



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**SUCCESSION CAUSE NO.715 OF 2014**

**IN THE MATTER OF THE ESTATE OF:**

**LUKIO OLUOCH OBIERO.....DECEASED**

**BETWEEN**

**SAMSON ONGONGA OLUOCH....APPLICANT/OBJECTOR**

**AND**

**DAVID OTIENO OLUOCH.....RESPONDENT/PETITIONER**

**JUDGMENT**

1. **LUKIO OLUOCH OBIERO** (deceased) died on 14/7/1993, and his son **DAVID OTIENO OLUOCH** applied for and obtained grant of letters of administration intestate on 8<sup>th</sup> June 2015 – this was subsequently confirmed on 23<sup>rd</sup> February, 2016.

The deceased was the registered owner of Land Parcel **No.KANYAMWA/KABONYO/KWANDIKU/143**, which was then distributed between **DAVID OTIENO OLUOCH** and **DANIEL OWITI OLUOCH** in equal share.

2. When **SAMSON ONGONGA OLUOCH** learnt about the grant he filed a summons for revocation or annulment of the grant under **Section 76** of the **Law of Successions Act (Rules 26 (1), 44, 49, 59 and 63)**, on grounds that the same was fraudulently obtained. Further that the petitioner failed to obtain consent from the other beneficiaries, nor did he disclose to the court that there were other beneficiaries of the estate namely the applicant (plaintiff) who was the deceased's son from his 2<sup>nd</sup> wife.

3. He also pointed out that the defendant failed to disclose to the court that some portions of the deceased's aforementioned land had been sold to **PAUL OWINO OGINGO** and **HEZRON OKELLO KOLLA**. The defendant and his brother **DANIEL OWITI OLUOCH** have also sold the entire parcel to **SAMSON AKUMU NYANGIYE** at Kshs.580,000/= without considering the plaintiff and the purchaser's interest.

4. It was the plaintiff's evidence that the late **LUKIO OLUOCH OBIERO** had married two wives namely; **SARAH OMOLLO OLUOCH** with whom he had two children –

- **DAVID OTIENO**
- **DANIEL OWITI**
- Apparently two others had died.
- The 2<sup>nd</sup> wife **EUNIA ANYANGO OLUOCH** bore him –
- **JOSEPH OBIERO**
- **SAMUEL OKOTH**
- **SAMSON ONGONGA**

5. The two wives and one son (**SAMUEL OKOTH**) are now deceased – their death certificates were presented to confirm that.

6. The matter proceeded with *viva voce* evidence and **SAMSON ONGONGA OLUOCH** (PW1) informed this court that the area chief, village elders and even fellow villagers knew and recognised him as Lukio's son. He explained that the asset in dispute is the place where he was born and grew up and even built his home. He buried his mother and wife on the land, and David attended their funerals.

7. He further stated that when he realized that the area Assistant Chief **MARGARET OKOTH** of **LOWER KABONYO** Location had not

included him in her letter setting out the deceased's beneficiaries, he asked her, and she informed him that she simply relied on the information given by the defendant that those listed in the letter were the only heirs to the estate.

8. The plaintiff explained that when filing his objection he obtained a letter dated 20/06/2016 from the Assistant Chief **BERNARD OKOMO** (who knew him) because the area chief was on leave. This letter confirmed that the plaintiff was one of Lukio's dependants. He later obtained another letter from the chief of **EAST KANYAMWA** location confirming that he was the deceased's son. He stated:-

**“I am the biological son of LUKIO and I am prepared to be subjected to DNA test if that is what DAVID wants so long as he meets the costs, because I cannot afford the test.”**

9. He urged the court to revoke the grant whose effect disinherited him from his share of his father's property and also left out his late brother's son one **BABU OBIERO**.

10. The plaintiff lamented that meanwhile the defendant is busy disposing of their father's property. It was his contention that no family member was involved in the consent which seemed to have only included **SAMSON AKUMU NYANGIYE** whose name now appears on the title document, yet there are other persons namely **PAUL OWINO OGGINGO** who bought 3 acres and **HEZRON** who bought one acre, and in fact live on the land.

The plaintiff was not aware of land in **LEWE KWAR**.

11. On cross examination he stated:-

**“The 1<sup>st</sup> wife had girls namely TURFENA, DAUDI, JOSHUA and DANIEL ... If you say the 1<sup>st</sup> house had 3 boys and 4 girls, I can't comment.”**

12. He further stated that his mother was married in the 1940's and he was born in 1970. Being his mother's last born he could not tell whether by the time she got married she already had 3 other children.

13. He confirmed on cross examination that **PAUL** lives on the land after purchasing it from **DAVID** and that he (plaintiff) witnessed the sale. So if he witnessed the sale then why is he complaining? He stated that initially the defendant wanted to sell 5 acres to **PAUL**, but he (plaintiff) objected and after consulting they agreed on a sale of 3 acres, because the land measured 12 acres.

14. The plaintiff further stated that his consent to sell was pegged on the understanding that his mother's house would get 6 acres and the defendant's mother's house would also get 6 acres. But the 3 acres sold would be deducted from that share, thus leaving the 1<sup>st</sup> house with 3 acres. He informed this court that the sale was propelled by the defendant's need for funds so as to secure treatment as he was ailing.

15. The plaintiff denied suggestions that his mother vacated the matrimonial home on the land in issue, after burying her first born son (**SAMUEL OKOTH**) saying his brother died after their mother had died. He also confirmed that one village mate named **OWINO** also bought a portion of the land in question.

The plaintiff stated –

**“All I want is my share and for my brother's son, not to evict the buyers. Paul and Hezron can inherit as buyers but let me get my share ...”**

16. **JAMES OPONDO ONYANGO** (PW2) a clan elder from **JANYAWO** village in **KANYAMWA** told the court that the late **LUKIO** had two wives and that the plaintiff was the 2<sup>nd</sup> wife's son. He also confirmed attending the funerals of **LUKIO**, his 2<sup>nd</sup> wife **EUNIA**, the plaintiff's wife and child. It was his evidence that the plaintiff was born when he was present. According to him the defendant was never present at those funerals because his mother had moved away with them after **LUKIO**'s demise.

How does he know so much about the **OLUOCH** family? He stated:-

**“The asset in contest is near our land, separated only by a path.”**

17. He also confirmed that **PAUL OWINO OGGINGO** lives on the land, having purchased it from the defendant. He was also aware that one by the name **JASEME** tills the land but does not live on it.

18. On cross examination PW2 stated he did not know Lukio's first wife much as she was much older than him and would never refer to her by her official name. It was his evidence that Lukio's wife moved away after his death and settled in **SEME**. He was not aware of a home established for the plaintiff's mother by Lukio at **LEWE KWAR** village. He was also not aware of a situation where the plaintiff's mother left her matrimonial home three years after marriage and returned with the plaintiff.

19. **PAUL OWINO** (PW3) confirmed that he lives on part of parcel NO. **KANYAMWA/KABONYO/KWANDIKU/143** which he bought from the defendant on 28/06/99. He knew the family of **LUKIO OLUOCH OBIERO** as they are from the same village. He confirmed that the deceased had two wives, and that the plaintiff is from the 2<sup>nd</sup> house. When he (PW3) made payments for the purchase, the defendant would bring the plaintiff along to witness. He too is unaware of land in **LEWE KWAR** belonging to the deceased.

20. PW3 confirmed that **HEZRON OKELLO** also bought a portion of the same parcel in issue and even planted trees thereon. It was his evidence that the plaintiff's mother was well known to him as they used to fellowship together and attend common social events.

21. According to this witness, it is actually the defendant's mother who vacated the matrimonial home together with her children and left the plaintiff's mother on the land.

22. On cross examination he confirmed that the defendant had offered to sell to him 5 acres of land but the plaintiff objected and they eventually settled at 3 acres. He stated:-

**“Daudi told me the part he was settling belonged to his mother,**

**and the part he was leaving belonged to Samson's mother .... when the land was sold to me SAMSON was present and signed the agreement....”**

However Samson did not sign the agreement but signed documents to confirm the payments.

