



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.2 OF 2019**

**FORMERLY NDHIWA SUCC. CAUSE NO.85 OF 2016**

**IN THE MATTER OF THE ESTATE OF: JOHN BEDE ACHIENG OSEDO.....DECEASED**

**AND**

**JOSEPHINE ANYANGO ACHIENG.....1<sup>ST</sup> APPLICANT**

**FREDRICK OTIENO ACHIENG.....2<sup>ND</sup> APPLICANT**

**HILDA AKOTH ACHIENG.....3<sup>RD</sup> APPLICANT**

**ALLOICE OBADO ACHIENG.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**HENRY FRANCIS OUMA ACHIENG..... RESPONDENT**

**RULING**

[1] The four applicants, Josephine Anyango Achieng, Fredrick Otiemo Achieng, Hilda Akoth Achieng and Alloice Obado Achieng, are beneficiaries cum proposed administrators of the estate of the late John Bede Achieng Oseido (**deceased**) who passed away on the 12<sup>th</sup> June 1993 and following a petition made by Henry Francis Ouma Achieng (**Petitioner**), grant of letters of administration intestate respecting the estate was issued to him on 3<sup>rd</sup> June 2017 by the Magistrate's Court at Ndhiwa in Succession Cause No.85 of 2016.

The applicants (**Objectors**) now seek an order for the revocation of the grant on the basis that it was obtained by means of untrue allegations of facts essential in point of law to justify the grant and that the petitioner has failed to proceed diligently and honestly with the administration of the estate to the extent that he has converted part of the estate before confirmation thereof.

[2] These grounds are fortified by the averments contained in the applicants' supporting affidavit dated 8<sup>th</sup> July 2019, but are opposed by the petitioner on the basis of the grounds set out in his replying affidavit dated 8<sup>th</sup> October 2019.

Direction were issued by the court that the application be canvassed by way of affidavit evidence and written submissions.

Accordingly, the applicants' supporting submissions were filed by **Messers G.S. Okoth & Co. Advocates** on 20<sup>th</sup> November 2019, while those of the petitioner in opposition were filed by **Messrs Mburu Maina & Co. advocates** on 22<sup>nd</sup> October 2019.

[3] **Section 76** of the **Law of Succession Act**, provides for revocation or annulment of grant if it 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 or if the holder of the grant has failed, after due notice and without reasonable cause to proceed diligently with the administration of the estate. The allegations by the applicants/objectors against the petitioner/respondent are anchored on these two factors. However, the applicants in their submissions, abandoned their first basic ground for revocation after they conceded that the impugned grant was properly and lawfully obtained by the respondent and the late Yunia Rose Achieng (deceased) but the respondent became the sole administrator after the demise of the said Yunia Rose Achieng.

[4] They however contended and stuck with the allegation that the respondent as the sole administrator has failed to diligently administer the estate of the deceased which comprised of land parcels No.

Kanyamwa/Kabonyo-Kwandiku/1581, No. Kanyada/Kanyango –Kalanya/3455, Plot No.1432/223 Homa Bay Town and three thousand nine hundred (3,900) shares held with Jubilee Holdings Limited. In that regard, they allege that after the expiry of the prescribed period of six months, the respondent ceased communication with other beneficiaries and declined to apply for confirmation of grant and has never done so to date. That, he converted to his own use Plot No.1432/223 situated in Homa Bay Town by collecting rental income without accounting for it and has also failed to account for the dividends earned from the shares held at Jubilee Holdings Limited. That, he has developed dictatorial tendencies by making crucial decisions without input from other beneficiaries.

[5] The respondent vehemently denied all the foregoing allegations against himself and implied that he has all along proceeded with diligence in the administration of the estate especially after the death of the co-administrator and that the delay in applying for confirmation of the grant was occasioned by the applicants or some of them when they inexplicably refused or evaded to give their consent to the mode of distribution proposed after a family meeting.

The respondent opined that the applicants said attitude manifested itself after it dawned for them that they would no longer collect rental income for their personal use. He contended that he had already filed the necessary application for confirmation of grant which was due for hearing before the magistrate's court on 31<sup>st</sup> October 2019.

[6] The burden to establish the allegations made against the respondent lay with the applicants and from their material and evidential facts herein, they have failed to discharge the burden. They have failed to provide sufficient evidence to show that the respondent has failed to diligently proceed with the administration of the estate. In any event, the allegation was disproved by the fact that an application for confirmation of grant has already been presented before the magistrate's court at Ndhiwa by the respondent. It is presupposed that the application would not have been presented if the beneficiaries or at least a majority of them had indeed not agreed on a mode of distribution. The allegation that the respondent ceased to communicate with other beneficiaries was in the circumstances untenable.

[7] However, the fact that it took quite a considerable period of time to present the application for confirmation of grant way past the prescribed period was a pointer to lower degree of diligence on the part of the respondent regard or allowance being given to that fact that the entire family of the deceased took some time to mourn the departed co-administrator.

Under **section 76 (a) (i)** of the **Succession Act**, a grant may be revoked if it is not confirmed within one year from the date of issue or such longer period as the court may order or allow. This is something that any administrator of an estate must always have in mind lest he/she be accused of being indolent and lacking in diligence.

[8] Any administrator must also have in mind and pay due deference to **Section 83** of the **Succession Act** which clearly and adequately prescribes the duties of personal representatives.

Otherwise, the applicants' allegations against the respondent have not adequately been proved to the satisfaction of the court for it to exercise discretion in favour of the applicants by revoking the impugned grant. In any event, the grant is awaiting confirmation before the magistrate's court. Any aggrieved beneficiary ought to address the trial court during the hearing of the pending summons for confirmation of grant.

It must be pointed out that in filing the present application before this court, the applicants jumped the gun as the matter is properly and lawfully before the magistrate's court.

Indeed, the respondent raised a preliminary objection in that regard but the court did not see the necessity of making a considered ruling on the same because the issue ought to have raised before the hearing of this application or before directions were given.

What the respondent did when he raised the objection in his written submissions was to "ambush" the applicants.

[9] In sum, the present application is dismissed with each party bearing their own costs and being advised to exhaust the process in the magistrate's court prior to moving to this court.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**27.11.2019**

**[Delivered and dated this 27<sup>th</sup> day of November, 2019]**