



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. APPL. NO. 249 OF 2013

PAMELA ATIENO SUING ON BEHALF OF

JENIPHER OKELO NJON'G

ALFRED OTIENO ONYANGO.....APPLICANTS

VERSUS

COLLINCE OPIYO OTHIM.....RESPONDENT

RULING

1. On the **16th October 2013** the Applicant **Pamela Atieno** filed a Summons for revocation of grant dated the **16th October 2013**. The application is brought under Section 48 and 76 of the Law of Succession Act Cap. 160 (the *LSA* Act), Rule 44, 58, 63 and 73 of the Probate and Administration Rules, Section 8a and 63 (e) of the Civil Procedure Act. The Applicant seeks the following orders;

- i. The grant of letters of administration issued to the Respondent by the Principal Magistrate's Court **Rongo vide cause no. 158/2013** when already another Succession filed earlier albeit Rongo Succession Cause no. 102/2013 and even gazette albeit Gazette Notice Number 6053, gazette grant issued and was confirmed on the 14th day of August 2013 be revoked and annulled.
- ii. The Registration of the titles L.R. No. Kamagambo/ Kamwango/200 in the names of the Respondent also be revoked upon granting prayers no. 1
- iii. There be an order of injunction restraining the Respondent from intermeddling in any manner whatsoever whether by sale, lease, mortgage, charge or in any manner detrimental or adverse to the interest of the Applicants pending the hearing and determination.

2. The application is premised on the grounds stated on the face of the application and the affidavits of Pamela Atieno and Alfred Otieno Onyango. The applicant avers that she is the wife of Njong Onditi (Njong) the deceased, and co wife to Jeniffer Okelo who filed **Succession Cause no. 102 of 2013**. Subsequently the Respondent filed another **Succession Cause no. 158 of 2013** and he proceeded to obtain title deed albeit **L.R. No. Kamagambo/Kamwango/200** in his name. That she has two children with the deceased Calvin Odhiambo and Fabrigas Ochieng, hence the Respondent intends to disinherit her the whole portion of the land. That the deceased's 1st wife Jenifer Okelo Njong (Jenifer) passed on without leaving any issue, culturally and traditionally Jenifer placed her to sire on her behalf to perpetuate the continuation of the family of Walter Njong Onditi. That the respondent forged the chief's letter and the matter was reported to the police and is under investigation.

3. **Alfred Otieno Onyango's** (Alfred) interest is that he purchased a portion of **LR No. Kamagambo/Kamwango/200 measuring 1 ½ acres** for a consideration of Kshs. 120,000/- but Walter Njong died intestate before transferring the land to him. That the family of the deceased included his name in the **Rongo Succession Cause no. 102 of 2013** as a purchaser.

4. **Collince Opiyo Othim** ('Collince') the respondent, filed a replying affidavit dated the 11th November 2014. He avers Pamela has lied as the deceased was not a polygamous man neither did the late Jenipher Okel Njong have a co-wife. Njong Onditi died before Pamela Atieno was born. The summons for revocation has been overtaken by events by dint of section 24, 25 and section 26 of the Land Registration Act No. 3 of 2012 which bestows on him overriding proprietary rights. That the application filed by the applicants offends the provisions of sections 6 and 8 of the Civil Procedure Act 2012 as the matter is directly and substantially in issue pending before the Kisii ELC Court Case no. **416 of 2013**. That Pamela went to their location in 2007 when she married one Kennedy Angura Otiu of Kodero clan, Kamajua village, a clan not associated in any way with Kanyasasi clan in Kanyawanga village, where the late Njong belonged and had two brothers, Matthews Opiyo and Atieno Othim, father of the Respondent, making him the most immediate nephew of the late Njong Onditi. That the applicants are strangers to the suit estate and that is why they cannot state the deceased's date of death plus their succession cause states strange names namely; Walter Njong or Walter Njong Onditi names not associated with the deceased Njong Onditi. That the 2nd applicant who claims to be a purchaser has not shown any evidence that he paid the balance of the purchase price of Kshs. 80,000/- on or before the death of Jenifer Njong. That the said sale of land was not witnessed by any family member. That the 1st applicant was not included by the late Jenifer in her

form P & A5 and even the chief's letter dated the 8th April 2013 leaves a lot to be desired and is suspicious. That the applicants have concealed and/ or failed to disclose all material facts relevant and/ or necessary to enable this court reach a just conclusion. That the suit land is currently in his name and is therefore lawfully belongs to him and he is bestowed and/ or conferred with absolute rights over the same to the exclusion of other.

5. The respondent did not attend the hearing of the application. The applicant filed submissions in court on the 4th December 2017. The submissions reiterate what the applicants aver in their affidavits in support of the application for revocation. It was submitted that the proceedings by the respondent used to obtain a grant in Rongo Law Court in **Succession Cause no. 158 of 2013** were *void abinitio* and premised on fraud and falsehood as there was double registration of **Rongo Succession Cause no. 102 of 2013** filed by Jenipher Okel Njong co- wife of the 1st applicant and that Jenipher died soon thereafter upon the outcome of Gazette Notice No. 6053. That the purported chief's letter used by the respondent was fake as the area chief did a letter to the 1st applicant dated 29.7.2013 to replace and substitute Jenipher in **Succession Cause no. 102 of 2013**. That there are two gazette notices over the same cause of action i.e Gazette notice No. 6053 dated 3.5.201 and Gazette no. 8998 dated the 25.6.2013. That the application by the respondent dated 14.8.2013 was done before six months and was done in falsehood. That this court should nullify **Succession Cause no. 158 of 2013**.

6. To determine this matter I called for **Succession Cause no. 158 of 2013** filed at the Principal's Magistrate court at Rongo. The cause relates to the estate of Njong Onditi who died on the 20.3.1983. The administrator of the said cause is Collince Opiyo Othim, the respondent in this cause. In a letter dated the 19.12.2018 to the Deputy Registrar Kisii High Court the SRM at Rongo court indicates that **Succession Cause no. 102 of 2013** was transferred to Migori High Court on the 18.9.2014. Succession cause no. 102 of 2013 was not availed to this court. In Succession cause no. 158 of 2018 a grant was issue to the respondent in respect of the estate of Njong Onditi, who is said to be the same deceased in succession cause no. 102 of 2013. The 1st applicant claims that succession cause no. 102 of 2013 was instituted by Jenipher Okeyo who was her co-wife. PA1b shows that succession cause no. 102 of 2013 exists and was filed at Rongo court by Pamela Atieno Njong. It relates to the estate of Walter Njong who died on the 11th March 1984. Despite calling for succession cause no. 102 of 2013 from Rongo Law Courts, the said file was not availed to this court. I therefore do not know the last orders in the said or why it was taken to Migori Law Courts and the application that was before the High Court at Migori. In **ELC Case no.416 of 2013**.

7. Succession Cause no. 158 of 2013 which relates to the deceased was filed after succession cause no. 102 of 2013 which also relates to the same deceased was filed. This is obviously an abuse of the court process. Only one succession cause should have been filed. I read mischief in the acts of the respondent. The respondent did not attend court to support what is averred in his replying affidavit. The applicant presented their case in court. Under section 76 of the Law of Succession Act Cap. 160, a grant can be revoked or annulled if 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**. In this case it clear that the respondent whilst filing succession cause no 158 of 2013 concealed from the court something material that there was pending another succession cause no. 102 of 2013 relating to the same deceased Njong Onditi. I therefore revoke the grant issued in Succession Cause 158 of 2013 dated the 31st July 2013 and confirmed on the 14th August 2013. With this order the applicant is at liberty to pursue the revocation of the titles relating to L.R. **Kamagambo/Kamwango/200** in the Environment and Land Court (ELC) as the status of the said land is not clear. The applicant can also seek an order for injunction from the ELC court too. Costs to the applicant.

Dated signed and delivered at Kisii this 15th day of August 2019

R.E.OUGO

JUDGE

In the presence of;

Applicant Absent

Respondent Absent

Rael Court Clerk