



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.903 OF 2015

FORMERLY OYUGIS SRM'S SUCC. CAUSE NO.1 OF 2001

IN THE MATTER OF THE ESTATE OF:

SIMON OYOO ACHIENG.....DECEASED

AND

IN THE MATTER OF LR NO. CENTRAL KASIPUL/KACHIENG/452

AND

IN THE MATTER OF APPLICATION FOR SETTING ASIDE, REVIEW AND/OR VARIATION OF THE ORDERS

BETWEEN

KEPHER OLWA ODHIAMBO.....OBJECTOR

VERSUS

EZRA OMBURA OYOO

ENOS ODHIAMBO OYOO.....PETITIONERS/APPLICANTS

RULING

1. The history of this matter would perhaps present a proper understanding and appreciation of the dispute at hand. Going down the memory lane we see the foundation of the case in the form of **Succession Cause No.1 of 2001** filed at the magistrate's court in Oyugis on the 5th January 2001, with respect to the estate of the late **SIMON OYOO ACHIENG** (deceased) who passed away at the very ripe age of 115 years on the 27th July 1976.

The petition for grant of letters of administration intestate was presented by **EZRA OMBURA OYOO** (first petitioner) and **ENOS ODHIAMBO OYOO** (second petitioner) in their capacity as the surviving children of the deceased.

2. The affidavit in support of the petition dated the 5th January, 2001 and deponed by the petitioners indicated that the deceased was survived by the two petitioners and their mother, **TRUPHENA AKETCH OYOO**, as the only widow. The letter from the chief dated 3rd January 2001, was apparently for the purposes of enabling the registration of the deceased's only asset i.e. **Land Parcel No.Central Kasipul/Kachieng/452**, in the name of the two petitioners with confirmation or approval from their mother and one **Shem Ayodo Oyoo**.

The letter did not mention any other person thereby implying that the petitioners were the only beneficiaries of the estate of the deceased.

3. It was on the 3rd July 2003, that the grants of letters of Administration Intestate was issued to the petitioners. This was confirmed on the 12th January 2004 and a certificate of confirmation of grant was accordingly issued with the result that the estate property was to devolve in equal shares to the two petitioners.

At the hearing of the summons for confirmation of grant, the deceased's widow (Truphena) agreed to the transmission of the estate property to the two petitioners with an order that she would have a life interest on the property. This qualification was however, not reflected in the certificate of confirmation of grant.

4. Quite intriguing, the widow indicated in her testimony before the magistrate at Oyugis on 8th January 2004, that apart from the two petitioner sons of the deceased, there were other children i.e. three daughters who were all married. These three daughters whether married or not were not mentioned as beneficiaries of the estate. Ironically, the widow was also not mentioned as a beneficiary in the certificate of confirmation of grant. Nonetheless, the grant was confirmed by the magistrate's court. The estate property was thus distributed according to the wishes of the petitioners and their mother who seemed to have allowed the sons to petition for the grant instead of herself as the first in the priority of those eligible to petition.

5. The matter remained undisturbed and presumably settled for a period of about thirteen (13) years until the month of December 2015, when the summons for revocation of grant dated 22nd December 2015, was filed in this court on 28th December 2015, by **KEPHER OLWA ODHIAMBO** on the basis that the grant was obtained fraudulently and by concealment of material facts in that the deceased was survived by a widow and a total of six (6) children including the petitioners but the rest of the children including **JOHN OLWA OYOO**, the father of the applicant, were not included as beneficiaries of the deceased's estate.

The applicant also alleged that the grant was issued by the Oyugis Resident Magistrate court which was not seized of the necessary jurisdiction on account of the value of the property which was at the time estimated at Kshs.150,000/=.

6. On the 3rd October 2016, this court differently constituted, heard the application and rendered its ruling on 3rd November 2016, with orders that the impugned grant issued to the petitioner be revoked together, with the registration of the estate property i.e. Centrla Kasipul/Kachieng/452.

