



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HIGH COURT CIVIL MISC. NO. 4 OF 2016

**IN THE MATTER OF THE ESTATE OF OGOLA AKUMBA OCHIENG ALIAS OGOLA
OCHIENG – DECEASED**

AND

**IN THE MATTER OF AN APPLICATION FOR REVOCATION AND/OR ANNULMENT OF
GRANT ISSUED TO P O O ON 4TH DECEMBER 2012 VIDE SIAYA PRINCIPAL
MAGISTRATE’S COURT SUCCESSION CAUSE NO. 21 OF 2012**

BETWEEN

MESHACK OPONDO APPLICANT/OBJECTOR

VERSUS

P O O RESPONDENT/PETITIONER

(CORAM: J.A. MAKAU – J.)

**(UNDER SECTION 51, 52, 53, 63, 66, 70, 76 THE LAW OF SUCCESSION ACT AND RULE 44(1)
(2) AND (3) OF THE PROBATE AND ADMINISTRATION RULES)**

JUDGMENT

1. The Objector **MESHACK OPONDO** through an application for Revocation and/or Annulment of grant issued to **P O O** on 4.12.2012 vide Siaya Principal Magistrate’s Court in PMC. Succession Cause No. 21 of 2012 pursuant to Section 51, 52, 53 of The Law of Succession Act and Rules 44(1), (2) and (3) of Probate Administration Rule, sought the following orders:

“(i) That grant of letters of Administration intestate issued to the respondent herein P O O in respect of the deceased’s estate OGOLA AKUMBA OCHIENG on the 18th May 2012 and confirmed on the 4th December 2012 by the Principal Magistrate’s Court Siaya in Succession cause No. 21 of 2012 be revoked and/or annulled forthwith.

(ii) That there be declaration that any of purported sale, transfer by the respondent P O O to any party in respect of the deceased’s parcel No. WEST/ALEGO SIGOMA URANGA/[particulars withheld] and subsequent to the confirmation is illegal, null and void ab initio, the same to be cancelled transferred and registered in the name of the APPLICANT MESHACK OOKO OPONDO.

(iii) That this Honourable Court do issue an order transfer/recall of the said SIAYA PM'S Succession cause Case Original Case No. 21 of 2012 for revocation of the said grant, for perusal to ascertain, the legality, impropriety of the said grant and give necessary direction and any other order the Court may deem fit and just to grant.

(iv) That the cost of this application be provided for or be borne by the respondent.

2. The application is premised on the supportive affidavit sworn on 12.2.2014.

3. The Respondent filed a Replying affidavit dated 26th January 2017.

4. That before hearing of the application for the Revocation of the grant direction were given to the effect that the application be determined by way of oral evidence. The issues for determination were framed as follows:-

(a) Who are entitled to the grant and who are the beneficiaries?

(b) Whether applicant's consent to seeking of grant was necessary?

(c) Who should be petitioners incase grant is revoked?

APPLICANT'S CASE:

5. The Objector gave evidence and called one witness. He stated that he is son to Patrick Opondo Onyango and brother to Lawrence Omondi. That his grandfather was Onyango son of Bwoga who was son of Ochieng. That Ochieng had a son called Akumba, whose estate is subject of this Objection. That Ochieng Ogolla who was staying at Mombasa, returned home and died in 1988. That the Parcel of Land Sigoma/Uranga/[particulars withheld] was then registered in the name of Ochieng Ogolla, that the petitioner P O O is the son of Ocheing Ogolla and at the time his father died, the petitioner was 4 years old. That Ogolla Ochieng left the land under care of Patrick Opondo as his grandson for the benefit of the son of Ochieng Ogola and that once P O grew up the land should be shared between P O and Lawrence Omondi Opondo. He went on and stated his father fell sick and directed that the land be shared between P O and Lawrence Omondi Opondo. He concluded by stating he was not claiming any interest over this land.

6. During Cross-examination, OW1 stated his name is Meshack Ooko Opondo and not Meshack Opondo urging the Court to accept pleadings with his three names only. He stated Ogola Ochieng is brother to his grandfather and that Lawrence Opondo is his brother. That the deceased gave his title to OW1's father to hold in trust for his children. That he made his will in presence of Bismarch Onyango. He stated his grandfather had two sons Bwoga and Akumba. P O is from the lineage of Akumba and Objector from the lineage of Bwoga. On further cross examination, he stated the Will was made on 2.7.1986 and the Testator died in 1988. He admitted P is the son of the owner of the land and stated his (Objection) claim is over his father's land. On re-examination OW1 stated he is not claiming anything from the deceased's estate.

7. OW2, Lawrence Omondi, young brother to OW1, stated the petitioner, who is accusing him is like his father. He testified land parcel SIGOMA/URANGA/[particulars withheld] was part of family land, as he found his father tilling it and that in 1988 he called them, told them it was a family land and as it was not registered in anyone's name. He stated he was told the land should be shared between Akumba's family and Bwoga's family. He claims a share from the land as Objectors are supposed to share the land with the petitioner.

