



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SUCCESSION CAUSE NO 440 OF 2015

IN THE MATTER OF THE ESTATE OF JOSEPH AJUOGA ADUDA

DENNIS OUMA OGWENO.....1ST APPLICANT

MARGARET ANYANGO DANIEL.....2ND APPLICANT

MICHEAL OWINO OGWENO.....RESPONDENT

RULING

1. The applicants seek that the grant of letters of administration issued to **MICHEAL OGWENO** (the respondent) on 24.11.2010 be revoked and fresh grant of letters of administration be issued jointly to the applicants. This is grounded on the premise that the respondent to whom the grant was issued failed after due notice and without reasonable cause, failed to administer the estate diligently. He is accused of failing to disclose to the court and the area chief the bona fide beneficiaries of the estate by presenting himself as the sole beneficiary.
2. Further that the respondent failed to produce to the court within the prescribed time, any such account or inventory of administration as required by law.
3. They depose in the supporting affidavit that they are the son and wife respectively of the late **JOSEPH AJUOGA ADUDA** who died on 10.11.1984
4. After the respondent was issued with the grant, he illegally took up the administration of the estate and deprived the applicants of income or any share from the estate. He is accused of intermeddling with the estate and appropriating the entire land parcel **No. GEM/KOYOLO/69** in his name
5. The applicants urge this court to find that the respondent is not fit to administer the estate.
6. In opposing the application the respondent deposes in the replying affidavit that the deceased was a biological brother to his late father **SAMUEL OGWENO ADUDA**. It is his contention that his late father and the deceased herein lived on, and cultivated portions of the said parcel which was ancestral land
7. The parcel was registered in the name of the deceased herein but in trust for **SAMUEL OGWENO ADUDA**, so he is entitled to a portion of the same
8. He confirms that the 2nd applicant was married to the deceased herein but they officially separated in 1976 and she re-married and has been living away from home. He also confirms that the 1st applicant was abandoned by the 2nd applicant at the age of 2 years and remained in the custody and care of the deceased until his demise in 1984. Thereafter the late **SAMUEL OGWENO ADUDA** took over the responsibility of caring for him until he came of age.
9. The respondent maintains that he disclosed the identities of the true beneficiaries to the estate of **JOSEPH AJUOGA ADUDA** as **MATTHEW OTIENO OGWENO, DENNIS OUMA OGWENO, CHARLES OGWENO OGWENO**, and himself.
10. He explains that in the year 2013, he invited a surveyor to survey and demarcate the disputed asset measuring 6.8 Hectares into four equal portions to enable him transfer to the four beneficiaries but the process was frustrated by the 1st applicant who became hostile.

11. The respondent says he is holding the asset for his benefit and in trust for the other three beneficiaries and he has not wasted the estate in any way. He contends that it is the 1st applicant who is determined to ensure that the other beneficiaries do get their rightful shares.

12. The 1st applicant deposes in a further affidavit that although their fathers were brothers, each had his own parcel of land- his father owned the one in dispute and **SAMUEL** owned /parcel **No GEM/ KOYOLO/76** as per the annexed search certificate, and their fathers never shared the respective parcels.

13. He also stated that **SAMUEL** never cultivated or lived in parcel **No GEM/ KOYOLO/69** and all his sons have built on parcel No 76. However the respondent in a bid to defraud him of his father's estate lied to the chief that never married and had no children and he never sought the applicant's consent before petitioning for the letters of administration.

14. The respondent then transferred the whole parcel **No GEM/ KOYOLO/69** into his own name and thereafter filed Civil suit **No 15 of 2015 (Homa Bay)** against the 1st applicant knowing very well that he had obtained the title fraudulently.

15. The matter proceeded by way of viva voce evidence wherein **JAMES OMBIDI AMINO**, the assistant chief of **Koyolo sub-location, GEM EAST LOCATION in RANGWE** sub-county told this court that **JOSEPH AJUOGA ADUDA** who was a resident of Koyolo died some years back and he never got to meet him. So when the respondent approached him seeking a letter so a succession cause in respect of the estate, he readily obliged. He later realized that the respondent had given him misleading information.

16. The letter dated 19th October 2009 confirmed to the court that the deceased **JOSEPH AJUOGA ADUDA** was not married and that the petitioner was his next of kin, being a nephew entitled to inherit the disputed land which he would then subdivide for his brothers **MATTHEWS OTIENO OGWENO** and **CHARLES OGWENO OGWENO**. That letter did not state that the parcel was registered in trust for **SAMUEL OGWENO** or that it was ancestral land, but even more significant is that the 1st applicant's name was omitted among the beneficiaries.

