



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT KISUMU**

#### **SUCCESSION CAUSE NO. 1067 of 2015**

#### **IN THE MATTER OF THE ESTATE OF CLEOPA ANYANGE OLIECH (DECEASED)**

**BETWEEN**

**MOSES ODHIAMBO OTWARA.....OBJECTOR/APPLICANT**

**AND**

**BENJAMIN ATIENO OLIECH.....PETITIONER/RESPONDENT**

#### **JUDGEMENT**

##### **Introduction**

1. The deceased, **Cleopa Anyange Oliech** died sometimes on 10th October, 1977. The deceased's estate comprises of **land parcel No. Kisumu/Bar/424**. The petitioner applied for letters of administration which were issued in his favour on 2nd June, 2016. The grant was confirmed in the names of Benjamin Atieno Oliech, Mary Odhiambo, Mary Atieno Juma and Cleophas Otwaro in equal shares on 27th February, 2017.

##### **Application**

2. The Summons before the court is dated 4th July, 2017 and it is made under Section 45, 47, 51 & 76 of the Law of Succession Act (*the Act*) and Rule 44, 49 & 73 of the Probate & Administration Rules (*the Rules*). The applicant seeks the orders among them that

- 1. That the grant of Letters of Administration Intestate of the estate of Cleopha Nyange deceased herein, issued to the petitioner and confirmed on 1st March., 2017 be annulled**
- 2. That the Honourable Court do order for fresh succession that incorporates all the beneficiaries**
- 3. That the petitioner be condemned to pay the costs of this application**

##### **Objectors/Applicants' Case**

5. In his evidence, Moses Odhiambo Otwaro stated that the deceased was his paternal grandfather and that petitioner was his step-brother. It was his evidence that the deceased begot 2 sons:

- i. Samson Ogendero Anyange
- ii. Justo Otwaro Anyange (petitioner and objector's father)

6. It was further his evidence that Justo Otwaro Anyange had 4 wives:

- i. Phoebe Ocharo (deceased)
- ii. Truphena Mwanda (deceased petitioner's mother)
- iii. Rose Adhiambo (deceased objector's mother)

iv. Mary Akello

It was also his evidence that his siblings are as follows:

**Children of Phoebe Ocharo (deceased)**

Clariss Achieng

**Children of TruphenaMwanda (deceased petitioner's mother)**

i. Benjamin Oliech

ii. Michael Juma (deceased)

iii. Jane Achola

iv. Joseph Odhiambo

v. Jeremiah Agengo (deceased)

vi. Rose Anyango

vii. George Ochieng (deceased)

**Children of Rose Adhiambo (deceased objector's mother)**

Moses Odhiambo Otwaro

**Children of Mary Akello**

i. John Ochieng

ii. Caroline Awino

iii. Cleophas Anyange

iv. Rose Akinyi

It is petitioner's case that **land parcel No. Kisumu/Bar/424** was to be shared out by the family of Justo Otwaro Anyange (petitioner and objector's father) since the family of Samson Ogendo Anyange had been given land before the demise of his grandfather.

The objector faults the petitioner for not denying him and other family members a share of their grandfather's estate.

PW2 Shadrack Anyange Ogendo a son of Samson Ogendo Anyange confirmed that their father had been given land by their deceased grandfather. He supported the objector's claim for a share of his grandfather's estate.

PW3 Mary Akello, step-mother to the petitioner and the objector confirmed that the objector is the son of her co-wife. She supported the objector's claim for a share of his grandfather's estate.

PW4 Tom Onyange Odida, a distant relative of the deceased confirmed that objector and petitioner and others are grandchildren of the deceased and that they were entitled to a share of their grandfather's estate.

**Petitioner/Respondent's Case**

7. The Petitioner/Respondent, Benjamin Atieno Oliech confirmed that he was a grandson of the deceased and not a son as indicated in the chief's letter and other documents that he filed in support of this cause.

8. He confirmed that the objector was the son of his father's 3rd wife whose name he did not know. He confirmed that the deceased had 13 grandchildren and that he distributed the estate to only 4 of them.

9. DW2 Clariss Achieng and Joseph Odhiambo Otwaro, sister and brother of the petitioner respectively told court that the estate of the deceased was not equitably distributed and that the objector and other grandchildren of the deceased were denied their respective shares.

**Analysis and Determination**

10. The matter before the court was brought by way of an application for revocation and/or annulment of letters of administration under the provisions of section 76 of the Law of Succession Act and which provides as follows:

***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 by the making of a false statement or by concealment of 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***

10. The issue for determination is whether the objectors/applicants' case falls within the provisions of section 76 of the Law of Succession Act.

11. The evidence on record has disclosed that the petitioner/respondent to whom letters of administration intestate were granted is not deceased's son as indicated in chief's letter and other documents filed in this cause but deceased's grandchild.

12. The evidence has further disclosed that the distribution was to only four of the deceased's many grandchildren including the objector who were left out without any reasonable cause.

13. I am satisfied that the grant of Letters of Administration Intestate of the estate of Cleopha Nyange deceased herein, issued to the petitioner and confirmed on 1st March, 2017 was obtained by the making of a false statement and by concealment from the court of material particulars to the case.

14. Consequently, the court makes the following orders:

***1. The grant of Letters of Administration Intestate of the estate of Cleopha Nyange deceased herein, issued to the petitioner and confirmed on 1st March, 2017 is hereby annulled***

***2. Benjamin Oliech, Moses Odhiambo Otwaro, Claris Achieng and Mary Akello are appointed joint administrators of the estate of Cleopha Anyange Oliech.***

***3. Upon issuance of the letters of administration, the administrators shall apply for confirmation of the grant within 30 days which shall be supported by a list of names***

***4. all the wives and children (if deceased their spouses and children) of Justo Otwaro Anyange***

***5. The respondent/petitioner is hereby condemned to pay costs of this objection to the objector/applicant***

**DATED AND DELIVERED THIS 8th DAY OF March, 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix and Carol

Petitioner/Respondent - Present

Applicant/Objector - Present