



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SUCCESSION CAUSE NO.505 OF 2015

FORMERLY KISII HC SUCC. CAUSE NO.538 OF 2011

FORMERLY HOMA BAY SRM'S SUCC. CAUSE NO.77 OF 2011

IN THE MATTER OF THE ESTATE OF: ODONGO MBWAYO.....DECEASED

AND

MILLICENT ACHIENG OBURA.....APPLICANT

VERSUS

JOHN OBINGO ODONGO.....RESPONENT

RULING

1. A grant of letters of administration respecting the estate of the late **Odongo Mbwayo** (deceased) was issued on the 15th February 2016, to the petitioner/respondent, **Millicent Achieng Obura**, in her capacity as the sole surviving widow of the deceased and after a previous grant issued to the applicant/objector, **John Obingo Odongo**, was revoked.

The petitioner was thereafter given a period of thirty (30) days to confirm the grant and in that regard, she filed the necessary summons for confirmation of grant dated 15th March 2016, in which a proposal was made to have the estate property comprising of land parcels No.W/Nyokal/Kanyikela/519 and 539 transmitted wholly to herself.

2. In response to the summons, the objector or protestor filed a replying affidavit dated 16th August 2016, which in actual sense was a protest to the proposed mode of distribution on the basis that not all beneficiaries to the estate were included in the share of the estate and that the property described as parcel No.539 is wrongly described as such and should actually be parcel No.359.

The protest was heard by way of “**viva-voce**” whereupon the petitioner commenced her testimony and that of her witness after the objector and his witness had testified. The objector was treated as the plaintiff in the case while the petitioner was treated as the defendant.

3. The burden to prove that the summons for confirmation of grant excluded some of the beneficiaries lay with the objector and in doing so, he was required to establish that the beneficiaries he refers to have a kinship relationship or otherwise with the deceased.

In her evidence, the petitioner (**DW1**) indicated that the deceased was the father of her late husband called Godfrey Obura who had a brother called Shadrack (now deceased), she indicated that the deceased was a polygamist with two wives.

Her relationship with the deceased was that of a father and daughter-in-law as her husband was a son to the deceased with his first wife called Maua Nyokongo. She further indicated that the second wife of the deceased called Turfena Nyongondo (deceased) had two daughters with the deceased but these are now married.

4. The petitioner also indicated that the objector is a son of one Hellena Magare Okuto who in 1991 entered into a levirate union with the deceased and came to live with him leaving behind the objector and his siblings at their biological father's home but he later followed his mother to the deceased's home after the death of the deceased in 1994 and was given a parcel of land No.W/Nyokal/Kanyikela/360 by her (petitioner's) late husband to erect a house and in 2005, he leased another parcel of land No.Nyokal/Kanyikela/359 to one Jakadem without informing any family member of the deceased and at a later stage instituted a succession cause No.77 of 2011 at Homa Bay in total disregard of the rights of the defendants of the deceased and in the process listed land parcels W/Nyokal/Kanyikela/359 and 519 as comprising the

entire estate of the deceased.

5. In essence, the petitioner portrayed the objector as a stranger in the estate of the deceased or a person who overstayed and abused his welcome in to the homestead and family of the deceased with a view to disinheriting the petitioner and other rightful beneficiaries of the estate.

In that regard, she was supported by her witnesses, **James Obonyo Andango (PW2)** and **Shadrack Orwe Ongire (DW3)**.

However, the objector (**PW1**) indicated in his testimony that the deceased was his father as he had three wives including his mother, Lena Odongo, who was the third wife and sole survivor of the deceased among his three widows. He stated that the petitioner was his sister in-law as she was the wife of his late brother Geoffrey Obura, son of the deceased with his first wife together with one Shadrack who is also deceased.

He indicated that he is the only surviving child of his mother as his sister Violet is now deceased. He mentioned several other persons who allegedly are beneficiaries of the estate of the deceased but were not included in the summons but instead, more beneficiaries were included. He contended that the deceased gave him his land parcel No.359 but left parcel No.519 which is to be shared among his entire household.

