



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE NO. 30 OF 2014
IN THE MATTER OF THE ESTATE OF SHADRACK OICHOE OISEBE (DECEASED)
AND
IN THE MATTER OF AN APPLICATION FOR GRANT OF LETTERS OF REPRESENTATION
JOE OICHOE OISEBE.....PETITIONER/RESPONDENT
VERSUS
BILIA BOSIBORI OISEBE.....OBJECTOR/APPLICANT
RULING

1. On 19th May 1992 the petitioner herein Joe Oichoe Oisebe commenced succession proceedings over estate of Shadrack Oichoe Oisebe (hereinafter also referred to as the deceased.) Grant of letters of administration intestate was subsequently issued to the petitioner on 30th September 2009. The objector has now filed summons for revocation of the said grant.

2. In the summons for revocation of grant dated 28th December 2009 filed under **Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules** the objector seeks for orders of revocation of the said grant of letters of administration intestate on the grounds that:-

a. **The grant of letters of administration intestate was obtained fraudulently by the making of false statements and by the concealment from the court of material facts to the case.**

3. The application is supported by the objector's affidavit sworn on 28th December, 2009 in which she states that the petitioner concealed material facts from this court with a view to misleading the court by failing to disclose the actual number and identity of all the beneficiaries of the estate of the deceased. She adds that the petitioner's affidavit in support of the petition disclosed that the deceased was survived by the objector, the petitioner and one Tom Oichoe notwithstanding the fact that deceased had four (4) other surviving children namely:- Florence, Margaret, Mary and Pauline. She further claims that the petitioner did not obtain the consent of all the beneficiaries before making the application for grant of letters of administration

4. The objector also took issue with the list of the deceased's assets submitted by the petitioner in the petition for grant of letters of administration and deponed as follows:

a. That property known as Gesima Settlement Scheme/234 is registered in the name of her deceased husband Sweney Manasseh Oisebe and not Shadrack Oichee Oisebe whose estate is the subject of these proceedings. She annexed a copy of the title deed marked as “BBO-1” as proof of her late husband's ownership of the said land. It was therefore the objector's case that the said parcel of land cannot form part of the estate for the deceased as it did not belong to the deceased.

b. That even though land parcel known as Kisii Mun/Block III/36 is registered in the name of Shadrack Oichoe Oisebe, the deceased herein, the said property had been purchased, developed and maintained by her late husband and thus did not form part of the deceased's estate.

c. That land parcel number W/Bogiakumu/1001 is family land and all the beneficiaries are entitled to a portion thereof including the siblings whom the petitioner has not mentioned in the petition.

5. The objector further contended that the petitioner undervalued the deceased estate by stating that the same was worth Kshs. 400,000/= only with a view of defrauding the other beneficiaries of their rightful share of the said estate.

6. It is the objector's case that if the grant of letters of administration intestate issued to the petitioner is not revoked, the beneficiaries of deceased's estate stand to suffer irreparable harm and damage as the petitioner may proceed to transfer all the property to his name to the detriment of the rightful beneficiaries of both the estates of deceased and the estate of her late husband Sweney Manasseh Oichoe.

7. The petitioner did not oppose the application for summons of revocation of grant by the petitioner.

8. When the matter came up before me on 11th April 2016, I directed that the same be argued by way of written submissions. The objector filed her written submissions but the petitioner has to date not filed his submissions.

9. Having considered the summons for revocation of grant filed by the objector, the affidavit in support thereof and the written submissions, I find that the issues that require determination are:-

1. Whether the petitioner was the right person to petition this court for grant of letters of administration.

2. Whether the petitioner sought consent or renunciation from the objector before petitioning for the grant.

3. Whether the objector has made out a case for revocation of the grant of letters of administration issued to the petitioner.

10. From the pleadings filed by the objector, it is clear that the deceased who was the objector's father in law, had other children apart from the petitioner, and one Tom Oichoe.

