



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**SUCCESSION CAUSE NO.206 OF 2014**

**IN THE MATTER OF THE ESTATE OF:**

**JULIUS ODIRA OMWAI .....DECEASED**

**AND**

**MONICA OUMA .....OBJECTOR/APPLICANT**

**VERSUS**

**BATHLOMEW OMWAI AROCHO.....RESPONDENT/PETITIONER**

**RULING**

1. Long after the death of the deceased, **Julius Odira Omwai**, on the 24<sup>th</sup> May 1986, a petition for grant of letters of administration intestate was filed in the Magistrate's Court at Ndhiwa on the 13<sup>th</sup> June 2014, by **Bartholomew Arocho Omwai** (herein, petitioner/respondent) in his capacity as the brother of the deceased who was aged thirty four (34) years at the time of his demise and was said to have been survived by the petitioner together with three others i.e. Jully San Arocho, Charles Apiyo Ogolla and Gordon Ochieng Otieno. All of them were represented as the true heirs and beneficiaries of the deceased's estate comprising of a parcel of land described as **No.Kanyamwa/Kwandiku/533**.

2. The petition went through the required pre-requisites and on the **17<sup>th</sup> August 2015**, the grant of letters of administration intestate was issued to the petitioner.

Interestingly enough, as the record shows, as at that 17<sup>th</sup> August 2015, a separate grant respecting the estate of the same deceased Julius Odira Omwai, had already been issued to a separate petitioner called **Selphina Owino Onyango** on the **28<sup>th</sup> July 2015**.

Nonetheless, the first grant is yet to be confirmed. The second grant dated 17<sup>th</sup> August 2015 was confirmed after the present petitioner/respondent took out the summons for confirmation of the grant dated 28<sup>th</sup> August 2015.

A certificate of confirmation of grant dated **4<sup>th</sup> September 2015**, was accordingly issued in favour of the respondent to the extent that the sole estate property was to be wholly transmitted to him.

3. However, three years after confirmation of the grant, a summons for annulment of the same dated 31<sup>st</sup> August 2018, was filed herein on the 4<sup>th</sup> September 2018 by **Monica Ouma** (herein, applicant/objector) on the basis of the grounds set out in summons and supported by the averments contained in her

supporting affidavit deponed on the 31<sup>st</sup> August 2018 and a further supporting affidavit dated and deponed on the 20<sup>th</sup> February 2019.

The respondent opposed the application on the basis of the grounds set out in his replying affidavit dated and deponed on 13<sup>th</sup> November 2018, and further replying affidavit filed herein on 21<sup>st</sup> January 2019.

4. Basically, under **section 76** of the **Law of Succession Act**, a grant of representation whether or not confirmed may be revoked or annulled if the proceedings to obtain it were defective in substance or if it was obtained fraudulently by the making of false statements or by concealment of material facts or by means of untrue allegations, among other factors.

It was incumbent upon the applicant/objector to establish any of these factors against the respondent on a balance of probabilities.

In doing so, evidence was required and this was availed in the supporting affidavits of the applicant but was countered by the respondent's evidence in his replying affidavits.

Additional oral evidence was availed by both the applicant and the respondent after the court directed that the application be heard by way of "**viva-voce**" evidence.

4. In that regard, the applicant, Monica (**PW1**) testified and called **Charles Aundo Ojwang (PW2)** and **Hastings Yongo Owiso (PW3)** as her witnesses.

The respondent, Bartholomew (**DW1**) also testified and called **Gredus Ochieng Oloo (DW2)** as his witness.

After trial, written submissions dated 23<sup>rd</sup> July 2019, were filed by the applicant while the submissions dated 31<sup>st</sup> July 2019 were filed on behalf of the respondent by **M/s Nyauke & Co. Advocates**.

This court, having given due consideration to the application and its supporting and opposing grounds, and the rival submissions of the parties, is of the view that the basic issue emerging for determination is whether the impugned grant was obtained by misrepresentation of facts and/or by concealment of material facts. Short of this, the basic issue, would be whether the grant was obtained in proceedings which were defective in substance.

