



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 200 OF 2015

IN THE MATTER OF THE ESTATE OF

REBECCA NYANGANYI ODOTI (DECEASED)

BETWEEN

ANNA KERUBO OMBACHI..... APPLICANT

AND

MARITA MORAA AYOGA..... PETITIONER/RESPONDENT

RULING

1. This matter concerns the estate of REBECCA NYANGANYI ODOTI (“the deceased”) of Nyakoe who died on 3rd February 1992. The petition for letters of administration intestate was filed by her daughter in law Marita Moraa Ayoga (“Marita”). The deceased’s only asset was a piece of land; WEST KITUTU/BOMATARA/402 (“Plot 402”). During her lifetime she had five children; Dismas Nyarandi Odoti (“Nyarandi”), Francis Ombachi Odoti (“Ombachi”), Juliana Kemunto Odoti (“Juliana”), Dinah Nyomenda and John Ayoga Odoti (“Ayoga”). All the deceased’ sons are survived by their respective wives. The applicant, Anna Kerubo Ombachi (“Anna”) is the widow of Ombachi.
2. A grant of letters of administration for the estate was issued to Marita and confirmed on 13th October 2016. According to the certificate of confirmation of grant Plot 402 was shared between her, holding the property in trust for herself and her children and Alloys Nyerere Omari. In due course, Anna filed the summons for revocation of grant dated 28th June 2017. The grounds on the face of the application and the deposition in support are that the petitioner failed to disclose that the deceased had other beneficiaries. The applicant also sought an order of inhibition on Parcel Nos. West Kitutu/Bomatara/7833 and 7834 carved from Plot 402 pending hearing and determination of the application.
3. The summons for revocation was opposed by Marita and Alloys Nyerere Omari (“Alloys”). Marita acknowledged that the deceased had three sons Nyarandi, Ombachi and Ayoga but she deposed that during her lifetime, the deceased transferred West Kitutu/Bomatara/403 and 404 (Plots 403 and 404) to Ombachi and Nyarandi respectively while she remained with Plot 402 which was reserved for Ayoga, who was the youngest son, although a portion of it was sold to Mark Oponga Omari.
4. Ayoga and Alloys filed a petition for letters of administration in *High Court Succession Cause No. 210 of 1994* but before the grant could be confirmed Ayoga died. Subsequently Anna attempted to transfer Plot 402 without the letters of administration and upon an application by Alloys seeking injunctive orders prohibiting the sale or transfer of plot 402, the court revoked the grant issued to Alloys while Anna was found guilty of intermeddling.
5. Alloys deposed that his father, Mark Oponga Omari, bought the land from the family of Odoti so that Ayoga could raise cows necessary for the dowry in his marriage to his wife Marita. Thereafter his father took possession of the land and put up their home and started cultivating the land. Alloys deposed that in 2009, Anna unlawfully obtained court order and demolished their homes.
6. I heard oral testimony from Juliana (PW 1), Anna (PW 2), Alloys (PW 3), Charles Mose Nyabera (PW 4) and Marita (DW 1). Under **section 76** of the **Law of Succession Act (“LSA”)**, the court may on application by any interested party or on its own motion revoke a grant on the ground that the proceedings to obtain the grant were defective in substance; or that the grant was obtained fraudulently by making of a false statement; or by concealment of something material to the case; or that the grant was obtained by means of untrue allegations of facts essential in point of law.
7. The issue for determination is whether the applicant proved her case entitling the court to revoke the confirmed grant under **section 76** of

the **LSA**. Her case as set out in the summons for revocation was that she, as the widow of the Ombachi, was entitled to a share of the deceased's estate. It is not disputed that Marita did not disclose that the deceased had 5 children and while I agree that the failure to disclose all beneficiaries of the estate is sufficient ground to revoke the grant, that alone will not dispose of the substantial issue before the court which is whether Anna is entitled to a share of the estate.

8. It is common cause that the only asset of the deceased is Plot 402. It emerged during trial that the deceased was also the owner of Plots 403 and 404 which she transferred to her sons Ombachi and Nyarandi during her lifetime and prior her death leaving Plot 402 to her son Ayoga. PW 1 testified that Anna and her children were given Plot 403 while Nyarandi was given Plot 404. When pressed in cross-examination, PW 2 confirmed that Plot 403 is in the name of her husband, Ombachi, while Plot 404 is in the name of Nyarandi. None of the beneficiaries disputed the arrangements made by the deceased in distributing those plots prior to her death.

9. The controlling provision governing distribution of the deceased's estate is **section 38** of the **LSA** which provides that 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** of the **LSA**, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children. *Prima facie* therefore, Plot 402 would devolve to all the deceased's five children in equal shares. However, that is not the end of the matter as **section 42(a)** of the **LSA** provides that where the intestate gave or settled any property for the benefit of a child then that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child. In light of that provision, I find and hold that Ombachi having received Plot 403 from the deceased during her lifetime, I Anna, as his wife, was catered for and is not entitled to Plot 402.

10. Since Anna is not entitled to Plot 402, she is not in a position to claim Alloys is not entitled to part of Plot 402 but for completeness I shall consider the claim by Alloys. PW 4, testified that his brother, Marko Omari Nyabera, bought the land from John Odoti, the husband to the deceased, in 1968. He recalled that at the time cows were paid so that Ayoga could raise dowry to marry. In cross-examination, PW 1 stated that when Ayoga sold part of his shamba to Omari Nyabera and she did not object to the sale. Anna did not discharge her burden of showing that part of Plot 402 was not sold by Ayoga to Alloys' father. At the time of sale, the deceased was still alive and made no objections to the sale despite the property being in her name. Alloys family occupied that part of the land until 2009 when Anna unlawfully demolished their homes. In effect the portion sold to Marko Omari Nyabera is not available for distribution to the deceased beneficiaries. I would also point out that although Nyarandi's widow stood in the same position as Anna, she did not make any claim for part of Plot 402 thus confirming my conclusion the deceased had already catered for her other sons in her lifetime.

11. Following the conclusions, I have reached, I find that the Anna has not made out a case for revocation under **section 76** of the **LSA**. I therefore dismiss the summons for revocation dated 28th June 2017. As this is a family matter there shall be no order as to costs.

DATED and DELIVERED at KISII this 27th day of MAY 2019.

D. S. MAJANJA

JUDGE

Mr Anyona instructed by Asati, Anyona and Company Advocates for the applicant.

Mr Ombachi instructed by Ombachi and Company Advocates for the petitioner/respondent.