



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

SUCCESSION CAUSE NO. 1947 OF 2010

IN THE MATTER OF THE ESTATE OF PHEOBE OMONDI MIGOYE (DECEASED)

DAVID BARRACK OTIENO MRUKAPETITIONER/ RESPONDENT

VERSUS

ALIMA NYANGWESO AOGA.....1ST OBJECTOR/ APPLICANT

GEORGE ONYANGO AOGA.....2ND OBJECTOR/ APPLICANT

JUDGMENT

1. On the 28th of September 2010 **David Barack Otieno Mruka** hereinafter referred to as the petitioner petitioned for Letter of Administration Intestate for the estate of Phoebe Omondi Migoye as the only grandson. The assets listed in the petition are; parcel **No. Kisumu/ Tamu/144** and parcel **No. Kisumu/Tamu/544**. The deceased died on the 12th June 2000. A grant was issued to David Barack Otieno Mruka on the 11th of March 2011. The grant was confirmed on the 24th of October 2011.

2. On the 5th of November 2014 the **Alima Nyanweso Aoga** and **George Onyango Aoga** hereinafter referred to as the Objectors filed an application to have the Certificate of Confirmation of grant issued to the petitioner on the 24th of October 2011 revoked. The application was supported by the affidavits of **Alima Aoga** dated the 5th of November 2014 and 27th January 2015, **George Aoga's** further affidavit dated the 27th January 2015 and **Sam Barrack Ocholla** dated the 8th June 2015. It is deposed by the 1st objector that the petitioner misled the Court into believing that he was the sole beneficiary of the estate and that he was the biological son of the to one Johana Nisbet Vincent Mruka Mgoye. That the deceased was a sister to her late husband Washington Aoga who was the last born in a family of six. That the 1st born of her husband's family Micah Jasor Omondi had six children. The petitioner is the biological son of Patricia Anyango, who is Micah Omondi's 5th born and she is still alive. The deceased had one son Johana Vincent Mruka Mgoya who passed in 1997. The petitioner is therefore not a son of Johana neither is he the deceased's grandson. That the 2 assets **Kisumu/Tamu/065/144** and **Kisumu/Tamu/544** were properties held in trust by the deceased on behalf of her late husband. That together with her husband and co-wife Asha Mwiritu Aoga and children they moved to Muhoroni from Ugenya in the early 1970's and thereafter the deceased Phoebe moved in with them in Muhoroni. That her late husband in the 80's purchased the said properties but left the same to his sister Phoebe to hold in trust as she had no other place of abode in Muhoroni and was intent on starting a children's home. They moved to a different home within the same area where they live to date. The petitioner also lived with the deceased for some time upto 1990's when he left for an unknown place. That she has not seen the petitioner for over 20 years though she was informed that he was making regular visits to Muhoroni in the company of the area Assistant Chief, who wrote a letter stating that the deceased died leaving behind the petitioner as a grandson. That after the deceased died in 2000 no one lived in the said on the said properties, she cultivated them and leased one to Barack Ondere Owis. That together with her son George Onyango Aoga they sold a portion of **Kisumu/Tamu/065/144** to **Charles Awino Awor** on agreement that she would regularise the petition for letters of administration and it is then they found out that the petitioner had obtained the letters of administration. That the petition was filed in Nairobi and not Kisumu in contravention of Section 48 and 49 of the Law of Succession Act. That the petitioner made a false statement that he was the biological son of one Johana Vincent Mruka Mgoye and the grandson of the deceased and claiming that he was the sole beneficiary of the deceased's estate. That he is guilty of material non-disclosure by failing to disclose that his biological mother is Patricia Anyango and not Rosemary June Miruka. That the petitioner is guilty of perjury having sworn an affidavit that his mother died in 1981. His mother is alive and is working in Kisumu. That she was not able to petition for the letters of administration as she is a pauper and is semi- illiterate and financially incapable of doing so. That the petitioner is guilty of material non-disclosure by failing to disclose to the court that the objector has been in possession of the bequeathed property over 14 years and is a beneficiary. George in his affidavit reiterates what is deposed by Alima his step-mother. He deposes further that the petitioner and he lived in the suit property by the name HAPPY HOMES set up by the deceased for some time and when the deceased became of age he moved away in 1990. That he and his step-mother are beneficiaries of the properties titled Kisumu/ Tamu/064/144 and Kisumu/Tamu/544. That the deceased died in 2000 and therefore the orphanage closed did not close down in 2007. Sam Barrack deposes in his affidavit that the objector's have been his neighbours since the 1960s when they moved to Muhoroni. That the family of Washington Aoga purchased L.R Kisumu/Tamu/065/144 and Kisumu /Tamu/544 and that they live in parcel no 144 and tilled parcel no 544. That the applicant left parcel no.144 to the deceased where she used to ran an orphanage. That Doctor Johana Mruka used to pay fees and take care of the needy members of the extended family in the orphanage. Doctor Mruka did not adopt the petitioner. That parcel nos. 144 and 544 belong to the family of Washington Aoga. That Albert Edward Owino also lived in the said orphanage and left when he became of age.

3. The petitioner in his replying affidavit dated the 28th of November 2014 avers that he is the legal administrator of the deceased's estate and he admits that the deceased had a son Johana Mruka Migoye who married to Rosemary June Lunn who died in 1981. That the late Dr. Johana and the late Rosemary were not blessed with any child of their own and he was adopted by them even though born he was the son of Johana's cousin Patricia Anyango. His mother consented to the adoption but it was not formalised or reduced into writing because of the brother and sister relationship. That he was named after Dr. Johana Mruka Migoye after being adopted. That his school fees and all school requirements were done by Dr. Johana Mruka Migoye. That before the death of his adoptive parents the late Johana Mruka Migoye and Phoebe Omondi Migoye the deceased had opened an orphanage in property Kisumu/ Tamu/544 in the early 1980s which was operational until 2007 when the orphanage had moved elsewhere after the applicant Halima Nyagweso Aoga severally disturbed the peace at the orphanage over its ownership. That he lives in the orphanage to date. That he was born in Muhoroni and raised in the said place which he has known as his home he still holds Phoebe as his grandmother and Johana as his adoptive father. That parcel of land Kisumu/Tamu/544 has been his home all along and he is the only beneficiary under the law entitled to inherit the estate of the deceased as of right. That being the rightful beneficiary the distribution was proper and the 2 titles were property registered in his name. He did not conceal any material facts he did not depose that his biological mother is dead nor did he depose that Rosemary is his mother. That the 2 titles are registered in his name and he is the only who can qualify as a beneficiary to the said estate. That after independence in 1960's an opportunity to give back the land to the local community at Muhoroni arose. Aoga Jassor a brother of the deceased Phoebe advanced some money to enable her raise a deposit to secure the 2 parcels of land Kisumu/ Tamu/ 544 original plot Tamu 65/544 and 144. The said deposit given to the deceased was paid back from the loan she had secured and the deceased continued to service the loan to the Land's Board of which by the time of her death in June 2000 she had not repaid in full and he repaid the remaining amount. That the applicant is determined to disinherit him of his inheritance. He seeks to have the application dated the 5th November 2014 dismissed with costs.

4. The petitioner called 2 witnesses. **Albert Edward Owino's** affidavit is dated 18th May 2015 and **Edward Buyengo Mbenda's** affidavit is dated the 18th May 2015. Edward Mbenda deposes that he stayed with the family of Dr. John Mruka at Muhoroni from 1980 to 1996 a period of 17 years and that David their son stayed with Dr. John and his wife, his mother Phoebe Omondi and their son David. He knows that the couple cared and paid David's fees. David returned to Mruka's residence during school holidays. He got to know later that David was adopted by Dr. John Mruka. Albert deposed that the petitioner is his nephew and the objector his aunt and cousin respectively. That his grandfather Jasor Omondi had 3 wives namely Akumu, Siaje and Ajula. Siaje the 2nd wife had six children namely Mike Omondi, Washington Aoga, Phoebe Omondi, Adhaimbo and Auma. The petitioner's mother Patricia was the daughter of Mike Omondi and the Objector were of Washington Aoga's family. Phoebe had a son Dr. Johana Mruka whose wife was Rosemary. The couple had no children, they adopted the petitioner cared for him paid his school fees whilst schooling at Tamu Primary and Lenana High school. That he is aware that his Aunt Phoebe and Uncle Washington settled at Muhoroni Settlement Scheme, they obtained loan from the settlement fund and bought 2 parcels of land they settled in one and did farming in the other. That the land was not in trust for Washington by Phoebe Omondi. That the petitioner was a dependant to the late Dr. Johana Mruka lived with the family during their lifetime and still occupies the home to date.

5. Oral evidence was given based on the affidavits filed and the witnesses were cross-examined. Parties also filed written submissions. The applicant's narrated the facts and evidence and stated the following as the issues for determination;

i. Whether the Respondent is a beneficiary of the estate of the late Phoebe Omondi Migoye?

ii. Whether the applicant survived the estate of the late Phoebe Omondi Migoye?

iii. Whether the applicants have satisfied the conditions for revocation of the grant of letters of administration?

On the first issue it was submitted that the petitioner is not the deceased's grandson as stated in the petition for grant filed on the 28th of September 2010. The applicants pointed out what they considered as statements deposed by the petitioner which were not true. The applicant pointed out that though the respondent claimed he was adopted by Doctor Miruka the respondent was not a beneficiary to the estate of the deceased. Reliance was made on Succession cause **No. 104 of 2004** in the **Matter of the Estate of Daniel Gichuru Gatere and Miriam Wambui Kimore & another vs. Joseph Gatere Gathaika** where Justice Kimaru held that though the deceased had invited his brother's son to go live with him in his home and constructed a house he was not he was not a beneficiary. It was submitted that the respondent was out to take advantage and to disinherit the survivors as averred at paragraph 26 of the 1st applicant's supporting affidavit. That the respondent is not a "child" within the meaning of Section 3 (2) or a "dependent" within the meaning of Section 29 of the Law of Succession. On the 2nd issue it was submitted that the deceased had a son the late Johana Mruka whose wife was Rosemary June Miruka and that the two did not have children. The applicants relied on Sections 39 (1) and 40 (1) of Cap 160 stating that the petitioner does not dispute that Washington Aoga was a polygamist and hence any property left by him would automatically go to the surviving spouse and his children. That in this case the surviving spouse is the 1st applicant and son the 2nd applicant. That no procedure of adoption under the Luo customary law in regard to the petitioner was followed. That the petitioner's mother who is still alive was not called to testify to prove the allegations of customary adoption. That it is not enough to assert that the deceased's son's good gesture of helping a needy child by paying school fees and providing care should be mistaken for adoption. That the Respondent did not survive the deceased's son, to qualify as deceased's grandson and as such is not a child within the meaning of Section 3 (2) or a dependent of the deceased within the meaning of Section 29 of the Law of Succession. On the 3rd issue it was submitted that the procedure used to obtain the grant was defective. Reliance was placed on Sections 76 (a), (b) & (c). The applicant relied on the case of **Anil Behali Ghosh vs. SMT Latika Bla Dass & Others** the Supreme Court of India whilst interpreting the equivalent with Section 76 had this to say on the expression " **defective in substance**" means, " *the defect was of such character as to substantially affect the regularity and correctness of the previous proceedings*". The applicants argued that the properties are within Muhoroni area with the jurisdiction of Kisumu court yet the petition was made in Nairobi that this makes the matter suspect further the deceased was domiciled and died in Kisumu. That the respondent deposed in his affidavit dated the 22nd of June 2010 that the none of the family members of the deceased's family had applied or obtained the death certificate, that this confirmed that he knew that the deceased had other relatives who could petition for the grant of letters of administration. That Section 76 (b) provides that a grant of representation can be revoked or annulled if the court decides that the grant was obtained fraudulently by making a false statement or by the concealment of material facts from the court something material to the case. The applicants stated the grounds upon which the grant should be revoked. The applicant also relied on Section 26 (1), (2) of the Probate and Administration Rules arguing that the respondent not being a child of the deceased the applicants fall under the category envisaged under Rule 26. To support this argument the applicants relied in the case of **Samuel Wafula Wasike vs. Hudson Simiyu Wafula CA No. 161 of 1993** as cited with approval in the case of **In the Matter of the Estate of the**

Late Joseph Mwangi Maina (Deceased) Succession Cause No. 692 of 2012, where the Court revoked the grant having found that the petitioner had stated in his petition that he was a grandson of the deceased yet the deceased was a sister to his grandmother. The court held that the grant had been obtained fraudulently. Reliance was also made in **Nairobi Succession Cause No. 842 of 1991 In the Matter of the Estate of Basen Chepkwony**. The applicants sought to have the grant revoked under Section 76 (b) and also that the Respondent ranks lower than his mother Patricia Anyango way below the order of priority of applying for the grant of letters of administration intestate.

