



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.23 OF 2007

MARGARET OGOLA NGESA.....PETITIONER

VERSUS

VINCENT OPONDO OKWACH.....OBJECTOR

AND

PATRICK MANGO.....INTERESTED PARTY

R U L I N G

[1] The genesis of this matter is apparently the grant of letters of administration intestate issued in favour of **Catherine Atsieno Okwachi** and **Stephen Oduor Okwachi (petitioner)** on the 5th December 2007, respecting the estate of the late Odipo Afwande Bwore (**deceased**).

Later in the year 2008, the two administrators applied for confirmation of the grant vide the summons for confirmation of grant dated 28th August 2008. However, a beneficiary name **Joseph Ngesa Odipo** filed an affidavit of protest dated **30th October 2008**.

A second affidavit of protest dated 4th May 2010, was by two other beneficiaries i.e. **Redemuda Akello Obonya** and **Margaret Atieno Odipo**, who alleged that they were the only daughters of the deceased but were omitted in the share of the estate property.

The original protestor (**objector**) Joseph Ngesa Odipo, reportedly passed away and on the 15th June 2011, an application for his substitution as an objector was filed by one Margaret Agola Ngesa.

[2] The first petitioner, Catherine Atsieno Okwachi, also passed away and on the 3rd February 2015, her second son, **Vincent Opondo Okwachi** applied to be substituted in her place. The application was allowed by the court. Later, several third parties claiming an interest in the estate property were enjoined as interested parties in the matter. All along, the objection to confirmation of the grant remained pending. Ultimately, when the parties appeared in court on 12th June 2019, a hearing date for the objection was fixed for 5th November 2019 but that was adjourned to future dates on several occasions up to the 22nd March 2021, when the court directed that the protest/objection dated 24th April 2018, be heard by way of affidavit evidence and written submissions. Accordingly, the petitioners written submissions were filed on 18th May 2021 by **Bogonko, Otanga & Co. Advocates**, while the objector/protestors, filed their submissions on 10th May 2021 through **Omeri, & Associates Advocates**. The second petitioner's submissions were filed on 5th July 2021, through **Gabriel Fwaya Advocates** and the interested party's submissions were filed on 20th September, through **Wanyama & Co. Advocates**.

[3] The protest or objection was given due consideration by this court in light of the supporting grounds and those in opposition thereto as well as the submissions of the respective parties.

For the avoidance of doubt, the material affidavit of protest is basically the one dated 30th October 2008, by Joseph Ngesa Odipo (**first objector**). It is in respect of the summons for confirmation of grant dated 28th August 2008, by Catherine Atsieno Okwachi (**first petitioner**) and Stephen Oduor Okwachi (**second petitioner**). However, alleged daughters of the deceased named Redemuda Akello Obonya and Margaret Atieno Odipo, filed a second affidavit of protest on 7th May 2010. Nevertheless a determination on the first protest would invariably dispose off the second protest in one way or the other. What could not become quite clear was whether Margaret Atieno Odipo is the person also known as Margaret Agola Ngesa who was substituted as the first or main objector following the demise of Joseph Ngesa Odipo.

[4] Be that as it may, the objection was basically on the mode of distribution of the estate property as proposed by the petitioners in the certificate of confirmation of grant. In that proposal, it is indicated that the sole estate property, being land parcel No.Marachi/Elukhari/1781, be shared among the specified beneficiaries namely, Roselinda Nyongesa Naboga, Margaret Okwaro Sinda, Vincent Opondo Okwachi, Joseph Odhiambo Okowa, Joseph Ngesa Odipo and Stephen Oduor Okechi. However, in the proposal contained

in the objector's affidavit of protest, the specified beneficiaries appear to be different and include alleged purchasers of part of the estate property namely, **J.W Namatsi** and **Patrick Mango (interested parties)** It is therein indicated that the interested party/purchaser was to be given 2.0 acres of the property while the other purchaser was to be given 5.0 acres.

[5] In actual sense, the second objection was either in opposition or support of the mode of distribution as suggested by the petitioner's, or the first objector. It was grounded on the fact that the two objectors being the daughters of the deceased are entitled to a share of the estate property but were excluded in the distribution thereof. Apparently, what is actually in dispute in this matter is with regard to the actual and true beneficiaries of the deceased and their respective shares in the estate property. This is the bone of contention which would be determinable by retracing the process leading to the grant of the letters of administration intestate which in turn led to the impugned summons for confirmation of grant dated 28th August 2008, and indeed, the affidavit of protest dated 30th October 2008.

[6] In that regard, the petition for the grant dated 2nd February 2007, was presented by the petitioners Catherine Abieno Okwachi and Stephen Oduor Okwachi, describing themselves as the widow and son respectively of the deceased. The beneficiaries included the two petitioners together with Joseph Ngesa Odipo, Vincent Opondo Okwachi and Joseph Odhiambo Okuwa, described as son, grandson and cousin of the deceased respectively. It may be noted that in the list of the deceased's survivors and/or dependants, the second petitioner (**Stephen**) was described as a grandson and not son of the deceased. It may also be noted that in the petition, it was implied that the deceased was not a polygamist and that this was an intestate succession i.e. the deceased died intestate of all his free property of which he has not made a will capable of taking effect.

[7] The first petitioner (**Catherine**) was presented as the sole surviving spouse (**widow**) of the deceased. She was therefore an actual and true beneficiary of the estate of the deceased and was the first in priority in petitioning for the grant. She actually did so but jointly with her son described as the grandson of the deceased. The grandson is the second petitioner. Catherine has since passed away and her place in this matter was taken over by her other son, Vincent Opondo Okwachi who is said to be a grandson of the deceased. The substitution occurred in the year 2015, long after the grant had been issued to original two petitioners on the 5th December 2007. The administration of the estate of the deceased was therefore placed under the two grandsons of the deceased. This was ironic because the deceased was survived by a son, Joseph Ngesa Odipo (**first original objector**) and probably two daughters (**second objectors**).

[8] The foregoing notwithstanding, the Chief's letter dated 3rd January 2007, indicated that the deceased was a widower who was survived by two sons namely John Okwachi Odipo and Joseph Ngesa Odipo. John was at the time deceased but was survived by his wife Catherine Atsieno Okwachi and her sons Stephen and Vincent. All these persons were listed as beneficiaries in the Chief's letter along with Margaret Okwero Sindala and Roselinda Nyongesa Nabweba as purchasers of parts of the estate property from the deceased prior to his demise. This explains why the two were indicated as purchasers in the petition for letters of administration. Also listed in the Chief's letter is one Joseph Odhiambo Okuwa whose late father Philip Okuwa Makomba, was a cousin of the deceased.

All these listed beneficiaries were also listed as such in the impugned certificate of confirmation of grant. Additional beneficiaries named J.W. Namabi and Patrick Mango were listed in the first affidavit of protest while the second affidavit of protest indicated that the objectors therein are daughters of the deceased and also beneficiaries of his estate.

[9] It is clear from the Chief's letter that the accused and the beneficiaries of the estate of deceased were his sons John Okwochi Odipo and Joseph Ngesa Odipo. Since John was deceased, his widow Catherine Atsieno Okwochi, was also a true beneficiary of the estate in her capacity as a daughter in law of the deceased. Her sons Stephen and Vincent were indirect beneficiaries through her.

Instead of applying for the grant with her own son (Stephen) Catherine ought to have done so jointly with the deceased's surviving son Joseph Ngesa Odipo who actually had the first priority in applying for the grant or the deceased's surviving daughters. The daughters of the deceased (**second objectors**) were omitted from the Chief's letter yet they were lawful beneficiaries of the estate of their late father. Such omission led to their discrimination and disinheritance from the estate of the deceased.

[10] Margaret Okwaro Sinala and Roselinda Nyongesa Nabwalba were not true beneficiaries of the estate of the deceased but had an interest on parts of the estate property which they purchased from the deceased. In the circumstances, their respective interest ought to have been factored in the distribution of the estate failure to which the remedy lay in a claim for damages and ownership of land in a normal civil suit. And, if any sale of the estate property occurred after the death of the deceased and prior to the confirmation of the grant then such sale and purchase was unlawful, null and void "*ab initio*". The remedy would in the circumstances be a normal civil suit against the vendor/beneficiary if he does not surrender his share in the estate property to the innocent purchasers for value.

[11] In sum, the actual and true beneficiaries of the estate of the deceased were his surviving daughters (**second objectors**) and son (**first original objector**) and wife of his late son (**first original petitioner**) and through her, his grandsons second original petitioner and current petitioner in place of the deceased first original petitioner i.e. (**Vincent Opondo Okwachi**).

All the other persons named as beneficiaries in the petition or the Chief's letter or the summons for confirmation of grant or the first affidavit of protest including the purchasers of part of the estate property and cousin of the deceased were not true beneficiaries of the estate and were not expected to benefit as such in the distribution of the estate property.

[12] Undoubtedly, as it is apparent from all the foregoing factors and all the evidence availed in the record the process normally and legally used in applying and obtaining grant of letters of administration intestate was herein misused and abused by the petitioners inasmuch as it was initiated without the consent of all the actual and true beneficiaries of the estate and by means of false representations and concealment of material facts. Consequently, the impugned summons for confirmation of grant must and is hereby disallowed. This in effect means that both protest to confirmation of grant and distribution of the estate are merited. Any abuse of the court process must be frowned upon and discouraged at all costs. Therefore, in exercise of the powers conferred by **Rule 73 of the Probate and Administration Rules**, this court orders that the grant of letters of administration issued herein on 5th December 2007 be and is hereby revoked forthwith together with any other grant that may have existed, rightly or wrongly, respecting the estate of the deceased.

[13] If the parties in their wisdom consider undoing the damage arising from a faulty process in order to save the estate and facilitate proper and lawful distribution of the estate property, they should agree on whom to appoint as an administrator and/or administrators of the estate and they move the court in this very cause to issue a fresh grant of letters of administration intestate. They may thereafter agree on the distribution of the estate and take out the necessary summons for confirmation of grant within the shortest period possible. In that way, they shall find peace of mind and indeed allow the deceased to rest in peace.

[READ AND SIGNED THIS 30TH DAY OF SEPTEMBER 2021]

J.R. KARANJAH

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