6. The objector thus denied the allegations made against him by the petitioner and contended that she failed to include all the beneficiaries in the share of the deceased's property. He also contended that parcel No.360 was given to the petitioner's husband by the deceased while he was given parcel No.359 and therefore the only parcel available for distribution to all the deceased's households is parcel NO.519, which in the circumstances should not be wholly transmitted to the petitioner as indicated in her summons for confirmation of grant. All these contentions were supported by the objector's witnesses, **Jeckton Liech Mbwayo (PW2)**, a brother to the deceased and **Lena Amagore (PW3)**, mother of the objector and alleged third wife of the deceased.

7. What comes out from all the foregoing evidential facts is that the deceased was indeed a polygamist before he died. His wives were two at the time. The two were his first and second wives who preceded him in death after which the objector's mother came to the scene either as a new wife on an inherited or levirate wife. She did not come alone but with her two children a daughter and a son. The daughter is now deceased but the son is alive and is the objector herein. It was indicated that the objector only joined his mother after the death of the deceased and was given a portion of the deceased's land to settle and that this was done by a son of the deceased with his first wife i.e. Godfrey Obura, late husband of the petitioner.

It is quite telling that neither the objector nor his witnesses wanted to talk about the alleged levirate union between the deceased and his mother (PW3). They insisted that the objector was a biological son of the deceased even though no evidence was led to establish the fact. Besides, the objector avoided the issue altogether in his evidence but in cross examination he gave a clear indication that his mother was inherited by the deceased after the deaths of the two wives of the deceased when he stated that he was not privy to any information regarding the alleged levirate union.

8. The deceased's brother (PW2) gave a clear indication that the objector's mother was an inherited wife of the deceased who came to the deceased's homestead with the objector. He therefore strongly implied that the objector was not a biological son of the deceased when he stated that he was given apportion of the deceased's land according to customs.

The objector's mother (PW3) was very economical with the truth regarding her alleged levirate union with the deceased. She insisted that she came into the life of the deceased as a third wife prior to the death of his second wife yet the totality of the evidence availed herein indicates otherwise and strongly indicates that her relationship with the deceased was on account of their levirate union. She thus came into the home of the deceased not as a third wife but a new wife who actually survived the deceased and had children especially the objector from previous relationships with other persons.

9. In the circumstances, it was the objector's mother (PW3) as the surviving widow of the deceased who ranked first in priority among all those entitled to petition for grant of letters of administration respecting the estate of the deceased including the petitioner as the surviving widow of the departed son of the deceased called Godfrey, the objector, being a person not related to the deceased in kinship did not feature anywhere in the order of priority or preference in terms of **Section 66** of the **Law of Succession Act**. If he was indeed taken in by the deceased and treated as his own son, then he could only be provided for as a dependant in terms of **Section 26** of the **Law of Succession Act**.

Against all the foregoing background, it would follow that the application by the petitioner to confirm the grant in terms of the proposal set out in paragraph 5 of the so called supplementary affidavit dated 8th March 2016, cannot be sustained as it is clear that proper beneficiaries of the estate have not been identified and their share in the entire estate property determined.

Further, not all the assets belonging to the deceased prior to his death are included considering that this is an intestate succession.

10. Consequently, in the exercise of this court's powers under **Section 73** of the **Probate and Administration Rules, 1980**, it is hereby ordered that: the grant of letters of administration intestate issued to the petitioner, **Millicent Achieng Obura (DW1)**, on 15th February 2016, be rectified to include the name of the deceased's surviving widow, **Helena** or **Lena Amagore (PW3)** as a co-administratrix, after which a fresh summons for confirmation of grant may be taken out incorporating all the beneficiaries and all the assets of the deceased and in any event, not later than six (6) months from this date hereof.

Ordered accordingly.

J.R. KARANJAH

JUDGE

26.11.2019

[Delivered and dated this 26th day of November, 2019]