. The Petitioner did not also include Hellen Odinde in the said P & A 5.

27. The Petitioner admitted that she left out some of the beneficiaries when she filed the Petition for the Grant for Letters of administration intestate. She said that she did not know that persons who were deceased could be listed as beneficiaries. A perusal of P & A 5 shows that she listed all the beneficiaries except those who were deceased. These beneficiaries included the children of the 1st and 3rd wives.

28. Bearing in mind that the Petitioner only left out Stephen Odongo Odinde (now deceased) and Hellen Odinde, this court was persuaded to give her the benefit of doubt and not deem the omission as having been concealment of material fact or fraudulent as provided in Section 76 (b) of the Law of Succession. Indeed, she filed the Petition herself without the assistance of an advocate.

29. While it is true that the Petitioner had not distributed the said estate as required within six (6) months of the issuance of the Certificate of Grant for Letter of Administration on 6th June 1996, she had attributed this to the animosity and non-cooperation by the beneficiaries. The Objector adduced in evidence copies of minutes and letters from the Chief evidencing that the deceased's family had been unable to agree on the distribution of the deceased's estate.

30. Although the Petitioner had asked this court not to accept the minutes of the meetings that had been annexed to the Objector's Supporting Affidavit and relied on the case of **In the matter of the Estate of Daniel Njoroge Mbugua (Deceased) 2017 eKLR** where the court therein disregarded the minutes of a meeting where distribution of properties had purportedly been agreed upon, this court found that it was undisputed that the deceased's estate was yet to be distributed amongst his beneficiaries.

31. Indeed, failure to distribute a deceased's estate is a ground for revocation of a grant for letters of administration as provided under Section 76 (d) of the Law of Succession. However, such revocation is not automatic. It is conditional. It is dependent on the applicant demonstrating that notice has been issued to the person who has applied for the grant and that person has failed:-

a. To apply for confirmation of the grant within a year from the date of such notice or such time fixed and/or prescribed by the court; or

b. To administer the deceased's estate; or

c. To produce an inventory or account of administration as required by the law within a time prescribed by the court.

32. The Objector did not furnish the court with such notice. This court therefore was not satisfied that the Objector had proven the ground set out in Section 76(d) of the Law of Succession for the revocation of the said Grant.

33. Having said so, this court noted that there was no Form 38 attached to the Petition. Whereas the Petitioner had argued that the Petition was gazetted and the beneficiaries did not object to the same being granted to her, it was unreasonable to have expected the said beneficiaries to have raised an objection when they did not know about existence of the Petition.

34. Notably, execution of Form 38 by all beneficiaries to a deceased's estate could signify no objection amongst those beneficiaries. It does not, however, preclude the beneficiaries who would not have executed Form 38 objecting to the grant of letters of administration being made to the petitioner therein.

35. This court was persuaded that the proceedings to obtain the grant were defective in substance as provided in Section 76(a) of the Law of Succession. Having said so, such defectiveness need not lead to the revocation of a grant. Indeed, the defectiveness in the proceedings can be compromised by a petitioner and an objector agreeing to be co-administrators in a deceased's estate as was correctly submitted by the Petitioner herein and held in the case of **In the Matter of the Estate of Johnson Njogu Gichohi (Deceased) 2018 eKLR** where the court therein exercised and ordered a joint administration between the objector and the petitioner therein.

36. If as the Objector had stated that none of the beneficiaries were aware of the Petition herein, she did not proffer any plausible reason to explain why she never took out a grant of Letters of Administration yet she had been holding a copy of the deceased's Certificate of Death that was issued in 1981 to her mother, the deceased's 1st wife who died on 30th May 1994.

37. Under Rule 73 of the Probate and Administration Rules, 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.

38. The Petitioner was aged eighty (80) years. Too much time had passed since the deceased passed away on 14th January 1979 and 20th November 2020 when the present Summons for Revocation of Grant was filed. Revoking the Grant for Letters of Administration that was issued on 6th June 1996 at this time would cause much prejudice to the Petitioner's and beneficiaries' interests.

39. This court therefore found favour in the Petitioner's proposal that the Objector herein could be enjoined as a joint administrator of the deceased's estate. The Objector would be representing the deceased's 1st wife's family while the Petitioner would be a petitioner in her own right as the deceased's wife.

40. Under Section 66 of the Law of Succession Act, the Petitioner ranks higher in preference to the Objector in taking out letters of administration. The same Act does not limit a person who can take out letter of administration on the basis of old age. Section 56 of the Law of Succession Act provides that :-

(1) No grant of representation shall be made-

(a) to any person who is a minor, or of unsound mind, or bankrupt; or

(b) to more than four persons in respect of the same property.

41. Notably, the Objector did not adduce any evidence to prove alleged incapacity on the part of the Petitioner. She did not adduce any evidence to show that the Petitioner was of unsound mind or bankrupt. This Court also had due regard to Article 27 of the Constitution of Kenya, 2010 which gives effect to equality and freedom from discrimination.

42. Indeed, the Petitioner's advanced age would not be a bar to administering the deceased's estate. If the court were to accept the Objector's argument in having her replaced because she was of advanced age, this would be contrary to Article 27(4) of the Constitution of Kenya, that prohibits discrimination based on age, sex, race, amongst other biases. The Objector's prayer to have the Petitioner removed was therefore discriminatory and did not find favour with is court.

