



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO.109 OF 2014

IN THE MATTER OF THE ESTATE OF ONGOBA OTUNDO (DECEASED)

IN THE MATTER OF REVOCATION OF LETTERS OF ADMINISTRATION

BETWEEN

CHARLES ANGWENYI OTUNDO.....PETITIONER

AND

JUSTUS ATISI MANDI.....OBJECTOR

JUDGMENT

1. This ruling concerns the estate of **Ongoba Otundo** who died intestate on 20th May 2005. The letters of administration were issued to his brother **Charles Angwenyi Otundo** (the petitioner) on 20th January 2015 and confirmed on 24th July 2015.

2. Justus Atisi Maindi is the objector ('the objector'), wants the letters of administration revoked. He is the son of the late Mandi Maganga *alias* Mandi Otundo who was also a brother of the deceased. He claims that his uncle obtained letters of administration by concealing the fact that his father and the deceased were registered as joint proprietors of L.R. No. Nyaribari Chache/B/B/Boburia/2132 (hereinafter referred to as "the suit land"). The objector claims that his father was never served with a citation or any documents relating to the succession cause. He avers that since the deceased had no children, his father was the only one entitled to the land and since his father has passed away, he and his brothers Charles Mandi, Elijah Mandi, Ezra Mandi and Michael Mandi are the true beneficiaries of the estate. The objector avers that they exclusively occupy the land and if the court does not grant the prayers sought they will be rendered destitute.

3. The petitioner swore a replying affidavit on 21st February 2017, in response to the application. He agreed with the objector's deposition that the deceased had not been survived by a spouse or children and that he left behind L.R. No. Nyaribari Chache/B/B/Boburia/2132 which was registered jointly in his name and the objector's father's name. The petitioner averred that on 28th March 2013, he and Chrisantus Onserio Otundo cited Mandi Otundo and served him with summons. When Mandi Otundo failed to attend court on 3 occasions, they proceeded to file a suit for grant of letters of administration. He stated that they included Mandi Otundo as a beneficiary of the estate despite his expressed disinterest in the said portion and he did not complain. He insisted that due process had been followed and urged the court to dismiss the application.

THE EVIDENCE

4. The parties took directions to canvass the application through oral evidence.

5. The objector, **Justus Atisi Mandi** adopted his statement and list of documents as his evidence. He added that at the time of his death, his father and his uncles Charles Angwenyi Otundo and Chrisantus Onserio Otundo were not in good terms. He claimed that before the meeting held on 1st February 2013, to deliberate on how this present succession cause would be handled, his father was arrested for causing disturbance. The objector claimed that despite the indication in the minutes that he had attended the meeting, his father was in police custody having been arrested at 4:00 a.m. The objector explained that the reason for the dispute between his father and his uncles was father's refusal to give his brothers a share of the suit land. He claimed that his uncles lived on parcel no. 2368 which was ancestral land while the suit land had been given to his father by their great grandmother. He testified that his father invited the deceased to live on the land and since he had died without children, they were entitled to inherit his land.

6. On cross examination, the objector testified that his father was the eldest son of the family followed by a lady and his uncles David Onkoba, Charles Angwenyi Onyigo and Jackson Onserio. He testified that his grandfather had one parcel of land known as Nyaribari

BB/Boburia/2368 which was subdivided among his uncles but his father and the deceased were not given a share of the land. He testified that he resided in parcel 2312 which was registered in the name of his father and the deceased. He reiterated that his father was not aware of citation case No.133/13.

7. The objector's mother, **Bathseba Kwamboka Mandi (PW2)** testified that her husband owned the suit land where she had been living since she got married to him. She stated that the deceased also lived on the land and never got married until he died. She testified that her husband had 2 other brothers who lived on a separate piece of land which had been given to them by their grandfather. She stated that her husband had not allowed his brothers to subdivide the portion where he lived and insisted that the land belonged to her.

8. During cross examination, PW2 stated that suit land had been given to her late husband by his uncle known as Nyambanyi. She denied that her sons had removed boundaries that had been erected on the land by the chief and also denied that there had been discussions over the land at their home.

9. The objector's brother **Elijah Mandi Onkoba (PW3)** informed the court that he was 49 years old and he had been living on the suit land since he was born. He told the court that the suit land was jointly owned by his father and the deceased. He stated that they had just cultivated the land as a whole since it was not subdivided. PW3 testified that the land they lived on was not ancestral land and that his uncles Charles and Chrisantus lived on land parcel nos. 3773 and 2368 which they had gotten from his grandfather. He stated that since his father had not gotten a share of the ancestral land, his uncles did not have a right to inherit the suit property.

10. **Chrisantus Onserio Otundo alias Jackson Otundo (DW1)** stated that his father Otundo Maganga Nyamoki had four sons namely James Mandi Otundo (deceased), Daudi Onkoba Otundo, himself and Charles Angwenyi Otundo. He stated that each of them had been given land by their father. James and the deceased had gotten equal portions of the suit land while he and Charles had been given equal portions of parcel No. 2368.

11. Chrisantus testified that his brother Daudi Onkoba died without a wife or children. He stated that they buried him in the suit land and it was agreed that the 3 surviving brothers would divide his portion amongst themselves. He testified that the decision to subdivide the land into 3 portions was reached by the chief in a meeting. James Mandi opposed the division of the land in the manner proposed and they decided to file a citation against him. Later, they got 3 titles to the suit land. He stated that he got parcel no. Nyaribari Chache/13/B/Boburia/13952, Charles got Nyaribari Chache/13/B/Boburia/13951 and James Mandi got land parcel no. 13953. He stated that they had not been able to cultivate the land because James chased them away. He urged the court to give them their portions as decided by the elders and the court.

12. The petitioner, **Charles Angwenyi Otundo (DW2)** similarly testified that the deceased and Mandi Maganga owned the suit land which had been given to them by their father while he and Chrisantus owned land parcel no. 2868. He stated that as an administrator of the estate of his brother, he subdivided the land into equal portions among the surviving brothers. He recalled that he had cited his elder brother in citation No. 133 of 2013 because he did not want them to cultivate the portion and he kept moving the boundaries. Mandi Otundo was served with the citation but he said that they could complete the succession process and give him his portion which he did.

13. During cross examination, Charles stated that they had summoned Mandi for a meeting with the assistant chief and elders because he was not ready to divide the shamba as they had suggested. According to him Mandi had changed his mind in the course of the transaction because he was instigated by his children. Charles testified that Mandi's children chased them away from the land and plucked the boundaries that had been put up. He stated that he had seen no need to involve his nephews in the succession process, since the land belonged to his father.

14. **Cornerlius Mochache (DW3)** testified that he was the assistant chief of Mitengero within Monda village as well as a village elder. He recalled that on 1st February 2013, they had held a meeting which was attended by Charles Otundo, Mandi and Jackson to discuss their deceased's land. He stated that the brothers lived on adjacent pieces of land. Jackson and Charles lived on one side and their brothers Mandi and Daudi Onkoba lived on the other side. DW3 testified that in the meeting, it was decided that since Daudi had died without a family, his land be divided amongst the 3 brothers who were alive. He stated that when they started subdividing the land later that day, Mandi's wife began screaming and protested the division of the land. He testified that they had not been able to complete their task due to the fracas. DW3 stated that James had initially agreed with them but his wife and children opposed the decision and he joined them. He denied the claim that James was arrested on the day of the meeting.

15. **Lawrence Mochache Kiyaba (DW4)** described himself as an elder in Kianyambari village within Nyanancha. He testified that he knew his village mate James Mandi and his brothers Daudi Onkoba, Jackson Omoke and Ratemo Otundo. He testified that he was also aware that their father Otundo Maganga had two parcels of land on opposite side of the hillside. Jackson and Ratemo Otundo lived on one side while James Mandi and Daudi Onkoba stayed on the other side. He confirmed that a meeting had been held by the clan elders on 1st February 2013 to subdivide the land of Daudi Onkoba who had died without a family. He recalled that when they reached there they found a commotion and could not proceed with the subdivision of the land. He stated that the fracas was initiated by the wife of James Mandi but denied that Mandi was arrested on that day.

