



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
PROBATE AND ADMINISTRATION NO. 6 OF 2009
IN THE MATTER OF THE ESTATE OF JOHN OSURU MUSUNGU.....DECEASED
AND
ROSEMARY NABWIRE MUSOWA.....PETITIONER/RESPONDENT
AND
DISMAS OTIENO ONYANGO.....INTERESTED PARTY/RESPONDENT
VERSUS
MICHAEL OTIENO OSURU.....OBJECTOR/APPLICANT
RULING

(Summons for revocation of grant dated 18th March, 2015)

1. The Objector/Applicant Michael Otieno Osuru in his application dated 18th March, 2015 seek orders as follows:

- “(i) THAT this matter be certified urgent and heard on priority basis.**
- (ii) THAT pending the hearing and determination of this application there be registered a restriction on title land parcel L.R. Marachi/Bujumba/1151.**
- (iii) THAT the grant issued to Rosemary Nabwire Musowa on 2.6.2009/14.6.2009 confirmed on 3.11.2010 and rectified on 21.10.2011 or any other herein be revoked/annulled.**
- (iv) THAT the registration (entry Nos. 7 and 8) of Rosemary Nabwire Musowa and Dismas Otieno Onyango in respect of Marachi/Bujumba/1151 be cancelled/rectified to restore (entry No. 2) the deceased – John Osuru Musungu.**
- (v) THAT a fresh grant be issued to the objector and the same be confirmed so as land parcel L.R. Marachi/Bujumba/1151 be given to the Objector.**
- (vi) THAT the names of Peter Omina Onetswe Wayama and Dismas Otieno Onyango be struck out of the pleadings/proceedings herein.**
- (vii) THAT this court do make such other Just orders.**

(viii) THAT costs be borne by the petitioner.”

2. The application is supported by the grounds on its face that:

“(a) The grant was obtained fraudulently by the making of a false statement or by concealment from the court something material to the case.

(b) The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

(c) The petitioner included strangers and caused them to benefit from the deceased’s estate, thus disinheriting the actual heirs.

(d) The objector’s consent was never sought or obtained.

(e) The registration of Dismas Otieno Onyango in respect of LR. Marachi/Bujumba/1151 is illegal.”

3. The application is also supported by an affidavit sworn by the Applicant on the date of the application.

4. The Applicant’s case is that John Osuru Musungu died intestate on 5th December, 2003. John Osuru Musungu shall henceforth be referred to as the deceased. Subsequently, Rosemary Nabwire Musowa, the Petitioner/Respondent applied to administer the estate of the deceased. A grant of letters of administration was made on 2nd June, 2009, confirmed on 3rd November, 2010 and rectified on 21st October, 2011.

5. The Applicant’s case is that upon confirmation of the grant, the only asset of the estate of the deceased being L.R. No. Marachi/Bujumba/1151 was transmitted to Peter Omina Onetswe but upon rectification of the confirmed grant, the same was registered in the name of Dismas Otieno Onyango.

6. The Applicant averred that Peter Omina Onetswe and Dismas Otieno Onyango are neither children nor heirs of the deceased but strangers to the estate of the deceased. It is the Applicant’s case that the Respondent attempted to sell the said land to Peter Omina Onetswe but he objected to the sale and caused a restriction to be registered on the parcel of land on 25th August, 2005. According to him, the deceased never sold land to either Peter Omina Onetswe or Dismas Otieno Onyango.

7. The Applicant averred that he is the son of the deceased as his mother Mary Nabwire Osuru was the first wife of the deceased and the Respondent was the last wife of the deceased.

8. The Applicant asserted that the Respondent did not disclose that the estate of the deceased had other heirs and neither did she seek the consent of the Applicant before commencing these succession proceedings. The Applicant contended that although the parcel of land in question is situated in Bujumba Sub-Location, Bumala Location the letter from the Chief dated 30th August, 2008 which introduced the Respondent originated from Nangoma Location in Bukhayo.

9. The Applicant averred that Dismas Otieno Onyango whom he has named as Interested Party is the current registered owner of the parcel of land in question as restriction which he had placed over the title was removed. According to him the Interested Party’s registration as the proprietor of the land in question is illegal. The Interested Party, Dismas Otieno Onyango did not file a response to the application although he was present in Court on 13th March, 2017 when the matter came up for taking a ruling date.