The Registrar of Lands – Homa Bay was directed to rectify the register to reflect the name of the deceased as the original owner pending proper succession of the deceased's estate. However, on the 26th September 2017, the petitioners filed an application to review and/or set aside the proceedings and ruling of the court made on the 3rd November 2016.

7. The application was compromised by a consent made between the applicant/objector and the petitioners on the 4th December 2017, through their respective counsel **MESSRS OGUTTU, OCHWANGI, OCHWAL & CO. ADVOCATES** and **MESSRS OCHILLO & CO. ADVOCATES**. The same was approved by the court and made into a court order on 8th December 2017.

The applicant/objector's application for revocation of grant dated 22nd December 2015, was thus re-instated for hearing and determination. Accordingly, this court on the 25th September 2018, directed that the application be heard by "viva-voce" evidence with each party allowed to call a maximum of three (3) witnesses.

8. In that regard, the objector, **KEPHER OLWA ODHIAMBO (PW1)** testified in court and called one witness i.e. **JOSEPH NDIEGE ON'GETE (PW2)**.

The first petitioner **EZRA OMBURA OYOO (DW2)**, also testified and called his mother **TRUPHENA AKETCH OYOO (DW1)**, as his sole witness.

At the end of the trial, both parties filed their respective written submissions which have been given due consideration by this court in the light of the grounds for the application and the evidence adduced in court by both the objector and the petitioners and their respective witnesses.

9. Basically, this is an intestate succession which is provided for under the **Law of Succession Act (Cap 160 Laws of Kenya)**.

Section 76 of the **Act** is the applicable provision in the present circumstances as it provides for revocation or annulment of grant at any time if the grant was obtained in proceedings which were defective in substance or was obtained fraudulently by the making of a false statement or by concealment from the court if something material to the case, among other factors.

This application is premised on **section 76 (a) (b) and (c)** of the **Act**. It is therefore the objector's contention that the grant was obtained by means of misrepresentation or false representation as well as concealment of material facts on the part of the petitioner in their failure to include the objector and others as beneficiaries of the deceased's estate and that the proceedings for obtaining the grant were defective in substance as the Resident Magistrate's court at Oyugis did not have jurisdiction to deal with estate property with a value of over Kshs.100,000/=.

10. As for the petitioners, it was contended that the objector as a grandson of the deceased fell below the petitioners as sons of the deceased in the order of priority to petition for the grant and more so, having been allowed to do so by the surviving widow of the deceased who stood first in the order of priority as the surviving spouse of the deceased. That, the necessary consents for the petitioners to apply for the grant were given by the surviving widow (**DW2**) and the petitioners' eldest brother, **SHEM AYODO OYOO**. Therefore, the objector's consent was not necessary as the deceased had several sons who were above the objector in the order of priority.

11. The petitioners contended further that the objector failed to prove on a balance of probabilities that the grant was obtained fraudulently and could not do so by merely stating that the petitioners and their mother (**DW1**) were the only persons mentioned as the beneficiaries yet he failed to call the alleged female children of the deceased to give evidence in support of his claim.

On the issue of jurisdiction of the magistrate's court at Oyugis, the petitioners contended that the objector did not avail any valuation report to prove that the value of the estate property was more than Kshs.150,000/=.

12. From all the foregoing contentions, the basic issues arising for determination of **firstly**, whether the impugned grant was obtained by the

petitioners by false representations and/or concealment of material facts and **secondly**, whether the grant was issued and eventually confirmed by a court which was not possessed of the necessary jurisdictions. Starting with the second issue, the law at the material time was that a magistrate's court could only handle succession matters with respect to property whose value was Kshs.100,000/= and below.

That law has since changed but the changes do not impact on the subject grant which was issued in the year 2003 and confirmed in the year 2004.

13. It was the petitioners themselves who in their affidavit in support of petition for letters of administration intestate dated 5th January 2001, gave the value of the estate property as Kshs.150,000/=. They cannot now be heard to ask from the objector a valuation report to prove that the estate property was at the material time value more than Kshs.150,000/=.

In any event, the first petitioner (DW2) admitted in his testimony that the value of the property was placed at Kshs.150,000/= and that this was not false information.

It would therefore follow that the magistrate's court at Oyugis erred in issuing a grant respecting the estate of the deceased with a value of Kshs.150,000/=. In doing so, the court exceeded its pecuniary jurisdiction of Kshs.100,000/= at the material time.

It would also follow that the court's proceedings leading to the issuance of the grant and confirmation thereof were defective in substance.

14. With regard to the first issue for determination i.e. whether the impugned grant was obtained by means of false representations and/or concealment of material facts, the court record speaks for itself. Although the surviving widow of the deceased (**DW1**) was the first in the order of priority for the petition, she apparently surrendered her status to her two sons i.e. the petitioners who listed her and themselves as the only persons who survived the deceased and hence, the only beneficiaries of the estate of the deceased. But surprisingly, as pointed out hereinabove the widow was not listed as a beneficiary and provided for in the subsequent certificate of confirmation of grant.

This meant that the widow (**DW1**) was placed in a very vulnerable position at the expense of her sons as long as the grant remained valid.

15. The evidence from both sides clearly showed that the petitioners and their mother were not the only surviving dependants of the deceased as represented in the petition for grant of letters of administration.

Although the objector argued his case and presented evidence as if this was a dispute over ownership of land and the petitioners somehow responded in kind, what was disclosed therefrom was the fact that the deceased had seven (7) wives some of whom survived him including the seventh wife Truphena (**DW1**). Each of the wives or a majority of them it would appear had children with the deceased. It was indicated that the deceased fathered more than ten (10) children. The petitioners were his children with Truphena (DW1) while the objector was his grandson being the son of the deceased's son called **John Olwa Oyoo**, a step son to Truphena and a step brother to the petitioners.

While it was not necessary for the objector to give his consent for the petitioners to apply for grant of letters of administration respecting the estate of his grandfather nor was it necessary for him to be included as a beneficiary, it was incumbent upon the petitioners to include as beneficiaries all the surviving widows of the deceased and all his surviving children as beneficiaries of his estate whether or not they had interest in the estate or whether or not they were married female children.

16. As it were, the petitioners discriminated against the other surviving widows and children of the deceased when they applied for the impugned grant and disinherited them of the estate of the deceased in collusion with their mother.

It was also disclosed in evidence that the land parcel No. Central Kasipul/Kachieng/452 may not have been the sole immovable asset belonging to the deceased. There was mention of land parcel No.453 which was not included in the list of assets yet it ought to have been availed for distribution considering that this was an intestate succession in which the deceased did not leave behind any will showing the manner in which his estate would be distributed among the beneficiaries and/or dependants.

17. It is abundantly clear from all the factors aforementioned that the petitioners were not candid when they petitioned for the impugned grant and when they took out the subsequent summons for confirmation of the grant. They made false statements in the process and concealed facts which were so material and which were disclosed in evidence at the hearing of the present application.

Suffice for this court to ultimately hold that the impugned grant was obtained not only by means of false representations and concealment of material facts but also in a manner which was unlawful for want of jurisdiction on the part of the court which issued the grant.

Consequently, it is hereby ordered that the grant obtained by the petitioners on 3rd July 2003 and confirmed on 12th January 2004 be and is hereby revoked to the extent that any transaction of the estate property executed on its strength be and is hereby rendered null and void "**abinitio**".

A fresh grant shall issue in the name of **TRUPHENA AKETCH OYOO** (DW1) as the sole surviving widow/spouse of the deceased and may be confirmed after the expiry of six (6) months from this date hereof or any shorter period if all the beneficiaries are in agreement on the mode of distribution of the entire estate of the deceased including land parcels No.452 and 453 and any other parcels that were not mentioned herein.

J.R. KARANJAH

JUDGE

10.04.2019

[Read and signed this 10th day of April, 2019].