SUBMISSIONS

16. The objector's learned counsel submitted that from the evidence, it was clear that the father of the objector, Mandi Otundo did not appear in court during the succession proceedings. He stated that they had issued summons to the court process server to come and produce his affidavit of service and be cross examined on its contents but he deliberately failed to attend court and thus an inference should be drawn that he had not served the father of the objector.

17. Counsel argued that it was apparent from the evidence that the land owned by the deceased and Mandi Otundo was not ancestral land. He submitted that since the land was jointly owned, the entire suit land should have devolved to the objector's father. He argued that the objector's father never agreed that his brothers the petitioner and Chrisantus should have a share in the suit land. He accused the petitioner and his brother of conspiring to apply for letters of administration without involving the objector's father. He submitted that the petitioner

and his brother Chrisantus had not only connived to take the suit land but had also taken their uncles land parcel no. 3773. He submitted that it was naturally expected that being an owner of the land, the objector's father would participate in the main proceedings but he had not done so, because he was deliberately excluded from the process.

18. Conversely, the petitioner's counsel submitted that the objector had failed to prove any of the ingredients for revocation of a grant as set out in **Section 76** of the **Law of Succession Act**. He argued that the objector had the onus to prove his allegation that the petitioner concealed material facts from the court and obtained the grant fraudulently but failed to discharge his burden of proof. He submitted that the suit land was owned by the deceased and his brother as a tenancy in common and the doctrine of survivorship did not apply in this case. That since the deceased did not have a family his brothers automatically became his beneficiaries. He contended that the succession process had been done within the confines of the law and the objector's application should be dismissed.

ANALYSIS AND DETERMINATION

19. **Section 76** of the **Law of Succession Act** empowers this court to revoke a grant of representation whether confirmed or not if it decides;

(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)...

(e)...

20. The evidence on record is certain that the deceased was not survived by a spouse or children. It has also been established that he was a co-owner of the suit land which was his sole property at the time of his death. The petitioner who was the deceased brother's brother was issued with letters of administration in the estate of the deceased on 20th January 2015 which were confirmed on 24th July 2015. In his application for confirmation of grant, the petitioner urged the court to subdivide the suit land equally between him and his brothers Mandi Otundo alias Mandi Maganga and Chrisantus Onserio Otundo.

21. The petitioner claims that after the death of the deceased, a meeting was held on 1st February 2013 and it was decided that since the deceased had no family of his own, the land should be divided equally among the three surviving brothers. The petitioner and his witnesses testified that Mandi Otundo initially agreed to the mode of distribution of the land among them but later changed his mind when his wife and children opposed the proposed mode of distribution in the meeting. The petitioner claimed that following the botched meeting, he instituted succession cause no. 133 of 2013 where he cited Mandi Otundo to accept or refuse letters of administration in the estate of the deceased, but Mandi did not respond to the citation. He averred that after Mandi failed to attend court on 3 occasions, they decided to proceed with the succession cause.

22. The objector claimed that his father was never served with the citation. He stated that despite having their own land, his uncles had forged documents, had his father arrested and concealed the succession proceedings from him. His evidence depicted his uncles as people who would go to any lengths to acquire more land for themselves.

23. An original copy of an affidavit of service filed in court on 15th May 2014, stated that Mandi Otundo had been served with the citation order and he accepted service but declined to sign on it. No meaningful effort was made to impugn the averments made in that affidavit. I also find it curious that Mandi Maganga did not move the court to determine the deceased's estate after he died in May 2005 yet he was a co-owner of the suit land. He also failed to make any complaint when his brothers decided to share the suit land equally amongst them in March 2013. My interpretation of the evidence is that Mandi was opposed to sharing the suit land with his brothers and chose to dismiss the citations and succession process to his detriment. That said, I have reached the conclusion that the application for revocation of the grant issued to the petitioner is merited for reasons to be given hereunder.

24. From the copy of official search and the green card of the suit land it is apparent that the land was owned by the deceased and Mandi Otundo as tenants in common. The objector's contention that the deceased and his father were joint tenants of the suit land is rejected because the shares of the co-owners was clearly indicated in the title.

