



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.199 OF 2015

IN THE MATTER OF THE ESTATE OF: SAPHAN MARUCHA.....DECEASED

AND

ESTER ATIENO OTIENO..... OBJECTOR

AND

BENEAH AMORE MARUCHA.....1ST PETITIONER

SIMION OOKO MARUCHA..... 2ND PETITIONER

PASCALIA ACHIENG OJOW..... 3RD PETITIONER

RULING

[1] This is an unusual case where a single application/petition was made for grant of letters of administration intestate respecting the estate of the deceased **Saphan Marucha Amore** and **Ezrah Ochieng Marucha** who died on the 27th July 1987 and 11th March 2007, respectively.

Each of them was survived by a widow and collectively by five sons including Albert Otiemo, Woodley Abisalom, Willys Saoko, Festo Otiemo and Geoffrey Okeyo.

A daughter-in-law, Lucy Adhiambo Kenneth, also survived the deceased whose immovable property included two parcels of land described as Kanyada/Kanyabala/541 (plot No.541) and Kanyamwa/K/K/Kakaeta/ 153 (plot No.153).

[2] The application was filed on the 21st May 2015, by **Beneah Amore Marucha** and **Simion Ooko Marucha** in their capacity as sons of the deceased and **Pascalina Achieng Ojow**, in her capacity as the wife of the deceased Ezrah Ochieng as indicated in the chief's letter dated 18th May 2015.

However, on the 26th August 2016, a notice of objection to making of grant was filed by **Ester Atieno Otiemo** (herein, the objector), in her capacity as a daughter-in-law of one Wilson Gao (deceased) who was said to have been the initial owner of the estate parcel No.541, which was considered as ancestral land and who was survived by a son called Otiemo who is deceased and was husband to the objector and father to her six (6) children.

[3] On 22nd February 2016, the objection was withdrawn in court with an order that grant of letters of administration do issue to the three petitioners, Beneah Amore Marucha, Simion Ooko Marucha and Pascalina Achieng Ojow (herein, petitioners/respondents) and that the application for confirmation of the grant be filed and served within twenty one (21) days.

Accordingly, the petitioners took out necessary summons for confirmation of grant on the 26th February 2016, on the basis of the grounds contained in their supporting affidavit deponed by the first and third petitioner on the 26th February 2016.

The mode of distribution of the estate property was specified in the supporting affidavit.

[4] However, on the 28th July 2016, the objector filed an affidavit in protest to confirmation dated 30th June 2016, on the basis of the averments contained therein which imply that she was a beneficiary of the estate on account that her late father in-law, Wilson Gao, was the original owner of plot No.541 yet she was not included as a beneficiary neither was she made aware of the application by the petitioners for grant of the subject letters of administration.

The court directed that the protest be heard by “**viva-voce**” evidence and in that regard, the objector (PW1) gave her testimony and called three witnesses i.e Elsa Ayoo Mira Odero Wilson Gao (PW2), Perez Atieno Wambada (PW3) and Musa Odero (PW4). The petitioners’ evidence in opposition to the application was led by the first petitioner (DW1).

[5] From the evidence, both affidavits and oral, and the submissions filed herein by all parties, it is apparent that the issues arising for determination are whether the estate plot No.541 belonged to the objector’s father-in-law Wilson Gao (deceased) and if so, whether on account of the ownership the objector was a beneficiary of the estate of the deceased herein.

Under **section 71** of the **Law of Succession Act**, a grant may be confirmed after the expiration of a period of six months or such shorter period as the court may direct in order to empower the distribution of a deceased’s estate to all beneficiaries and/or dependants. However, the grant of letters of administration intestate cannot be confirmed unless the court is satisfied as to the respective identities and shares of all persons beneficially entitled to the estate and when confirmed such grant shall specify all such persons and their respective shares.

[6] In this case, the complaint by the objector giving rise to her protest is that she was not identified and included as a beneficiary of the estate of the deceased persons at the time the petitioners took out the impugned summons for confirmation of grant. It was thus incumbent upon her to establish or prove by necessary evidence that she is in fact a beneficiary of the estate and is entitled to a share thereof alongside the rest of the beneficiaries particularly in relation to plot No.541.

[7] In her testimony, the objector acknowledged that the deceased Saphan Marucha was not her relative but a neighbor. She thus implied that the first petitioner who is son to the said deceased is also not her relative but neighbor. She effectively confirmed that she has no family connection with the deceased Saphan. Her failure to mention the second deceased Ezra Marucha and his relationship with any of the petitioners or his linkage to plot No.541 was also a confirmation that there was no family relationship between them. She contended that plot No.541 belonged to her father-in-law but did not avail any evidence to prove as much.

