



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**SUCCESSION CAUSE NO. 69 OF 2014**

**(Formerly Homa Bay SRM Succession Cause No. 151 of 2011)**

**IN THE MATTER OF THE ESTATE OF**

**WERE NYAKUMBA OSELU alias PETERLIS WERE NYAKUMBA (DECEASED)**

**BETWEEN**

**GEORGE OKOTH WERE .....**

**APPLICANT**

**AND**

**FESTUS OCHIENG NYAKUMBA ..... RESPONDENT**

**RULING**

1. The application before the court is a summons for revocation of the grant issued to Festus Ochieng Nyakumba (“Festus”) in respect of the estate of the late Were Nyakumba Oselu alias Peterlis Were Nyakumba (“the deceased”). The deceased died on 13<sup>th</sup> March 2006. Festus, claiming to be a brother of the deceased, applied for the grant of letters of administration intestate in *Homa SRM Succession Cause No. 151 of 2011*. The grant was issued on 10<sup>th</sup> October 2011 and confirmed on 28<sup>th</sup> August 2011. The deceased’s only property **KANYAMWA/K/K/KADWET/1572** (“suit property”) was shared between Festus and his mother Isidora Odera Nyakumba.
2. The summons for revocation dated 26<sup>th</sup> June 2014 is brought by George Okoth Were (“George”) principally on the ground that the grant was obtained through fraud and misrepresentation. According to his deposition in support of the summons sworn on 27<sup>th</sup> June 2014, he states that he is the biological son of the deceased and that Festus did not disclose that the deceased had a wife and other children and that Festus is not entitled to inherit the deceased’s property. He also stated that his mother and siblings resided on the deceased’s property upto the time of his death when they were removed from the property. The position taken by Festus in his replying affidavit sworn on 30<sup>th</sup> July 2014 is that the deceased never married; that he never had any children and that George was not his son. He further deponed that George, his mother and his siblings never resided on the deceased’s property.
3. In view of the contested allegations, I directed that the matter be heard by *viva-voce* evidence. The applicant testified and called 3 witnesses while the respondent testified and called one witness. A summary of the material testimony was as follows.

4. George (PW 1) testified that the deceased was his father and at the time of his death the deceased was residing on the suit property which he had inherited from his father. He stated that his father had only one wife; Marceline Apiyo and that they had four sons; Charles Ochieng Were, Nicholas Odhiambo Were and Eric Otieno Were and himself and two daughters; Mary Atieno and Elizabeth Aoko. He identified Festus as a step brother to the deceased. When cross-examined he stated that when the deceased was still alive, his elder brother bought land in Kabuoch where they went to stay and that he returned to Kanyamwa in 2013 to build a house on his deceased's father's property. When he returned, he reported to the chief and clan elders who told him to build on the deceased's land.
5. Charles Ochieng Were (PW 2) confirmed that he was the son of the deceased and PW 1's biological brother. He stated that he had bought land in Kabuoch in 2002 where he was residing. In cross-examination he stated that his father assisted him to establish his homestead. He stated that when his father started ailing he took care of him while Festus stayed in Naivasha and by the time his father died, he was staying in Kabuoch and since Festus had access to his father's documents, he acquired them and used them to process the succession case.
6. Samuel Onyalo Oswago (PW 3), the Chief of South East Kanyamwa Location, testified that the deceased was a resident in his area of jurisdiction and that he knew him prior to his death. He confirmed that he was the one who wrote the letter dated 11<sup>th</sup> August 2010 which Festus used to commence the application for grant of the deceased's estate. He recalled that when Festus came to collect the letter to commence proceedings, he came to his office with the deceased's identity card. Prior to issuing the letter, he called the deceased's family members and who came and informed him that the deceased did not leave any descendants and that they had no objection to Festus taking out the application for grant. He further recalled that after some time, the wife of the deceased came to see him with her two sons. They informed him that they wanted a letter of introduction to enable them apply for the grant in respect of the estate of the deceased. After questioning them, he called the family members who had granted Festus permission to apply for the grant. He recalled that at the meeting Festus was present. He stated that family members agreed that the deceased's family could not be abandoned and that they had the right to settle on the property though Festus took the position that he was entitled to the land. He confirmed that he told the George to proceed and put up a house. He later heard there was a dispute and that police officers had been sent to remove George from the land. In cross-examination, he stated that the family of the deceased accepted the deceased's wife and family when they came from Kabuoch.
7. Hannington Ombuto Nyadundo (PW 4) recalled that he knew the deceased before he died as they came from the same clan and resided in the same village. He recalled that the deceased died in 2006 and that Festus was the deceased's brother. He stated that George was the son of the deceased and that the deceased was indeed married to M who came from Uyoma. He stated that they were married in 1984 and he was present during the dowry negotiations. Thereafter the two stayed together until the time of his death and had 6 children. He recalled that the deceased's eldest son bought land in Kabuoch and the rest of the family moved there in 2007 but that the family was still in Kanyamwa when the deceased died and were present during his funeral.
8. Marceline Apiyo (PW 5) testified that she was the deceased's wife and that they were married in 1970 and that they had 6 children together. She stated that they lived together with the deceased in Kanyamwa during his lifetime but that at present she was residing with her son, Charles Ochieng (PW 2) in Kabuoch. She testified that after her husband's funeral, Festus, who is her brother in law and was close to the deceased, demolished her house causing her to leave in Kabuoch. By the time she left was 12 years old and she went to live with an old man who welcomed them. She testified that PW 2 purchased the land much later. She testified that she came back to Kanyamwa with her family in order to reclaim the deceased's land. They visited PW 3 in order to resolve the issue of the land which had been transferred to Festus to no avail. In cross-examination she stated that she attended her husband's funeral and that she left thereafter. She accused Festus of stealing her husband's documents.

9. Festus (DW 1) testified that the deceased was his brother. He recalled that the deceased had a wife called Jane Yonge who was from Alego whom he married in 1961 and they divorced in 1970. They had one child who died in infancy. Festus testified that he was born in 1969 and that he could recall when he was growing up the deceased did not have a wife or any children. He testified that the deceased lived suit property. Festus further testified that the deceased would come to see him when he visited home from Naivasha where he used to work and that he always supported the deceased. He described how the deceased began ailing in 2005 and how the deceased disclosed to him that he wanted him to inherit his land and in that regard gave him his title deed and other documents. The deceased swore him to secrecy as he did not want the family to fight over the land. When the deceased died, he was called from work and he came home on the day of burial. After the funeral the family members briefed him on what had happened and he refunded funeral expenses to some of the family members. He explained that he permitted his brother to plough the land and that is why he did not immediately apply for the grant of letters of administration. He stated that he got the burial permit from the chief and processed the death certificate in 2001. Thereafter he went to the Chief, PW 2, who summoned family members and after inquiring about the status of the family, he wrote the letter dated 11<sup>th</sup> May 2010 which he used to process the application for grant for the deceased's estate. Festus stated that he did not know PW 5 and had only seen her in court and did not see the family at the funeral. He denied that he chased away PW 5 and her children.
10. Joseph Otieno (DW 2) testified that he was the older brother of Festus. He testified that the deceased did not have a wife and children at the time he died and that he did not know PW 1 and PW 5.
11. Under **section 76(b)** of the **Law of Succession Act** the court may on application or on its own motion revoke a grant of representation on the ground that, "*the grant was obtained fraudulently by making a false statement or by the concealment from the court of something material to the case.*" This case therefore falls within the parameters of the law as it is alleged that the respondent failed to make material disclosures and the court making the grant did not have jurisdiction. The issue for consideration is whether the deceased had a wife and children and if so, whether the petitioner failed to disclose this fact. The question must be answered by consideration of the evidence. In answering the issue I bear in mind the issue of burden of proof governed by **sections 107, 108, 109 and 112** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** whose collective effect on the issue of burden of proof is that the person who alleges must prove their case.
12. The applicant asserted that he was the son of the deceased and that PW 5 was his mother and the wife of the deceased. In order to prove marriage, the applicant had to show or prove that the formalities of a Luo customary marriage were complied with although the lack of specific formalities would not invalidate such a marriage or the deceased and the PW 5 cohabited for such a long time raising the fact that there was a presumption of marriage.
13. PW 5 stated that she was married the deceased in 1970. She did not give evidence of the manner in which they were married whether dowry was paid or the other formalities accompanying Luo Customary marriage. She did not name any independent witnesses who witnessed the ceremonies attendant to their marriage. The independent witness who was called to prove marriage, PW 4, was not particularly helpful as he stated that the deceased married in 1984 yet PW 5 stated she was married in 1970. His testimony as to the ceremony was rather threadbare. Turning to whether the marriage could be presumed from long cohabitation, I find the testimony of the applicant witnesses lacking in quality of the nature of cohabitation. If indeed PW 5 cohabited with the deceased from 1970 until his death in 2006, nothing in her testimony adverts to the manner in which she and the deceased lived together, how he took care of the children, what he did for a living, the nature of their relationship and the events surrounding his death.
14. What happened at the deceased's funeral is pivotal in considering whether PW 5 was the deceased's wife. PW 5 testified that she attended the funeral but she left for Kabuoch thereafter and her house was destroyed by Festus. Festus denied this and there was no independent witness

to testify as to what happened at the funeral. The Chief, PW 3, who testified that he knew the deceased, could not recall whether he attended the funeral. The antecedents between PW 5 and the deceased and also PW 5 and the deceased's family could have shed light on what transpired that led PW 5 to be chased away, if indeed she was chased away. PW 1 testified that when he returned to Kabuoch, the family allowed him to settle on the suit property. Although PW 3 recalled that family members came to see him, none of the family members were named or called as witnesses. PW 4 who stated that he was a clan elder confirmed that he did not attend any of the meetings called by PW 3.

15. I was impressed by the testimony of Festus as it was detailed and I was left with the impression that he knew the deceased very well. When considered alongside that of the applicant and the witnesses, I was formed the view that they did not know the deceased very well and that they were being less than candid.

16. The Court of Appeal in *Tadis Travel and Tours Ltd & Another v Astral Aviation Limited* NRB CA Civil Appeal No. 3 of 2008 [2015] eKLR quoted with approval Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the standard of proof in civil cases as follows:

*That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.*

17. Having considered all the facts and applying the principle I have cited in the preceding paragraph, I am satisfied that the applicant has not proved, on the balance of probabilities, that he was the son of the accused and PW 5, his mother, was the wife of the deceased. The applicant's case raises more questions than answers and the only conclusion I can reach is that the summons for revocation must be dismissed.

18. The applicant raised the issue of jurisdiction namely that the value of the property was above Kshs. 100,000/- which is above the jurisdiction of the Magistrates Court under **section 48** of the *Law of Succession Act*. While this is correct, I hold that to revoke the grant would serve no purpose in view of the findings I have made.

19. The Summons for revocation dated 26<sup>th</sup> June 2014 is dismissed with costs to the respondent.

**DATED and DELIVERED at HOMA BAY this 12<sup>th</sup> day of February 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyauke instructed by Nyauke and Company Advocates for the applicant.

Respondent in person.