



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 736 of 2013**

**IN THE MATTER OF THE ESTATE OF NICHOLAS OWISO OYULE**

**GENSON OWINO OWISO.....1ST APPLICANT/OBJECTOR**

**SAMUEL OTIENO.....2ND APPLICANT/OBJECTOR**

**VERSUS**

**JASCA AWOUR ONYANGO.....PETITIONER/RESPONDENT**

**LAZARO ODUOR OTIENO.....INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

The deceased, Nicholas Owiso Oyule died sometime in January 1987. The deceased had three sons Genson Owino Owiso, George Obuongo Owiso and William Okoth Owiso (deceased). Jasca Awour Onyango, the wife to George Obuongo Owiso and daughter in law to Nicholas Owiso Oyule (deceased) applied for letters of administration which were issued in her favour on 24th October 2013. The grant of confirmation was issued on 18th December 2014. The only property of the deceased, Plot No. 1 Ugunja Market was distributed wholly to the petitioner.

**Application**

The application before the court is dated 11th November 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 applicant seeks the following orders:

1. The Certificate of Confirmation issued to the petitioner on 5th December 2014 be annulled and/or revoked
2. That the interested party Lazaro Oduor Otieno substitutes Jasca Awuor Onyango as the owner of the property Plot No. 1 Ugunja Market
3. The costs of the application be provided for.

**Objector/applicant's Case**

The application is supported by the applicant's affidavit sworn on 11th November 2016. The 1st applicant depones that after their father's death, him together with his brothers George Obuongo Owiso and

William Okoth Owiso (deceased) entered into a sale agreement dated 14.8.02 PEXH. 1 in which they sold the plot comprising his estate to Francisca Akoth Otieno (deceased) and after receiving Kshs. 200,000/- from her gave her vacant possession.

The applicant states that he discovered that the petitioner had obtained a grant of letters of administration without consulting him and the family of his late brother William Okoth Owiso (deceased). He additionally stated that his signature on the consent to confirmation of grant was forged. As a result; the 1st applicant seeks that the grant be annulled and the same be confirmed in the name of the Lazaro Oduor, who is son of the purchaser Francisca Akoth Otieno (deceased).

Samuel Otieno Okoth the 2nd applicant/objector, son to William Okoth Owiso (deceased) stated that Nicholas Owiso Oyule (deceased) was his grandfather. He stated that the petitioner did not consult the family of William Okoth Owiso (deceased) before obtaining grant of confirmation in this case.

Lazaro Oduor Otieno, the interested party stated that he was in possession of Plot No. 1 Ugunja Market which his mother Francisca Akoth Otieno (deceased) bought as shown by a sale agreement dated 14.8.02 PEXH. 1.

### **Respondent's Case**

The petitioner stated that before Nicholas Owiso Oyule (deceased) died, he called his sons and told them that he had given Plot No. 1 Ugunja Market to her because she had been taking care of him. She stated that although the family of William Okoth Owiso (deceased) was not represented in court on 5.12.14, her husband George Obuongo Owiso and the 1st applicant were present when the grant was issued in her favour. She stated that she did not know on what basis the interested party was occupying her plot.

In cross-examination by Mr Njue advocate for the applicants, petitioner disclosed that Nicholas Owiso Oyule (deceased) had 5 sons John Owino Owiso (deceased), Genson Owino Owiso, Mark Odongo Owiso (deceased), George Obuongo Owiso and William Okoth Owiso (deceased) and not one son as stated in the chief's letter she filed in court and not 3 sons as stated by the applicants. She confirmed that she did not consult all the immediate relatives of Nicholas Owiso Oyule (deceased) before she obtained the disputed grant. She confirmed she did not have evidence to prove that the disputed plot had been bequeathed to her and could not explain why her husband signed the sale agreement if he was aware that the plot had ben bequeathed to her.

DW2 George Obuongo Owiso, one of the sons to Nicholas Owiso Oyule (deceased) and petitioner's husband stated that he was present in court together with the 1st applicant when the grant in favor of petitioner was confirmed.

