



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
SUCCESSION CAUSE NO. 583 OF 2013
IN THE MATTER OF THE ESTATE OF ODHIAMBO OLIECH – DECEASED
AND
IN THE MATTER OF AN APPLICATION BY DOMNIC ODHIAMBO ODAIRO
AND
IN THE MATTER OF REVOCATION OR ANNULMENT OF GRANT BY
JACKLINE ANYANGO & MARY ALUOCH MUDHUR
RULING

Before me is the Summons for Revocation/Annulment of Grant dated 12th May 2014. The same is brought under Section 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules. It seeks to revoke the grant issued by this Court to Dominick Odhiambo Odairo on 26th February 2013 and subsequently confirmed on 31st December 2013. The applicants are Jackline Anyango and Mary Aluoch Mudhur who are the daughter and sister respectively of the deceased in the cause.

The grounds for the application are that the grant was obtained without the knowledge and consent of the applicants; that the Petitioner concealed material facts and that the grant was obtained by fraud and misrepresentation.

In the supporting affidavit of Mary Aluoch Mudhur sworn on 12th May 2014 she deposes that Jackline Anyango was the only child of the deceased and his wife Obamba Odhiambo also deceased. That upon the death of her husband the deceased in this case, Obamba Odhiambo got married to one Odairo who is the real father of Domnick Odhiambo Odairo, the respondent in this case. She also deposes that whereas she and her co-applicant are the real sister and daughter respectively of the deceased the applicant did not inform them that he had petitioned for Letters of Administration and that he has now embarked on a subdivision and disposition of the land to their detriment yet they are the true beneficiaries of the estate.

In his replying affidavit sworn on 7th August 2014 the respondent deposes that the deceased was his father and that he obtained the grant having been appointed and given the blessings of family members, and that he was subsequently named as the successor of the property to hold in trust for himself, and the family of Obingo Oliech and Ohoto Oliech with the blessings of the family. He deposes that he is now shocked that the objectors have filed this application when they are the same people who gave him their blessings. He reads malice in their application at this stage when the land has been transferred to his

name and what is left is for him to partition and distribute the land to the respective beneficiaries. He describes as outrageous the averment by Jackline Anyango that he is not related to the deceased in this case.

In a further affidavit sworn on 12th January 2015 he gives the impression that the applicants are no longer interested in these proceedings and blames his brothers for the same. The summons were heard by way of viva voce evidence. The applicants categorically disputed that they were informed that the respondent was petitioning for Letters of Administration. On his part the Respondent while reiterating that he was a son of the deceased contended that it was the applicants who told him not to mention their names in the petition.

The parties also called the witnesses and thereafter filed written submissions.

Having considered the evidence and submissions carefully I am satisfied that the application has merit. Section 76 of the Law of Succession Act provides that a grant whether or not confirmed can be revoked if the Court decides inter alia that the proceedings to obtain the same were defective in substance; that the grant was obtained fraudulently by making of a false statement or by the concealment from the Court something material to the case or 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. It is my finding that the aforementioned circumstances all abide in this case. To begin with the respondent obtained the grant on the strength of a chief's letter that said he was the only son of Odhiambo Oliech yet that is not the position. From the evidence it emerged that he was not the biological son of the deceased but was the son of the wife/widow of the deceased and one Odairo the man to who married her upon the death of the deceased. Moreover he could not be the only son of the deceased when in his own testimony he alludes to having brothers. There is however evidence that Jackline Anyango the 1st applicant is the biological daughter of the deceased a fact which the respondent admits at paragraph 9 of his replying affidavit sworn on 7th August 2014. Being the biological daughter of the deceased she is a beneficiary of the deceased and would on a strict interpretation of Section 66 of the Law of Succession Act rank higher in the order of preference to obtain the Letters of Administration. She would also rank higher as a beneficiary under Section 38 of the Succession Act. It is not the fact of being male or female that determines the order of preference under Section 66 of the Law of Succession Act but the relationship to the deceased. The law also recognizes that the discretion on who to grant the letters of administration lies with the Court. It also recognizes that in certain circumstances an applicant who ranks lower in the order of preference may apply for the letters of administration. Rule 7(7) and Rule 26 of the Probate and Administration Rules require such an applicant to inform the beneficiaries who rank equally or higher in writing and to satisfy the Court that he has done so. In his petition for Letters of Administration (Form P & A 80) the applicant states he presents the petition in his capacity as a son of the deceased and in the affidavit in support of the petition (Form P & A 5) he has in the space provided for the survivors of the deceased (paragraph 4) stated "N/A" which means "not applicable." In the replying affidavit he states that it is the applicants who said they did not want to be named in the documents. That is not borne by evidence. The applicants could not have brought this application if that were the position. They both struck me as credible witnesses. Failing to disclose the existence of the applicants amounts to a concealment from Court of something material to the case and which in my view also renders the proceedings to obtain the grant defective in substance as their consent in writing was not sought both at the time of petitioning for the grant and the time it was confirmed. It is also evident that the grant was obtained by means of an untrue allegation of a fact essential in point of law. By stating that he was the only son of the deceased which was an untrue allegation the respondent gave himself an order of priority to which he is not entitled. As already stated the fact that Jackline is a woman and he a man does not confer on him priority. As the only biological child surviving the deceased she has preference over the him and her consent ought to have been obtained in writing as provided under rules 7(7) and 26 of the Probate and Administration Rules both at the time of petitioning for the grant and at the time of confirmation.

It is also noteworthy that as per the certificate of Official Search filed together with the petition the deceased in this case is listed as proprietor of the parcel of land, which is named as the only asset in his estate, together with Obingo Oliech, Opiyo Oliech and Ohoto Oliech. However in his application for

confirmation the respondent had the entire parcel of land devolve to him for "use by the entire family." Legally he would have been entitled only to the share due to the deceased which is what forms his estate but not the entire parcel. Accordingly, I find merit in the summons and hereby order that the grant and subsequent certificate of confirmation be and are hereby revoked and any disposition of the land comprising the estate shall be canceled forthwith so that the land reverts to the deceased and the other co-proprietors. The applicants shall then be at liberty to apply for a grant of Letters of Administration.

Signed, dated and delivered at Kisumu this 22nd day of February 2016

E. N. MAINA

JUDGE

In the presence of:-

Mr. K'Owinoh for the Applicants

Respondents in person

CC: Felix Magutu