



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**SUCCESSION CAUSE NO. 32 OF 2009**

**IN THE MATTER OF THE ESTATE OF SIMEON EMOJONG (DECEASED)**

**AND**

**DAVID ATEE PAPA.....PETITIONER/RESPONDENT**

**VERSUS**

**ATYANG ROVIS.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**TITUS SIMEON PAPA.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**RULING**

1. This cause relates to the estate of Simeon Emojong (the deceased) who died intestate leaving behind an estate comprising of land parcel No. North Teso/Moding/53.
2. The Petitioner David Atee Papa, a son to the deceased obtained grant of letters of administration. His petition is challenged by his brother Titus Simeon Papa (the 2<sup>nd</sup> Objector), a son to the deceased and Atyang Rovis (the 1<sup>st</sup> Objector), the daughter of the 2<sup>nd</sup> Objector and therefore a grandchild to the deceased through a summons for revocation of grant dated 23<sup>rd</sup> July, 2015. In the application it is argued that the Petitioner hid from the Court the fact that he was not the only beneficiary to the estate of the deceased by leaving out his brother.
3. The 1<sup>st</sup> Objector in her affidavit begins by stating that she is suing on behalf of the 2<sup>nd</sup> Objector who is of frail health and mentally unsound. For this reason the Petitioner succeeded in locking out her father's interest. Annexed to the affidavit in support of the summons are treatment notes showing that the 2<sup>nd</sup> Objector is of ill health and suffers from mental disease.
4. The Petitioner on his part failed to answer to the summons for revocation of grant. It is therefore not in dispute that the 2<sup>nd</sup> Objector is a son to the deceased and therefore entitled to a share of the estate of the deceased.
5. In terms of Section 76 (b) &(c) of the Law of Succession Act, Cap. 160 such material non-disclosure of material fact would warrant revocation of the grant in favour of the 2<sup>nd</sup> Objector.
6. For this reason only, the application is warranted. However, there is the allegation that the 2<sup>nd</sup> Objector is mentally unstable. The query that arises thereafter is whether the 1<sup>st</sup> Objector is competent to file the objection on behalf of her father who is in such a state. It is my humble view that the 1<sup>st</sup> Objector ought to

have brought these proceedings either as next friend in terms of Order 32 Rule 15 of the Civil Procedure Rules, 2010 or under the provisions of the Mental Health Act, Cap. 248.

7. The 1<sup>st</sup> Objector is a grandchild of the deceased and the Petitioner who is her uncle and the son to the deceased has priority over her in benefiting from the estate.

8. Furthermore, the 2<sup>nd</sup> Objector has not been adjudged to be a person of unsound mind. A report from a psychiatrist would be essential. The other alternative available to this Court is to conduct an enquiry into the soundness of mind of the 2<sup>nd</sup> Objector and ascertain whether he is capable of protecting his own interests as provided for under Section 26 of the Mental Health Act, Cap 248. However, the Court cannot conduct such an enquiry at this stage of the proceedings.

9. The above notwithstanding, is this one of those cases wherein the need to render substantive justice should be given priority. Reference is made to the decision of the Supreme Court in the case of **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others**[2014]eKLR that:

**“It is also our view that Article 163(4) (a) of the Constitution gives the appellant a “right” to come to Court when seeking a constitutional interpretation and/or application. Such a right should not be abruptly excluded blatantly for non-compliance with a procedural rule, especially where no apparent prejudice to the other party can be deduced.”**

10. Ultimately, the 2<sup>nd</sup> Objector is entitled to a share of the estate of the deceased and no prejudice will be occasioned to the Petitioner.

11. In the circumstances of this case the application succeeds and orders shall issue as follows:

- a. The grant of letters of Administration and the confirmation thereof in respect of the estate of the deceased Simeon Emojong issued to David Atee Papa are hereby revoked.
- b. David Atee Papa and Atyang Rovis are hereby appointed as joint administrators to the estate of Simeon Emojong (deceased) with effect from the date of this ruling.
- c. In view of the fact that the matter was not defended, there shall be no order as to costs.

Dated, signed and delivered at Busia this 18<sup>th</sup> day of August, 2016

**W. KORIR,**

**JUDGE OF THE HIGH COURT**