



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 273 OF 2008

IN THE MATTER OF THE ESTATE OF ONYIEGO OGWORA (DECEASED)

EARNEST MOTURI OGWARA.....1ST APPLICANT

PASKALIA NYANGARA ONYIEGO.....2ND APPLICANT

VERSUS

CHRISTOPHER OBWAGI.....1ST PETITIONER/RESPONDENT

CONRAD MANGERA.....2ND PETITIONER/RESPONDENT

SUSAN N. ANGWENYI.....3RD PETITIONER RESPONDENT

AND

JOHN MOMOIMA ONYIEGO.....1ST RESPONDENT

PETER ANGWENYI.....2ND RESPONDENT

NICHOLAS ANGWENYI.....3RD RESPONDENT

J U D G M E N T

Introduction

1. The deceased herein **Onyiego Ogwora** died intestate on the 22nd August 1991. The Certificate of death attached to the petition for grant of letters of administration in this case reflects his age at the time of death as 90 years. On 10th May 2000, the petitioners herein Christopher Obwagi, Conrad Mangera and Susan Angwenyi were issued with letters of administration intestate over the estate of the deceased in their capacities as the sons and daughter-in law of the deceased respectively. The deceased died intestate and was prior to his death the registered owner of several land parcels but for the purposes of this judgment the land parcel in question is land parcel no. **Central Kitutu/Mwamosioma/1052** (hereinafter "the suit land"). However, in the petition for grant of letters of administration, the assets of the deceased are listed as follows:

- **LR.NO 5/18 Kisii Municipality**
- **LR.NO 958 Mwamosioma Central Kitutu**
- **LR.NO 111/151 Kisii Municipality**

The pleadings

2. On 23rd February, 2011 the applicants herein **Ernest Moturi Ogwora** and **Paskalia Nyangara Onyiego** filed summons for revocation of grant and rectification of register under **rules 47, 59, 63, 73 and 76** of the **Probate and Administration Rules, Section 55 of the Law of Succession Act (hereinafter “the Act”)** and **Section 128 and 129 of the Registered Land Act Cap 300** seeking orders as follows :-

1. Spent

2. Spent

3. That this court be pleased to make a declaration that the sale and transfer of LR No. Central Kitutu/Mwamosioma/1052 (hereinafter also known as the suit land) without confirmation of grant of letters of administration from the names of the deceased is null and void.

4. That this Honorable Court be pleased to rescind, recall, vary and/or null the transfer and registration of LR Nos. 2728, 2729, 2730, 2731, 2732, 2733, 1231, 1232 and the suit land in the names of the 4th, 5th and 6th respondents in lieu and/or in place of the deceased.

5. That the Honorable Court be pleased to grant an order directing rectification of the register in respect of LR No. Central Kitutu/Mwamosioma/2728, 2729, 2730, 2731, 2732, 2733, 1231 and 1232 by deleting the name of the 4th, 5th and 6th respondents and restoring the names of the deceased herein, as the legally registered owner in respect of the subject land pending the confirmation of the grant for equal distribution of the estate.

6. That this Honorable Court be pleased to revoke/annul the grant of letters of administration intestate issued to the petitioners herein on the 10th May 2010.

7. That this Honorable Court be pleased to make such other and/or further orders as may be just and expedient in the circumstances.

8. That costs of this application be provided for.

3. The application is supported by the 1st applicant's affidavit, with the authority of the 2nd applicant, in which he depones that the 2nd applicant and himself are the beneficiaries of the deceased estate and they did not give consent to the petitioners to file succession proceedings in respect to the deceased's estate and that the 4th, 5th and 6th respondents have caused the subdivision and transfer of the estate of the deceased before the confirmation of grant. The applicants state that the petitioners herein sought and obtained grant of letters of administration in respect to the deceased's estate on the 10th May 2000 by concealing material facts and that at the time of his death the deceased was the registered owner of LR No. Central Kitutu/Mwamosioma/1179, 1178, 1173, 1148, 1152 and LR No. Kisii Town/block III/151. He attached copies of the official search marked as annexure “**EM-02**”. The applicant's case is that on 15th March 2006 and 12th June 2006, the 4th, 5th and 6th respondents transferred the suit land from the name of the deceased into their names before the confirmation of grant in respect of the deceased estate. A copy of the green card to this effect was attached to the supporting affidavit and marked as annexure “**EM-03**”. The applicants argue that the subdivision and transfer of the suit land was fraudulent and amounted to intermeddling with the estate of the deceased since no confirmation of grant of letters of administration had been issued so as to entitle the petitioners or any other person to appropriate or alienate the estate of the deceased before the confirmation of grant.

4. It is for the above reasons that the applicant's now contend that said subdivision, transfer and registration of the deceased's said suit land in favour of the 4th, 5th and 6th respondents ought to be

recalled, rescinded and/or nullified.

5. The application was opposed by the respondents through the 5th respondent's replying affidavit dated 21st March, 2011 in which he states that 1st applicant lacks capacity to file any proceedings relating to the estate of the deceased as he (1st applicant) is not a beneficiary entitled to intestacy as defined under section 66 of the Law of Succession Act and that the applicants allegations of fraud have not been particularized.

6. The 5th respondent depones that he (5th respondent) is a grandson of the deceased by virtue of his being the son of one Dr. Charles Peter Angwenyi (deceased) who was the first born son of the deceased herein Onyiego Ogwora and that land title No. Central Kitutu/Mwamosioma/1231 was given to him and his younger brother, Nicholas Angwenyi (the 6th respondent herein) by the deceased in 1991, after his father's death. He contends that the transfer form in respect to the suit property "1231" was signed by the deceased in June 1991 at a time when the deceased was still alive, and it is the subsequent registration of the title that was done later in 2006 and the title was issued in his name and that of his younger brother. He attached copies of the said transfer forms to the replying affidavit annexure "PA1".

7. The 5th respondent further depones that given the fact that the title number 1231 was given to him and his brother by the deceased before his death, the said title did not form part of the deceased's estate and was therefore not the subject of the succession proceedings herein. The 5th respondent explains that the delay in processing of his title did not in any way negate the fact that the land was a gift from the deceased (his grandfather) and that it was the deceased's intention to gift it to them. He further contends that the said title No. Central Kitutu/Mwamosioma 1231 did not form part of the assets of the deceased in this instant succession cause since it is property that the deceased had already gifted to them.

8. The 4th respondent herein John Momoima Obwagi also swore a replying affidavit dated 26th March 2011 in which he depones that the deceased had, prior to his death, sought and obtained the requisite land control board consent from the Municipality Land Control Board to subdivide the suit land into two (2) portions namely LR No. Central Kitutu/Mwamosioma/1231 and 1232. He further depones that upon subdivision, the deceased prepared or executed the transfer forms in favour of the 5th and 6th respondents in respect to LR No. Central Kitutu/Mwamosioma/1231. He attached a copy of the duly signed transfer form as annexure "JMO1" to his said replying affidavit. It is the 4th respondent's case that after the executing the transfer instruments, the same were handed over to M/s Mitema Mogaka & Company Advocates to facilitate their presentation and lodgment at the land registry, at Kisii for registration but that the said registration did not take place because the said advocate died soon thereafter.

9. It is therefore the 4th respondent's case that to the extent that the deceased had executed the transfer documents in respect of LR Nos. Central Kitutu/Mwamosioma 1231 and 1232 prior to his death, the two (2) parcels of land herein did not form part of the estate of the deceased and this explains why they were not included in the schedule of assets in the succession proceedings.

10. He further depones that in November 2010, he sought and obtained consent to subdivide LR No. Central Kitutu/Mwamosioma/1232 into (6) portions thus culminating into LR Nos. Central Kitutu/Mwamosioma/2728, 2729, 2730, 2731, 2732 and 2733. He produced copies of certificates of official search which were marked as "JMO3". He thus contends that to the extent that LR Nos. Central Kitutu/Mwamosioma/2728, 2729, 2730, 2731, 2732 and 2733 arose from LR No. Central Kitutu/Mwamosioma.1232 hitherto registered in his name, the same do not form part of the estate of the deceased.

