



**REPUBLIC OF KENYA**

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

**MISCELLNEOUS SUCCESSION CAUSE NO. 122 OF 2015**

**IN THE MATTER OF THE LAW OF SUCCESSION ACT CAP (160) OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ESTATE OF HEZEKIAH OUKO ACHIENG – DECEASED**

**ROSE NDHIWA OUKO ..... OBJECTOR**

**AND**

**MAURICE GUYA ODINDO ..... RESPONDENT**

**JUDGMENT**

1. The Objector **ROSE NDHIWA OUKO** through Summons for **Annulment of grant pursuant to section 45, 47, 51 and 76 of The Law of Succession Act (Cap 160) and under Rules 44, 49 and 73 of the Probate and Administration Rules** sought the following orders:

- a. *That the grant of Letters of Administration Intestate of the estate of HEZEKIAH OUKO ACHIENG – deceased herein issued to the Respondent/Petitioner in the Siaya Succession Cause Number 51 of 2007 and certificate of confirmation of the said grant issued on 11th October, 2007 be annulled.*
- b. *That land parcel number KISUMU/KOLUNJE/891 revert back to the estate of the deceased HEZEKIAH OUKO ACHIENG for the Objector/applicant herein to file her application for grant of letters of administration in respect of the said estate.*
- c. *That the transfer and registration of the Petitioner/Respondent as the owner of the land parcel number KISUMU/KOLUNJE/891 be revoked and the property revert back to the deceased.*
- d. *That the cost of this application be provided for by the Respondent/Petitioner.*

2. The Summons is premised on the grounds on the face of the application *interalia*, that

1. *The proceedings to obtain the grant were defective in substance as the Petitioner is not related to the deceased nor the dependants of the deceased HEZEKIAH OUKO ACHIENG.*
2. *The Applicant is the widow and dependant of the late HEZEKIAH OUKO ACHIENG.*
3. *That the grant was obtained by means of untrue allegations.*
4. *That the grant was obtained fraudulently by making of false statement.*
5. *That it is at the utmost of justice that this application be allowed.*

3. The Application is supported further by supporting affidavit of Rose Ndhwa Ouko the Objector and the annexures thereto being RMO1, copy of Official Search dated 18.11.2003, RNO2, copy of the

Certificate of Objection of grant, RMO3 being a letter from area chief dated 25.4.2014, RNO4 copy of Official Search dated 14.4.2014.

4. The Respondent filed a replying affidavit dated 6.4.2016.

5. That on 7th April 2016, Court issued direction that the summons be determined by way of *viva voce* evidence.

6. That during the hearing of the summons the Objector gave evidence and called two (2) (*witnesses*) whereas the Respondent gave evidence and called one (1) witness.

7. The Objectors case is briefly as follows: – That OW1 Ndhwa Ouko, relied on the contents of her affidavit dated 30.11.2015 and all annexures thereto and prayed that the annexures be marked as O exhibits 1, 2, 3 4, 5 and 6 respectively. She further relied on her affidavit dated 22.4.2016. OW1 added that **HEZEKIAH OUKO OCHIENG (deceased)** herein was her biological father and that he died on 2.1.1986. That he had married four wives namely:-

1. *Joyce Ojigo Ouko 1st wife.*
2. *The 2nd wife was mother to Silia Adero Ouko.*
3. *Jane Anyango Ouko – the 3rd wife.*
4. *Magure Abwao – the 4th wife.*

That her father's children were all girls as he did not have a son or anyone by the name **MAURICE GUYA ODINGO** urging that in their family and even in their extended family they do not have anyone by the Respondent's name. She testified that the Chief's letter O exhibit 3 has all her father's children names adding one **SAMUEL OBUYA OUKO** was born after her father's death and he is entitled to the deceased estate though.

8. OW1 testified that the petitioner filed this petition at Principal Magistrate's Court being PMCSC No. 51 of 2007 claiming that he was son to the deceased herein, without informing the Objector and without her consent. She confirmed that her father's estate included parcel No. KISUMU/KOLUNJE/891 which the Respondent transferred it into his name as per O exhibit 4 and O exhibit 2.

9. On the Respondent's claim that he was given the land by Joyce Ojigo Ouko, 1st wife to the deceased herein, through a Will. She refuted the Respondent's claim urging that she is not aware of the alleged gifting and further that Joyce Ojigo Ouko had no land that she could give as a gift to the Respondent. She further averred that her stepmother Margaret Ouko Similarly could not give any land to the Respondent without other beneficiaries knowledge and consent. She further urged the Petitioner's/Respondent's assertion that Objector got married in 1970 and she cannot have the entitlement to her father's estate is baseless, adding in 1970 she was only 9 years and could not have been married then. She stated as a daughter to the deceased herein she has every right over her father's estate.