8. On cross-examination, OW2, stated, he is from Bwoga's family and that they have a family land, that the Objectors homes are on their family land and that no one lives on the disputed land. On being shown annexure POO2, Sigoma/Uranga/[particulars withheld] he admitted the land is in the name of Opondo Onyango, thus it is his father's land. That he stays there. He stated in the meeting called by his father,

they were four but his brother (OW1) did not mention their grandfather being there. He urged he is before court because the land was sold without their knowledge and consent. OW2, admitted, that Ogolla was not his grandfather. OW2, admitted, though he claims interest over the land, he had not filed any pleadings, purporting he gave someone else authority but on being challenged further, he stated he had not given any authority in writing. He admitted that it is correct, the land was held in trust for P O. OW2 stated he does not know the land referred to as Sigoma/Uranga/[particulars withheld]. He said the land was not registered in 1988. On re-examination OW2 claimed he was to get share from land No. [particulars withheld].

RESPONDENT'S CASE:

9. The Petitioner gave evidence and called one witness. PW1, P O O, relied on his Replying Affidavit dated 26.1.2017. He stated his great, great, grandfather is Ochieng, who had two sons Akumba and Bwoga, who gave birth to O Wilfrida Auma and Ogola Ochieng, who is father to PW1. That Bwoga is father to Onyango, who sired Opondo Patrick, who is father to Meshach Opondo (OW1) and Omondi (OW2). He stated the Objector is from the lineage of Bwoga. On cross-examination, PW1 stated Land Sigoma/Uranga/[particulars withheld] belongs to James Opiyo Onyango.

10. PW2, a neighbor of OW1 stated he knew the family of Bwoga and Akumba. That the Petitioner and Objector are not brothers and that no one lives on the disputed land, but their great grandfather was one. That everyone has his own land. He stated that the Objector and Petitioner are not related, but the two share one great grandfather.

ISSUES FOR CONSIDERATION:

11. I now wish to consider the agreed issues in this cause. The first **issue is who are entitled to the grant and who are the beneficiaries?** Section 29(a) (b) and (c) of the Law of Succession Act defines a dependant as follows:-

“dependant” means”

(a) 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) of the deceased's parents, step-parents, grand-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.”

12. In the instant case the Objector was unable to bring his relation to the deceased herein within the meaning set out under **S. 29(a) and (b) of the Law of Succession Act**. He claimed to be a nephew to the deceased. The Petitioner demonstrated he is the only son of deceased. He with his witness PW2, demonstrated as per annexure POO3 that the Objector comes from a lineage of Bwoga, brother to Akumba. It is indeed their respective fathers who are first cousins. The Land Sigoma/Uranga/[particulars withheld] belonged to Petitioner's father. The Objectors therefore are distance relatives and not beneficiaries to the deceased's estate. The Objectors are not entitled in the same degree and priority or at par in seeking for grant of letters of administration with the petitioner.

13. **Rule 26(1) of the Probate and Administration Rules** provides:

“(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

In view of the provisions of **Section 29(a) and (b) of the Law of succession and Rule 26 of Probate**

and Administration Rules, I find and hold that the Petitioner as son to the deceased, is entitled to the grant of letters of administration to the estate of the deceased and the beneficiaries in this matter are the children of the deceased Ogola Akumba Ochieng alias Ogola Ochieng who do not include the Objector or his brother.

14. Was the Applicant/Objector's consent to the making of the grant necessary? **Rule 26(1) of the Probate and Administration Rules** Provides:-

“26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

In this case the Objector do not fall under the category of the persons entitled to issuance of grant in the same degrees or in priority to the petitioner. The Objector has no claim or interest over the deceased estate and his consent for petitioning for grant of letters of administration is not necessary for the purposes of the grant. I therefore hold the Objector's/Applicant's consent was not necessary and the petitioner was not in breach of any law by failing to notify the Objector of his intention to Petition for the grant of letters of administration and by failing to seek his consent.

15. The last issue, is who should be the petitioner, incase the grant is revoked? In this case the Objector himself stated he is not interested in the deceased's estate and is not making any claim over the deceased's estate. He stated it is his Second witness who has a claim. OW2, confirmed his interest was being taken care of by OW1. He claimed his interest on the ground of an alleged oral Will made in 1986 by his father, who never owned the property. The Oral Will was not proved nor was there an attempt to do so, through calling witnesses. In any event, the father to the Objector could not bequeath what he never owned. In this case I have found no basis to revoke the grant or grounds warranting this Court to do so, as I have found, no reasons to revoke the grant. The grant shall remain with the petitioner.

16. The upshot is that the summons for revocation of the grant is dismissed with costs to the Respondent/Petitioner.

DATED AT SIAYA THIS 29TH DAY OF JUNE, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 29TH DAY OF JUNE, 2017.

IN THE PRESENCE OF:

M/S. CHARLES OCHIENG ADVOCATE FOR THE APPLICANT/OBJECTOR

M/S. MUGOYE & ASSOCIATES FOR THE RESPONDENT/PETITIONER

COURT ASSISTANTS:

1. L. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE