



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE NO.39 OF 2016**

**MISHAEL OGOTI OSORO.....OBJECTOR/APPLICANT**

**-VERSUS-**

**JERUSA MOIGE OSORO.....1<sup>ST</sup> RESPONDENT/ADMINISTRATOR**

**DUNCAN OMARI OSORO.....2<sup>ND</sup> RESPONDENT/ADMINISTRATOR**

**DANIEL TITUS GESICHO.....3<sup>RD</sup> RESPONDENT/ADMINISTRATOR**

**WILSON NYABAYO OSORO.....4<sup>TH</sup> RESPONDENT/ADMINISTRATOR**

**RULING**

1. On the 24<sup>th</sup> of May 2016 an application for summons for revocation of grant was filed by the Mishael Ogoti Osoro the objector (applicant). The application is brought under Section 76 of the laws of succession act chapter 160 of the laws of Kenya and Rules 44, 49, 59 and 73 of the Law of Succession Act Cap 160. The applicant seeks that ;

***i. Pending the hearing and determination of the summons herein the honorable court be pleased to issue a prohibitory order of injunction, restraining the administrator/respondent from distributing alienating the assets of OSORO MOTARI the deceased the deceased herein particularly land parcel number BASSI/BOGETAORIO II/2301 and any resultant parcel emanating from the said land in any manner whatsoever and or however.***

***ii. Pending the hearing and determination of the summons herein the honorable court be pleased to grant an order of inhibition, inhibiting any transaction, sale charge and or any other dealing with land parcel number BASSI/BOGETAORIO II/2301 and any resultant parcels in any manner whatsoever and however.***

***iii. The grant of the letters of Administration granted to the respondents vide Kisumu High Courts Succession Cause number 714 of 2004 be revoked, annulled and or rectified.***

***iv. Costs of Application be borne by the Respondents.***

***v. Any such further orders be made as the honorable court may deem fit to grant.***

2. The application is grounded in the annexed affidavit of the Applicant herein and on the following grounds;

i. The grant of letters of representation which was issued to the respondents was obtained by fraud and concealment of material acts and or deliberate misrepresentation and falsehoods and omitted the names of the Objector as beneficiary.

ii. The grant was obtained fraudulently by making a false statement and or by deliberate concealment from the court on the material fact.

iii. The grant was obtained by means of an true allegation of fact essential in point of law to justify the grant withstanding that the allegation was made in ignorance or inadvertently.

iv. The respondent concealed a fact that the objections are sons of the deceased.

v. The grant of letters of Administration thereof is a nullify abi-inition.

- vi. It is expedient and in the interest of beneficiaries as of the estate that grant of letters of representation herein be revoked.
- vii. The respondents have derived or disinherited the Applicant/Objector his entitlement to the estate of the deceased.
- viii. The respondents are dishonest and hence incapable of carrying out the duties and the roles of the Administration of the estate of the deceased.
- ix. The Objector is an adult and thereof capable of being administrator of estate.
- x. The Objector did not give any consent that the petitioners to take the letters of administrations.

3. The applicant in his supporting affidavit dated the 24<sup>th</sup> May 2016 deposes that he is the son to OSORO MOTARI (deceased) who died domicile in Kenya on the 21<sup>st</sup> day of October 1998. That he has never been served with any papers either from the Respondents or this court and hence all along he has never known the existence of this matter. That he came to learn of this case when the Respondents went home with surveyors and started to make demarcations on the parcel of land in question. That on inquiring from the surveyor what was going on he was informed that they were executing a court order he was given the case number and he got his lawyers to peruse the court record.

4. The 4<sup>th</sup> Respondent (Respondent) filed a replying affidavit dated the 24<sup>th</sup> February 2017. He deposes as follows that; that he has authorized by his co-respondents to swear the affidavit. That the applicant is his brother is pretending not to be aware of the instant suit whereas in the years 2006 the applicant instructed the DIVISIONAL CID HEADQUARTERS OGEMBO to write a letter dated 14<sup>th</sup> February, 2006 to the Registrar Kisumu and in the said letter he quoted the case of the instant suit. The deceased who is their late father and a husband to the 1<sup>st</sup> respondent had 3 parcels of land namely: **BASSI BOGETAORIO II/268**, which the applicant occupies whole, was given to the objector by their father before his demise. **BASSI BOGETAORIO II/453** was given to his brother SAMSON NYAKINA OSORO who is not part of the proceedings herein and finally title number **BASSI BOGETAORIO II/2301** was left for him and other respondents. He annexed copies of the green cards attesting to the same. That the applicant was not entitled to parcel number **BASSI BOGETAORIO II/2301** as he had his own parcel of land **BASSI BOGETAORIO II/268** that is why he did not file any objection during gazettelement of the administrator of the estate who is his mother. That the 1<sup>st</sup> respondent application of revocation of grant now is an afterthought. That before they commenced the succession proceedings in court they had a dispute concerning the suit where the matter was discussed with the elders in the presence of the chief Nyangiti location where it was resolved that the suit land should go to their mother 1<sup>st</sup> respondent herein in trust for the three brothers who had not been given land by the deceased before his demise. That the applicant wants to have two shares the one he was given by our father and the suit property and that if the applicant want to demand a share they must also demand a share from **BASSI BOGETAORIO II/268** which he owns. That the succession will be done for all the three parcels of our late father OSORO MOTARI that includes **BASSI BOGETAORIO II/268** which is currently owned by the applicant, **BASSI BOGETAORIO II/453** which was owned by Samson Nyakina Osoro who is not a party to the proceedings who later gave the parcel to his son Herbert Mobisa Nyakina and **BASSI BOGETAORIO II/2301** which is owned by the respondents. That the matter was published at the Kenya gazette supplement on the 3<sup>rd</sup> September, 2004 vide gazette notice No.6941, but the objector did not object the issuance of the grant after 30 days he cannot now come to court and say that the grant was fraudulently obtained. He sought a dismissal of the application for revocation.

5. Parties were given directions on the 28/2/2017 to proceed by way of written submissions. The objector filed his submissions on the 30<sup>th</sup> of January 2018 and the Respondents filed their submissions on the 27/6/2018. I have read and carefully considered the said submissions. The objector claims that being the eldest son of the deceased he is entitled to inherit his late father's estate. That the instant cause was taken by his mother secretly in cahoots with her other sons leaving out other estate beneficiaries. That the Chief's letter dated the 29/6/2004 is misleading as his late father had 2 wives namely; Jerusa Moraa Osoro and Teresia Kerubo who is deceased. That the 2<sup>nd</sup> wife has other children who are also left out of the cause namely: Peter Gesimba Osoro, Simion Nyabate Osoro, Ayibu Osoro and Magoma. That the administrator of the estate concealed material facts and therefore the grant should be revoked. That the issues in this matter should be resolved by way of oral submissions. The respondent in his submissions reiterated what is deposed in his replying affidavit and sought a dismissal of the application.

#### **DETERMINATION.**

6. I have considered the affidavits, the written submissions and the provision of Section 76 of the Law of Succession Act. It is not in dispute that the deceased Osoro Motari had 2 wives. The objector/ applicant claims to be the deceased's 1<sup>st</sup> born son. This is not denied by the respondents. He claims he was not informed that a succession cause had been filed. I have looked at the petition of letters of administration filed in High Court at Kisumu on the 15/7/2004. The petitioner is Jerusa Moige Osoro. She presented the petition as the widow of the deceased. Her affidavit in support of the application lists the following as the ones surviving the deceased; Wilson Nyambayo Osoro, Daniel Titus Gesicho and Duncan Charles O. Osoro (the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents). The only asset listed is **LAND PARCEL NO. BASSI/BOGETAORIO11/2301**. The letter referred to dated 14<sup>th</sup> February 2006 was written by the Divisional CID-Gucha and the complaint was from one of the wives the deceased whose name is not indicated. The complaint was over false swearing and subsequent obtaining registration of the only piece of land by false pretense in the estate of the late Osoro Motari. It was upon the petitioner to list all beneficiaries of the deceased at the time she filed the petition in the absence of an explanation of why she did so I can only conclude that she failed to disclose to the court that there were other beneficiaries to the deceased's estate which amounts to concealment of something material to the case. Section 76 (b) of the Law of Succession Act Cap 160 provides that;

**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)....

**(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;(emphasis mine).**

Having found that there was concealment from the court something material to this case, that the some children and beneficiaries to the deceased's estate were not included in the petition for grant, the grant issued in Succession Cause 714 of 2004 dated the 3<sup>rd</sup> June 2005 is hereby revoked. **JERUSA MOIGE OSORO** and **MISHAEL OGOTI OSORO** are hereby appointed as administrators to the deceased's estate. A fresh grant to issue in the names of **JERUSA MOIGE OSORO** and **MISHAEL OGOTI OSORO**. The 2 administrators shall file an application to confirm the grant within 45 days, listing all the beneficiaries, the deceased's asset/s and the mode of distribution. In the event the parties do not agree on the list of assets and mode of distribution they shall file affidavits on the mode of distribution and take a date for directions. I further order that the respondent and the objector shall not alienate the assets of the deceased and in particular Land Parcel **NO. BASS/ BAGETAORIO11/ 2301** and any resultant parcel emanating from the said land. An order of inhibition shall also issue inhibiting any transaction, sale charge and any other dealing with the said land parcel **NO. BASS/ BAGETAORIO 11/ 2301** and any resultant parcels in any manner whatsoever. Parties shall take a mention date to confirm compliance and directions. This being a family member costs shall be in the cause. It is so ordered.

**Dated signed and delivered this 27<sup>th</sup> of September 2018**

**R.E. OUGO**

**JUDGE**

In the presence of;

For the Applicant/ Objector in person

4<sup>th</sup> Respondent in person

Rael Court/ clerk