6. The Respondent submitted as follows that; both the petitioner and the objector fall within the definition of Section 29 (b) of the Succession Act that the qualified word is, "maintained *by the deceased prior to her death*". That the objectors made no case of dependants within the meaning of Section 29 (b) of the Succession Act. That the said Section talks of children the deceased had taken into his family as his own not through adoption. That the petitioner was the only surviving beneficiary of the deceased dependant prior to her death. That Section 39(1) of the Succession Act is inapplicable in the matter as the issue falls under Section 29 (b). That in **Re Estate of Geoffrey Muchiri Kamau (2016) eKLR** it was held that persons that fall within the meaning of Section 29 (b) has a duty to prove dependency to qualify as a dependant. On the issue whether the titles **Kisumu/ Tamu/ 144** and **Kisumu/ Tamu/544** form part of the estate the deceased, it was submitted that there is an assertion that the 2 properties were bought by Washington Aoga and that the same were held in trust by the deceased. That the evidence adduced is that the 2 properties were bought by Phoebe Omondi Migoye and registered in her names, no evidence was adduced to support the allegation of trust. That the issue of indefeasibility of title has been settled that a certificate of title is a conclusive evidence of ownership (see **In HCCC 438 of 2004 Park view Shopping Arcade vs. Kangethe & 2 others**). That no evidence was adduced by the objectors against the deceased to defeat the ownership of the suit and therefore the properties form part of the estate. On whether the grant was obtained fraudulently it was submitted that there was no concealment of facts that could have changed the succession that the petitioner is and still remains a beneficiary to the exclusive of all others.

DETERMINATION.

7. I have carefully considered the evidence the submissions and the law. The undisputed facts are that; that the deceased Phoebe Omondi Migoye and Micah Jason Omondi were siblings of Washington Aoga. The objectors are the sister-in-law and grandson. The deceased had a son Johana Mruka who married Rosemary Mruka and that they had no children and that the petitioner lived with the Johana Vincent Mruka. It is also not in dispute that the 2 assets **Kisumu/ Tamu/144** and **Kisumu/ Tamu/544** the subject of this Succession cause are situated in Muhoroni area and that the deceased died intestate. It's also not in dispute that the petitioner's mother one Patricia Anyango the daughter of Micah Jason Omondi is still alive.

8. The issues for determination are;

i. Whether the Respondent is a beneficiary of the estate of the late Phoebe Omondi Migoye?

ii. Whether the applicants have satisfied the conditions for revocation of the grant of letters of administration?

From the evidence this is what I gather as the petitioner's relation to the deceased. The petitioner mother is Patricia Anyango. She was daughter of Micah Jason Omondi a sibling to the deceased and the late Washington Aoga. The deceased therefore was the petitioner's grandson by virtue of being the son of Patricia who was the niece of the deceased. The petitioner in his petition stated that the deceased's only grandson. This he claims is true as the deceased's only son Doctor Mruka adopted him. That he lived with the late Doctor Mruka who cared for him and paid his fees and therefore was a dependant of Doctor Mruka as provided under section 29 of the Law of Succession Act. He has adduced some evidence to show that Doctor Mruka paid his fees whilst in School. There is also evidence that he stayed with them. **Section 29 of the Law of Section provides as follows: Meaning of dependant**

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the

deceased whether or not maintained by the deceased immediately

prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents,

grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

From the definition provided under Section 29 (b) and evidence adduced the petitioner has demonstrated that he was a dependant of the son of Doctor Mruka. Being a dependant of Doctor Mruka who was a son to the deceased he qualifies as a beneficiary amongst other family members if they can prove that they are dependants of the deceased as provided under Section 29. On whether the applicants have satisfied the conditions for revocation of the grant of letters of administration. The applicants allege that the petitioner obtained the grant fraudulently by making a false statement that he was the only beneficiary. From the evidence adduced the petitioner was not the only beneficiary, the applicants have a claim over the deceased's land which they need to establish. They ought to have been informed of the application for petition for grant. The petitioner did not disclose to the court that there were other person's with a beneficial interest in the matter, now that the deceased had no husband or biological children to petition for letters of administration. Section 76 (b) provides that a Court may revoke a grant if

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

The petitioner ought to have disclosed to the court that there were other family of the deceased. He was aware of the claim by the 1st applicant over the 2 properties the subject of this cause. In my view the petitioner concealed material facts when he filed the petition and hence I find that it's only in order that the grant made to the petitioner be revoked. The Certificate of Confirmation of Grant made to David Barrack Otieno on the 24th of October 2011 is hereby revoked.

9. The applicants have also raised the issue that the petition ought to have been filed at Kisumu High Court as the properties the subject of this Succession Cause are with Muhoroni area in line with the provisions of Section 48 and 49 of the Law of Succession Act Cap 160. The properties mentioned in the petition by the petitioner are situated with Muhoroni are in Kisumu county. The matter falls within the jurisdiction of Kisumu High County. This Succession Cause shall be transferred to Kisumu High Court. The Deputy

Registrar shall act on the same administratively. Each party shall bear their own cost. It is so ordered.

Dated signed and delivered this 29th day of June 2018.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Applicants**

.....**For the Respondent**

Charity

Court Clerk