



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CIVIL APPLICATION NO. 28 OF 2015

(Formerly Kisii High Court/ELC Misc. Civil Application No. 1 of 2013)

IN THE MATTER OF THE ESTATE OF GLADIS ODINGA ORINDA (DECEASED)

-BETWEEN-

EUNITA ANYANGO GEKO

ESTHER ATIENO MAUCHA.....OBJECTORS/APPLICANTS

-AND-

PHILIP OBUNGU ORINDA.....PETITIONER/RESPONDENT

RULING

1. The history of litigation in this matter dates to 2008 when the Petitioner herein, **Philip Obungu Orinda**, applied to administer the estate of **Gladis Odinga Orinda** (hereinafter referred to as '**the deceased**') as a son/step-son to the deceased. That is 10 years ago.
2. The deceased who passed on 27/06/1998 was one of the six wives of one Orinda Chacha. She died intestate and left behind a parcel of land known as **Suna East/Wasweta I/6151** (hereinafter referred to as '**the property**') as the only free property. The Petitioner was granted the administration of the estate of the deceased vide the **Migori Senior Resident Magistrate's Court Succession Cause No. 123 of 2008** on 29/10/2008. I will henceforth refer to the Grant of Letters of Administration issued to the Petitioner as '**the Grant**').
3. The Applicants herein, **Eunita Anyango Geko** and **Esther Atieno Maucha**, then filed the Chamber Summons dated 15/01/2013 seeking *inter alia* the annulment and/or revocation of the grant issued to the Petitioner. That is the application under consideration in this ruling.
4. The application was filed on 16/01/2013 in Kisii High Court/Environment and Land Court as Misc. Civil Application No. 1 of 2013. The application was heard *ex-parte* and allowed vide a ruling delivered on 11/07/2013 by **Sitati, J.** The ruling was however set aside thereby paving way to a fresh hearing hence this ruling.
5. The Applicants relied on the Affidavits they initially filed together with their then *ex-parte* submissions and the ruling which was set-aside in prosecuting the current application. On 27/04/2017 the Respondent filed a Replying Affidavit he had sworn on 24/04/2017 in opposition to the application. He also filed written submissions on 27/07/2017.
6. The Applicants in seeking the revocation of the grant contend that the Petitioner has no beneficial interest in the estate of the deceased. They separately deponed that each of them was married to the deceased under the **Abasuba Community Woman-to-Woman Customs** and as such they were the ones legally entitled to the administration of the estate and inheritance of the property. The Applicants gave a very elaborate history of how the property evolved from the original parcel known as **Suna East/Wasweta I/460** to its current registration and annexed appropriate supporting documents.
7. It is the Applicants' contention that the Petitioner was instead a son to one of the other five wives of the said Orinda Chacha and who had already inherited what was lawfully bequeathed to him through her mother. That, the Petitioner took out the succession proceedings fraudulently and concealed material facts and that he intentionally did not involve them with a clear intention of disinheriting them. They impugned various documents used in petitioning the grant including the Petitioner's changing position of being a son and a step-son to the deceased.
8. The Applicants' position was vouched by **Shadrack Maucha Orinda** one of the children of Orinda Chacha who swore an affidavit. He reiterated that the Applicants were married to the deceased under their customs.

9. Turning to the submissions which the Applicants' Counsel filed and highlighted on during the hearing of the application in the first instance, the Applicants referred to **Eugene Cotran's** book on '**Restatement of African Customary Law in Kenya Vol. 1**' which recognizes the woman-to-woman marriages among the Luo people in Kenya and how the succession unfolds on the death of the 'woman-husband'. Counsel also referred to the decisions in the cases of **Milicent Njeri Mbugua vs. Alice Wambui Wainanina (2008) eKLR** and **Agnes Kwamboka Ombuna vs. Birisilla Kerubo Ombuna, Kisii High Court Civil Appeal No. 132 of 2008** (unreported).

10. Counsel further submitted that the deceased fully performed all the requirements in respect to the Applicants' marriages and lived with them as her wives. The Applicants prayed that the application be allowed as prayed.

11. The Respondent opposed the application. He deponed that the Applicants were not truthful and had concealed material facts to mislead the Court. He denied that the Applicants were married to the deceased as alleged and stated that instead each of the Applicant was married to a man. That, the first Applicant was married to one **John Geko** and the second Applicant was married to one **Shadrack Maucha Orinda** both men being stepsons of the deceased and as such the Applicants were step-daughters to the deceased. The Respondent further deponed that the Applicants' marriages were confirmed in criminal proceedings they had instigated against him in **Migori Senior Principal Magistrate's Criminal, case No. 302 of 2009** and annexed copies of the proceedings and the judgment. He contended that even in the woman-to-woman marriages it was a taboo for a woman to marry her daughters-in-law. The Respondent further deponed that the Applicants who willfully swore false affidavits committed perjury. He denied that the Applicants have any entitlement in the state of the deceased.