11. The 2nd applicant herein Paskalia Nyanginyi Onyiego swore a "protest affidavit" dated 30th May 2011 in which she denies having granted the 1st applicant the authority to use her name in the instant application for revocation of grant. She confirms that the deceased subdivided the suit land during his lifetime and transferred portions thereof in favour of the 4th, 5th and 6th respondents herein. She also confirms that she witnessed the said subdivision by surveyors and consequently, the resultant parcels of land being LR Nos. Central Kitutu/Mwamosomia/1231 and 1232 did not form part of the estate of the

deceased as at the time of his death. She disassociated herself from the summons for revocation of grant and the allegations contained in the supporting affidavit.

Oral evidence

12. Parties agreed to canvass the application by way of oral evidence. The 1st applicant herein Ernest Muturi Obwora testified that the deceased had 5 wives and 21 sons and he was a grandson from the 1st wife's house while the 2nd applicant, who had since died, was the 4th wife. He produced several copies of certificates of official search to attest to the fact that at the time of his death, the deceased had several parcels of land and since no certificate of confirmation of grant had been issued to anyone so as to allow the distribution of the property, the estate of the deceased should be reinstated to its state as at August 1991. He further testified that the parcels of land had been irregularly subdivided in following manner:-

- **Central Kitutu/Mwamosioma 1231 measuring 0.63ha in the names of Peter Angwenyi and Nicholas Angwenyi (the respondents) registered on 12th June 2006. That before the registration the title was in the name of the deceased.**
- **Central Kitutu/Mwamosioma/1232 Green card opened 15/9/2004.**
- **That 1st entry is the name of deceased.**
- **That the 2nd entry is the name of John Momoima Onyiego a son to the deceased and 4th respondent. That he was registered on 15/3/2006 long after the deceased had died. That the 4th respondent proceeded to subdivide the title into 6 pieces i.e “EMO2 f-k” exhibit 2 f-k. He further stated that the 6 sub-divisions are currently registered in the name of the 4th respondent before confirmation of the grant.**

13. It was the 1st applicant's case that the deceased estate should not have been distributed before the grant was confirmed and that the court should rectify the register by cancelling the titles issued before the grant is confirmed. He further claimed that to date, the family has not appointed anyone to apply for the grant of letters of administration so that the correct procedure for subdivision of the estate can be carried out. The first applicant reiterated that the activities of the respondents are likely to prejudice other beneficiaries and it is therefore necessary that an administrator be appointed so that the estate can be distributed in accordance with the law. On cross examination he stated that he was a grandson to the deceased from his 1st wife and that his father did not tell him about the subdivision of the suit land when he was alive. The 1st applicant did not call any witness to support his case and therefore closed his case with his testimony only.

14. DW1 was John Momoima Onyiego, the 4th respondent herein. His testimony was that the deceased, who died on 22nd August, 1991 was the registered owner of the suit land and that before his death, the deceased had subdivided the suit land into two portions namely; LR Central Kitutu/ Mwamosioma/1231 and 1232 which he on 17th June, 1991 transferred to the 5th and 6th respondents respectively by executing the requisite transfer forms. He produced the copies of the said transfer forms as exhibit D1 and D2. He further contended that the deceased never complained that his signature had been forged and neither did the 1st applicant, in his testimony, present any evidence to the effect that the transfer forms were forged.

15. The 4th respondent's case was that he was not able to process the titles on time because soon after the deceased executed the transfer forms, he (4th applicant) handed over the duly signed transfer forms to his lawyers for presentation and registration at the lands registry before he proceeded to the United States of America, but unfortunately his said lawyer died before processing the titles and it was only upon his return back to the country in 2006 that he was able to follow up on the registration. He added that he was allocated land parcel number Central Kitutu/Mwamosioma/1232 which he later subdivided to create 6 numbers namely; Central Kitutu/Mwamosioma /2728, 2729, 2730, 2731, 2732 and 2733. He produced copies of official search in support of the subdivision as exhibit D3.

16. The respondent contended that land parcel No. 1232 did not form part of the estate of the deceased because the deceased had already gifted the land to them before his death. The respondent added that the

deceased had prior to his death subdivided his land among all his 21 sons, the father of the applicant included. The respondent similarly closed his case without calling a witness.

Determination

17. I have considered the 1st applicant's application together with the supporting affidavit, the respondents replying affidavit, the oral evidence tendered in court and written submissions. I note that the issues for determination are as follows:

(i) Whether the 1st applicant has capacity to petition for revocation of grant in relation to the deceased estate?

