



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 193 of 2007

IN THE MATTER OF THE ESTATE OF PATRICK ONYANGO KANYAGOR (DECEASED)

BETWEEN

BENSON BARRACK OTIENO.....1ST APPLICANT/OBJECTOR

BARRACK OTIENO ONYANGO.....2ND APPLICANT/OBJECTOR

PETER BARRACK OKUMU.....RD APPLICANT/OBJECTOR

AND

JARED OKOTH ODENY.....PETITIONER/RESPONDENT

JUDGEMENT

Introduction

The deceased, **Patrick Onyango Kanyagor** died sometimes in November 1998. Deceased was survived by Peres Auma Onyango (widow now deceased), Joy Akumu Onyango (daughter), Abigail Onyango (daughter), Yvonne Onyango (daughter), Benson Onyango (son) and Debra Onyango (daughter). Jared Okoth Odeny, the petitioner applied for letters of administration which were issued in his favour on 21st July 2014. The grant of confirmation was issued on 14th April 2015. The only property of the deceased, LR. NO. East Gem/Anyiko/218 was distributed wholly to the petitioner.

Application

The application before the court is dated 25th February 2016 and is a summons for annulment of grant made under section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya). The applicants seek the following orders:

1. That the grant of administration intestate issue to Jared Okoth Odeny on 14th April 2015 be revoked and/or annulled.
2. The costs of the application be provided for.

Objectors/Applicants' Case

The application is supported by a joint affidavit sworn by the objectors on 16th February 2016. The objectors describe themselves respectively as father, son and brother, of **Patrick Onyango Kanyagor (Deceased)**. Benson Barrack Otieno and Peter Barrack Okumu testified that the land in question belongs

to their late son and brother respectively whose wife Peres Auma Onyango is also deceased but is survived by 5 children Joy Akumu Onyango (daughter), Abigael Onyango (daughter), Yvonne Onyango (daughter), Benson Onyango (son) and Debra Onyango (daughter). It is their evidence that the petitioner is not their relative and they do not know on what basis he obtained the grant to their kin's estate. They stated that they learnt that a grant had been issued in favor of the petitioner when they were served with a notice to vacate the land where they have settled for more than 20 years. It was further their evidence that the rightful beneficiaries of the deceased who include his 5 children were not consulted before the grant was issued.

Respondent's Case

The petitioner stated that the suit land originally belonged to his cousin Stephen Odedo who died when the petitioner was a young person. He stated that he learnt that before he was born, his father, in 1939, gave Stephen Odedo the said land. It was his evidence that on 19.12.65 his father called Stephen Odedo and told him that the land in issue would revert to petitioner's relatives upon Odedo's death. It was also his evidence that upon Odedo's death, his wife Peres sold the said land to Patrick Onyango Kanyagor (Deceased) without consulting the petitioner's extended family. Petitioner stated that he was entitled to deceased's estate because the land originally belonged to his grandfather.

In cross-examination by Mr. K'Opot, advocate for the objectors, the petitioner conceded that the sale of the suit land to Patrick Onyango Kanyagor (Deceased) has to date not been set aside. He also confirmed that he did not consult the family of Patrick Onyango Kanyagor (Deceased) before filing this succession cause allegedly because he knew they would not agree with him. He further conceded that a notice showing that the original title deed in the name of Patrick Onyango Kanyagor (Deceased) was gazetted while in fact the title deed was not lost but is in possession of the 1st objector.

DW2 Hannington Oyona Odeny, the petitioner's elder brother also told court that the land originally belonged to their grandfather and that it was on that basis that petitioner applied for letters of administration.

Determination

The matter before the court is an application for revocation of the grant which is governed by section 76 of the Law of Succession Act and which provides as follows;

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 by the making of a false statement or by concealment of 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

The issue for determination is whether the objectors/Applicants' case falls within the provisions of section 76 of the Law of Succession Act. The evidence on record has disclosed that **Patrick Onyango Kanyagor** (deceased) was survived by Peres Auma Onyango (widow now deceased), Joy Akumu Onyango (daughter), Abigael Onyango (daughter), Yvonne Onyango (daughter), Benson Onyango (son) and Debra Onyango (daughter). It is on record that the petitioner who is a distant relative of the deceased's family did not consult the family of the deceased nor disclose their existence to court before he obtained the grant of administration intestate to the estate of **Patrick Onyango Kanyagor** (deceased).

The Greencard for LR. NO. East Gem/Anyiko/218 attached to the petitioner's further affidavit filed on 25.10.16 shows that the land was lawfully sold to **Patrick Onyango Kanyagor** (deceased) by the registered owner Peres Adhiambo Osedo. The petitioner conceded that the sale has to date not been challenged. The Greencard does not contain the name of the petitioner's grandfather and father and his evidence that they owned the land which they later gave to Stephen Osedo is hearsay and not supported by any tangible evidence.

Having said that, I find that there is overwhelming evidence to support the objectors' case that the grant of administration intestate was obtained by the making of a false statement and by concealment from the court of something material to the case. I further wish to state that petitioner's action of causing the original title deed for LR. NO. East Gem/Anyiko/218 to be gazetted as lost borders of criminality since it was within his knowledge that the title deed was in the custody of the 1st objector.

Decision

As a result, it is hereby ordered **THAT**:

- 1. The Certificate of Confirmation issued to the petitioner, Jared Okoth Odeny on 14th April 2015 be is hereby revoked*
- 2. The title to LR. NO. East Gem/Anyiko/218 shall revert to PATRICK ONYANGO KANYAGOR*
- 3. Benson Barrack Otieno, Barrack Otieno Onyango and Peter Barrack Okumu are hereby appointed as the administrators of the estate of PATRICK ONYANGO KANYAGOR (deceased).*
- 4. Once the reverting is completed; the administrators should proceed to apply for confirmation of the grant in accordance with the provisions of the law*
- 5. This court's order issued on 21.6.17 restraining the 1st objector from interring the body of his wife Leonida Otieno on LR. NO. East Gem/Anyiko/218 is vacated*
- 6. The petitioner is hereby ordered to pay costs of this objection to the objectors*

DATED AND DELIVERED THIS 27th DAY OF July 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Present in person

Objectors - Mr Oyola holding brief Mr Kopo