



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 896 OF 2007

IN THE MATTER OF THE ESTATE WILFRIDA NYAMORI (DECEASED)

BETWEEN

PERES AUMA OWANO.....PETITIONER/RESPONDENT

AND

CHARLES OKELLO OWANO.....OBJECTOR/APPLICANT

JUDGMENT

Introduction

1. **WILFRIDA NYAMORI** is alleged to have died sometimes on 04.04.71. Her estate comprised of **PLOT NO. 062-417 SONGHOR (suit property)**.
2. Letters of administration were issued on 11th March, 2008 to **PERES AUMA OWANO, (hereinafter referred to as Petitioner)** who described herself as sister to the deceased.
3. The grant was subsequently confirmed in favour of the Petitioner and a Certificate of Confirmation of Grant was issued to Petitioner on 21st May, 2010.

Application

4. The application dated 04th May, 2011 filed on even date was brought by **DORINA ATIENO OWANO** who passed on and was by an order dated 07th February, 2018 substituted with **CHARLES OKELLO OWANO (hereinafter referred to as the Objector)**. **DORINA ATIENO OWANO** now deceased and Petitioner's husband **BENJAMIN OWANO OKELLO** also deceased are children of **OKELO SIDHE**. The application is made under Sections 76 of the Law of Succession Act (*the Act*) and Rule 44 and 73 of the Probate & Administration Rules (*the Rules*). The Applicant seeks revocation of the Letters of Administration and Certificate of Confirmation of Grant issued to Petitioner on 11.03.18 and 21.05.10 respectively.

Applicants' Case

5. The objector told court that while it is true that **PLOT NO. 062-417 SONGHOR** initially belonged to **WILFRIDA NYAMORI**, the same had by a letter dated 24th August, 1971 from the Director of Settlement been transferred to his grandfather **OKELO SIDHE** after he purchased it from **WILFRIDA NYAMORI**. Subsequent to the death of **OKELO SIDHE**, the *suit property* was registered in the name of **DORINA ATIENO OWANO** and a charge in her favour was issued on 30th June, 1976. Subsequent to the death of **DORINA ATIENO OWANO**, the objector and Caleb Odhiambo Owano were on 01st October, 2014 appointed administrators of her estate and a Certificate of Confirmation of Grant distributing the *suit property* was issued on 31st July, 2015.
6. **PW2 WILFRIDA NYAMORI OGONDO** stated that her husband owned some land in Songhor and denied that the land had been sold.
7. **PW3 GEORGE OGONDO OGONDO** and **PW4 GORETTY ADOYO ONYANGO** son and daughter to **PW2** respectively; **PW5**

RUTH AKINYI OGONDO wife to PW4 and **PW6 ELLY ODHIAMBO** a nephew to PW2 stated that the *suit property* belonged to PW2 and had not been sold.

Petitioners' Case

8. **PERES AUMA OWANO (the Petitioner)** stated that deceased was her sister who was unmarried and had no child. It was her evidence that the *suit property* was given to the deceased by her father and that upon her death, the suit property rightfully devolved to her. She denied that the deceased and PW2 were one and the same person.

9. **DW2 RAMJUS OGUTA ONYANGO** and **DW3 JARED ODHIAMBO OYARE** stated that they were neighbour of **WILFRIDA NYAMORI**, the deceased owner of the *suit property*. **DW4 ALICE ADHIAMBO FREDRICK** stated that she was sister to the Petitioner and **WILFRIDA NYAMORI**, the deceased owner of the *suit property*.

SUBMISSIONS BY THE PARTIES

Objector's submissions

10. It was submitted for the objector that **WILFRIDA NYAMORI** to whom this cause relates is still alive and that the grant was therefore obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. The Objector argued that **DORINA ATIENO OWANO** now deceased and the Petitioner's husband **BENJAMIN OWANO OKELLO** also deceased are children of **OKELO SIDHE** from whom the suit property was transferred to **DORINA ATIENO OWANO** and that the Petitioner did therefore not have a right over the suit property since **WILFRIDA NYAMORI** to whom this cause relates is still alive.

11. In support of his proposition, the Objector relied on **In Re Estate Of M'hurania M'arimi** [2019] eKLR and **In Re the Estate of Njue Eremano** [2005] eKLR and urged the court to revoke the grant on the ground that **WILFRIDA NYAMORI** to whom the cause relates is still alive.

Petitioner's submissions

12. The Petitioner holds the view that **WILFRIDA NYAMORI** to whom the cause relates died on 08.04.71 and that the death had been corroborated by chief's letter dated 07.11.07. In support of the assertion that the certificate of death filed in this cause was evidence of death, Petitioner placed reliance on **Re Estate of Kariuki Kubuta (Deceased)** [2014] eKLR where the court relied on chief's letter as prove of death.

13. It was submitted for the Petitioner that PW2 and the deceased are not one and the same person since the deceased is **WILFRIDA NYAMORI** whereas PW2 is known as **WILFRIDA NYAMORI OGONDO**. It was also submitted that PW2 had denied occupying the suit property or selling it to **OKELO SIDHE**. The petitioner urged the court to find that she rightly applied for grant in the estate of her deceased sister and in support thereof relied on Section 39 of the Law of Succession Act (*the Act*) and **Re Estate of Ndirangu S/O Njama (Deceased)** [2019] eKLR.

14. The Petitioner argued that fraud had not been established and urged court to reject the application to revoke the grant and in support thereof relied on **Jeff Suleiman Abdalla & Anor V Duncan Otieno Ogwang (2011)** eKLR. Finally, the Petitioner submitted that the jurisdiction to determine ownership of the *suit property* lies not on this court but on the Environment and Land Court.

Analysis and Determination

15. 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. **Whether WILFRIDA NYAMORI is still alive**

ii. **Whether the grant was obtained fraudulently**

Whether WILFRIDA NYAMORI is still alive

16. **PW2 WILFRIDA NYAMORI OGONDO** in her evidence stated that she was the owner of the *suit property* and denied selling it to anyone. The letter by the Director of Settlement dated 24th August, 1971 however demonstrates that one **MRS. WILFRIDA NYAMORI** had transferred the suit property to **OKELO SIDHE**. If indeed PW2 sold her land to **OKELO SIDHE**, I would have expected that as she remembered that she owned the *suit property*, she would equally recall that she sold it to **OKELO SIDHE**. The fact that PW2 could not recall this important event gives credence to the Petitioner's evidence that the deceased **WILFRIDA NYAMORI** and PW2 are not one and the same person. The Petitioner's evidence that **WILFRIDA NYAMORI** died on 08.04.71 is corroborated by the certificate of death and chief's letter dated 07.11.07. It is not unusual to have people share names and I therefore reject the Objector's assertion that **WILFRIDA NYAMORI** who is referred to as deceased in this cause is still alive.

Was the grant was obtained fraudulently

17. **WILFRIDA NYAMORI** died intestate. The issue in question is whether the *suit property* that is subject to succession is in terms of Section 34 of the Law of Succession Act Cap 160 Laws of Kenya (**hereinafter referred to as the Act**) was her free property.

18. Section 3 of *the Act* defines "**free property**" to mean the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

19. As stated hereinabove, a letter dated 24th August, 1971 from the Director of Settlement demonstrates that the suit property was transferred from **WILFRIDA NYAMORI** to **OKELO SIDHE**. Subsequent to the death of **OKELO SIDHE**, the *suit property* was registered in the name of **DORINA ATIENO OWANO** and a charge in her favour was issued on 30th June, 1976. From the foregoing, it is apparent that the *suit property* is therefore not part of deceased's free property subject to succession in terms of Section 34 of *the Act*.

20. It is trite that at the time of filing a succession cause, a Petitioner is expected to file documents in support of the assets that he/she seeks to administer. None was filed in this cause. This court makes a presumption that the said documents were not filed for the reason that the Petitioner was aware that the *suit property* no longer belonged to the deceased. I am however not convinced that the grant was obtained fraudulently but it has been demonstrated that the grant was obtained by means of an untrue allegation of a fact either made in ignorance or inadvertently for the reason that the Petitioner was unrepresented.

Disposition

21. Consequently, I am satisfied that the Objector has made out a case for revocation of the grant issued to the Petitioner. As a result, it is hereby ordered **THAT**:

- a) **Letters of administration issued on 11th March, 2008 to PERES AUMA OWANO (Petitioner) are hereby revoked.**
- b) **The subsequent Certificate of Confirmation of Grant issued to the Petitioner on 21st May, 2010 is correspondingly revoked.**
- c) **Each party shall bear its own costs of these objection proceedings**

DELIVERED AND SIGNED AT KISUMU THIS 31st DAY OF October 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistants - Amondi/Okodoi

For Petitioner/Respondent - Mr. Otieno

For Objector/Applicant - Mr. Ariho hb for Mr. Ogonda