11. Under **Section 29 of the Law of Succession Act**, the term ‘dependant’ is defined as:

(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.

12. In line with the above mentioned section, I am satisfied that the objector, being a daughter in law to the deceased is a dependant and a beneficiary to the deceased estate as defined under **Section 29 of the Law of Succession Act**.

13. **Section 66 of the Law of Succession Act** sets out the order of preference to be given in petition for

the grant. The section provides as follows:-

“When a deceased has died intestate, the court shall save as otherwise expressly provided, have a final discretion, as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-

- a. **Surviving spouse or spouses with or without association of other beneficiaries’**
- b. **Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- c. **The public trustee; and**
- d. **(d) creditors;**

provided that where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

Rule 7 (7) (a), (b) and (c) of the Probate and Administration Rules provides:-

7. Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having prior preference to a grant by virtue of that section has:

- (a) Renounced his right generally to apply for a grant;**
- or**
- (b) Consent in writing to the making of the grant to the applicant; or**
- (c) Been issued with a citation calling upon him either to renounce such right or to apply for a grant**

14. The petitioner in this cause did not rank higher than the objector in priority and in seeking a grant of administration intestate and was required before the making of the grant to furnish this court with information and satisfy the court that the objector having prior preferences to a grant being a daughter in law of the deceased had renounced her right generally to apply for the grant or had consented in writing with making of the grant to the petitioner or that she had been issued with a citation calling upon her either to renounce such right or to apply for a grant. In the instant case, the only person who seemed to have consented to the petitioner to take grant over the estate of the deceased was the petitioner’s brother, one Tom Oisebe, since he is the only one who has signed the consent to the making of a grant of administration intestate to a person of equal or lesser priority. It is therefore my finding that the petitioner, in failing to seek and obtain the consent of all the beneficiaries, did not comply with the mandatory provisions of **Rule 7 (7) of the Probate and Administration Rules.**

15. Turning to the question of whether or not the petitioner has made out a case for the revocation of the grant, **Section 76 of the Law of Succession Act** provides:-

“A grant of representation, whether or not confirmed, may at any time revoked or annulled if the court decides, either on application by any interested party or of own motion:-

- a.

b. 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.

16. In the instant case, I find that the petitioner was guilty of concealment of material facts when he failed to list all the beneficiaries of the deceased estate. I note that in the Probate and Administration form P&A 5 the petitioner only listed himself, the objector and one Tom Oisebe as the only beneficiaries of the deceased estate, hence he concealed the fact that the deceased also had 4 daughters. Omitting the daughters of the deceased from the succession case is contrary to the provisions of Section 29 of the act which does not discriminate against the children of the deceased on account of their gender. Also see **Rono Vs Rono & Another [2005] IKLR 538**. To leave such a situation unaddressed would also be contrary to the provisions of the Constitution that prohibit discrimination on the basis of sex.

17. Furthermore the objector's claim that the petitioner included LR No. Gesima Settlement/Scheme/234 as part of the estate of the deceased yet the said property belonged to and was registered in the names of Sweney Manasseh Oisebe (now deceased and husband to the objector), has not been denied by the petitioner.

18. In the circumstances having found that the petitioner acted in breach of **Section 29 of the Act, Rule 7 (7) of the Probate and Administration Rules** and having found that he concealed the number and identity of beneficiaries/dependants in the estate of the deceased, I hereby revoke the grant of letters of administration issued to the petitioner dated 30th September 2009. In its place, I hereby issue a fresh grant in the joint names of the petitioner and the objector. The petitioner or the objector are at liberty to apply for the confirmation of the grant which application for confirmation must include the names all the beneficiaries to the estate and only the property belonging to the deceased. Each party shall bear his/her own costs in view of the fact that this case involves members of the same family.

Dated, signed and delivered in open court this 17th day of August, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- N/A for the Applicant
- N/A for the Petitioner
- Omwoyo: court clerk