



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**SUCCESSION 474 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE OTUNDO ONSERIO....DECEASED**

**AND**

**MARY NYANCHERA MIKAYE.....OBJECTOR/APPLICANT**

**VERSUS**

**NYANGARESI OTUNDO ONSERIO**

**DARIMASIUS ONSERIO**

**WILFRED MONYENYE YOGI**

**LAND REGISTRAR KISII.....RESPONDENTS**

**RULING**

**Introduction**

1. **OTUNDO ONSERIO**, (hereinafter “the deceased”) died intestate on 25<sup>th</sup> December 1986. Prior to his death, the deceased owned LR. NO. NYARIBARI CHACHE/B/B/BOBURIA/2349 (hereinafter “the suit land”).
2. On 5<sup>th</sup> September, 2013, grant of letters of administration intestate was made to the 1<sup>st</sup> respondent/petitioner herein Nyangeresi Otundo Onserio.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were the guarantors of the 1<sup>st</sup> respondent in the petition for grant of letters of administration while the 4<sup>th</sup> respondent is the Land Registrar at Kisii Land registry.

**Application dated 4<sup>th</sup> December 2015**

4. Following the issuance of grant of letters of administration to the 1<sup>st</sup> respondent herein, he moved in to secure the registration of the suit land into his name thereby prompting the applicants to file the application dated 4<sup>th</sup> December 2015 that is the subject of this ruling.
5. In the said application brought under **Section 45 (1) and (2) (b) and Section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules Cap 160 Laws of Kenya**. The applicant seeks the following orders:

1. The petitioner/1<sup>st</sup> respondent and 4<sup>th</sup> respondent be and are hereby found guilty for intermeddling with the estate of the deceased in contravention of the law.

2. The petitioner/1<sup>st</sup> respondent be declared unfit to administer the estate of the deceased with consequent orders that letters of administration issued to the petitioner/1<sup>st</sup> respondent on 5<sup>th</sup> September 2013 be revoked.

3. Darimasius Onserio and Wilfred Monyenye Yoge being guarantors of the administrator herein be directed to make good any loss suffered by beneficiaries in view of the administrators breach of duty to properly administer the estate of the deceased for the benefit of all beneficiaries as guaranteed to the sum of Kshs. 3 million.

4. The Land Registrar Kisii be and is hereby ordered to cancel the registration of Land Parcel No. Nyaribari Chache/B/B/Boburia 2349 fraudulently registered in the name of the 1<sup>st</sup> respondent.

6. The application is supported by the affidavit of Mary Nyachera Mikaye, the applicant herein, dated 4<sup>th</sup> December 2015 wherein she states that she is a beneficiary of the estate of the deceased by virtue of being the deceased's daughter in law having been married to the deceased's son one **CHARLES MIKAYE OTUNDO**(also deceased) as shown in a copy of the death certificate attached to the affidavit and marked "MNM-1". She further states that the suit property is family land that has been in dispute since the year 2011 when the 1<sup>st</sup> respondent and his other brothers conspired to sell the entire suit land without her husband's consent thereby prompting him to place a caution on the suit land, a copy of which she attached to the affidavit and marked as "MNM-2".

7. She further avers that in total disregard to the law and the caution placed on the land, the 1<sup>st</sup> and 4<sup>th</sup> respondents took advantage of the death of her husband to fraudulently register the suit land into the name of the 1<sup>st</sup> respondent even before the confirmation of grant of letters of administration. She attached a copy of a certificate of official search in respect to the suit land as annexure "MNM-7" to show the change of ownership of the suit land into the 1<sup>st</sup> respondent's name. She accuses the 1<sup>st</sup> and 2<sup>nd</sup> respondents of intermeddling with the estate of the deceased contrary to the provisions of Section 45 of the Law of Succession act (hereinafter "the Act") and prays that they be found culpable and be punished in accordance with the law.

### **The 1<sup>st</sup> Respondent's response**

8. The 1<sup>st</sup> respondent opposed the application through his replying affidavit sworn on 15<sup>th</sup> January 2016 wherein he concedes that a grant of letters of administration in respect to the deceased's estate was made to him upon obtaining the consent of all the beneficiaries and that he thereafter secured registration of the suit land into his name with the sole aim and in readiness to distribute the estate equally to the 7 sons of the deceased, the applicant's late husband's house included.

9. He contends that the application is misconceived, vexatious and without merit as he did not make any false statement prior to his application for grant letters of administration as all the 7 beneficiaries have all along been in agreement on the mode of distribution. He denies the allegation that he had intermeddled with the estate of the deceased and accuses the applicant of filing multiple actions in this cause with the aim of forcefully obtaining a bigger share of the estate.

10. When the application came up for hearing before me on 7<sup>th</sup> February 2017, parties agreed to canvass it by way of written submissions which they subsequently filed and which I have perused.

### **Analysis and determination**

11. Upon perusing the application, the 1<sup>st</sup> respondent's replying affidavit and the party's respective

submission, I note that the main issue for determination is whether the applicant is entitled to the orders sought in the application.

12. It was not disputed that the 1<sup>st</sup> respondent sought and obtained grant of letters of administration in respect to the estate of the deceased and that he subsequently secured the registration of the suit land into his name before the confirmation of the grant.

13. **Section 45 (1) of the Law of Succession Act** stipulates as follows:

**“45. No intermeddling with property of deceased person**

**(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”**

14. Section 71 (1) of the Act provides thus:

**“71. Confirmation of grants**

**(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”**

15. In the instant case, it is abundantly clear to me that the 1<sup>st</sup> respondent obtained registration of the suit land into his name before the confirmation of grant contrary to the mandatory provisions of **Section 71 (1) of the Act** which stipulates that the distribution of any capital assets can only be done upon the confirmation of grant. Clearly therefore, the 1<sup>st</sup> respondent jumped the gun and placed the cart before the horse by purporting to obtain the registration of the suit land in his name before getting the said grant confirmed by the court. The provisions of **Section 71 (1)** are couched in mandatory terms and it matters not that the 1<sup>st</sup> respondent had the “good intentions” of ultimately distributing the suit land to all the beneficiaries in equal shares.

16. Needless to say, the 1<sup>st</sup> respondent was all along ably represented by a legal counsel in this case who should have known better and advised him on the correct procedure to be adopted in the distribution of the deceased’s estate so as to avoid unnecessary delays caused by objections and applications such as the one before the court.

17. The applicant also sought orders that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, being the guarantors of the 1<sup>st</sup> respondent/petitioner herein be directed to make good any loss suffered by the beneficiaries as a result of the petitioners’ breach of duty. The applicant did not however specify the loss, if any, that the estate of the deceased has suffered as a result of the transfer of the suit land into the names of the petitioner and I therefore find that this prayer was neither proved nor merited and I will not allow it.

18. Having found that the petitioner acted improperly by transferring the suit land into his name before the confirmation of grant, I find that the applicant has made out a case against the 1<sup>st</sup> respondent to warrant the revocation of the grant issued to him on 5<sup>th</sup> September 2015. Consequently, I hereby allow the application dated 4<sup>th</sup> December 2015 in the following terms:

**a) Grant of letters of administration intestate issued to the 1<sup>st</sup> respondent herein on 5<sup>th</sup> September 2015 is hereby revoked.**

**b) A fresh grant shall henceforth be issued in the joint names of the applicant and the 1<sup>st</sup> respondent.**

**c) The 4<sup>th</sup> Respondent is hereby ordered to cancel the registration of the suit land in the name of the 1<sup>st</sup> respondent which registration shall revert to the names of the deceased to await the distribution by the court during confirmation.**

**d) The new administrators are at liberty to apply for confirmation of the grant either jointly, or severally in which case, one administrator will be at liberty to file an affidavit of protest if he/she is not in agreement with the mode of distribution proposed by his/her counterpart.**

**e) Each party shall bear his/her own cost of the application.**

**Dated, signed and delivered in open court this 21<sup>st</sup> day of June, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

- N/A Nyatundo for the petitioner
- Mr. Okemwa for Begi for the objectors
- 1<sup>st</sup> Respondent present in person
- Omwoyo: court clerk