25. In the case ***In re Estate Dorica Lumire Mapesa (Deceased) Succession Cause No. 106 Of 2008 [2018] eKLR*** Musyoka J. distinguished a joint tenancy from a tenancy in common thus;

18. I have therefore to determine whether or not the property was held jointly or in common for that has consequences upon the demise of one or more of the co-owners. The distinction between two was brought in Isabel Chelangat vs. Samuel Tiro Rotich & 5 others (2012) eKLR, in the following terms –

‘At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point I have borrowed heavily from two texts, Megary & Wade, The Law of Real Property [2] and Cheshire & Burn's, Modern Law of Real Property, [3]. According to Burn, "...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares..." Joint tenancy carries with it the right of survivorship and "four

unities". The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence...

Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants.^[8] In other words they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.

...

19. The register in respect of East/Wanga/Lubinu/66 did not indicate whether the proprietorship was joint or in common. However, going by what is stated in Cheshire & Burn's, *Modern Law of Real Property* cited above, that a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...

26. Proprietorship in common was defined in the following terms in Section 103 (1) of the **repealed Registered Land Act**;

103. (1) where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

27. Similarly the **Land Registration Act** at section 91(4) and (5) provide;

91 (4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

(a) dispositions may be made only by all the joint tenants;

(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or

(c) each joint tenant may transfer their interest *inter vivos* to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.

(5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

28. The title of the suit land in this case spelt out that Mandi Otundo and the deceased had equal shares in the land. The petitioners proceeded with the distribution of the estate as though the same was wholly owned by the deceased and proceeded to subdivide the land among the deceased's three surviving brother. I find that the grant was obtained by means of an untrue allegation of an essential fact and I hereby revoke it.

29. The deceased was only entitled to half a share of the suit land. The applicable provision for distribution of his estate is section 39 Law of Succession Act which lists the hierarchy of persons entitled to his estate thus;

39 (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority —

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

30. The deceased had no surviving parents, spouse or children when he died, his brothers Mandi Otundo (deceased), Chrisantus Onserio and Charles Angwenyi Otundo were therefore entitled to inherit his share of the suit land. Since Mandi Otundo passed away on 21st April 2016, the estate of the Mandi Otundo is entitled to his share of the deceased's property.

31. For the foregoing reasons, I allow the application dated 31st August 2016 and make the following final orders;

a. The grant of letters of administration issued on 20th January 2015 to Charles Angwenyi Otundo and confirmed on 24th July 2015 be and is hereby revoked.

b. A fresh grant of letters of administration be and is hereby issued and confirmed to **Charles Angwenyi Otundo** and **Julius Atisi Mandi**.

c. An order is hereby issued revoking the title deeds for the subdivisions of L.R. No. Nyaribari Chache/B/B/Boburia/2132 being L.R. No. Nyaribari Chache/B/B/Boburia/13950, L.R. No. Nyaribari Chache/B/B/Boburia/13951 and L.R. No. Nyaribari Chache/B/B/Boburia/13952 and any other sub-divisions thereof which shall revert to L.R. No. Nyaribari Chache/B/B/Boburia/2132;

d. L.R. No. Nyaribari Chache/B/B/Boburia/2132 shall be divided as follows;

NAME	DESCRIPTION OF PROPERTY	SHARE OF HEIRS
The estate of Mandi Otundo	½ share of L.R. No. Nyaribari Chache/B/B/Boburia/2132	Absolutely
Chrisantus Onsiero		Equal share
Charles Angwenyi Otundo	½ share of L.R. No. Nyaribari Chache/B/B/Boburia/2132	Equal share
The estate of Mandi Otundo		Equal share

e. The parties shall agree on a joint surveyor to carry out the survey and share the land in the mode indicated in order (d) above taking into consideration the portions occupied by the parties.

f. The parties shall each bear their costs as this is a family matter.

Dated, signed and delivered at KISII via this 29th day of May 2020.

R.E.OUGO

JUDGE

In the presence of;

For the Objector

For the Petitioner

Ms. Rael Court Assistant