17. Later in the year 2015 PW1 learnt that the deceased had in fact been married and even had a son whom he had not met personally. The 1st applicant testified as PW2 and informed the court that the other persons named in the chief's letter as beneficiaries were actually the respondent's brothers. He however confirmed that his mother had left the matrimonial home and only returned after the deceased's demise

18. On cross examination the applicant explained that his father left him when he was a child and he was in the custody of **SAMUEL OGWENO**. After his father died **SAMUEL** begun cultivating the deceased's land, while taking care of it as a brother

19. He further testified that the respondent got elders to demarcate the land after their fathers had died but there was no agreement about sharing out the land. He explained that it was the clan elders who made a proposal that since he did not have other siblings, he should give the respondent a small portion and he had agreed to give his cousins 3 acres- instead the respondent took a large portion yet he already had 3.8 acres which had belonged to his father.

20. **JOSEPH OWINO ONYUKA**, a 2nd cousin to the parties (as they share a great grandfather) was categorical that parcel No. 69 was not ancestral land but belonged to **AJUOGA ADUDA** who had inherited from his father **MATTHEWS ADUDA**. He had joined a group of elders who tried to arbitrate between the parties in the year 2009. The respondent said he wanted 3 acres from the land due to the applicant i.e. parcel No 69, but the elders did not endorse his wish.

21. In his testimony **MICHEAL** confirmed that he is indeed the son of **OGWENO** who was a brother to the deceased Ajuoga Aduda and that when he was born, he found both **ADUDA** and **OGWENO** living on parcel No 69. He insisted that the parcel in question belonged to their grandfather and therefore constituted ancestral land. However after adjudication it was registered in the name of **AJUOGA ADUDA** who is the father of **DENNIS OUMA**. It is his contention that this succession cause was filed after consultations with the family and he was nominated to be the administrator of the deceased's demise. The grant was issued and distribution done and he maintains that Dennis got his share.

22. He explained that on the ground there is a euphorbia fence which separates **AJUOGA'S** portion from **OGWENO'S** and that his father's family has been cultivating a portion of that parcel to-date. He urges this court to rely on what is currently prevailing to determine the mode of distribution, and prays that the application for revocation of the grant issued to him be dismissed.

23. JOSEPH NGARE (DW2), another cousin to the parties stated that he had the history of parcel because he went to the area in the 1960's even before the objector was born parcel belonged to their grandfather who had in fact placed a boundary in 1981 marking what portion belonged to each respective son -t that time both sons were alive, and DW2 was present alongside other elders.

24. It is not disputed that **MARGARET** was married to the deceased (**AJUOGA**) but for undisclosed reasons the relationship was discontinued and she left the matrimonial home. There is no evidence that she remarried. It is also not disputed that **DENNIS OUMA OGWENO** was an issue of the union and that **MICHEAL OWINO** who obtained grant of letters of administration of the deceased's estate is not a child of the deceased. When he applied for the letters of administration, **MICHEAL** described himself as a nephew of the deceased and relied on a letter from **JAMES OMBIDI AMIMO** (the assistant chief of **KOYOLO** chief sub-location) dated 19th October 2009. That letter stated that the deceased was unmarried and left no off spring to inherit his land. The letter referred to land parcel **No Gem/KOYOLO/69-Proprietor JOSEPH AJUOGA OCHODO**

25. That letter formed the basis of the subsequent application for and issuance of the grant of letters of administration. Although the Respondent listed the applicant in the list of beneficiaries, he failed to disclose the true relationship he had with the deceased. Having already presented a letter claiming that the deceased had no child then the inclusion of Dennis alongside the applicants own blood brothers the only inference I can draw is that respondent intended to further hoodwink the court into believing that Dennis was a nephew of the deceased, like all the other listed beneficiaries.

26. It is not even so much the question of mismanaging the estate, it is the false information presented to court. Section 76 (1) provides that:

“ 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;”

27. Whether the land No 69 was jointly owned by the two brothers is beside the point, infact the information presented to the court by the respondent when he applied for the letters of administration was that the parcel belonged to the late **JOSEPH AJUOGA ADUDA**, and he cannot now spin a new line and present a cousin to say otherwise.

28. Consequently there is adequate reason to warrant revocation of the grant of letters of administration issued to **MICHEAL OWINO OGWENO** ON 24th November 2011 and I so order

29. The applicants shall be issued with fresh grant of letters of administration in respect of the estate of **JOSEPH AJUOGA ADUDA**.

30. The costs of this application shall be borne by the Petitioner/Respondent

Delivered and dated this 21st day of September 2016 at Homa Bay

H.A.OMONDI

JUDGE