



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 791 OF 2011

IN THE MATTER OF THE ESTATE OF JACOB ODHIAMBO WANGÁNYA (DECEASED)

RULING

1. The certificate of death serial number 327028, dated 18th September 2009, indicates that the deceased persons to whose estate this cause relates, was known as Jacob Odhiambo Wangányá, who died on 15th March 2008. There is a letter on record from the office of the Chief of Koyonzo Location, dated 29th April 2011, which states that the deceased had been survived by a widow, Joiner Mangeni Odhiambo, a son called Daniel Odhiambo Odera, and three other individuals, whose relationship with the deceased is not disclosed, being Francis Ochieng Odhiambo, Patrick Wesonga Odhiambo and Meshack Onyango Odhiambo. He was said to have had died possessed of a property known as North Wanga/Lunganyiro/523.
2. A petition for letters of administration intestate was lodged herein, on 26th October 2011, by Daniel Odhiambo Wangányá, in his capacity as son of the deceased. In the affidavit in support of the petition, he listed himself as son, and the other four persons named in the Chief's letter, being widow and sons, as survivors of the deceased. The deceased is also expressed to have died possessed of North Wanga/Lunganyiro/523. Letters of administration intestate were made to the petitioner, Daniel Odhiambo Wangányá, on 28th February 2012, and a grant was duly issued to him, dated 2nd March 2012. I shall refer to Daniel Odhiambo Wangányá hereafter as the administrator.
3. The administrator filed, on 1st August 2013, a summons for confirmation of grant, dated 30th July 2013. In the affidavit in support, sworn on 30th July 2013, he listed the five individuals named in the petition as the survivors of the deceased. Athanas Barasa Mangula was listed as a purchaser. It was proposed that the only asset of the estate, North Wanga/Lunganyiro/523, be shared out between the administrator and Athanas Barasa Mangula, so that the administrator took 11 acres, while the purchaser took 2 acres. Filed simultaneously with the application was a consent on distribution, in Form 37, dated 30th July 2013, purported to have been signed by the purchaser and all the five survivors of the deceased.
4. The application dated 30th July 2013 was placed before Dulu J. on 17th February 2014. The administrator and several other beneficiaries attended court. Francis Ochieng Odhiambo informed the court that the family had not agreed on distribution. The widow, Joiner Mangeni Odhiambo, indicated that she did not support the proposed distribution. Selper Odhiambo stated that she was the eldest daughter of the deceased, and that she had not been consulted over the matter. She also indicated that the deceased had eleven daughters. Whereupon, the court directed the other survivors to file their proposed mode of distribution within given timelines, and to thereafter obtain dates for hearing at the registry.
5. The directions given by Dulu J. on 17th February 2014 were not complied with. Instead, the administrator filed another summons for confirmation of his grant, dated 26th March 2019, without first withdrawing that dated 30th July 2013. In the second application he listed himself, Athanas Barasa Mangula, Patrick Wesonga Odhiambo, Meshack Onyango Odhiambo, Joiner Nanyeni Odhiambo, Benedict Onyango Oloo and Payilet Nabwire Matswa as the survivors of the deceased. He proposed distribution of North Wanga/Lunganyiro/523 between himself and the other seven individuals listed in his affidavit. He also filed a consent on distribution, in Form 37, purportedly signed by himself and the other seven alleged survivors of the deceased.
6. The application, dated 26th March 2019, was never heard. The administrator had it fixed for hearing on 27th November 2019. Come 27th November 2019, the matter was placed before me. Neither the administrator nor the other survivors of the deceased attended court, whereupon I dismissed the application for want of prosecution and non-attendance.
7. The administrator reacted to the dismissal by filing the application dated, 27th November 2019, in which he sought reinstatement of the application dated 26th March 2019, and confirmation of his grant in the terms proposed in the said application.
8. The application dated 27th November 2019 was never heard, for it was never fixed for hearing. Instead of prosecuting it, the administrator filed another summons for confirmation of his grant, dated 26th June 2020. He listed himself and the other four individuals listed in the petition as the survivors of the deceased. He proposed that North Wanga/Lunganyiro/523 be shared out, unevenly, between himself and Patrick Wesonga Odhiambo, Benedict Onyango Oloo, Joiner Nanyeni Odhiambo, Francis Ochieng, Caroline Mtope Barasa, Paylet Nabiwire Matswa, Oscar Kayugira Ndakalu and Benard Musumba Musikoyo. He simultaneously filed a consent on distribution, dated 26th June 2020,

signed by himself and Benedict Onyango Oloo, Joiner Nanyeni Odhiambo, Caroline Mtope Barasa, Paylet Nabweire Matswa, Oscar Kayugira Ndakalu and Benard Musumba Musikoyo.

