



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION NO. 184 OF 2009

IN THE ESTATE OF:

OMUSUNGU OBARA ANYANGA.....DECEASED

BETWEEN

PETER PANYAKO OMUSUNGU.....PETITIONER

AND

PATRICK EMOIT BARASA

BISANSIO ETYANG' OJUMA

CHRISTOPHER OMUSE ODERE.....APPLICANTS

(Legal representatives of Barasa Omusugu Anyang, Seferio Ojuma Omusugu and Thomas Papa Omusugu)

RULING

1. The applicants have moved the court by way of chamber summons filed on 19th April 2016 under section 76 of the Law of Succession Act and Rules 44 and 73 of Probate and Administration Rules. They are seeking the following orders:

- a) That the grant of letters of Administration in respect of the estate of Omusugu Obara Anyang' issued to Peter Panyako Omusugu on 5th October 2009 be revoked.
- b) All subsequent orders arising from and incidental to the said grant be nullified.
- c) That a fresh grant be issued to the applicants jointly with the petitioner herein.
- d) That costs of this application be provided for.

2. The application was based on the following grounds:

- a) That the grant was obtained by concealing from the court material facts to the cause.
- b) That the grant was obtained fraudulently by making of a false statement as to the beneficiaries of the estate.

3. The application was opposed by the petitioner/respondent on grounds that:

- a) That the deceased herein had provided for his three sons.
- b) The land parcel Number SOUTH TESO/779 was to be shared by Peter Panyako Omusungu and Francis Omuse Omusungu.

4. By an application dated 4th June 2010, the applicants had prayed for similar orders. That application was struck out on 24th February 2016 for the applicants lacked the legal capacity to represent the estates of Barasa Omusugu Anyang', Seferio Ojuma Omusugu and Thomas Papa Omusugu. Though in the instant application they have quoted Busia High Court P&A Nos. 32 of 2015, 41 of 2016 and 42 of 2016, they have not attached copies of their appointment as administrators. They have not therefore proved that they have the legal capacity to bring this

application.

5. Patrick Eموit Barasa, the first applicant at the time of hearing, conceded that his father and the father of the other applicants have other land. This was after the petitioner contended that their father had apportioned land to his other sons and registered land parcel Number SOUTH TESO/779 and his (deceased's) name that of Panyako Omusungu and Francis Omuse Omusungu. The purpose, he claimed was to have these two share out this land.

6. The fact that the father of the first petitioner died in 2004 and prior to his demise he had not filed any case in respect of his father's estate (the deceased herein) is an indication that he was satisfied with the status of their father's land arrangements.

7. All the applicants are the grandchildren of the deceased herein. By dint of the provisions of section 38 of the Law of Succession Act, they can only come in as legal representative of their parents. The section provides:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

When this section is read together with section 42 of the Act, it gives credence to the petitioner's contention. Section 42 provides:

Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

8. From the foregoing, I find that the application lacks merit and the same is dismissed with costs.

The petitioner is ordered to apply for the confirmation of the grant issued herein within 30 days failure of which it shall be revoked.

DELIVERED and SIGNED at BUSIA this 25th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE