



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 878 OF 2014

IN THE MATTER OF THE ESTATE OF AOMO OYOWE (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR LETTERS OF

ADMINISTRATION INTESTATE BY SAMSON ODOYO OYOWE – APPLICANT

AND

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT
TO SAMSON ODOYO OYOWE BY KILLION ONDITI AOMO – (OBJECTOR)**

SUMMONS FOR REVOCATION OR ANNULMENT OF GRANT

(Under Section 76 of the Law of Succession Act Cap 160 Laws of Kenya And Rule 44 & 73

of the Probate and Administration Rules)

KILLION ONDITI AOMO.....APPLICANT/OBJECTOR

VERSUS

SAMSON ODOYO OYOWE.....PETITIONER/RESPONDENT

RULING

This is a ruling on the Summons for revocation dated 11th April 2016. The grant herein was issued on 29th January 2015 and confirmed on 30th October 2015 thereby devolving the whole of **LR KISUMU/KABODHO EAST/1617** which was the only asset comprising the deceased's estate to the Respondent.

The gist of the summons was that the grant was obtained through fraud and non-disclosure of material facts being that the deceased was survived by other children other than those named in the petition.

In the replying affidavit the respondent denied that the grant was obtained fraudulently and contended that he had when petitioning for the grant invited the applicant to join him but he declined. He also contended that the land had been given to him by the deceased as the other sons had been given theirs.

The summons were canvassed by viva voce evidence and thereafter the Advocates for the parties summed up through written submissions.

During the hearing it became clear that the deceased had survivors other than those named in the petition. The deceased was polygamous and of his three wives only one Preskila Auma Aomo the mother of the Respondent survives him. The persons named in the petition (Form P & A 5) are the children and the siblings of the Respondent. However the deceased had other children among them the applicant, from his other two wives. Those were not named in the Petition as surviving the deceased. The Law of Succession Act and the Probate and Administration rules are clear. To begin with rule 7(1)(e) of the Probate and Administration Rules requires the Petitioner in cases of total or partial intestacy, such as is the case here to so far as may be within his knowledge, disclose inter alia -

“(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased.....”

“(ii) whether any and if so which of those persons is under the age of eighteen years.”

Secondly, Rule 26(1) requires the applicant to give notice to every other person entitled to the grant in the same degree as, or in priority to the applicant. Indeed rule 26 prohibits the court from granting the letters of administration in the absence of such notice. This rule therefore makes notice to persons of same or higher degree mandatory.

Rule 26(2) requires the applicant to file the written consent of such persons and Form 38 is provided for that purpose.

In the case of confirmation Rule 40(8) of the Probate and Administration Rules requires that all persons beneficially entitled file a consent to confirmation of grant in writing in Form 37. There is now also a requirement for the consent of those who are beneficially entitled to the mode of distribution in Form 37B.

From the record it is clear that apart from the children of the deceased born of the same mother with the applicant, the other children were not notified to consent either to the making of the grant or to its subsequent confirmation and the mode of distribution. The applicant by failing to disclose that there were other persons beneficially interested in the estate obtained the grant fraudulently by the concealment from the Court of something material to the case. It can also be said that he obtained the grant by means of an untrue allegation of fact essential in point of law to justify the grant not to mention that the Respondent having not observed the mandatory provisions of Rules 7 (1)(e)(i) and (ii), Rule 26 (1) and (2) and Rule 40 (8) of the Probate and Administration Rules the proceedings to obtain the grant were defective in substance. Granted that Section 66 of the Law of Succession Act gives the court, in cases of intestacy, a final discretion as to the person or persons to whom a grant shall issue it requires that the court accept as a guide an order of preference which puts the applicant herein and the Respondent and indeed all the other surviving children of the deceased in the same degree. Accordingly I find merit in the summons before me. The grant and the subsequent certificate of confirmation is therefore revoked and this court orders that the resultant title deed issued to the respondent shall be cancelled. A fresh grant shall be issued to the applicant and the respondent jointly and the argument whether the respondent should inherit the whole of **LR KISUMU/KABODHO EAST/1617** shall, should parties disagree on the mode of distribution, be canvassed at the confirmation stage which may be made within three (3) months of this ruling. Each party to bear its own costs.

Signed, dated and delivered at Kisumu this 31st day of January 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Aduor for the Applicant/Objector (HB for Mr. Omondi MM)

Mr. Okungu for the Petitioner/Respondent

Respondent

C/A: Serah Sidera