(ii) Whether the suit land formed part of the assets of the estate of the deceased?

(iii) Whether the 1st petitioner has established the grounds for revocation of the grant issued to the petitioners?

18. It is an undisputed fact that the 1st applicant is a grandson to the deceased. Section 66 of the Succession Act provides for the preference to be given to certain persons to administer where deceased has died intestate. The section provides:

When 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 be made, but shall in the best interests of those concerned, be made, 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) Creditors.**

19. The respondents opposed the application on the basis that the 1st applicant is not a direct beneficiary of the deceased but rather a grandson who, according to the respondents does not have a locus standi to object to the issuance of grant. The 1st applicant has on his part stated that he has an interest in the succession case since his father, John Ogwora, who was a direct beneficiary of the estate in question is deceased. Under those circumstances, I find that the applicant has locus standi to file the objection proceedings and the issue of whether or not his father had already received his share of the deceased's estate before the deceased died are issues to be determined at the confirmation and distribution of the estate, in the presence of all the beneficiaries. My position is fortified by the observation of Musyoka J. In the matter of the estate of **Veronica Njoki Wakageto (Deceased) [2013] eKLR**, where stated as follows:

“Under part V, grand children have no right to inherit their grandparents, who die intestate after 1st July, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents indirectly through their own parent, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time the grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

20. In the instant case, the 1st applicant's own father is one JOHN OGWORA is deceased and I find that the 1st applicant is justified to step into his father's shoes and claim directly whatever share of the deceased's estate was due to his father.

21. In the **Re Estate of John Musambayi Katumanga (deceased) [2014] eKLR** Musyoka J held:-

“...I suspect that she is a daughter of the said heir and therefore a granddaughter of the deceased. She is described in one of the papers as a dependant of the deceased. The said Laura Masitsa is not entitled to a share in the estate of the deceased. There are two reasons for this. She is not an heir of the deceased for grandchildren are not entitled to inherit from their grandparents so long as their own parents the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have for provision under section 26 of the Act, and there is no court order making her a dependant of her grandparent but for her to qualify as such she must demonstrate to the court in an application properly brought under section 26 of the Act that she was dependant on the grandparent immediately before his death”.

22. In the instant case as stated in the above authority the 1st applicant as a grandchild is entitled to a share in the deceased estate in view of the fact that his own father, who was the son of the deceased is dead. According to the evidence adduced by the 1st respondent (DW1) the 1st applicant's father was given a share of the deceased estate during the lifetime of the deceased but this would not be a barrier to the applicant claiming a share of the deceased estate that had not been distributed to the beneficiaries during the lifetime of the deceased. It is therefore my finding that the 1st applicant will be justified to lay a claim to his grandfather's estate during the confirmation of the grant herein.

23. On the issue of nullification of grant I find that the 1st applicant has not made out a case for the revocation of grant issued to the petitioners as he has not demonstrated that the petitioners have been at fault or have committed any actions stipulated by the law in Section 76 of the Succession Act Chapter 160 Laws of Kenya specifying the circumstances under which under which a grant can be nullified. The said section stipulates as hereunder:-

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

(a) that the proceedings to obtain the grant were defective in substance;

(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;

(c) that the grant 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;

or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and

(g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

24. In the present case, the 1st applicant has not demonstrated to the court that any of the above of the circumstances exist or that the petitioners are guilty of any misdeeds so as to justify the nullification of the grant issued herein. Instead, the applicants have blamed 4th, 5th and 6th respondents for transferring the deceased's suit land into their names before the confirmation of grant. It is worthy to note that the 4th, 5th and 6th respondents are not the petitioners in this case and therefore, the petitioners cannot be blamed for their misdeeds, if any.