10. The Respondent opposed the application through a replying affidavit sworn on 8th December, 2015. Through the said affidavit the Respondent averred that she is one of the four wives of the deceased. The first wife was Mary Nabwire who passed away leaving Michael Otieno, Monday Osuru and Margaret Osuru surviving her. The second wife Roselyne Aura also died leaving behind Joshua Osuru and

Godliver Adhiambo. The third wife Philis Juma was survived by George Osuru, Rasto Osuru, Mary Nyasaye, Milly Osuru and Divina Osuru. The fourth wife is the Respondent who is blessed with one child namely Alice Awino Osuru.

11. It is the Respondent's averment that the deceased had settled his first three wives on L.R. No. Bukhayo/Matayos/1053 being the ancestral land situated in Murende Sub-Location, Nangoma Location, Matayos Division on which land the deceased's remains were interred. It is her case that the deceased settled her on L.R. No. Marachi/Bujumba/1151 upon which he constructed a house for her. It is her evidence that she did not receive a portion of the ancestral land upon which the Applicant stays.

12. Her evidence is that upon the demise of the deceased the Objector developed interest in her parcel of land forcing her to register a caution over the same so as to protect her interests. She also sought advice from the area Chief who told her to institute these proceedings. That the Chief who wrote the letter introducing her to the Court wrote it the way it is; despite knowing that the deceased had other wives and children.

13. The Respondent asserted that the succession went through the normal process and the Applicant was aware of the same and was even in court during the confirmation of the grant. Further, that she sold the said parcel of land in order to purchase a bigger land which would enable her cultivate enough food for her family.

14. It is the Respondent's position that although the Objector is indeed a son of the deceased, the property in respect of which this cause was filed had been given to her and she had been occupying it to the exclusion of everyone else.

15. The undisputed facts that emerged from the affidavits filed in Court by the parties disclose that the Applicant is a step-son of the Respondent. The Respondent was one of the four wives of the deceased. The late Mary Nabwire who was the mother of the Applicant was the first wife. All the four wives had children.

16. It is also not disputed that the Chief's letter which the Respondent used to commence these proceedings indicated that she was the only wife of the deceased and her daughter Alice Owino Osuru was the only child of the deceased. In Form P&A5 at paragraph 4 the Respondent listed herself and her daughter as the only persons who survived the deceased. Although in her affidavit in opposition to the application, the Respondent indicated that the deceased had two parcels of land, at paragraph 6 of Form P&A5 she averred that the only asset the deceased had was L.R. No. Marachi/Bujumba/1151. There is also no evidence that the Respondent obtained the consent of the Applicant before seeking the permission of the Court to administer the estate of the deceased.

17. I also note that the Respondent's action amounted to succeeding part of the estate of the deceased. She ought to have listed all the deceased's dependants and property. She did not do so.

18. Section 76 of the Law of Succession Act, Cap. 160 which provides for revocation or annulment of grants states:

"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) that the proceedings to obtain the grant were defective in substance;

(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;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d)that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i)to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

19.A reading of the said Section discloses that the grant herein is a candidate for the invocation of legal provisions for the revocation or annulment of grants. I need not say more.

20.Orders are issued as follows:

(a)The grant issued, confirmed and rectified in the name of the Respondent is revoked;

(b)The Respondent and the Applicant are appointed joint administrators of the estate of the deceased;

(c)Unless the Applicant demonstrates otherwise, the list of the beneficiaries of the estate of the deceased will be as disclosed in paragraphs 4 and 5 of the affidavit sworn on 8th December, 2015 by the Respondent in opposition to the application. Those dependants are:-

(i)Michael Otieno;

(ii)Monday Osuru;

(iii)Margaret Osuru;

(iv)Joshua Osuru;

(v)Godliver Adhiambo;

(vi)George Osuru;

(vii)Rasto Osuru;

(viii)Mary Nyasaye;

(ix)Milly Osuru;

(x)Divina Osuru;

(xi)Rosemary Nabwire Musova; and

(xii)Alice Awino Osuru.

(d)The title for L.R. No. Marachi/Bujumba/1151 which is currently registered in the name of the Interested Party is cancelled and the same shall revert to the name of the deceased as was the case prior to his demise;

(e)The Applicant and the Interested Party shall file affidavits listing all the assets of the deceased and placing before the Court any other information that may be relevant to this matter. Two of the assets of the deceased are L. R. No. Bukhayo/Matayos/1053 and L. R. No. Marachi/Bujumba/1151. This should be done within 45 days from the date of this ruling; and

(f)The costs of this application shall abide the outcome of the distribution that has to take place as a result of this order.

Dated, signed and delivered at Busia this 30th day of March, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT