



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. APPL. SUCC. NO. 3 OF 2018

IN THE MATTER OF THE ESTATE OF AYUB OKULO MAYENDE *alias* OKULO MAYENDE (DECEASED)

AND

IN THE MATTER OF AN APPLICATION BY

DAMARIS MBIRA NJELI

JACKSON SEME OKUNDO

COSMAS OKOKO NJELI

ROSEBELLA AYIECHA OGATA

MARGARET SIMBE OYOGI

HELIDA OKA ODONDO

DAMARIS MBIRA WANJIRA

BEATRICE NAOMI AGISO

LEAH OPEWA OKULO

SARAH KUSA

MARY AMBAGA ACHOLA.....APPLICANTS

VERSUS

JAEL SAISI OKULO.....RESPONDENT

AND

PENINA OYIELA JOSIAH.....INTERESTED PARTY

EVANS AMKOA ODINDO.....INTERESTED PARTY

RULING

Before me is a summons for revocation of the Grant which had been issued to **JAEL SAISI OKULO**, on 15th January 2010.

1. Pending the hearing and determination of the said application, the Objectors/Applicant asked the Court to restrain;

(a) *the respondent from selling,*

alienating or in any other way

dealing with the property of the

deceased; and

(b) the interested party from

commencing construction upon

the suit property, or selling,

alienating or in any other way

dealing with the suit property.

2. Finally, the Applicants asked this Court to order that the transfer of the suit property, to the Respondent, and the subsequent subdivisions be canceled, so that the suit property can revert to the name of the deceased.

3. The said suit property is **L.R. NO. WEST BUNYORE/EKWANDA/2423**.

4. The application was based on 5 grounds, which can be summarized as follows;

(i) The grant was obtained fraudulently

by making false statements or by

concealment of material facts.

(ii) The proceedings were defective and

incompetent in substance.

(iii) The grant was obtained by means of

untrue allegations of a fact essential in

point of law to justify the grant.

(iv) No consent was obtained from the

objectors or any other beneficiaries, on

the appointment of the respondent as

the Administratrix.

(v) No assets or liabilities were listed or

disclosed in the petition, and therefore

the grant issued was inoperative and

useless.”

5. The application was supported by an affidavit sworn by the 1st Applicant, **DAMARIS MBIRA NJELI**. She deponed that the deceased, **AYUB OKULO MAYENDE** *Alias* **OKULO MAYENDE** had 4 wives, in his lifetime. The said 4 wives were;

(a) Okah Okulo (Deceased);

(b) Mikali Asiko (Deceased);

(c) Jael Oranga (Deceased); and

(d) Jael Saisi Okulo.

6. The first 3 wives were all deceased, leaving behind only the 4th wife, who is the Respondent herein.

7. Damaris (the 1st Applicant) told the Court that the 1st wife, Okah, begot one child Enock Otieno Masunde; but the son is deceased.

8. Damaris said that the 2nd wife, Mikali begot 5 children; being Amos Nyaoko (deceased); Jackson Seme; Cosmas Okoko Njeli; Jane Njeli (deceased) and Damary Mbira Njeli.

9. Damaris told the Court that the 3rd wife, Jael Oranga begot 6 children; being Rosebella Ayiecha Ogata; Helida Oka Odondo; Margaret Simbe Oyogi, Beatrice Naomi Agiso; Damary Mbira Wanjira; and Leya Opewa Okulo.

10. Finally, Damaris disclosed that the Respondent, Jael Saisi

Okulo, (who is the 4th wife) did not beget any children.

11. The Respondent has not disputed any of the facts concerning the constitution of the family of the deceased.

12. Notwithstanding the large size of the family, the Applicants told this Court that the Respondent never sought their concurrence when she applied for grant of letters of administration. Indeed, the Applicants say that they did not even have any knowledge that the Respondent had instituted these proceedings for

succession.

13. The Respondent failed to demonstrate that she not only informed the other beneficiaries about her intention to institute the proceedings, and that she sought and obtained their consents.

14. As the initial proceedings were before the Principal Magistrate's Court, Maseno, I called for the record of the said proceedings, being **SUCCESSION CAUSE NO. 47 OF 2008**.

15. A perusal of the Petition in that Cause shows that the Petitioner did declare as follows;

“Every person having an equal or

prior right to a grant of representation

***herein has consented hereto**”*

16. As at the date when the petition was filed, the co-wives to the Respondent herein were deceased. Therefore, in a strict sense, there was no other person who then had an equal or prior right, in comparison to the Respondent's right as the sole surviving wife.

17. However, as the Respondent has not disputed the information concerning the identities of the beneficiaries to the estate, I find that when she filed the Chief's letter dated 12th September 2008, she provided the Court with misleading information. I so find because the letter in question described the Respondent as an *“only wife.”*

18. The effect of that information is that the Court would have no reason to inquire whether or not the Respondent's co-wives (although deceased), had left behind any children.

19. As the Applicants have demonstrated to this Court, the co-wives of the Respondent had left behind a considerable number of children.

20. The Respondent, through the chief's letter, cited **SEVEN (7)**

children. The seven include the Six (6) daughters of Mama Jael Oranga (the 3rd wife).

21. The seventh name is of **MELSA NUSU**, who has not been mentioned by the Applicants.

22. The family of the 2nd wife, (Mama Mikali Asiko), was left out altogether.
23. Similarly, the family of the 1st wife, (Mama Okah Okulo), was also left out altogether.
24. Accordingly, I find that the Respondent concealed some material facts when she filed the petition.
25. The Respondent has stated that the Applicants had failed to turn up before **SENIOR CHIEF IRENE OMBIMA**, when it would have been possible to hold deliberations on the way forward, as a family.
26. I understand the Respondent to be confirming that she was always aware that the Applicants were beneficiaries.
27. The Respondent seems to be saying that the Applicants were left out from the list of beneficiaries because
- “they failed to show up to deliberate on the way forward as a family in the presence of the senior chief.”***
28. The failure by any beneficiary to attend before the chief cannot be a basis for excluding such beneficiary from the list of beneficiaries.
29. Although the Respondent now says that she had no deliberate intention to disinherit the Applicants, that is not borne out from her conduct. By leaving out the Applicants, just because they did not attend before the senior chief, sounds to me to be a very deliberate move!
30. But whether or not it was deliberate, the truth is that material information was withheld from the Court at the time the Respondent first moved the Court: that is sufficient reason to warrant revocation of the grant.
31. The second issue is about the mode of distribution.
32. The Respondent persuaded the Court to give to her the only asset which she disclosed as constituting the estate of the deceased.
33. In effect, although there were over **TEN (10)** beneficiaries, it is only the Respondent who was assigned the only asset which she had disclosed.
34. There was no justification given either then or even before me, to warrant denying all the other beneficiaries, some share in the estate of the deceased.
35. Therefore, I find that that is another reason that warrants the revocation of the grant.
36. Accordingly, the grant that was issued to the Respondent is hereby revoked.
37. The Respondent and the Interested Parties have submitted that this Court has no jurisdiction to adjudicate on the question **concerning the ownership of the parcels of land which the Respondent sold to the interested parties.**
38. In their understanding of the law, it is the grant which had been issued to the Respondent which empowered her to sell the **property which belonged to the deceased. In the absence of grant of letters of administration, it would not have been possible for the Respondent to sell the parcels of land belonging to the deceased.**
39. Pursuant to **Section 76** of the **Law of Succession Act**, a grant may be revoked or annulled at any time, whether or not it had been confirmed.
40. Although the Respondent and the interested parties appear to appreciate that fact, they submitted that the **Probate and Administration Court** cannot adjudicate on disputes between third parties and either the administrators or beneficiaries of the estate.

According to those responding to the application herein;

“Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation.

In the meantime, the property in question is removed from the distribution table.

The presumption is that such disputes arise before the distribution of the estate or the confirmation of the grant.

Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned.”

41. On the one hand, there may be persons who purchased some assets which are a part of the estate of the deceased, at the time when the person selling the same had obtained a confirmation of grant which transmitted the asset to the said seller.

42. If the buyer had no notice of anything unlawful or irregular about the authority which the seller had obtained through the confirmed grant, the buyer may be deemed to be an innocent purchaser for value.

43. On the other hand, when the grant is later annulled or revoked, it implies that the very foundation upon which the seller derived authority ceased to exist.

44. And when the sale resulted in a situation in which one or more beneficiaries were disinherited, it would be unfair to let the buyer retain a property which ought to have gone to the beneficiaries.

45. Therefore, in my considered opinion, the appropriate orders that should be made after a grant had been annulled or revoked, cannot be a “one-answer-fits-all.”

46. The sale may, prima facie be regular; but when it serves to disinherit deserving beneficiaries, whilst the seller keeps the money which got, that would result in an injustice. In other words, it is not just a question about whether or not the Sale transaction was regular, on the face thereof, at the time it was carried out.

47. I hold the view that each case ought to be determined on its own facts.

48. For instance, the proceeds of a sale could have been utilized to pay fees and other expenses for the benefit of beneficiaries. In such an instance, I find that the justice of the case dictates that the sale be upheld.

49. But where an administrator sells assets and benefits himself, to the exclusion of other beneficiaries, the Court might consider dividing the remaining assets to the said other beneficiaries.

50. But when there was only one asset, and the proceeds of sale did not benefit some of the beneficiaries, the Court has a difficult task in balancing between the seemingly innocent purchaser and the equally innocent beneficiaries who would otherwise be **disinherited**.

51. If the Courts were to readily uphold sales by administrators, on the grounds that an asset had been transferred to an innocent third party, I hold the view that that might encourage unscrupulous administrators to dispose of assets quickly, especially when the administrator was aware that he had disinherited some or all bona fide beneficiaries.

52. In the final analysis, I order that the Respondent and the interested parties shall be accorded an opportunity to make further submissions before this Court, so that I can thereafter determine whether or not to order for the parcels of land, (which are currently in the hands of the interested parties) to revert to the name of the deceased.

53. The Court will set a date for further submissions before making the final orders.

54. In the meantime I order that there shall be no dealings with the suit property **L.R. NO. WEST BUNYORE/EKWANDA/2423** or any other parcels which have arisen subsequent to the sub-division of the original title **L.R. NO. WEST BUNYORE/EKWANDA/39**.

55. The costs of the application dated 14th August 2018 are awarded to the Applicants, and shall be paid by the Estate of the deceased; and shall be deemed to have been obtained from such share of the estate as the Respondent was entitled to.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF NOVEMBER 2021

FRED A. OCHIENG

JUDGE