



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**SUCCESSION CAUSE NO. 83 OF 2016**

**IN THE MATTER OF THE ESTATE OF: OWENGA OMORO.....DECEASED)**

**ROSELINE ORIMBA ONDIJO.....APPLICANT**

**VERSUS**

**MAURICE OTIENO OCHOLLA.....1<sup>ST</sup> RESPONDENT**

**ROBERT OGOLA OCHOLA.....2<sup>ND</sup> RESPONDENT**

**AND**

**WILKISTER ADHIAMBO OTIENO.....INTERESTED PARTY**

**RULING**

The application for revocation of grant dated 20<sup>th</sup> March 2018, was canvassed by way of “viva-voce” evidence against the two respondents **Maurice Otieno Ochola** and **Robert Ogola Ochola** with a third party **Wilkister Adhiambo Otieno** appearing as an interested party.

In her testimony, the applicant **Roseline Orimba Ondijo (PW1)**, stated that the respondents are her neighbors and that their father one Ochola Omoro is alive. That the deceased **Owenga Omoro** was a brother of Ochola Omoro but the applicants did not know the deceased. That she and her husband purchased a portion of the estate property being land parcel No. West Kasipul/Kodero/Karaboch/881 from the aforementioned brother of the deceased i.e the father of the respondents/petitioners. The applicant further testified that she had never met the deceased by the time her husband died in the year 2001 but has been in occupation of the suit property for over thirty(30) years. She therefore prays for the revocation of the grant issued to the respondent as they have purported to sell the suit property to the interested party. In that regard, she further relies on the grounds contained in her supporting affidavit as well as her witness statement dated 6<sup>th</sup> June 2015. She did not agree with the statement by the respondent’s father filed herein on 26<sup>th</sup> July, 2018 nor was she aware of the consent letter marked Exhibit No.6 in her supporting affidavit.

[2] **Okulo Ochiel (PW2)**, was known to the deceased as his neighbor. He testified that the deceased died in the year 1974 as a single man and left behind his portion of land which was sold to the late Paul Ondijo, by the brother of the deceased. That Paul Ondijo was survived by the applicant as his wife and four sons who occupy the portion of land sold to them by the brother of the deceased, but which portion of land was allegedly sold to a third party.

Further to the foregoing, the wives (**PW2**) also relied on his statement dated 6<sup>th</sup> June 2018.

**Jenipher Okech (PW3)**, testified and indicated that the applicant is the wife of the late Paul Ondijo, who was her son and who actually purchased the suit property from the deceased Omwenga Omoro. That the land has always been occupied by the applicant and never the respondents or their father.

The wives (**PW3**) also relied on her statement dated 6<sup>th</sup> June 2018, and her testimony that the suit property has always been occupied by the applicant was confirmed by **Paul Ounda Ongeche (PW4)**.

[3] In challenge of the applicant’s claim and allegations, a representative of the deceased, **Joseph Abich Ochola (DW1)** testified and indicated that the applicant was from his village and that the interested party purchased a portion of the estate property. He also indicated that the two respondents are his brothers and confirmed that their father who is alive was the eldest brother of the deceased. He further relied on his statement filed herein on 26<sup>th</sup> June 2019 and produced some documents (DEX1 – 5) in urging this court to dismiss the applicant’s application. In that regard he was supported by one **James Ochola (DW2)**, also a brother of the deceased who alluded to the applicant and the interested party being strangers to him. He also relied on his statement filed herein on 26<sup>th</sup> June 2019.

The father to the interested party, **Samson Otieno Odongo (DW3)** testified and adopted his statement dated 1<sup>st</sup> October, 2019 as his evidence in this dispute.

All the three defence witnesses testified in support of the respondent's objection to the applicant's application to revoke the grant issued to the respondents who most interestingly did not testify in court despite the fact that they were crucial witnesses in support of their objection and their resistance to the revocation of the grant issued to them. Their father who allegedly sold the estate property to the Late husband of the applicant did testify as **(DW2)** and disowned the applicant and her claim. The interested party did also testify in court and left it to her father **(DW3)** to do so, she however, filed her grounds of objection and witness statements.

[4] Be that as it may and having considered all the foregoing evidence, it is apparent that the basic issue for determination is whether the grant of letters of administration intestate issued to the two respondents on **11<sup>th</sup> July 2016**, should be revoked on the basis that it was obtained by fraud and concealment of material facts.

In her evidence the applicant **(PW1)** suggested that the material suit property was not available for distribution to the heirs if the late Omwenga Omoro as it had been sold by him or his brother to the applicant's late husband, the respondents are sons of the alleged brother Ochola Omoro and nephews of the deceased. None of them came before this court to testify and dispute the applicant's claim that the land was sold to her husband prior to the death of the deceased thereby making her a beneficiary of his estate.

The respondent's brother **(DW1)** could not purport to testify on behalf of the respondents but in his evidence as a beneficiary of the estate he indicated that the suit property was shared between him and his brothers as well as their father. He confirmed that the property was ultimately sold and registered in the name of the interested party after the succession proceedings which were undertaken without the knowledge of the applicant's interest in the estate property which interest they denied.

[5] Despite their failure to testify in court, the respondents opposed the applicant vide their undated replying affidavit; filed herein as per the necessary court receipts on 31<sup>st</sup> May 2018, in which they imply that the estate property had been vacant and had at no time been occupied by the applicant who actually occupies a different parcel of land being parcel No. **West Kasipul/Kodero/Karaboch/887** owned by her late husband's father **Okombo Nyaoke**.

In essence, the applicant contended that she had an interest in the estate property by virtue of her late husband having purchased it from a brother of the deceased or the deceased himself. She therefore implied that when the property was distributed to the beneficiary she ought to have been included as one such beneficiary and in fact that she was accordingly left out of the grant or the certificate of confirmation of the grant dated **16<sup>th</sup> August 2017**, were obtained by fraud or by concealment of material facts.

Further to the main prayer for the revocation of the grant the applicant included other issues which are more sustainable for consideration and determination in the Environment and Land Court rather than this Succession court.

It is evident and undisputed that the applicant has no blood relationship with the deceased and therefore her desire to be treated and included as a beneficiary herein is grounded on her alleged purchase of the estate property or part thereof through their late Husband from the father of the petitioner who is the brother of the deceased. This fact was confirmed by Okelo **(PW2)** but the mother in law of the applicant **(PW3)** said that the land was actually sold by the deceased himself in her presence.

The alleged brother of the deceased **(DW2)** denied having sold the land to the applicant as alleged.

[6] As the applicant's claim to an interest in the estate property was pegged on proof of purchase of the property or fact thereof from either the deceased or his brother, it was incumbent upon the applicant to tender material and sufficient evidence in respect thereof. However, no such evidence has been provided and what is clear is that she may have a case of action against the estate of deceased based on an interest in land. In that case her remedy lies in the Environment and Land court and not this court. This is more so considering that she alleged that she has been in occupation of the land for over thirty(30) years. This is suitable fodder for a claim of interest in the Land by way of adverse possession. Otherwise, she has herein failed to prove by necessary evidence that the grant obtained by the respondents as nephews of the deceased was fraudulently obtained or was obtained without her consent as a beneficiary. Indeed she did not establish her claim interest in the land and could not therefore be regarded as a beneficiary of the estate of the deceased from whom necessary consent was required.

In the upshot, the application dated 20<sup>th</sup> Mach 2018 is devoid of merit and is hereby dismissed with each party bearing their own costs.

**[Delivered and Signed this 12<sup>th</sup> Day of November, 2020]**

**J.R. KARANJAH**

**JUDGE**