



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 07 OF 2019

IN THE MATTER OF THE ESTATE OF PAUL OPANGA (DECEASED)

AND

BETWEEN

FRANCO STEPHEN OPANGA.....PETITIONER/APPLICANT

AND

DANIEL MILTON OPANGA.....PROTESTOR/RESPONDENT

RULING

Introduction

1. **PAUL OPANGA (Deceased)** died intestate sometimes on 14.12.2014.

2. Letters of administration were issued to **Franco Stephen Opanga (Petitioner/Applicant)** on 14.04.2020. Subsequently, by summons dated 27.05.2020 filed on 29.05.2020 **Petitioner/Applicant** applied for confirmation of the grant in his favour. **Daniel Milton Opanga (Protestor/Respondent)** filed a protest vide an undated affidavit filed on 04.11.2020 in which he accused Franco of failing:

a) to disclose the widow and children of their brother JOHN KENNEDY OPANGA (deceased) who were maintained by the deceased herein

b) disclose all of deceased's assets including:

i. M/V KZV 378 M/Benz

ii. M/V KAC 518V M/Benz

c) Disclose Kisumu /Marera/136

d) Collecting 50% rent from Kisumu Municipality/Block/183

3. On the basis that both the Petitioner/Applicant and

Protestor/Respondent had by a chief's letter filed by the Petitioner/Applicant on 05.08.19 named as dependents and the issues raised by the Protestor/Respondent which in my view are weighty, I on 27.07.2020 revoked the letters of administration issued to Petitioner/Applicant and appointed as a co-administrator. I also directed both parties to apply for confirmation of the grant and in the event that they did not agree on distribution, to file proposed separate modes of distribution.

4. By a chamber summons dated 26.08.2020 filed on 07.09.2020, the Petitioner/Applicant prays review the order made on 27.07.2020 on the ground that he has discovered that the deceased had drafted a will before his death.

5. I have considered the application in the light of the supporting affidavit, the grounds of opposition and the submissions filed on behalf of

both parties.

6. Order 45 of the Civil Procedure Rules which as follows:

1. (1) Any person considering himself aggrieved-

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. The issue in question is whether the applicant has satisfied the threshold for grant of an order of review. Section 11 of the Law of Succession Act, provides for the formal requirements of a valid will. It states:

No written will shall be valid unless-

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

8. A draft will is not a valid will under the law and its discovery, though it might be new is not one that would entitle the Petitioner/Applicant for an order of review.

9. From the parties' submissions, their point of departure appears to be the distribution of **LR KISUMU MUNICIPALITY BLOCK7/183**. This is based on the misapprehension that the said property was free property of the deceased capable of being distributed.

10. Evidence in the form of a search certificate dated 19.10.2020 however discloses that the **LR KISUMU MUNICIPALITY BLOCK7/183** is still registered in the name of **CHRISTOPHER OBUGA OPANGA** father to the parties herein who is deceased.

11. Consequently, therefore **LR KISUMU MUNICIPALITY BLOCK7/183** does not form part of the deceased's estate capable of

being administered in this cause. The same can only be distributed in the matter of the estate of **CHRISTOPHER OBUGA OPANGA** in whose name the asset is registered.

12. From the foregoing analysis, I have come to the conclusion that the chamber summons dated 26.08.2020 filed on 07.09.2020 is devoid of merit and it is dismissed with costs to the Objector/Respondent.

DATED AT KISUMU THIS 22nd DAY OF October 2020

T. W. CHERERE

JUDGE

Court Assistants - Amondi/Okodoi

For the Petitioner/Applicant - Mr. Rodi for Rodi Orege & Co. Advocates

For Objector/Respondent - Mr.Nyamweya for N.E.Mogusu & Associates