43. Notably, if the deceased's 3rd wife had been survived by a child, this court would also have appointed one (1) person as an administrator to the deceased's estate. Both the Petitioner and Objector were agreed on this issue. For that reason, this court did not deem it necessary for an extra administrator to be appointed to represent her.

44. This court could not grant an order for the rendering account of the accounts within thirty (30) days of this Ruling as the Objector had sought for the reason that she did not satisfy this court that she had given the Petitioner notice to render the same as provided in Section 76 (d) of the Law of Succession and the Petitioner had refused.

45. Turning to Kisumu/Block 4/43 at Tom Mboya Estate, this court noted that the Petitioner and the Objector were in diametrically opposite poles. While it was correct as the Petitioner had argued that where matrimonial property was purchased jointly, it did not form part of a deceased's property to be subjected to succession as was held **In the matter of the Estate of Johnson Njogu Gichohi (Deceased)** (Supra) and that there had been no transmission of the property from the deceased to her, a perusal of P & A 5 shows that Kisumu/Block 4/43 at Tom Mboya Estate had been listed as a property belonging to the deceased. It had been valued at Kshs 300,000/=.

46. Further, quite a number of the documents that she attached to her Replying Affidavit were all addressed to the deceased's name. In a letter dated 14th December 1989, it was indicated that the documents of title were being issued to the deceased. From 2010, letters from the Ministry of Housing were addressed to the Petitioner herein and she was emphatic that that was her matrimonial home with the deceased.

47. On the other hand, the Objector was categorical that the Petitioner never lived in the said house and that all wives including the Petitioner herein lived at North Nyakach/Kabodho East/718 where they all lived in a rural set up and that Kisumu/Block 4/43 at Tom Mboya Estate was a rental house whose rental income was collected by the Petitioner herein.

48. Section 7 of the Matrimonial Property Act provides:-

Subject to Section 6(3) ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards the acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

49. However, as there was nothing on record to show that the Petitioner owned the said property in joint ownership with the deceased or that she lived in North Nyakach/Kabodho East/718 as had been contended by the Objector herein, the court could not for a fact make a determination based on the affidavit evidence. Indeed, it was not clear to this court if the Petitioner paid the arrears and the land rates merely to save the deceased’s house from being repossessed and that she managed to change ownership of the house after notifying Ministry of Lands that the deceased had passed on. This was a matter of evidence that was best left for determination by the court upon hearing oral evidence of the Petitioner and Objector.

50. This court took judicial notice that parties can always apply for rectification of a certificate of grant in the event a new property was discovered after the certificate of grant is issued. The time taken for the determination of the ownership of Kisumu/Block 4/43 at Tom Mboya Estate ought therefore not stop the distribution of the assets of the deceased that were uncontested. That notwithstanding, this is also an issue that the parties could find a solution to. They ought to be given an opportunity to see if they can resolve the same.

51. From her affidavit evidence, the Petitioner appeared keen to resolve this matter amicably. She welcomed the Objector being a co-administratrix to the deceased’s estate and requested this court to assist them in resolving the dispute between them right at the outset of her affidavit evidence. She had also not wasted and/or alienated the deceased’s estate because save for Kisumu/Block 4/43 at Tom Mboya Estate which was in her name, all the other properties were in the deceased’s name and were intact.

52. The court did not find anything in the Supplementary Affidavit to suggest that the Objector was opposed to resolving the issue in a similar manner. She was only very vehement that the Petitioner had come to court with unclean hands and that her response was full of deceit and bad faith.

53. It was not lost to this court that probate and administration matters are very emotive and parties may at times say things they would not have said if their relations were not strained because they are family. An order granted by the court could end up being unfavourable to one party or to all parties and the beneficiaries.

54. For that reason, this court had due regard to Article 159 (c) of the Constitution of Kenya which mandates court to promote alternative means of resolving disputes. This court thus found it prudent to urge the parties herein to first reconcile and reach an agreement on distribution whereupon it will adopt any agreement arrived at with a view to settling this matter. Indeed, this would be the preferred mode as the Petitioner is a senior citizen and the Objector is now her co-administratrix.

DISPOSITION

55. For the foregoing reasons, the upshot of this court’s decision was that the Objector’s Summons for Revocation and or Annulment of grant dated 24th October 2020 and filed on 20th November 2020 was partly merited.

56. The Grant of Letters of Administration issued herein on 31st October 1995 and confirmed on 6th June 1996 be and is hereby revoked but amended to reflect the change to the effect that the Objector has been enjoined as a joint administratrix of the deceased’s estate together with the Petitioner herein.

57. It is hereby directed that the matter be mentioned before the Deputy Registrar High Court Kisumu on 11th August 2021 for the appointment of a Mediator who shall facilitate the discussions between the parties under the Court- Annexed Mediation process. The Deputy Registrar High Court Kisumu shall cause this file to be placed before this court in the normal manner after the period stipulated for the mediation process under the Mediation Rules lapses for further orders and/or directions.

58. As the Objector was only partly successful in her Summons for Revocation of Grant, each party shall bear its own costs of this Summons.

59. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF JULY 2021.

J. KAMAU

JUDGE