



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
PROBATE AND ADMINISTRATION CAUSE NO 161 OF 2015
IN THE ESTATE OF ZADOCK OGADA OPUK
AND IN THE MATTER OF SUCCESSION ACT CAP 160

APPLICATION BY:

PETER ONYANGO OKIRO.....1ST APPLICANT/OBJECTOR

GIDEON MAGAK OPERE.....2ND APPLICANT/OBJECTOR

VERSUS

NANCY AKINYI.....1ST RESPONDENT/PETITIONER

KEPHA OLWA ODHIAMBO.....2ND RESPONDENT/PETITIONER

RULING

1. By a summons of revocation of grant dated 12th January 2017 made pursuant to the provisions of section 76 (a), (b), and (c) of the Law of Succession Act and Rule 44 and 73 of the Probate and Administration Rules, the applicants pray for:-

- *revocation and/or annulment of the grant of letters of administration issued to the respondents and confirmed on the 20/09/2016*
- *revocation and annulment of the registration of 30th December 2013 relating to parcel No CENTRAL KASIPUL/KACHIENG/ 1422, 1423 and 1424 pending proper succession of the estate of the deceased.*
- *Revocation of the title deed issued to the respondents in respect to the aforesaid parcels*
- *A fresh succession be initiated for the estate of the deceased with the applicants herein being joined as interested parties with purchasing interest*

2. The basis of this application is that the grant was obtained fraudulently on false claims that the 2nd respondent **KEPHA OLWA ODHIAMBO** is an heir/dependent of the deceased **ZADDOCK OGADA OPUK** yet he is neither related nor was he a dependant of the deceased. Further Land parcel No **CENTRAL KASIPUL/KACHIENG/1422** indicated to be held in trust by the 2nd respondent is a continuing trust and no such registration can be made in the name of the 2nd respondent alone.

3. It is also alleged that the grant was obtained fraudulently of a false statement to court that:-

- *There were no liabilities, yet the applicants have a purchasing interest and are therefore liabilities to the estate of the deceased*
- *The 2nd respondent is related or is a dependant to the deceased, a fact which is not true as he is a total stranger to the estate.*

4. The respondents did not file any response and the matter proceeded ex-parte by way of written submissions.

5. The background to this matter is that **ZADDOCK OGADA OPUK** died on 19/08/2002 and as indicated in the letter dated 02/01/2015 written by the chief of **EAST KAMGAK** location, was survived by:-

- NANCY AKINYI - widow
- GREENVINCE ODHIAMBO OGADA – adult son
- MOA – minor
- DAO – minor

6. The letter further indicated that the deceased had two wives **PAMELA AMOLO** (deceased) was the first wife and had left behind a son named **GREENVINCE ODHIAMBO OGADA** who therefore represents the first house. The 2nd respondent is not mentioned in the chief's letter and is therefore described as a stranger. The deceased's widow **NANCY** applied for and obtained grant of letters of administering his Estate.

7. It is the applicant's case that by a sale agreement dated 04/12/1994 and 17/07/1994 they purchased 1/2 an acre of land from the deceased during his lifetime –at the time the land still had its original registration No **CENTRAL KASIPUL/ KACHIENG/245** before it was subdivided. However **ZADDOCK** died before he could subdivide the land and effect transfer to enable the applicants to register the same in their names. Apparently the original parcel was subdivided into two parcels thereby creating parcel No **CENTRAL KASIPUL/KACHIENG/1388** and **CENTRAL KASIPUL/KACHIENG/1389** during the deceased's lifetime. The deceased retained parcel No **CENTRAL KASIPUL/ KACHIENG/1388** and by the time of his death that parcel had been subdivided into No **CENTRAL KASIPUL/KACHIENG/1422, 1423 and 1424**. The portion sold to the 2nd applicant by the 1st respondent was part of 1388

8. The 1st respondent was aware of this sale as indicated in the sale agreement dated 03/12/2007 as she is the one who acknowledged receipt of the sale proceeds from the 2nd applicant on behalf of her then deceased husband.

9. Do the applicants have locus to make this application. Counsel argues that the provisions of **Section 76** of the **Law of Succession Act** is that such an application can be made by any interested party so long as the conditions set out in that provision are satisfied. It is his contention that, the phrase "any interested party" covers purchasers. Counsel also refers to the order of preference of persons to whom grant of letters shall be made includes creditors under **Section 66** of the **Law of Succession Act** and submits that purchasers fall under that category.

10. He urges the court to be guided by the decision of Muriithi (J) in **KISII HCC NO 35 OF 2012 MUSA NYARIBARI GEKONE** versus **PETER MITIENDA AND ANOTHER**

Status of 2nd Respondent

11. As regards the status of the 2nd respondent counsel has referred to the provisions of section 39 of the Law of Succession Act which states:-

39 (1) Where an intestate has left no surviving spouse or children, the next intestate estate shall devolve upon the kindred of the intestate in the following order of priority;-

a) *Father, or if dead*

b) *Mother, or if dead*

c) *Brothers and sisters, and any child or children of the deceased brothers and sisters, in equal shares, or if none,*

d) *Half -brothers and half- sisters and any child or children do the deceased half-brothers and half- sisters to equal shares, or if none;*

e) *The relatives who are the nearest degree of consanguinity up to and including the 6th degree in equal shares”*

It is also argued that **Section 66** provides thus:-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the final person or persons to whom a grant of letters of administration shall in the best interest of all concerned be made, but shall, without prejudice to the discretion, accept as a general guide the order of the following preference:-

a) *Surviving spouse or spouses, with or without association of other beneficiaries*

b) *Other beneficiaries entitled on intestacy with priority according to their beneficial interest as provided by Part V*

c) *Public Trustee, and*

d) *Creditors”*

12. It is on account of these provisions that the 2nd respondent is viewed as a busy body as he does not fit into any of the categories of beneficiaries envisaged by section 66.

13. From the material presented I have no doubt that the applicants had purchased some portion of the land owned by the deceased when he was still alive, hence their protest that the portions sold to them should not have been included in the assets for distribution. Unfortunately transfer has not been effected so legally those parcels remained in the deceased's name and formed part of his estate. Ideally they ought to have lodged an objection then file affidavit of protest when the matter came up for confirmation but it is probable that they were not even aware that this cause was in court. Can the purchasers be categorized as creditors for the purposes of section 66? I think that is stretching the meaning of the word to unrealistic limits and with the greatest of respect I do not subscribe to the interpretation given by Muriithi (J) in **MUSA NYARIBARI GEKONE** versus **PETER MITIENDA AND ANOTHER**. A creditor in the simplest dictionary definition is.....and in my view the applicant's do not fit into the order of preference of persons listed under that provision.

14. I hold the view that being purchasers to whom transfer had not been effected, they ought to sue the administrators of the estate for specific performance. I do not think they qualify to be joint administrators of the deceased's estate. However I agree that under section 76 they are interested parties to the extent that they have raised issues regarding the status of the 2nd respondent in this matter- the fact that an adult son from the first house did not feature in the distribution of the assets.

15. There was also the alleged misrepresentation regarding Kepha Olwa that he has no relationship with the deceased in the order of consanguinity. Actually a perusal of the affidavit in support of the summons dated 20th July 2016 for confirmation of grant had listed the 2nd respondent not as a beneficiary but a joint trustee with the 1st respondent on behalf of the minors. However the certificate issued erroneously indicated the 2nd respondent as the only trustee. This was an error and conveyed the wrong message. The

cure would be to revoke the grant and have that anomaly corrected.

16. The totality of this is that the grant must be revoked as one beneficiary namely **GREENVINCE ODHIAMBO OGADA** who represents the first house has been left out of the distribution of the assets, and also because of the omission of the trustees holding the asset in trust for the children.

17. The 1st respondent is at liberty to apply for the grant but must include the child of the house in the proposed mode of distribution. Any transfers or transmissions done in relation to the deceased are nullified and the Registrar of Lands at Homa Bay is directed to rectify the register by cancelling the newly registered owners of the parcels mentioned which were as a result of the subdivision. The parcel number shall revert to its original registered namely the late **ZADDOCK OGADA OPUK**.

Delivered and dated this 21st day of June,2017 at Homa Bay

H. A. OMONDI

JUDGE