[8] Elsa Ayoo (PW2), the objector’s sister-in-law, also failed to lead any evidence establishing a relationship between the deceased and the objector. She acknowledged that the first and second petitioners are sons of the deceased Saphan and that the third petitioner was wife to the deceased Ezra. She did not or could not show how the objector is related to the petitioners (if at all) or the deceased and how plot No.541 was linked to her father-in-law who apparently was also the objector’s father-in-law. She indicated in cross-examination that the plot was given by her family to the deceased Saphan so that he may stay there. However, she did not provide any evidence to prove as much.

[9] Perez Atieno (PW3) indicated that the objector was her sister-in-law as she was the wife of her brother called Otieno. That, the deceased Saphan, father to the first and second petitioners was a son to a woman who was inherited by her (PW3) grandfather called Amore. That, the third petitioner was wife to Ezra Marucha, son to the deceased Saphan who was a son of her (PW3) grandfather with the woman he inherited.

[10] In essence, Perez (PW3) stated that the objector was connected to the family of the deceased Saphan by marriage as she was the wife of her brother Otieno and their grandfather Amore was the father of Saphan whose mother had been inherited by their grandfather who was the father of her father Wilson Gao, the father-in-law of the objector.

It is apparent from this evidence of Perez (PW3) that indeed the objector may not be related to the deceased Saphan or even the three petitioners by blood, but is certainly related to them by marriage such that she was not a direct beneficiary of the estate of the deceased so as to be consulted and included in the distribution of the estate. She could only benefit from the estate as a dependant on account of her marriage to her late husband, Otieno, son of her father-in-law, Wilson Gao, son of Amore, father to the deceased Saphan.

[11] The objector (PW1) and Elsa (PW2) indicated that the objector was a dependant of her father-in-law through her late husband who lived with his father on the disputed parcel No.541 which belonged to him. This was confirmed as much by Perez (PW3) who further indicated that upon the demise of her husband, the objector was left on the parcel of land which she continued to cultivate.

Musa Odero (PW4) also indicated that the objector has a beneficial interest in the disputed parcel of land.

[12] The petitioners through the first petitioner (DW1) did not dispute that the objector’s relationship with the family of the deceased was based on marriage. They however disputed that the objector was a dependant of her father-in-law on the basis of ownership of the disputed parcel No.541 by the father-in-law. They indicated that although the property is currently occupied by the objector, it does not belong to the family of her late husband through his father who was her father-in-law. They contended that her father-in-law had a separate parcel of land belonging to him i.e. parcel No.540.

[13] The fact that the objector is currently in occupation of the disputed parcel or plot No.541 or part thereof lends credence to the fact that it originally belonged to the grandfather of her late husband called Amore, who was the father of Wilson Gao and the deceased Saphan. Wilson Gao was the father of Otieno, who was the objector’s husband.

Indeed, the certificate of search filed herein on 21st May 2015, along with the petition for letters of administration indicate that the disputed plot No.541 was firstly registered in 1979 in the names of Marucha Amore and Ezra Ochieng Marucha long after the death of Wilson Gao whose family the objector allegedly joined in 1974 as a daughter-in-law.

[14] Whether or not the first registration of the property was done fraudulently, the fact remained that the objector was in occupation thereof as a daughter-in-law of its original but unregistered owner who was the father of Wilson Gao and Saphan Marucha.

In the circumstances, it may safely be stated that the objector was an indirect beneficiary of the estate of the deceased and more so, the disputed plot No.541. She was a dependant of the estate through her late husband who lived with his father (Wilson Gao) on the property belonging to his grandfather (Amore).

Accordingly, provision ought to be made for her as a dependant in the distribution of the property (i.e. plot No.541).

[15] Section 26 of the Law of Succession Act provides for making of reasonable provision for a dependant who is not provided for or adequately provided for on intestacy.

For all the foregoing reasons this court must ultimately find that the estate plot No.541 originally belonged to the objector's father-in-law through her grandfather-in-law called Amore Okiya and on account of that ownership she was an indirect beneficiary of the estate and ought to have been included in the distribution of the estate prior to the petitioners applying for confirmation of the grant issued to them.

[16] The protest by the objector is hereby sustained with orders that a fresh distribution be undertaken with regard to plot No.541 with a view to including the objector as a dependant in the share of the property. The petitioner's application for confirmation of grant dated 26th February 2016 is therefore dismissed. Fresh summons for confirmation of grant may be taken out once the parties agree on distribution.

Ordered accordingly.

J.R. KARANJAH

JUDGE

25.09.2019

[Dated this 25th day of September, 2019]