In cross-examination by Mr Njue advocate for the applicants, the witness stated that did not have evidence to prove that the disputed plot had been bequeathed to petitioner. He confirmed that he was present in court when the grant was confirmed but did not disclose to the petitioner and the court that the disputed plot had already been sold.

### **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 applicant's case falls within the provisions of section 76 of the Law of Succession Act. The petitioner has disclosed that Nicholas Owiso Oyule (deceased) had 5 sons John Owino Owiso (deceased), Genson Owino Owiso, Mark Odongo Owiso (deceased), George Obuongo Owiso and William Okoth Owiso (deceased) and not one son as stated in the chief's letter she filed in court and not 3 sons as stated by the applicants. It is on record that except for Genson Owino Owiso and George Obuongo Owiso that were aware of the alleged sale of the disputed plot to the interested party's mother, the family of John Owino Owiso (deceased), Mark Odongo Owiso (deceased) and William Okoth Owiso (deceased) were neither involved nor consulted.

Having considered the evidence, I find that the grant herein was obtained by the making of a false statement and by concealment from the court of something material to the case.

The second issue for determination is whether a case has been made out for grant of orders sought in favor of the 3rd party. **Section 55** of the **Law of Succession Act Cap 160**(the Act) stipulates:-

***“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”***

Similarly **Section 8 (b) (ii)** of the **Act** provides that personal representatives do have power to sell any asset vested in them, and states as follows:

***“(ii) No immovable property shall be sold before confirmation of the grant” [my emphasis].”***

W. Musyoka in his casebook on the law of succession at page 581 states that:-

***“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property”.***

However, the author goes on to cite **Re Diplock -vs- Wintle (1984) ch 485** which makes an exception to this general rule in a case where the holder of such property is a *bonafide* purchaser for value.

From the evidence on record, Francisca Akoth Otieno (deceased) cannot be said to be a *bonafide* purchaser for value without notice because Genson Owino Owiso, George Obuongo Owiso and William Okoth Owiso (deceased) did not have a good title in their hands that they could pass to her since they had not complied with Section 55 of the Law of Succession Act.

The actions of the Genson Owino Owiso, George Obuongo Owiso and William Okoth Owiso (deceased) can be termed as intermeddling which is prohibited by Section 45 of the Act which provides:-

***“Except so far as is 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.”***

Section 3 of the Act defines “free property” in the following terms:-

***“Free property” in relation to a deceased person, means the property of which that person was legally freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.”***

In the instant case; there is no doubt that there was no free property of the deceased to be taken possession or disposed of by Genson Owino Owiso, George Obuongo Owiso and William Okoth Owiso (deceased). They were clearly intermeddling with the estate of the deceased when they purported to dispose of the same before Grant of Letters of Administration were issued.

### **Decision**

As a result, it is hereby ordered THAT:

- 1. The letters of administration issued in favour of Jasca Awour Onyango on 24th October 2013 be and are revoked. It is further ordered that the letters be issued four (4) representatives to be agreed upon by representatives from the houses of Nicholas Owiso Oyule’s (deceased) 5 sons John Owino Owiso (deceased), Genson Owino Owiso, Mark Odongo Owiso (deceased), George Obuongo Owiso and William Okoth Owiso (deceased), failure to which the court will appoint administrators.***
- 2. Consequently, the Certificate of Confirmation issued to the petitioner, Jasca Awour Onyango on 5th December 2014 be and is annulled***
- 3. An order to declare the interested party Lazaro Oduor Otieno as the owner of the property in Plot No. 1 Ugunja Market is declined***
- 4. The title to Plot No. 1 Ugunja Market shall revert to Nicholas Owiso Oyule (deceased). Once the reverting to the Nicholas Owiso Oyule (deceased) is completed; the administrators should proceed with confirmation of the Grant in accordance with the provisions of the law under the Act.***
- 5. Both the petitioner and the 1st applicant are the reason for which the grant in this case has to be revoked. Each party shall therefore bear its own costs.***

**DATED AND DELIVERED THIS 27<sup>th</sup> DAY OF July 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant -

Petitioner - Felix

Respondents - Ms Kyanuzima

Interested party - N/A