5. From her evidence, it was apparent that the applicant not being a family member of the deceased was nonetheless claiming beneficial interest in part of the estate property on account of the same having been gifted to her by Hastings Yongo Owiso (**PW3**), her step-brother-in-law, who had purchased two (2) hectares of the estate from Charles Aundo Ojwang (PW2) who had in turn purchased it from the deceased in 1994.

The applicant indicated that she took possession of that part of the property in 2001 by occupation and usage until the year 2016 when she was ejected therefrom by the respondent.

Both Hastings and Charles agreed with the applicant. However, Hastings indicated that he purchased the land from Charles on behalf of the applicant. Hence, the sale agreement was actually entered between

Charles and the objector. Charles clarified that the deceased actually died in the year 1996 and not 1986 as represented by the respondent in his petition for the grant.

6. In his evidence, the respondent denied the aforementioned allegations by the applicant and her witnesses and contended that they are all strangers to him. He indicated that the estate property belonged to their late father, **Omwai Arocho**, who never sold it or part thereof to Hastings Yongo or Charles Aundo and by extension, the applicant/objector. His witness (**DW2**) agreed with him.

However, none of them denied that the deceased died in 1996 and not 1986 as alleged by the applicant. They were both silent with regard to the actual year that the deceased died.

7. Basically, the applicant is claiming a beneficial interest in part of the estate on account of purchase thereof by Charles (**PW2**) from the deceased and by Hastings (PW3) from Charles on her behalf. She therefore implies that she was a beneficiary of the estate and ought to have been included as such in the petition presented by the respondent for the impugned grant. However, the respondent's contention is that the applicant and indeed her witnesses are strangers to the estate of the deceased. His defence to the claim was generally a denial.

A pertinent issue which was brought up by the applicant and which was apparently not disputed by the respondent related to the actual year of the death of the deceased. This was said to be 1996 rather than 1986 as a copy of the green card exhibited herein (**P. Exhibit 1**) shows that the estate property was jointly owned by the deceased and his father Omwai Arocho at the time of first registration in 1992, to be precise 14<sup>th</sup> August 1992.

8. If indeed the deceased died in 1986 as represented by the respondent in his application for the grant, it is not possible that he became "**Jesus Christ**" and rose from his death to come back to the world and register his piece of land in his name in 1992.

This being the position, the applicant's evidence that the deceased's share of the estate property was sold by him to Charles Aundo (PW2) in 1994 and by Charles to Hastings Yongo (PW3) in 2001 after his (deceased) death in 1996, was therefore credible and unproved by any contrary evidence from the respondent.

What this therefore means is that the death certificate presented by the respondent showing that the deceased died in 1986 was mostly likely than not a false document and was used to misinform and mislead the court into issuing the impugned grant to the respondent.

Even if it is said that the applicant has no family relations with the deceased, her evidence proved on a balance of probabilities that she had a beneficial interest in part of the deceased's estate and ought to have been acknowledged as such in the respondent's petition.

9. The applicant's evidence has also shown that the impugned grant was obtained in proceedings which were substantially defective as the death certificate which was annexed to the petition as a false document and an earlier grant dated 28<sup>th</sup> July 2015 had already been issued in respect of the estate of the deceased to another person known as **Selphina Owino Onyango** and remains valid to date in as much as it has not been revoked by any competent court.

The existence of this original grant was not explained by the respondent thereby confirming that not only was the impugned grant obtained fraudulently by the making of false statement and concealment of material fact but was also obtained in proceedings which were substantially and fatally defective.

For all the foregoing reasons, the applicant's application/objection dated 31<sup>st</sup> August 2018 is hereby upheld with orders that the grant dated 17<sup>th</sup> August 2015 and the certificate of confirmation of grant dated 4<sup>th</sup> September 2015, be and are hereby annulled and rendered **null** and **void "ab-initio"** with the result that any transaction/s undertaken in relation to the estate property on account of the two documents is also null and void "**ab-initio**".

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**24.10.2019**

**[Dated and delivered this 24<sup>th</sup> day of October, 2019]**