9. The application dated 26th June 2020 was placed before me for hearing on 16th July 2020. The administrator and Patrick Wesonga, Francis Ochieng and Joiner Nanyeni attended court. The administrator addressed the court, and stated that the deceased did not have other children, and that he had no daughters. He went on to state that he had sold portions of the estate to Caroline Mtope Barasa, Oscar Kayugira and Benard Musumba Musikoyo. He said that he sold the land after the deceased died. He conceded that he had no authority from the court to sell the property, adding that he was not aware that he needed authority from court to sell the property. Patrick Wesonga, Francis Ochieng and Joiner Nanyeni confirmed that they were aware of the proposals that the administrator had made in his application, and that they had no objection to them.

10. Of the five individuals listed in the Chief's letter and the petition as the survivors of the deceased, only four were before me on 16th July 2020. Meshack Onyango was absent. With regard to Meshack Onyango, I directed the administrator to bring him to court on 29th July 2020, or otherwise get him to swear an affidavit stating his position. Meshack Onyango swore an affidavit on 27th July 2020, which was filed in court the same day. He too supported the proposed distribution, saying that he had sold his entitlement to North Wanga/Lunganyiro/523, being 0.1 hectare, to one Athanas Barasa Mangúla, the father of Oscar Kayugira Ndakalu.

11. Confirmation of grants is provided for under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, and the provision says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

12. In confirmation applications, there are two principal factors for the court consider, appointment of the administrators and distribution of the estate. Before I consider the matters of appointment of administrators and distribution of the assets, that is before I look at the merits of the application, it is important that I address the proviso to section 71(2) (d) of the Law of Succession Act, which requires me to be satisfied that the administrators have ascertained all the persons beneficially entitled to a share in the estate, and have identified their respective shares. It goes on to require that I should not confirm the grant before I am so satisfied. It would mean that I should be satisfied that all the persons beneficially entitled to a share in the estate have been ascertained and their shares identified, failing which I should not consider the application on its merits. I should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done.

13. The provisions in the proviso to section 71(2), have been written into the probate and administration procedures through Rule 40(4) of the Probate and Administration Rules, in the following language:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined.”

14. For the purpose of these proceedings I have asked myself, has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? The record before me discloses five individuals as the survivors of the deceased, the five persons listed in the Chief's letter dated 29th April 2011 and the petition filed herein on 26th October 2011, that is to say the widow, Joiner Mangeni Odhiambo, and four sons, being Daniel Odhiambo Odero, Francis Ochieng Odhiambo, Patrick Wesonga Odhiambo and Meshack Onyango Odhiambo. Are these persons the only survivors of the deceased? When the matter came up for hearing before me on 16th July 2020, the administrator informed me that the deceased had no other children apart from the four sons, and that there were no daughters. That contrasts with the record of 17th February 2014, where Selpher Odhiambo had attended court, and informed Dulu J. that she was a daughter of the

deceased, and disclosed that the deceased had ten other daughters. She mentioned that she had not been consulted over the matter.

15. For avoidance of doubt, this is what Dulu J. recorded on 17th February 2014:

“17/2/14

Before. G. Dulu J

CC Polycap

Admin. Present

Francis – We have not agreed on distribution

Joiner – I also do not agree to proposed distribution.

Selpher Odhiambo – I am the elder daughter of the deceased. I was not consulted on distribution. There are 11 daughters.

Ct

- 1. Objectors to file their respective proposed mode of distribution within 30 days from today.*
- 2. Fresh hearing date to be fixed at the registry.*

Dulu J”

16. Clearly, from the record of 17th February 2014, the deceased had other children, apart from the four sons who were disclosed in the petition.

17. The deceased died on 18th March 2008, after the Law of Succession Act had come in to force on 1st July 1981. Distribution of his estate is, therefore, subject to the provisions of the said Act, by dint of section 2(1), thereof, which provides as follows:

“2. Application of Act

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”

18. The processes for the application of the Law of Succession Act are in Part VII of the Act, which covers administration of estates. Applications for grants of representation are provided for in section 51 of the Law of Succession Act, which provides as follows:

“Application for grant

(1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to—

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

(3) ...”

19. The most relevant portion for the purpose of this ruling is section 51(2)(g) of the Law of Succession Act, which states the persons who ought to be disclosed by the person seeking representation in intestacy, like in the instant case. That provision requires disclosure of all the surviving spouses, children, parents and others. The provision is in mandatory terms. All the surviving individuals in the various categories must be disclosed. The deceased had eleven daughters. They were not disclosed in the application for letters of administration intestate that the administrator filed herein on 26th October 2011. Section 51(2)(g) talks of “children,” not sons. There is nothing in the provision which suggests that the word “children” should be read to mean sons. If it was intended that the word “children” meant sons or male children, nothing would have been easier than for Parliament to say so in the provision. That can only mean that the word “children,” as used in that provision, is meant to be gender neutral, and it refers to both sons and daughters, or the male and female children of the deceased.

20. The fact that the administrator herein did not disclose the daughters of the deceased, when he sought representation to the estate, would mean that he did not comply with the mandatory requirements of section 51(2)(g) of the Law of Succession Act.

21. The other relevant provision is section 66 of the Law of Succession Act, which sets out the order of preference with regard to who ought to apply for representation, and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased.

22. For avoidance of doubt, this provision states as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors ...”

23. Section 51(2)(g) and 66 of the Law of Succession Act should be read together with Rule 26 of the Probate and Administration Rules. Rule 26 requires that where a person applies for a grant of letters of administration, and that person has an entitlement to administration which is lesser or equal to that of others, then the applicant out to do certain things, such as giving notice to them or obtaining their consents or getting them to renounce their rights, among others. Rule 26 provides as follows:

“26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

24. Rule 26(1)(2) applies in cases where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation are then expected to signify that they had been notified of the petition by either executing renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

25. The record here indicates that the deceased was survived by a spouse, four sons and eleven daughters. All fifteen children had equal right or entitlement to apply for administration, going by section 66 of the Law of Succession Act. A reading of section 66 and Rule 26 of the Probate and Administration Rules together, would mean that if any one of the fifteen children of the deceased sought representation to the estate, to the exclusion of the other fourteen, then there would be a problem. The applicant would be required to comply with the requirements of Rule 26 Probate and Administration Rules. The administrator herein had equal right to administration with the eleven daughters, he, therefore, needed to list them in the petition as survivors of the deceased, and to obtain their consents or their renunciation of right to administer or to obtain citations to be issued and served on them, before he applied for representation to the estate of their late father.

26. I have perused the record before me relating to the process of application for grant herein. I have noted that the whole process of applying for grant was carried out to the exclusion of the eleven daughters of the deceased, contrary to section 51(2)(g) of the Law of Succession Act.

27. The same exclusion was repeated when the administrator filed for confirmation of his grant. He has filed a total of three summonses for confirmation of his grant. In none of the three has he disclosed the eleven daughters. He lied to court on 16th July 2020, that the deceased had no other children apart from the four sons, yet at the court appearance on 17th February 2014 one of the daughters, Selpher Odhiambo, attended court, and it was she who disclosed that the deceased in fact had other children, eleven of them. These eleven should have been involved in the confirmation process. It is what the law requires.

28. The procedures for applications for confirmation of grants are in Rule 40 and 41 of the Probate and Administration Rules. Rule 40(1) sets out the information that an administrator is expected to disclose in his application. That includes the names of the children of the deceased. The provision states as follows:

“(1) Where the holder of a grant which has not been confirmed seeks confirmation of the grant he shall apply for such confirmation by summons in Form 108 in the cause in which the grant was issued, supported by an affidavit in Form 8 or 9 ...”

29. Form 8 gives a format of the affidavit to be filed in support of an application for grant of letters of administration intestate. Paragraph or clause 2, of the prescribed format of the affidavit, requires the administrator to disclose the children who survived the deceased. The column is about disclosure of children. No distinction is made as between male and female children. That would mean that the administrator is expected to disclose all the children of the deceased, be they male or female, sons or daughters. An affidavit which discloses only a section of the children, and conceals or suppresses the other section of the children, would not be in compliance with Rule 40(1) of the Probate and Administration Rules.

30. The failure to disclose a section of the survivors of a deceased person would be one of the reasons for which a grant may be revoked, going by the provisions of section 76 of the Law of Succession Act. It is also a reason for which a court may decline to confirm an administrator as such, going by the provisions of section 71(2)(a) of the Law of Succession Act. I do not wish to take that route in this cause yet. I shall give the administrator a chance to remedy the situation, by bringing in the daughters of the deceased into the picture. Consequently, I shall not confirm the grant at this stage, instead I shall postpone it, and give directions on what the administrator shall do.

31. The orders that I am moved to make at this stage are as follows:

- (a) That the application for confirmation of grant dated 26th June 2020 is hereby postponed;**
- (b) That the administrator is hereby directed to file an affidavit in which he shall furnish the court with the full names, ages and addresses of all the eleven daughters of the deceased;**
- (c) That, in the event that any of the daughters has since died, the administrator shall disclose that fact in his affidavit and provide proof thereof, by way of attaching copies of certificates of death;**
- (d) That the matter shall be allocated a date for hearing of the application, at which date the administrator shall bring to court all the eleven daughters of the deceased;**
- (e) That in the event any of the daughters is not able to attend court on due date, the administrator shall cause to be filed an affidavit sworn by such daughter, in which she shall state whether or not she would like to take a share in the estate; and**
- (f) That the application dated 26th June 2020 shall only be determined once the administrator complies with the directions that I have given above.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 16th DAY OF October 2020

W. MUSYOKA

JUDGE