



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 142 OF 2015**

**(Formerly Migori Senior Principal Magistrate's Succession Cause No. 363 of 2000)**

**IN THE MATTER OF THE ESTATE OF SOLOMON ODWAR ANYANGO (DECEASED)**

**-between-**

- 1. MARGARET AKINYI AGAK**
- 2. PERES ANYANGO ABADHA**
- 3. MARY AWINO ODIRA.....APPLICANTS/PLAINTIFFS**

**-versus-**

- 1. DAN OUYA KODWAR**
- 2. SAMUEL OTIENO ODWAR**
- 3. MESHACK ABADHE.....RESPONDENTS/DEFENDANTS**

**RULING**

1. This ruling relates to the Summons for Revocation dated 19/08/2016 and filed on 22/08/2016 (hereinafter referred to as '**the Application**'). The application was taken out by three sisters namely **Margaret Akinyi Agak** (hereinafter referred to as '**Margaret**'), **Peres Anyango Abadha** (hereinafter referred to as '**Peres**') and **Mary Awino Odira** (hereinafter referred to as '**Mary**').

2. The application sought the revocation and/or annulment of the Grant of the Letters of Administration Intestate issued on 17/04/2015 and confirmed by a judgment of this Court rendered on 20/07/2016. The application was further premised on the main ground that the Applicants, being daughters to **Solomon Odwar Anyango** (the deceased in this Cause), were disinherited and hence did not benefit from the estate property. They sought for a redistribution of the estate property so that they would likewise benefit. The Applicants filed like Affidavits in support of their claims wherein they asserted that they were lawfully entitled to the estate property as daughters of the deceased herein.

3. The application was opposed by **Dan Ouya Kodwar** (hereinafter referred to as '**Dan**') through a Replying Affidavit he swore on 10/09/2016 and filed on 21/09/2016 and by a Further Replying Affidavit sworn by one **John Ochieng Masawa** on 10/09/2016 and filed on 21/09/2016. **Samuel Otieno Odwar** (hereinafter referred to as '**Samwel**') and **Meshack Abade** (hereinafter referred to as '**Meshack**') did not file any documents but participated in the hearing of the application.

4. Upon directions of this Court the application was heard by way of oral evidence. Margaret, Peres and Mary testified that they were among the daughters of the deceased and were entitled to share the estate. That, their mother was **Jennifer Akoth** the third wife of the deceased and that Samwel was their blood brother. They denied that they were children of one **Michael Obadha Masawa** (now deceased) from Central Alego Sub-Location, South Sakwa Location.

5. The husband of Margaret one **Phillip Agak Adoyo** (hereinafter referred to as '**Phillip**') testified as **1PW1**. He contended that he paid dowry for Margaret at the homestead of the deceased and not in Central Alego. The husband of Mary also testified. He was **Peter Odira Tato** (hereinafter referred to as '**Peter**') and testified as **3PW1**. Peter contended as Phillip. The Plaintiffs then closed their cases.

6. Dan testified and called two witnesses. They were **John Ochieng Masawa (DW1)** (hereinafter referred to as '**John**') who was a brother of the deceased herein and **Christopher Odeny Awela (DW2)** (hereinafter referred to as '**Christopher**'). They all fronted the position that

the Applicants/Plaintiffs were not the daughters of the deceased but of one **Michael Obadha Masawa** from Central Alego Sub-Location, South Sakwa Location. Dan then closed his case.

7. Since Samwel and Meshack did not oppose the application this Court declined their request for time to file their respective responses after Dan had closed his case. Parties were then directed to file their written submissions which they complied save for Samwel and Meshack.

8. From the application, the hearing and the submissions, three main issues come to the fore for determination. They issues are as follows: -

- (a) Whether the Applicants/Plaintiffs are daughters of the deceased in this Cause;
- (b) Whether the Applicants/Plaintiffs were dependants of the deceased;
- (c) Whether the Applicants/Plaintiffs are entitled to the estate of the deceased herein.

9. I will consider each of the issues singularly.

**(a) Whether the Applicants/Plaintiffs are daughters of the deceased in this Cause:**

10. The Applicants testified that they were daughters of the deceased whose mother was Jennifer Akoth, the third wife of the deceased and Samwel was their male sibling. They relied on a Chief's letter dated 27/07/2016 to that effect. Phillip and Peter testified that they married Margaret and Mary respectively from the deceased's home where they paid dowries.

11. Dan opposed the assertion and contended that the Applicants were not daughters of the deceased but of one Michael Obadha Masawa and that when their mother was married by the deceased they were long born and only followed their mother to the home of the deceased. That, when the Applicants came to the home of the deceased Dan was mature enough and clearly saw what happened. Dan agreed that Samwel was born of the deceased. Dan availed John (aged 81 years old) who testified that he was a brother to Michael Obadha Masawa (hereinafter referred to as '**Michael**') and that they hailed from Central Alego. John stated that Michael married Jura Akoth who gave birth to the Applicants before the two divorced and Jura Akoth was married by the deceased herein in Sakwa area. That, since the Applicants were then still young Jura Akoth left with them and they lived with her at the home of the deceased until they were married. That, the Applicants returned to Michael's home when they were about to be married and it was John who received their dowries since the deceased had already passed on. John contended that the Applicants have their inheritance which includes the parcel of land which was left behind by Michael and which is currently occupied by their other sibling in Central Alego. That, the Applicants have all along been participating in social activities in Alego where they were born. Christopher vouched the evidence of Dan and John.

12. Amid the foregone contentions, the onus was on the Applicants to prove their averments (See **Sections 107 to 109 inclusive** of the **Evidence Act, Cap. 80** of the Laws of Kenya). To that end, the Applicants relied on the Chief's letter which was authored after this Court rendered its judgment on the distribution of the estate. There is therefore no doubt that the letter was tailor-made as a basis of the application. Although the letter was produced as an exhibit its contents were vehemently denied. However, the maker thereof did not testify in proof of the contents.

13. I must state that production of a document is different from proving the contents of that document. A document may be produced in evidence but its contents not proved. When the contents of a document are denied the onus is on the party seeking to rely on the document to render evidence in proof of the contents. For instance, in this case, Dan having denied the contents of the Chief's letter it was incumbent upon the Applicants to at least call the maker of the letter to explain the basis of the contents. Since that did not happen the contents of the letter were not proved.

14. There was also the issue of the Applicants' marriages. Although Phillip and Peter testified to have married Margaret and Mary and paid dowries at the home of the deceased, Dan, John and Christopher denied and contended that the dowries were paid to John at the home of Michael who was long dead. Again, the Applicants did not prove those averments. Infact the marriages were not at all proved neither were any witnesses availed to confirm that indeed Margaret and Mary were married to Phillip and Peter and in the alleged manner.

15. The Applicants did not avail any other evidence to support that they were the children of the deceased herein. Even Samwel, their male sibling or any other member of the family of the deceased or the neighbours of the deceased were not called to testify to that effect. Further, there were no Certificates of Birth produced or any other admissible evidence tendered in proof of the hotly contested issue.

16. The Applicants' evidence did not therefore dislodge the evidence of Dan, John and Christopher for want of proof. There is *prima facie* evidence that the Applicants were children of Michael and not of the deceased. That finding is further buttressed by the Affidavit of Protest sworn by Samwel on 26/10/2015 which clearly indicated that Samwel was the only beneficiary from the house of Jura Akoth. The first issue is hence answered in the negative.

**(b) Whether the Applicants/Plaintiffs were dependants of the deceased:**

17. The application was made on the sole ground that the Applicants were daughters of the deceased. However, the Applicants introduced the aspect of dependency in their submissions. That change of position is contrary to settled rules of procedure and practice since parties are firmly bound by their pleadings. Further, submissions cannot take the place of evidence. (See the Supreme Court ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and the Court of Appeal in **The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** among others).

18. However, in the spirit of **Article 159(2)(d)** of the **Constitution** which vouches for substantive justice, I will nevertheless deal with the

issue as to whether the Applicants were dependants of the deceased.

19. **Section 29** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya describes who a '*dependant*' is in the following manner: -

*(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, grans-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*

*(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

20. Apart from contending that they were daughters of the deceased, the Applicants did not adduce any evidence to the effect that they were being maintained by the deceased immediately prior to his death. The deceased died on 17/04/1985. Margaret was married to Phillip in 1977 whereas Mary was married to Peter in 1972. Peres did not testify on when she was married. It is therefore clear that the Applicants were married long before the deceased died. As said, none of the Applicants demonstrated that she depended on the deceased immediately prior to his death.

21. The Applicants hence failed to prove that they were dependants of the deceased in law. The issue is also answered in the negative.

**(c) Whether the Applicants/Plaintiffs are entitled to the estate of the deceased herein:**

22. Given that the Applicants have neither proved that they are daughters nor dependants of the deceased, they are not be entitled to the estate of the deceased. The issue is rendered in the negative.

**Conclusion:**

23. Having duly considered the application I have come to the conclusion that the same is not merited. It is for rejection and is hereby dismissed with costs to Dan, the Petitioner/First Defendant.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 23<sup>rd</sup> day of November 2018.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Mr. Jura** Counsel instructed by Messrs. Kerario Marwa & Company Advocates for the Objectors/Applicants.

**Mr. Oguttu-Mboya** Counsel instructed by Messrs. Oguttu-Mboya & Company Advocates for the Petitioner/Respondent.

**Evelyne Nyauke** - Court Assistant