



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION NO. 131 OF 2007

IN THE ESTATE OF: SYLVESTER OPONDO.....DECEASED

BETWEEN

WILLIAM OUMA OPIO.....PETITIONER/RESPONDENT

AND

AUGOSTINO MALINGU.....OBJECTOR/APPLICANT

RULING

1. Augustino Malingu, the applicant/ objector herein filed an application dated 14th February 2018 for revocation of the grant issued herein under section 76 of the Law of Succession Act, Cap. 160 and Rule and 73 of the Probate and Administration Rules. It is premised on the following grounds:

- a) That the petitioner filed the petition without the knowledge of other beneficiaries.
- b) That the petitioner disinherited other beneficiaries.

2. The application was opposed by the petitioner/respondent on grounds that it was the wish of the deceased that he becomes the sole beneficiary of the estate.

3. I have perused the affidavits of both parties and the record. The following facts have emerged:

- a) That the deceased herein died without children or a wife.
- b) That at the time of the death of the deceased herein, his parents were deceased.
- c) That the petitioner and the objectors are brothers of the deceased Sylvester Opondo.
- d) That other than the petitioner and the respondent, there are other beneficiaries of the estate of the deceased.
- e) The petitioner when filing the succession cause, acknowledged that the deceased died intestate. The issue of a will, oral or otherwise does not therefore arise.

4. The law has provided the manner of distribution where the deceased has died intestate. Section 39 of the Law of succession Provides as follows:

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.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

5. Section 76 of the Law of succession provides inter alia as follows:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(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;

6. The objector has proved that the petitioner herein left out other beneficiaries and the grant cannot be allowed to stand.

7. Rule 73 of Probate and Administration Rules is on inherent powers of the court. It provides:

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

8. I therefore find that the application is merited. The grant is accordingly revoked. The petitioner and the respondent are hereby appointed co-administrators of the estate of the deceased.

9. I accordingly make an order that a proposal of distribution of the estate to all the beneficiaries be filed in court within 60 days of this ruling.

10. The costs of this application be in the cause.

DELIVERED and SIGNED at BUSIA this 26th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE