



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 605 OF 2010

IN THE MATTER OF THE ESTATE OF GIDEON OMESO OGALO (DECEASED)

AND

IN THE MATTER OF REVOCATION/ANNULMENT OF GRANT

AND

IN THE MATTER OF OF AN APPLICATION BY JOHN OGALO OMESO

JOHN OGALO OMESO APPLICANT

VERSUS

KEPHER LANGI OGUWI RESPONDENT

RULING

The deceased to whose estate these proceedings relate is Gideon Omeso Ogalo, who is said to have died on 12th November 1977 aged 103 years. Letters of administration into his estate were issued to Kepher Langi Oguwi, hereinafter referred to as the respondent, on 11th November 2010. The same were confirmed on 27th June 2011 and LR West Asembo/Nyagoko/1375 the only asset thereat vested in the respondent. However on 9th November 2011 John Ogalo Omeso, hereinafter referred to as the Applicant brought a summons for revocation of the grant and certificate of confirmation. He also sought an order for rectification of the register in regard to West Asembo/Nyagoko/1375 in his favour.

The gist of the application is that the respondent misrepresented that he was a son of the deceased and hence obtained the certificate of confirmation of grant through fraud, deceit and concealment of material facts and is now seeking to evict the applicant who is the real son of the deceased.

The application is supported by an affidavit sworn by the applicant on 9th November 2011 to which he has annexed the certificate of death of the deceased, his own national identity card, a letter from the chief South Asembo location evidencing he is a son of the deceased among other documents. In the affidavit he deposes that the respondent has no relationship with the deceased that would warrant him take out grant of letters of Administration to his estate; that he himself has been living on the land – the only asset of the estate – for as long as he can remember the same being his father's property and only came to learn it had been vested in the respondent when on or about 30th October 2011 the respondent demanded that he vacate the land. He states that the only survivors of the deceased are himself and his sister Alberta Oketch and that the respondent acted fraudulently in this matter as he had no right to administer the estate of the deceased.

In a replying affidavit sworn on 29th May 2012 the respondent deposes that his claim to this property arises from the fact that his grandparents resided on the land even before adjudication only for the deceased in this case who he admits is the father of the applicant, to get the entire parcel registered in his name. He deposes that the deceased held the land in trust and they all lived on the land and problems only begun when the applicant attempted to evict them and even cut his (the respondent's) father with a panga following which he was jailed. He also deposes that sometimes in 1995 the matter was arbitrated by the area chief who gave the land to the family of Enos Oguwi who is his father. At paragraph 13 he urges that the land be sub-divided and each family be given a title under his name and at paragraph 14 he deposes that they share great grandparents. To the affidavit he has annexed minutes of a baraza chaired by the Chief Asembo location held on 18th November 2009 and a letter authored by the same chief on 16th September 2010 and the gazette notice in relation to this cause.

The matter proceeded by way of viva voce evidence with the applicant being represented by Mr. Odongo Advocate and the respondent acting in person.

The Applicant testified and called two witnesses. Their evidence echoed the depositions in the supporting affidavit that the applicant and his late sister Alberta Oketch were the only children of Gideon Omeso Ogalo, deceased and that the deceased was the sole proprietor of land parcel LR West Asembo/Nyagoko/1375; that the respondent is the son of Oguwi Mboga who the deceased accommodated on that land although there was no close kinship.

The respondent also testified and called two witnesses. The respondent reiterated that this asset belonged to their great grandfather Ogalo who had two sons one Jaroko Ogalo and Gideon Omeso the deceased in this case. He stated that he was a descendant of Jaroko Ogalo who together with his wife are buried on this land; that his father was orphaned at two years of age and left to be raised by his uncle Gideon Omeso, the deceased. He even married under his care and the property belonged to them both but at the time of adjudication Gideon Meso got it registered in his name solely. A discussion between them resulted in the deceased's admission that he was holding the land in trust for Oguwi Mboga. The respondent grew up on the land peacefully but three years after the death of Gideon Meso, the applicant laid claim to the entire parcel of land and a dispute ensued. That dispute was adjudicated by the area Assistant chief and later by the chief and on both occasions it was resolved that the land belonged to Oguwi Mboga, the respondent's father. The respondent stated that he had followed due process to have this asset vested in him and that he even got a surveyor so that he could hive out a portion for the applicant but the surveyor was chased away by the applicant. He narrated other incidents in which the applicant has troubled him because of this asset and stated that it was the chief who advised him to "change this land into his name."