23. PW3 had his witnesses who were present during the sale, but they did not sign the agreement as they were illiterate. The defendant did not have a witness and said the chief would be his witness.

24. This witness has filed a case against the defendant because it turns out that the latter has sold the same parcel of land to another person after filing the succession case.

25. **GRACE ATIENO** (PW4) the chief of East Kanyamwa location (which comprises Upper Kabonyo, Lower, Kabonyo and Unga sub locations, confirmed that she knew Lukio Obiero as a resident of Lower Kabonyo, and he was also her neighbour. PW4 was born in the area and also got married there. She was categorical that the late Lukio had 2 wives – namely **Sarah Omollo** and the defendant was among her children.

26. She also knew the 2<sup>nd</sup> wife **Eunia** and that she too had children. It was her testimony that the 2<sup>nd</sup> house had three beneficiaries which included a grandson. She stated:-

**“I know Margaret Awino Okoth as the Assistant Chief of Lower Kabonyo sub location and if she said Lukio only had one wife and two sons, then I can only say she probably did not consult to establish the true beneficiaries.”**

27. On cross examination PW4 stated that she had interacted with the deceased during his lifetime and informed this court that Lukio's first wife (**Sarah**) vacated the land and moved to another one within the area.

28. She was not aware of **Eunia** having another home established for her by the deceased. She however stated in cross examination that after Lukio's demise, **Eunia** (the 2<sup>nd</sup> wife) left.

29. She confirmed writing the letter dated 8<sup>th</sup> November 2016 which listed the dependants of the deceased within the two houses, saying even as she was proving up she'd used to see the deceased's two wives.

30. The defendant (**DAVID OTIENO OLUOCH**) stated in his affidavit sworn on 3<sup>rd</sup> October 2016 (which he adopted as his evidence in chief) that his father had only one wife named **SARAH OMOLO** with whom he begot seven children (three sons and four daughters). However the four girls and one son died, leaving only him and **DANIEL OWITI**. He however stated:-

**“... the year 1971 my father married a certain woman called Eunia Anyango who already had three children and who resided in our mother's home for about 1 year then my father erected for her a homestead at a place called LEWE KWAR village near Arina School about three kilometers away from our homestead.2**

31. It was his evidence that after three years into the marriage **EUNIA** vacated the said homestead after burying her son **SAMWEL ODHIAMBO**, on that parcel – taking with her one son and one daughter.

32. When his father died, **EUNIA** and her children did not attend the funeral and her whereabouts remained unknown to the rest of the **OLUOCH** family.

33. In 1994 the defendant's mother returned to **SEME**, leaving the land under the care of **OMOLO MIJONDO** and when the defendant returned in 1996, he found the land having been leased to **PAUL OWINO OGINGO**. Later in 2006, when he was diagnosed with a terminal health condition, he decided to look for money for treatment, so he applied for grant of letters of administration of his father's estate to enable him sell the land to **SAMSON NYANGIYE**.

34. He doubts that **SAMSON** (the plaintiff) was sired by his father, even if he is the son of **EUNIA**, and that even if he is 2<sup>nd</sup> wife's son, then he is only entitled to the land at **LEWE KWAR** village. He insists that the plaintiff should prove his relationship with the deceased by a DNA test.

35. On cross examination the defendant confirmed that his father and the 2<sup>nd</sup> wife were buried on parcel No.143, whereas his mother (1<sup>st</sup>

wife) was buried in Seme. Although he insisted that his father owned land in **LEWE KWAR** village he told this court that he did not know the parcel number. He also confirmed that parcel No.143 was registered in the names of **LUKIO OLUOCH OBIERO**. He insists that the plaintiff is an **“out grower”** who was not sired by his father and denies that the plaintiff buried his child and wife in parcel No.143.

On further cross examination the defendant stated:-

**“I said I did not know Samson because he was far from me and I only realised when I came back in 1996 that they had moved to that parcel which I claim .... I did nothing because I knew their mother.”**

36. The defendant denied selling the land to **PAUL OWINO OGINGO** saying he only leased to him 3 acres in the year 1999 at a cost of Kshs.10,000/= and this was reduced in writing as shown in **Exhibit SOO3 (a)**.

