



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.11 OF 2015**

**IN THE MATTER OF THE ESTATE OF OMWENO ONYONI – (DECEASED)**

**ALICE MORAA OMWENO.....PETITIONER**

**AND**

**AGNES MBERA ONYONI.....OBJECTOR**

**RULING**

1. This succession cause relates to the estate of the late Lucas Omweno Onyoni who died in 1976. Alice Moraa Omweno his daughter filed a petition for letters of administration intestate in January 2005. On the 30/9/2005 she applied to have the grant of letters of administration intestate of 7/4/2005 confirmed.

2. On the 18/9/2006 Agnes Mbera Luka ( Agnes ) filed a Chamber Summons dated the 18/9/2006 seeking to have the grant issued to Alice Moraa Omweno (Alice) revoked on grounds that Alice obtained the grant fraudulently by making a false statement and or concealing from the court something material to the case. She also sought to have an order restraining Alice from selling, leasing charging on any other way disposing off or dealing in the parcel of land title **No.S.M. Bogetenga/2253** and also that an order do issue for rectification of register with respect to the said parcel of land to make provision for all the legal beneficiaries.

On the 27/4/2018 Agnes Mbera Onyoni filed an affidavit objecting to confirmation of the grant. In the said affidavit she states that the petitioner didn't include her and her children as lawful heirs to the deceased's estate, that the petitioner obtained the grant fraudulently and that the petitioner is a married woman. That the petitioner has unlawfully brought a total stranger an old lady of over 50 years one Esther Nyangarisa Oketch who is already married in Kuria land to the deceased's home.

3. The evidence adduced at the hearing was as follows; Agnes Mbera Luka Onyoni testified that she was married to the deceased's wife Patricia Luka in 1982. Agnes then became a wife of the deceased, she has six children. Agnes occupies the deceased's shamba together with her children. Agnes wants the shamba divided to her children. At that time Patricia married Agnes Patricia only had daughters. Patricia had a son called Tom who died Patricia built her a house. The parcel of land is 1.75 hectares. Agnes opposed dividing the shamba into half, but sought to have it divided into 8 portions for her children herself and the petitioner.

4. Alice Moraa Omweno a daughter of the deceased stated that they were 5 children in her family, 3 are alive. She petitioned for the grant and has attached a mode of distribution. She seeks to have the property divided into half. That Agnes was taken to her father's home by her uncle Nyangweso who married her and built for her at their home. They brought Esther into her father's home because of their deceased brother Tom who didn't have a wife. Esther stays in the said land She wants both Agnes and Esther to stay in the said land in their respective properties, that Esther will represent her and others house.

5. At the close of the hearing counsels from the parties opted not make any submissions. They left it to the court to decide. The deceased died in 1976. The Law of Succession Act Cap160 in Section 2 (b) states that;

***“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administrator of their estates shall commence or proceed so far as possible in accordance with the Act”.***

6. The petitioner filed her petition in 2005. At the time of filing the said petition she knew that Agnes was staying in the land of the deceased. She should have included her in the petition. She didn't do so. The objector's evidence is that she was married by Alice's mother, a fact Agnes denies. The facts of the marriage was not proved but there is evidence that Agnes lives in the deceased's land and she has lived there with her children when Alice's mother was alive. There is also evidence that a lady called Esther Nyangarisa Oketch was brought by the petitioner as a wife of their deceased brother. The issue is whether the grant should be revoked? I have said that the petitioner ought to have indicated that objector stays in the said land. The objector claims to be a wife. This in my view was not proved but it appears she has lived in the deceased's land for some time with the fully knowledge and consent of their late mother Patricia. She is a dependant. Under

Section 76 the court has the discretion to revoke the grant. Alice concealed a material fact at the time she petitioned for the grant. This was wrong. I therefore revoke the grant issued 7/4/2005. A fresh grant shall issue in the names of **Alice Moraa Omweno** and **Agnes Mbera Onyoni**. The 2 shall be joint administrators in the estate of Omweno Onyoni deceased.

7. On the issue of mode of distribution. Agnes wants the only asset divided into 8 portions. The petitioner seeks that it be divided into half. The land measures 1.75 acres. It is not clear what portion Agnes occupies and the portion Esther occupies. In order to make a decision on the actual mode of distribution it is important to get a report on the areas they occupy within land the subject of this succession cause land title **No.S.M. Bogetenga/2253**. This shall be done by the area Chief and officials of the public trustee office on a date to be given in court.

**Dated signed and delivered this 31<sup>st</sup> day of October 2018.**

**R.E. OUGO**

**JUDGE**

**In the Presence of;**

**Agnes Mbera Onyoni      In person**

**Mr. Anyona              For the Petitioner**

**M/S Rael   Court Clerk**