He contended that he followed due process in doing so and urged the Court to give a fair judgment so that the applicant can get his portion and him his. He called two witnesses George Sam Okeyo Ogalo (DW1) and Andrea Achola Ochieng (DW2) in support of his case.

Thereafter parties filed written submissions.

The applicant through Mr. Odongo, Advocate submitted that it had come out clearly from the viva voce evidence that the respondent was not a son of the deceased in this case and that as he had obtained the grant and certificate of confirmation based on a chief's letter that stated he was, he thereby obtained the grant by making a false statement and on that ground alone the grant and certificate of confirmation ought to be revoked.

Mr. Odongo contended that even were the applicant's claim to a customary trust legitimate the forum to litigate that would be the Environment and Land Court but not this Court. That in any case it transpired from the evidence of the respondent's witness that his father Enos Oguwi had his own land which is where the respondent's inheritance lies. Counsel urged the Court to allow the summons, cancel the recent registration to remove the respondent's name and revert the land back to the deceased. Alternatively after issuing the grant to the applicant order the land be vested in the applicant solely.

On his part the respondent submitted that the applicant is not the only child of the deceased in so far as this asset is concerned as his father too was brought up by Jaroko Ogalo a brother of the deceased; that the asset was registered in the name of the deceased as a trustee for Ogalo's estate. He stated that he filed this cause following two arbitrations by the chief which all ended in his favour. He accused the applicant of war mongering and stated that the only solution was him filing this cause. He argued that as his family has been living and using the land for over twelve years it is dishonest of the applicant to raise an issue. He contended that the applicant has no right to claim the entire parcel of land and further that as the applicant admitted that he wounded Enos Oguwi because of the land it is unlikely that he shall be willing to cede any party of the land to the children of Enos Oguwi. He urged this Court to order that the land be demarcated instead of ordering cancellation of the title deed.

The power to revoke or annul a grant whether or not confirmed is donated to this Court by Section 76 of the Law of Succession Act. Section 76(b) provides that the grant may be revoked or annulled if the Court decides **“that the grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the case;”** Under subsection c the grant may be revoked if it is shown that it **“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.”** The respondent in this case obtained the grant of letters of administration on the strength of a chief's letter which while correctly stating that he was the son of Enos Oguwi also stated that Gideon Omeso, the deceased in this case, died childless. This as it has transpired even from the respondent's own evidence, is an untrue allegation of a fact essential in point of law. He has by his own admission acknowledged that the deceased had two children one of who is the applicant in this case. This fact as well as the fact that he himself is not a son of the deceased were well known to him yet he petitioned as a son of the deceased and did not in that petition list the deceased's children as beneficiaries. During the hearing he acknowledged that he had a brother who is still living yet even this brother was not mentioned anywhere in the petition. His explanation that he excluded him because he lives abroad cannot hold. Rule 26(1) of the Probate and Administration Rules requires that every person entitled in the same degree as or in priority to the applicant be informed before a grant is issued. This was not the case here. The Respondent neither issued notice to the applicant who stands in priority over him or his own brother who would then have ranked in the same degree with him. By stating that he was the only survivor of the deceased as he did before Ali Aroni J on 17th June 2011 he concealed something material to the Court. He clearly was not a son of the deceased and neither was he the only survivor even of his own father. When it came to confirmation he did not seek the consent of the applicant or of his own brother as provided under rule 40(8) of the Probate and Administration Rules. In my view by stating that he was the only surviving son of the deceased in the petition he completely shut out any question regarding consent from any other person who was beneficially entitled to a share of the estate yet he now contends that his entitlement is only to a portion but not the whole of the asset. Not only did he obtain the grant by making an untrue allegation of fact but also fraudulently. If his claim to this asset was a customary law trust then he ought to have disclosed this to the Court. It is my finding that he was not the person best suited to obtain the grant and to administer the estate of the deceased. The same is revoked. Consequently the title issued to him in respect of the asset shall be canceled forthwith and the asset reverted to the name of the deceased. The grant of letters of administration shall issue to the applicant who shall then apply for confirmation after six months and the respondent shall bear the costs of these proceedings.

It is so ordered.

Signed, dated and delivered at Kisumu this 28th day of April 2016

E. N. MAINA

JUDGE

In the presence of:-

Mr. Siganga Advocate holding brief for Odongo for the Applicant

Respondent in person

CA: Sarah