



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 807 OF 2004

IN THE MATTER OF THE ESTATE OF ONGWENY WAYUNGU (DECEASED)

BETWEEN

JACOB ODHIAMBO OTIENO.....APPLICANT/OBJECTOR

AND

CHARLES ONDIEK AWUOR.....1ST PETITIONER/RESPONDENT

SOSPETER ONYANGO AWUOR.....2ND PETITIONER/RESPONDENT

JUDGMENT

Introduction

1. **ONGWENY WAYUNGU** (deceased) died sometimes on 14th July, 1981. It is pleaded that the deceased's estate comprises of Land Parcel Nos. **KISUMU/WANGAYA I/1954; KISUMU/WANGAYA I/1957** and **KISUMU/WANGAYA I/2555**.
2. Letters of administration were issued on 3rd July, 2012 in favour of **CHARLES ONDIEK OWUOR** and **SOSPETER ONYANGO OWUOR** (*hereinafter referred to as the 1st and 2nd Petitioners*). On 14th April, 2015, the grant was confirmed in favour of **Charles Awuor, Fred Awuor, Willis Awuor, Peter Omollo** and **Sospeter Onyango**. Their respective shares are as shown on the confirmed grant. This prompted the objection that is the subject of this judgment.

OBJECTION

3. By summons dated 29th January, 2016 brought under Section 76 of the Succession Act (*the Act*) the applicant/objector sought orders for revocation of grant. The application is supported by the affidavit sworn on 29th January, 2016 by **JACOB ODHIAMBO OTIENO** (*hereinafter referred to as the Objector*) in which he avers that the Petitioners has disinherited the rightful heirs of Ongweny Wayungu (deceased).

OBJECTOR'S CASE

4. **PW1 PILISTA OTIENO** testified that her claim over the deceased's estate arises from the fact that she is widow to deceased's son **COSMAS OTIENO ONGWENY**. The witness conceded that her mother in law Ochina Kanga was first married to Otiemo Alando subsequent to which she married the deceased and begot two children including her deceased husband **COSMAS OTIENO ONGWENY** and **MONICA OMBAYE**.
5. **PW2 JACOB ODHIAMBO OTIENO**, son to **PW1** and **COSMAS OTIENO ONGWENY** testified that the deceased, was his grandfather. He stated that the Petitioners who are sons of **JOSEPH AWUOR NYAKINDA** stay on **Land Parcel KISUMU/WANGAYA 1/2555** which was given to their father by the deceased. In further support of the applicant's case, he relied on an affidavit sworn by his deceased father, **COSMAS OTIENO ONGWENY** on 12.11.04 and filed in court on even date.

PETITIONER'S CASE

6. **DW1 CHARLES ONDIEK AWUOR**, the 1st Petitioner stated that the deceased and his wife Hereniah were not blessed with any

children. He also testified that his father **JOSEPH AWUOR NYAKINDA** was son of Oyondi who was deceased's brother and had two wives whose children included himself, Hereniah Awuor (deceased), Peter Awuor and Willis Awuor whereas the second wife Pamela Awuor's children are Sospeter Awuor, Fredrick Awuor and Diana Awuor (deceased). He additionally told court that **COSMAS OTIENO ONGWENY** was son to Otieno Allando's wife Ochina Kanga and was in no way related to the deceased. In support thereof, he produced family trees for **WANYUNGU** (the deceased) and **ALLANDO** as PEXH. 7.

7. **DW2 JOSEPH OGALLO AMBIRA** chief Nyangóma Location stated that the deceased and the parties herein hail from his location. He confirmed that the Petitioners are sons of **JOSEPH AWUOR NYAKINDA**, son to Oyondi who was deceased's brother. It was also his evidence that the deceased inherited Ochina Kanga and from the union begot **COSMAS OTIENO ONGWENY**, father to the Objector.

SUBMISSIONS BY THE PARTIES

Objector's submissions

8. It is the objector's case that his father **COSMAS OTIENO ONGWENY**, is son of the deceased born out of an inheritance union and is therefore a child of the deceased by virtue of Section 3(2) of *the Act* and hence a beneficiary to the deceased's estate. It was contended that the proposition by the Petitioners that a child born out of an inheritance union, is under Luo Customary Law, not entitled to estate of the man who inherits its mother is repugnant to the Constitution, justice and morality.

9. In support thereof, the Objector placed reliance on **THOMAS TITO NYACHAWO V JUDITH AKINYI NDEGE [2016] eKLR** where the court reiterated inter alia that:

“Whereas Article 11 of the Constitution recognizes culture as “the foundation of the nation and as the cumulative civilization of Kenyan people and nation”, it is this court’s finding that the people of Kenya, as the framers of the Constitution did not anticipate that culture would form a basis for discrimination between the peoples of Kenya”.

10. The Objector also relied on **RE ESTATE OF GAMALIEL OTIENO ONYIEGO (DECEASED) [2018] eKLR** where it was held that;

Section 2(2) of the Law of Succession Act, providing the law applicable after the commencement of the Law of Succession Act, with effect from 1st July 1981, on matters regarding succession, the law applicable is the Law of Succession Act. I will find the customary law do not apply in the instant cause as the deceased herein died after the Succession Act came into force. As regards then successions matters involving persons who died before the commencement of the Law of Succession Act, the customary law may be applied. Nevertheless, I am of the view that a customary law which provides that an inherited widow cannot inherit the property especially land of the inheriting man, to be a good law except in a situation where her deceased husband left her no property. That if that position would be allowed to stand, without exception, in my view that would be repugnant to the Constitution, justice and morality. I similarly find and hold that any customary law which stipulates that a child of an inherited widow cannot inherit the property especially land of the inheriting man to be a good law except in a situation where the child's biological father left him no property or land, otherwise such customary law, without exception would in my view be repugnant to the constitution, justice and morality. I find and hold so, as the customary law is clearly concerned about the welfare of the widow and a child as its purpose is to ensure amongst others, that the inherited widow and a child are provided for and as at the same time it supports the principle against double enrichment by the inherited widow and her child, in cases where the wife inheritor had his own legal wife and children.

11. The objector additionally relied on **Peter Karumbi Keingati & 4 Others V Dr. Ann Nyokabi Nguithi & 3 Others [2014] eKLR** where it was held that:

This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.

Petitioners' submissions

12. The Petitioners contended that **COSMAS OTIENO ONGWENY**, the Objector's father was not a biological son of the deceased and that he neither resided on deceased's land nor was he maintained by the deceased and was therefore not a beneficiary to the deceased's estate. The Petitioners sought to distinguish this case with **RE ESTATE OF GAMALIEL OTIENO ONYIEGO (DECEASED)** (supra) where the widow in that case stated that his son born before she was inherited by the deceased was not entitled to deceased's estate.

Analysis and Determination

13. I have considered the evidence on record, submissions filed on behalf of both parties and the cited authorities and I have deduced the following issues for determination.

i. Should the Grant be revoked

ii. Who is entitled to inherit the deceased's estate

14. Section 76 of *the Act* provides 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

14. In Musa Nyaribari Gekone & 2 Others v Peter Miyienda & another [2015] eKLR, the court of Appeal held that:

“The expression “any interested party” as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate.”

15. The expression “*any interested party*” as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate such as the applicants herein. PW1’s evidence that the deceased had three wives has been denied by the Petitioners and **DW2 JOSEPH OGALLO AMBIRA** chief Nyangóma Location where the parties reside. However, the Objector’s case that deceased inherited **OCHINA KANGA** the wife of Allando and out of the union begot **COSMAS OTIENO ONGWENY**, father to the Objector and husband to PW1 is corroborated by **DW2**. Consequently, I am convinced that the Objector’s late father **COSMAS OTIENO ONGWENY** is a biological son of deceased, beneficially entitled to the estate of deceased and on that basis hold that the Objector has *locus standi* to present the application for revocation of the grant.

16. Having said that, it is also my duty to determine who between the Objector who is deceased’s grandson, and the Petitioners who are nephews of the deceased, is entitled to deceased’s estate.

17. Section 39 of *the Act* provides:

(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.

17. Having found that Objector’s late father **COSMAS OTIENO ONGWENY** is a biological son of deceased, the contention by the Petitioners’ who are deceased’s nephews that they have the nearest degree of consanguinity to the deceased and that they rank in priority to the objector cannot be sustained and it is rejected.

18. Consequently, I am convinced that that the grant herein was obtained fraudulently by the making of a false statement and by the

concealment from the court, of all the beneficiaries of the deceased's estate and ought to be revoked.

19. In the result, I find and hold that deceased's Land Parcel Nos. **KISUMU/WANGAYA I/1954** and **KISUMU/WANGAYA I/1957** shall devolve upon the family of his deceased son **COSMAS OTIENO ONGWENY** who include the Objector. Further to the foregoing, I also find that **Land Parcel KISUMU/WANGAYA 1/2555** which the Objector concedes was bequeathed to the Petitioners' father **JOSEPH AWUOR NYAKINDA**, by the deceased, during his lifetime, shall devolve to that family which include the Petitioners.

Disposition

19. As a result, it is hereby ordered **THAT**:

a) The objection has merit and it is allowed

b) Letters of administration issued on 3rd July, 2012 in favour of CHARLES ONDIEK OWUOR and SOSPETER ONYANGO OWUOR and the grant confirmed in favour of CHARLES AWUOR, FRED AWUOR, WILLIS AWUOR, PETER OMOLLO and SOSPETER ONYANGO on 14th April, 2015 are hereby revoked.

c) Any sub-division and transfer in respect of Land Parcel Nos. KISUMU/WANGAYA I/1954; KISUMU/WANGAYA I/1957 and KISUMU/WANGAYA I/2555 is hereby cancelled and it is ordered that ownership in respect thereof shall revert to the name of ONGWENY WAYUNGU (DECEASED).

d) CHARLES ONDIEK AWUOR and JACOB ODHIAMBO OTIENO are hereby appointed joint administrators of the deceased's estate

e) Upon issuance of the Letters of Administration, CHARLES ONDIEK AWUOR and JACOB ODHIAMBO OTIENO shall within 30 days from the date thereof proceed to apply for confirmation of the grant in accordance with the provisions of the law after ascertaining and determining all the beneficiaries and their respective beneficial entitlement to the estate

f) The Petitioners are hereby condemned to pay costs to the Objector.

DATED AND DATED IN KISUMU THIS 27th DAY OF June, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant	- Felix
Petitioners/Respondents	- Present
For the Petitioners/Respondents	- Ms. Adwar
Applicant/Objector	- Present
For the Applicant/Objector	- N/A