37. Counsel filed written submissions where Miss Migai for the objectors argued that the evidence clearly demonstrated that the plaintiff deliberately left out dependants from the 2<sup>nd</sup> house, as all witnesses had confirmed that the plaintiff was a son of the deceased. She also argued that he failed to take into consideration the interest of **PAUL OWINO OGINGO** to whom he had sold 3 acres of the suit land and **HEZRON OKELLO KOLA** to whom he had sold 3 acres and ought to have been considered as liabilities to the estate, and therefore included in the distribution.

38. **MISS MIGAI** described the defendant's actions as laced with bad faith and dishonesty saying whereas in his affidavit he claimed never to have known about the existence of the plaintiff, on cross examination he said he knew the plaintiff as his step mother's son, yet he failed to disclose his existence.

39. The defendant's counsel **MR. G.S. OKOTH** submitted that since the plaintiff admitted that the plaintiff's mother was his father's wife who had three children born out of wedlock, then in view of the definition of a child under **Section 3 (2)** of the **Law of Succession Act** and **Part III** of the **Children Act**, the plaintiff is indeed a child of the deceased and therefore entitled to inherit the deceased's estate.

40. Mr. Okoth further explained that the defendant's conduct was not motivated by fraudulent intention, but a misunderstanding that children born out of wedlock are not children of their deceased father, hence the non-disclosure of material facts under **Section 76** of the **Law of Succession Act**. He conceded that the prayer for revocation of the grant as contemplated by **Section 76** of the **Law of Succession Act** is justified and a fresh grant be issued.

41. I think Mr. Okoth's submissions has made it easier for me – certainly the issue as to whether the plaintiff was sired by the deceased was moot – but fellow villagers including the area administrator confirmed that the plaintiff was a son of the deceased borne from the second wife. As to whether he was biologically sired or born out of wed lock – the principle in law is that the one who alleges the fact must prove it. The defendant is the one who alleged that the plaintiff was not his father's son, so it was upto him to request for and pay for the **DNA** test – which he was not prepared to do, citing financial inability.

42. Be that as it may **Section 3 (2)** of the **Law of Succession Act** provides that:-

**“3(2) References in this Act or child shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, (emphasis mine), and in relation to a male person, a child who he has expressly recognized or infact accepted as his own or for whom he has voluntarily assumed personal responsibility.”**

**3 (3) A child born to a female person out up wed lock, and a child as defined by subsection 2 as the child of a male person, shall have a relationship to other persons through her or him in wedlock.”**

43. From the evidence presented, the deceased had accepted and lived with his 2<sup>nd</sup> wife alongside her children whether he sired them or they were begotten out of wedlock. The plaintiff fits within the provision of **Section 3 (2)** and **3 (3)** cited above.

44. It was therefore improper and dishonest for the defendant to fail to disclose that his father had another wife, who had other children. **Section 76** of the **Law of Succession Act** provides:-

**“that where there is fraud, misrepresentation or non-disclosure of material facts or information a grant shall be revoked.”**

45. The defendant left out beneficiaries who included the plaintiff and his late brother's son.

46. I am satisfied that there are sufficient reasons to warrant revocation of the grant. I order that the grant issued in favour of **DAVID OTIENO OLUOCH** on 8<sup>th</sup> June 2015 and subsequently confirmed on 23<sup>rd</sup> February, 2016 be and is hereby revoked.

(B) The property which had been transferred to other persons as purchasers was sold without taking into account the interest of the rightful heirs to the estate.

47. Consequently the Land Registrar at Homa Bay is directed to cancel the title document issued to **SAMSON AKUMU NYANGIYE** in respect of parcel **NO. KANYAMWA/KABONYO-KWANDIKU/143**, and the same do revert to the original registered owner that is, **LUKIO OLUOCH OBIERO**, pending proper succession and distribution of the estate.

**Delivered and dated this 16<sup>th</sup> day of October, 2017 at Homa Bay**

**H.A. OMONDI**

**JUDGE**