25. The main bone of contention in the instant application is the suit land that the applicant alleges was irregularly transferred from the name of the deceased to that of the 4th, 5th and 6th respondents before the confirmation of grant. The 4th respondent testified that the deceased herein, who was his father, had prior to his death, sought and obtained the requisite land control board consent to subdivide the suit land into 2 portions namely; LR Nos. Central Kitutu/Mwamosioma/1231 and 1232 respectively. It was the 4th respondents case that upon the subdivision, the deceased executed transfer forms transferring LR No. Central Kitutu/ Mwamosioma/1231 to the 5th and 6th respondents jointly, while LR No. Central Kitutu/Mwamosioma/1232 was transferred to him (4th respondent). The 4th respondent explained that his failure to effect the immediate registration of the titles to his name and that of the 5th and 6th respondents was due to his long sojourn in the United States of America and the subsequent death of his lawyer, Mitema Mogaka, whom he had assigned the task of following up on the registration of the new titles.

26 The 4th respondent's testimony is corroborated by the 2nd applicant's affidavit in which she confirms that the deceased had indeed transferred the suit land to the respondents prior to his death. The applicant's case, on the other hand, was that since the suit land was still in the name of the deceased at the time of his death, then despite the execution of the transfer documents the suit land still formed part of the estate of the deceased.

27. The above scenario brings me to the next issue for determination which is, whether in view of the corroborated and uncontested testimony of the 4th respondent to the effect that the deceased had transferred the suit land to them, the said suit land still formed part of the estate of the deceased that ought to have been included in the list of assets of the deceased so as to be subjected to distribution during the confirmation of grant.

28. What is the law on the question of the deceased having obtained the **Land Control Board** consents and signed the transfer forms?

29. The Court of Appeal in **The Registered Trustees Anglican Church of Kenya Mbeere Diocese – vs- The Rev. David Waweru Njoroge – Civil Appeal No. 108 of 2002** quoting **Shells Equity 29th Edition** observed as follows:-

“...where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Thus in *Re-Rose Midland Bank Executor and Trustee Co. Ltd –vs- Rose (1949) Ch. 78* the donor executed a transfer of shares in a private company and handed it with share certificate to the donee who died before it had been registered. Although the donee’s legal title would not be perfected until the company had passed the transfer for registration or at least until the donee had unconditional right to be registered, it was held that the gift was good because the donor had done all that was necessary on his part. Likewise a gift of Registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as proprietor.”

30. In the instant case, I find that the deceased had done everything that was required to be done in relation to the transfer the suit land to his son and grandchildren. Indeed the suit parcels of land are now registered in the names of the 4th, 5th and 6th respondents under the **Registered Land Act Cap 300 Laws of Kenya**. The land given by the deceased to the respondents was a gift to them during the lifetime of the deceased as provided for under section **28 (d)** of the **Act**. The land transferred by the deceased in his lifetime therefore no longer forms part of the estate of the deceased and is not free property that is now available for distribution.

31. How about if the distribution of the land by the deceased was unfair and not equitable? It is noteworthy that none of the deceased's wives or sons have protested concerning the transfer of the suit land to the respondents. It came out in evidence that the deceased had a total of 5 wives and 21 sons and it was therefore quite curious that none of them joined the 1st applicant in his present protest and that even the 2nd applicant who appeared to have been with the 1st applicant at the start of the objection later backtracked by swearing an affidavit of protest in which she supported the respondents' position that the deceased had transferred the suit land to them before his death. It is therefore quite apparent that the 1st applicant is the lone voice of dissent in such a large family thereby adding weight to the respondents' case that the deceased had distributed a large part of his estate during his lifetime.

32. It is my finding that the evidence as presented by the 4th respondent was not rebutted by the 1st applicant. The 4th respondent proved, on a balance of probabilities, that the deceased had distributed his estate *inter vivos* amongst his sons and this explains why the two parcels of land LR Nos. Central Kitutu/Mwamosioma/1231 and 1232 were not included in the schedule of assets of the estate of the deceased.

33. In the end I find that the 1st applicant did not prove his case against the respondents on a balance of probabilities and I therefore dismiss his application dated 23rd February 2011. Since this dispute involves family members each party shall bear their own costs. At this juncture I hasten to add that the petitioners or any of the beneficiaries is at liberty to list the pending application for confirmation of grant for hearing as soon as possible so as to bring this longstanding succession case to an end.

Dated, signed and delivered at Kisii this 15th day of August, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Nyambati for the Applicant

N/A for the Respondent

Mr. Oguttu for the 4th Respondent

Omwoyo: court clerk