10. During cross-examination OW1 testified that her mother's name is Silvia Odera Ouko, who is indicated in Chief's letter as Siprosa Aoko Ouko. That she became aware of this cause in 2015 through gazette notice dated 5.7.2007 and she did object to the grant as she did not see the gazette notice. She state she knows Ndhwa Achieng who is her uncle, but denied that her grandfather had a brother by the name Guya. She stated her mother was buried at her father's land whereas, the third wife was buried at her parent's home. That after the death of her father, Margaret Guya left the matrimonial home and was away for 26 years. She further stated she knew Elijah Odindo whose father was Zakariah Ndhwa Ochieng and that Elijah Odindo is father to the Petitioner/Respondent. She immediately retracted that and stated that father to Elijah Odindo is unknown to her. She testified that she has interest over her father's estate adding the Respondent is just a neighbour.

11. OW2 James Onyango Chindo, grandson to Joyce Ojigo Ouko testified that he did not see any document giving land to Elijah Odindo Guya adding his grandmother ere signed by document giving the Respondent land parcel No. 891. He stated the documents referred to as a “Will” is not genuine as he did

not sign it on 15.11.1995 or at any one time. During cross-examination OW2 stated that Elijah Odindo is not his relative and denied having gone to chief when the land was purportedly given.

12. OW3 Josephine Oyoo Obwolo relied on her statement dated 22.4.2011. She averred that she was sister-in-law to the deceased herein who was the owner of parcel No. KISUMU/KOLUNJE/891, which was registered into his name by OW3's husband when the deceased was in Kampala. She averred that Joyce Ojigo Ouko could not give the deceased's land to Elijah Odindo Guya as the land was not hers, she termed it as a lie that the land was given to Respondent's father without involving family members.

13. PW1 Maurice Guya Odindo testified that the land initially belonged to Elijah Odindo Guya before adjudication process in 1976. He testified his father Elijah Odindo Guya was brother to Ouko. That Joyce Ojigo Ouko made a "Will" transferring Land Parcel KISUMU/KOLUNJE/841 to his father, which "Will" he produced as exhibit P1. He stated he Petitioned for the grant of letter of administration because the "Will" gave his father Parcel No. Kisumu/Kolunge/891. During cross-examination PW1, testified that he agrees he is not son of Hezekiah Ouko Achieng. Shown, P & A 80, PW1 admitted he lied when he stated he was son to the deceased and by failing to include the children and wives of the deceased in his application for grant. He stated he did not get consent from as the deceased beneficiaries. He admitted it in his Replying affidavit he did not indicate that he was a beneficiary to the deceased estate nor a son nor did he indicate he was not a relative of the deceased. He stated the land was given to his father through a "Will." He admitted that when he petitioned for the grant, the land was in the name of the deceased urging that Joyce Ojigo Ouko had power to give the land as a surviving wife of the deceased. He admitted that at the same time the other wives of the deceased were still alive. On the issue of citing the beneficiaries he stated he did not cite them as they were far away.

14. PW2 Margaret Abwao Ouko, surviving wife to the deceased, however testified that Parcel No. Kisumu/Kolunje/891 belonged to Elijah Odindo, her brother-in-law, who had given it to her husband as he had not been given any Land. On cross-examination PW2 testified that she was wife number four (4) and when she was married in 1974 she found the deceased living on the land with his three (3) other wives and she does not know how the deceased acquired the land. She stated she does not have any document to show how the land was given to her husband. She gave the names of her late husband's brothers as follows:- Zakaria Ndhiwa, Ezekial Ouko and Oduaro. She stated that her husband did not have a son called Maurice Guya Odindo. She stated that she left her matrimonial home after the death of her husband and was away since 1989.

15. I have summarized the evidence of both the Objector's and Petitioner's case. I have very carefully considered the pleadings, parties evidence as their counsel rival submissions and authorities in support of their opposing positions. The issues for consideration in this matter can be summarized as follows:-

- a. ***Whether the Respondent/Petitioner proved that his father gave land Parcel No. Kisumu/Kolunje/891 to Hezekiah Ouko Achieng?***
- b. ***Whether the Petitioner is a stranger and/or beneficiary to the deceased estate and whether in petitioning for grant of letters of administration intestate he followed the provisions of the Law of Succession Act and the Probate and Administration Rules.***
- c. ***Whether the purported Will by Joyce Ojigo is valid and whether she had capacity to bequeath the parcel No. Kisumu/Kolunge/891 to the petitioner's father Elijah Odindo Guya?***

16. Whether the Respondent/Petitioner proved that his father gave parcel No. Kisumu/Kolunje/891 to Hezekiah Ouko Achieng? The burden of proof that the parcel of land Kisumu/Kolunje/891 initially belonged to the father of the Respondent Elijah Odindo Guya lies with the Respondent. The Respondent called PW2 who testified the Land Kisumu/Kolunje/891 belongs to Elijah Odindo Guya who gave it to Hezekiah Ouko Achieng. PW1 on his part stated that the land initially belonged to Elijah Odindo Guya who gave it to Hezekiah Ouko Achieng as he had not been given any land. PW1 on his part stated the land initially belonged to Elijah Odindo Guya before land Adjudication process in 1976. PW1 did not in his evidence state what happened during Land Adjudication process and why the land if it belonged to his father ended up being registered in the name of the deceased. Objection O exhibit 1, Official Search over Kisumu/Kolunje/891 shows that the land was registered in the name of the deceased herein on

24.6.1976. The deceased as per O exhibit 5 died on 2.6.1980, thus 14 years since being registered as the owner of parcel land Kisumu/Kolunje/891. There is no evidence of any action having been taken by Elijah Odindo Guya or by any member of his family to assert their rights over the land or claim the land. There is evidence from OW1, OW2 and OW3 that the said land was all the time in possession of the family of the deceased. PW2 on being cross-examined by Mr. P.D. Onyango, learned Advocate for the Objector admitted that when she was married by Hezekiah Ouko Achieng in 1974 she found him on the same parcel of land with his other three wives. She admitted she does not know when he started living on the land and that she does not know how the deceased got the land nor does she have any documents to show how her husband got the land. OW2 testified that the land was registered in the name of the deceased by her late husband Odwalo Achieng. The registration of a person as a proprietor of a parcel of land is *prima facie* evidence that he is the owner of the land unless it is proved to the contrary. In the instant case the respondent has not demonstrated either through oral evidence or documentary evidence that Kisumu/Kolunje/891 ever belonged to Elijah Odindo Guya and that he gave it to the father of the Objector. Further the Respondent did not prove that if the land had been given to the deceased herein, it was ever to revert back to his father or his family. I am in view of the foregoing not satisfied that Kisumu/Kolunje/891 was given to the deceased by the Respondent's father and that the Respondent has every right to reclaim the same on that basis.

17. Whether the Petitioner is stranger and/or beneficiary to the deceased estate and whether in petitioning for the grant of letters of administration intestate he followed the provisions of the law of **succession Act and the Probate and Administration Rules? Section 51 of the Law of Succession Act** provides that an application for grant of representation should be made in such form as may be prescribed, signed by the Applicant and witnessed in a prescribed manner. The information required to be included in such a form include the full name of the deceased, the relationship (if any of the applicant) to the deceased, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased and any of the children of any child of his or hers. The Section is couched in a mandatory manner which means it is mandatory for the required information to be given. **Rule 7 (1) of the Probate and Administration Rules** lays down same requirements as set out under **Section 51 of the Law of Succession Act**.

18. In the instant petition in form P & A 9 under paragraph two (2), the petitioner/respondent indicated that the deceased was survived by Maurice Guya Odindo as a “son” and under paragraph three (3) which required him to disclose the deceased's other surviving dependants, the Respondent put “N/A.” Under P & A form 80 the Respondent indicated that he was presenting the petition in his capacity as “son” to the deceased. Still under P & A form 80 the Respondent confirmed that the document was commissioned before a commissioner for Oaths and that every person having equal or prior right to a grant of representation had consented thereto or had renounced such a right or has been issued with citation to renounce such right and to apply for a grant of representation.

19. In the instant cause the Respondent admitted that he is not son to the deceased Hezekiah Ouko Achieng, that he had in completing form P & A 9 lied that he is son to the deceased, he admitted he knew the deceased had wives and children but did not include their names as beneficiaries in filling the form, the Respondent admitted that in seeking the grant of the letters of administration to the deceased estate the proceedings to obtain the grant were defective in substance, that he obtained the grant fraudulently by the making of a false statement or by concealment from the court of something material related to the cause and that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegations were made in ignorance or inadvertently.