12. The Respondent further contended that he remains the closest and legitimate beneficiary of the estate of the deceased and the Applicants who have no relation at all with the deceased have no beneficial interests in the estate of the deceased. In his submissions, the Respondent contended that the issue of woman-to-woman marriage was not proved as required under **Sections 107 and 108 of the Evidence Act, Cap. 80** of the Laws of Kenya and relied on the decisions in the cases of **Paul Nganga Nyaga & 2 Others vs. Attorney General & 3 others (2013) eKLR, Gilbert Otieno Okiti vs. Moses Odero Onditi & 2 Others (2013) eKLR** and three other cases.

13. He further submitted that the allegation of fraud and misrepresentation was not proved either. He cited the case of **Virani t/a Kisumu Beach Resort vs. Phoenix of East Africa Limited (2004) 2 KLR 269** in support of the submission. He submitted that he applied for the grant as a stepson and that is what appeared in the Gazette Notice which is a public document. It was submitted that the Applicants had not established a case for the revocation of the grant and referred to the unreported case of **Charles Otieno Seto vs. Ano. vs. Didacua Ojwang Onyango, Kisii HC Succ. No. 24 of 2003**.

14. The Respondent further submitted that the Applicants were not deserving of any orders as they were in Court with unclean hands and had not demonstrated that they were not dependants to the deceased. He prayed that the application be dismissed with costs.

15. The grounds on which a grant may be revoked or annulled are provided for under **Section 76 of the Law of Succession Act, Cap. 160** of the Laws of Kenya. The said section provides as under: -

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

16. The onus of proving any of the said grounds rests on the party which desires the Court to believe the facts as presented by that party. In this case it is the Applicants who bear that incidence of burden. The Applicants' contention of their entitlement to the estate and the property is based on the claim that they were married to the deceased under the Abasuba community woman-to-woman marriage customs. The position is denied by the Respondent who contends to be the sole beneficiary to the estate of the deceased.

17. That, the issue of the marriage between the deceased and the Applicants is the most crucial one in these proceedings is not in doubt. As the issue is not settled, there is need for it to be fully canvassed and a determination made. That can be done during the confirmation proceedings given that in the event the Applicants succeed then they will no doubt have the undisputed right to the estate and the property. However, if the Applicants fail to prove their marriage to the deceased then unless otherwise demonstrated they may not have any

entitlement to the estate of the deceased. I have also seen several affidavits and Witness statements on the record on the issue in which the witnesses stated their readiness to testify in Court.

18. Before the issue is determined, this Court is of the considered view that the prevailing *status quo* in respect to the administration of the estate ought to be maintained. I say so because if, for instance, the administration of the estate is handed over to the Applicants and the issue of the marriage is eventually not determined in the Applicants' favour then further orders will have to be made to revert the administration of the estate to the Respondent once again. On the other hand, if the marriage is proved, then this Court will make the necessary orders for the Respondent to hand over the administration of the estate to the rightful administrator(s) alongside an appropriate account of his administration since the issuance of the grant.

19. Since the Applicants are yet to bring themselves within the confines of **Section 66** of the **Law of Succession Act**, as persons who are entitled to administer the estate of the deceased, and as such having not proved any of the grounds for revocation or annulment of a grant under **Section 76** of the **Law of Succession Act**, the application cannot succeed. The Applicants will have to first adduce evidence in proof that indeed they were married to the deceased under the Abasuba customs.

20. As the application is rendered unsuccessful, the truth is that the real dispute between the parties still subsists. There is therefore need for this Court to take deliberate steps within its wide powers under **Article 159** of the **Constitution**, **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules** towards the determination of the substantive issue herein.

21. Given the period this cause has been pending in Courts and since this Court is not able to ascertain from the current record if the grant issued to the Petitioner was confirmed, this Court is of the considered view that the Applicants ought to be accorded an opportunity to fully present their case. As said, that will be during the confirmation proceedings. To that end therefore, the following orders do hereby issue: -

(a) The Chamber Summons dated 15/01/2013 be and is hereby dismissed.

(b) In the event the Grant was confirmed, then the confirmation proceedings together with the resultant Certificate of Confirmation of the Grant shall stand set-aside and/or revoked.

(c) The Petitioner who is the Administrator of the estate herein shall file for the confirmation of the Grant within 21 days of this ruling and serve the same upon all interested parties within 7 days of filing.

(d) A date for directions shall be fixed at the Registry within 60 days of today.

(e) Costs of the application to abide the outcome of the confirmation proceedings.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 08th day of March 2018.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Oguttu Mboya Counsel instructed by Messrs. Oguttu, Ochwangi, Ochwal & Company Advocates for the Petitioner/ Respondent.

Mr. Roche Odhiambo Counsel instructed by Messrs. Odhiambo & Company Advocates for the Objectors/Applicants.

Ms. Nyauke - Court Assistant