



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO.1021 OF 2014

IN THE MATTER OF THE ESTATE OF OMACH SIMBA alias ERASTO OMACH SIMBA (DECEASED)

BETWEEN

WILLIS ONEKO OPIATA.....PETITIONER

AND

FREDRICK OMONDI WERE.....OBJECTOR

JUDGEMENT

Introduction

1. The deceased, **OMACH SIMBA alias ERASTO OMACH SIMBA (hereinafter referred to as the deceased)** died on 25th July, 1979. The deceased's estate comprises of **SIAYA/MAHAYA/3358**.
2. Letters of administration were issued to the petitioner on 21st April, 2015. The grant was confirmed on 11th May, 2016 in the following terms:

1. **Willis Oneko Opiata** - 0.55 Ha
2. **Pamela Adhiambo Opiata** - 0.33 Ha
3. **Erick Odhiambo** - 0.33 Ha
4. **George Philip Ochung** - 0.33 Ha
5. **Samuel Ogaa Opiata** - 0.33 Ha
6. **Sela Odianya Opiata** - 0.33 Ha

Application

3. The Notice of Motion before the court is dated 11th January, 2018. The objector seeks an order for revocation of the grant issued to the petitioner on 11th May, 2016 on the ground that the objector who is a grandson of the deceased was not provided for and has thus disinherited.

Applicant's/ Objector's Case

4. The objector stated that he was a great grandson of the deceased and gave the family tree of the deceased as follows:-

Children

1) Michael Wera Omach

2) Dishon Opiata Omach

Michael Wera Omach

Wife

Deceased

Children

Osere Rao

Grandchildren

Fredrick Omondi Were (Objector)

Dishon Opiata Omach

5. The witness stated that Dishon Opiata had three wives one of whom is deceased. He gave the names of the other two wives as Consolata Omanga Opiata and Risper Adhiambo Opiata. He also stated that Consolata had 2 children who are deceased but their families are still alive. He further stated that Risper Adhiambo Opiata had 5 children one of whom is deceased. He named the others as:

1) Erick Odhiambo

2) George Philip Ochung

3) Samuel Ogaa Opiata

4) Sela Odianya Opiata

6. The objector faulted the petitioner for disinheriting him and the family of Consolata Omanga Opiata whereas the chief's letter dated 9.6.14 **DEXH. 1** had clearly stated that they were heirs to the deceased's estate.

7. **PW2 Consolata Omanga Opiata** stated that she was the 1st wife of Dishon Opiata the son of the deceased. She confirmed that the objector is son of Asere Rao, a grandson of the deceased and similarly faulted the petitioner for disinheriting her family and the objector whereas the chief's letter dated 9.6.14 **DEXH. 1** had clearly stated that they were heirs to the deceased's estate.

8. The petitioner applied for confirmed that the objector was related to the deceased in that he was son of Asere Wera who was son of Michael Wera who was son of the deceased.

Petitioner's Case

9. The petitioner stated that the deceased had only one son Opiata Omach who was his father. He also stated that his father and mother Pamela Adhiambo Opiata were blessed with the five children named in the certificate of Confirmation of Grant. He denied that Risper Opiata, PW2 Consolata Omanga Opiata and the objector were known to him. He additionally denied that the objector was the Fredrick Omach named in chief's letter dated 9th June, 2014 which he filed in court on 28th October, 2014 and disputed the truthfulness of the said letter. He instead sought to rely on a letter from assistant chief Rachar sub-location dated 9.4.18 **DEXH. 3** in which it was stated that the objector was son of Asere Rao who was son of Dibogo and had no relationship with the deceased. In cross-examination, the petitioner confirmed that the deceased is from Akom sub-location and not Rachar sub-location.

Analysis and Determination

10. I have considered the evidence on record and the issue in question is whether the objector has made out a case for revocation of the Grant issued to the petitioner on 11th May, 2016.

11. **Section 38 of the Law of Succession Act** stipulates how the net intestate shall devolve where intestate has left a surviving child or children but no spouse.

12. In the instant case, parties are in agreement that the spouse and children of **Omach Simba alias Erasto Omach Simba**(deceased) are deceased and that those claiming under him are his daughters in law, grandchildren and great grandchildren.

13. The evidence on record discloses that the deceased hailed from Akom sub-location and not Rachar sub-location. It is therefore imprudent for the petitioner to deny the authenticity of the chief's letter he filed in court upon which the grant was confirmed and from which he is a beneficiary. The Akom assistant chief's letter dated 9th June, 2014 **DEXH. 1** filed by the petitioner on 28th October, 2014 in my considered view contains the certainty of some of the deceased's kinsfolks and the one from assistant chief Rachar sub-location dated 9.4.18 **DEXH. 3**

which the petitioner now seeks to rely upon therefore rejected.

14. The Akom assistant chief's letter dated 9th June, 2014 **DEXH. 1** filed by the petitioner on 28th October, 2014 lists Consolata Opiata wife of Opiata, Risper Opita wife of Opiata and Fredrick Omach son of Asere as the beneficiaries of the deceased's estate.

15. The objector has demonstrated that he is the Fredrick Omach named in the letter marked **DEXH. 1** and his evidence has been well corroborated by PW2 Consolata Omanga Opiata who is also named in the said letter as a beneficiary.

16. Section 76 of the Law of Succession Act 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”

(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

17. The expression “*any interested party*” as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate such as the applicants herein. The applicant is a great grandchild of **Omach Simba alias Erasto Omach Simba** (deceased). PW2 Consolata Omanga Opiata is a daughter in law of the deceased. The objector and Consolata Omanga Opiata just like the petitioner and his siblings who are grandchildren of the deceased are persons beneficially entitled to a share of the estate now that the deceased's children who are their fathers and grandfathers as the case may be, are deceased. I therefore find that applicant has the *locus standi* to present the application for revocation of the grant.

18. From the foregoing analysis; I am satisfied from the facts in this case that the grant confirmed on 11th May, 2016 was obtained by concealment of material facts and non-disclosure of other beneficiaries' interests and on the basis of an untrue allegation that all persons beneficially entitled to the estate had been ascertained and determined.

19. In the result, I find that there is overwhelming evidence to support the applicant's case for revocation of the grant confirmed on 11th May, 2016.

Disposition

20. Consequently, it is hereby ordered **THAT**:

1) Letters of administration which were issued to the petitioner on 21st April, 2015 are hereby revoked and it is ordered that the same be issued jointly to WILLIS ONEKO OPIATA and FREDRICK OMONDI WERE

2) The Grant confirmed on 11th May, 2016 be and are hereby revoked

3) The Land Registrar, Siaya County is directed to cancel title deed issued in respect of SIAYA/MAHAYA/3358 issued to Willis Oneko Opiata and revert its ownership OMACH OSIMBA

4) Once ownership of SIAYA/MAHAYA/3358 has reverted to OMACH OSIMBA the joint administrators WILLIS ONEKO OPIATA and FREDRICK OMONDI WERE shall apply for confirmation of the grant in accordance with the provisions of the law after ascertaining and determining all persons and their respective beneficial entitlement to the deceased's estate

5) Since this is a family matter, each party shall bear its own costs.

DATED AND DELIVERED IN KISUMU THIS 29th DAY OF November 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Mr Kowinoh/MR Kujo

Objector - Mr Aoko/ Odongo