20. **Section 29 of the Law of Succession Act** defines who are the beneficiaries. It provides thus:

**“29. For the purposes of this Part, “dependant” means-**

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

- (b) *such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*
- (c) *Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

21. The Respondent in the instant case is not a son to the deceased as he stated. OW1, OW2 and OW3 testified that the Respondent/Petitioner is a stranger to the deceased estate. PW1 in his evidence in chief failed to state exactly who he is to the deceased estate stating that his father was brother to the deceased, a fact strongly contested by the Objector and her witnesses. He did not call any evidence to demonstrate his relationship to the deceased within the meaning of the “dependant” under **Section 29 (a) and (b) of the Law of Succession Act**. I therefore find and hold the Respondent/Petitioner is a stranger to the deceased estate.

22. **Rule 22 (1) of the Probate and Administration Rules**, provides who can issue citation to accept or refuse to take a grant. It provides:-

*“22. (1) A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.”*

The Respondent did not cite the Objector and/or any of the deceased beneficiaries. The Respondent is not entitled to grant as a stranger but he proceeded to fraudulently secure grant in this cause. I further find that he could not as a stranger to the deceased estate, proceed to cite any of the deceased beneficiaries. He did not claim he was entitled as a creditor under **Section 66 of the Law of Succession Act** but as a son which purported relationship he used as a basis for seeking grant and which I have found was fraudulent. He sought and obtained the grant through unlawful means and the same should not be allowed to stand.

23. **Rule 26 of the Probate and Administration Rules** provides how grant of letters of administration can be granted. It provides:-

*“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.*

*(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as*

*the court may require.*

*(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”*

The Objector pleaded and proved that the Respondent did not give her and the other beneficiaries notices as a person entitled to grant in priority to the Respondent. PW1, the Respondent admitted that he sought grant secretly and did not file any consent to representation of the grant duly executed by the Objector and the beneficiaries to the deceased estate. I therefore find that the grant issued to the Respondent was issued in complete disregard of the **Probate and Administration Rules** which are mandatory.

24. On confirmation of the grant, the petitioner was obligated to serve notice of the application to all beneficiaries, obtain the consent on the mode of distribution and the confirmation of grant. In case the beneficiaries were unable to attend confirmation of the grant. It is prudent for the petitioner to have copies of National identities of all other beneficiaries certified, attached to their consents in case they are unable to attend confirmation. **Rule 40 (8) of the Probate and Administration Rules** provides:-

*“40 (8) without delay be placed by the registrar before the court by which the grant*

*was issued which may, on receipt of the consent in writing in Form 37 of all*

*dependants or other persons who may be beneficially entitled, allow the application*

*without the attendance of any person; but where an affidavit of protest has been*

*filed or any of the persons beneficially entitled has not consented in writing the*

*court shall order that the matter be set down as soon as may be for directions in*

*chambers on notice in Form 74 to the applicant, the protester and to such other*

*persons as the court thinks fit.”*

25. Whether the purported “Will” by Joyce Ojigo is valid and whether she had capacity to bequeath the Land Parcel No. Kisumu/Kolunge/891 to the petitioner's father Elijah Odindo Guya? The purported “Will” relied upon by the Respondent reads as follows in “*Dholuo language*”

#### **SINGRUOK MAR WEYO LOPA**

#### **NAMBA 891 NE ELIJAH ODINDO GUYA**

**An Mama Joyce Ojiyo Ouko ID/No.2711872/65 asingora ni Katho to lopa ma koro na mbane andiko maloni owey ni Elijah Odindo Guya ID/No.2724709/65. Kaka Ng' ama oserita eyore duto kendo ema osegedona kendo ema alamone mondo olo lienda ngama ochande to nyasaye nonene.**

**Seyi Mara**

**Joneno – James Onyango (grandson)**

**Seyi - .....**

**TRANSLATION OF THE FREE GIFT OR WILL**

**AGREEMENT FOR TRANSFERING MY PARCEL OF LAND NO. 891 TO ELIJAH ODINDO GUYA**

**I, mama Joyce Ojigo Ouko ID/No.2711872/65, I make a covenant that if I die then my parcel of**

**land whose number I have written above, I leave to one Elija Odindo Guya of ID/No.2724709/65 as**

**somebody has seen me through in all ways and has built me a house and is the one am praying for**

**so that he organize my funeral. Someone who disturbs him, the same God will see.**

**MY SIGNATURE: R.T.P. ....**

**WITNESSES- James Onyango (grandson)**

**Sign .....**

**AGREEMENT OF FREE GIFT**

The mama Joyce Ojigo Ouko came with Odindo Elija and James Onyango on the above agreement on

15.11.95 in the office. Signed  
.....

**CERTIFICATE OF TRANSLATION**

I, Ayub Oteino, a legal clerk at Nyanga & Co. Advocates, do hereby state that I understand both

English and Dholuo to the best of my knowledge and understanding hence have translated this land

**transfer agreement and or free gift/will.**

**Date: 03/04/2016**

**Signature .....**

26. The Respondent's exhibit P 1 purportedly is signed by one witness JAMES ONYANGO (grandson) to be testator of the purported "Will"

27. **Section II (a) (b) (c) of the Law of Succession Act** provides what a valid written "Will" should contain. It provides:-

*witness.*

***“11. No written will shall be valid unless-***

***(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;***

***(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;***

***(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”***

28. I have very carefully perused exhibit P1 to ascertain whether it contains what a valid will should have. The exhibit P 1 has a affixed mark of the purported testator but it does state that it was signed or affixed in presence of the witness. The purported “Will” is only attested by one witness instead of a minimum number of two. The purported written “Will” do not satisfy the requirements of a valid will.

**PW2 JAMES ONYANGO**, who purportedly witnessed the testator affix her mark on the document denied knowledge of the said document, denied that the purported signature was his signature terming the document as fake or a forgery. The Respondent therefore failed to prove the validity of the said Will and even if he had proved that PW2 had signed the document the same would still be invalid as it was not witnessed by the minimum number of two or more than one witness.

29. **Section 5 of the Law of Succession Act** clearly states that one can have capacity to make a Will in respect of his free properties.

**Section 5 of the Law of Succession Act** provides:-

***“ (1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses***

***(2) A female person, whether married or unmarried, has the same***

*capacity to make a will as does a male person.*

*(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing. Appointment by will of executor. Wills caused by fraud, coercion importunity or mistake.*

*(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.”*

30. The exhibit O1, (issued on 18.11.2003), and evidence of Ow1, OW2, OW3, PW1 and PW2 is clear that Kisumu/Kolunge/891 as of the time of making of the purported “Will” exhibit P1, thus on 5.11.1995 was still registered in the name of the deceased Hezekiah Ouko Achieng under the names Ouko Ochien'g. I therefore find that the purported testator was not the owner of Kisumu/Kolunje/891, and therefore she could not bequeath what she did not own or belonged to her late husband. She had not even sought Letters of Administration in respect of her late husband's estate and even if she had without the confirmation of the grant and property transferred into her name she could not have had capacity to make a Will and bequeath the property of her late husband to anyone.

31. I note the Respondent's Counsel raised the issue as to what was applicable law in respect of succession matters prior to the day of 1st day of July 1981, thus before the commencement date of the Law of Succession Act. I think it would be inappropriate for this court to venture into dealing with that issue, simply because it is not one of the issues raised either in the pleadings and/or in the evidence of the parties. Secondly as I have stated the issues at hand are, whether the grant was properly applied for, obtained and whether there are sufficient grounds to warrant revocation and/or annulment of the grant. Those were the issues raised before me and the the issue as to the law applicable as regards succession matters prior to the 1st July 1981 was not raised and may be raised at the time of distribution of the deceased estate but not now as I understand the issues raised in the summons were for revocation of the grant. I therefore decline to deal with that issue for the reasons I have stated hereinabove.

**32. The upshot is that the Objector's application is merited and I proceed to make the following orders:-**

- a. **The grant of letters of Administration intestate of the estate of HEZEKIAH OUKO ACHIENG, (deceased) issued to the Respondent/Petitioner in Siaya Principal Magistrate's Court Succession cause No. 51 of 2007, through P & A 41 dated 10.9.2007 and Certificate of Confirmation of the said grant through Form P & A 54 dated 11.10.2007 be and is hereby annulled.**
- b. **That title to land parcel No. KISUMU/KOLUNJE/891 issued to MAURICE GUYA ODINDO on 6.11.2007 be and is hereby revoked and/or cancelled forthwith and the same do revert back to the estate of HEZEKIAH OUKO ACHIENG also known as OUKO OCHIENG.**
- c. **The Objector to petition for grant of letters of administration with other deceased beneficiariwa (as shall agree) in accordance with the provisions of the Law of Succession Act.**
- d. **The Objector is awarded costs of this cause against the Respondent/Petitioner to be agreed and/or taxed by the Deputy Registrar of this Court.**

**DATED SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF JULY, 2016.**

**J. A. MAKAU**

**JUDGE**

**Delivered in Open Court in the Presence of:**

**Mr. P.D. Onyango for the Objector/Applicant.**

**Nyanga & Co. Advocate for Respondent.**

**Objector present**

**Respondent present**

**C.C. 1. Kevin Odhiambo.**

**2. Mohammed Akideh.**

**J. A. MAKAU**

**JUDGE**