



**REPUBLIC OF KENYA**

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

**IN THE MATTER OF THE ESTATE OF SAWANGA OKONDA – DECEASED**

**SUCCESSION CAUSE NO.286 OF 2009**

**1. JOSHUA ANAKOLI OKONDA**

**2. THOMAS NATHANIEL OKONDA ..... PETITIONERS/RESPONDENTS**

**VERSUS**

**EUNICE OPINDI KEAH ..... OBJECTOR/APPLICANT**

**RULING**

1. **Eunice Opindi Keah**, (Eunice) objector, took out summons under section 76 of the law of Succession Act, Cap 160 Laws of Kenya dated 22<sup>nd</sup> November, 2006, seeking revocation of grant of representation made to **Joshua Anakoli Okonda** (Joshua) and **Thomas Nathaniel Okonda**, (Thomas) the grounds were that it was fraudulently obtained by making a false statement and concealment from court of material facts; that the proceedings were defective because she did not append her signature on the documents, and that the grant was obtained by means of untrue allegation of a fact material to the case in point of law.

2. In the affidavit in support, the objector deposed that she is the 4<sup>th</sup> widow to the deceased, that she was not made a party to the proceedings although her names appear in those proceedings, that proceedings were taken secretly and that she only came to know about the proceedings on 20<sup>th</sup> September, 2013. According to the objector, she never signed any documents for purposes of petitioning for a grant in this cause. She also protested the fact that she was only given one (1) acre out of the entire estate of the deceased, which was unfair.

3. The applicant further deposed that the deceased's assets were omitted particularly **A/C Number 134620089** and **4526009 National Bank of Kenya** and **Barclays Bank Nakuru Branch** respectively. She therefore asked that the grant be revoked and distribution done afresh.

4. Another summons dated 26<sup>th</sup> February, 2013 was filed by **Eris Abucheri Sawaganga (Eris)** under **section 76(d)(ii)** of the Act, also seeking revocation of grant and appointment of **Joshua A. Okonda** as the administrator in place of the 2<sup>nd</sup> petitioner, on grounds that he had failed to act in accordance with the certificate of confirmation to distribute the deceased's estate. That application was supported by an affidavit by **Eris**, the 2<sup>nd</sup> widow to the deceased. Her main complaint, is that the 2<sup>nd</sup> petitioner has refused to transmit to her the share allocated to her.

5. Although I have not traced a reply to the summons by **Eunice**, the 2<sup>nd</sup> petitioner filed a replying affidavit to the summons by **Eris** and denied any wrong doing. He argued that the summons by **Eunice** should be disposed of before the issue raised by **Eris** could be dealt with. In a supplementary affidavit,

sworn on 10<sup>th</sup> April, 2015. **Eris** stated that the summons by **Eunice** only challenged the share given to her and had nothing to do with her own summons. She took issue with the 2<sup>nd</sup> petitioner's action of registering **Parcel Number Nakuru Municipality Block 29/209** in his name. In a rejoinder by the 2<sup>nd</sup> petitioner in the form of a replying affidavit to the supplementary affidavit sworn on 1<sup>st</sup> September, 2015, the 2<sup>nd</sup> petitioner denied that the said parcel had ever been in the deceased's name.

6. On 3<sup>rd</sup> May, 2016 **Mophat Sawanga Okonda**, (Mophat) son to **Eris**, filed an affidavit of protest sworn on 26<sup>th</sup> April, 2016. According to him, the mode of distribution contained in the certificate of confirmation dated 30<sup>th</sup> April, 2004 is neither fair nor equitable. According to **Mophat**, the deceased left behind four (4) widows and a number of parcels of land in various parts of the country. He therefore proposed that re-distribution be done according to houses, and gave his proposed mode of distribution. Parties then took directions that the two applications be heard by oral evidence and the matter proceeded as such.

7. PW1, **Eunice**, testified that she was the deceased's 4<sup>th</sup> wife,; that she was not informed when the petition for grant of representation was filed, and that she only came to know about it when she went to collect rent in one of the properties left behind by the deceased. She said she was not satisfied with the one (1) acre given to her.

8. The witness told the court that she resides on **Parcel Number 240 Moi's Bridge**, which measures about 7 acres. According to the witness the deceased had several parcels but that she was only given one (1) acre out of **Parcel No.240**. She pleaded with the court that the estate of the deceased be shared fairly amongst all beneficiaries. She produced searches for **Parcel Numbers Miti Mingi/Mbaruk/1727, Miti Mingi/Mbaruk Block 3/728, Butsotso/Shikoti/2452, Kakamega/Moi's Bridge/240, North Bunyore/Embali/1337 and West Bunyore/Embali/424** to show that the properties were in the deceased's name. She further produced a search for **Parcel Number Municipality Block 29 Ronda 209** in the name of **Joseph Juma Abisai**.

9. In cross examination **Eunice** told the court that she was not sure whether **Parcel Number Nakuru Municipality Block 29/209** was in the name of the deceased prior to it being registered in the petitioner's name. She also confirmed that that particular parcel was not in the certificate of confirmation.

10. PW2, **Mophat**, relied on his affidavit sworn on 26<sup>th</sup> April, 2016 and filed in court on 3<sup>rd</sup> May, 2016. He sought a redistribution of the deceased's estate among the 4 widows so that the first widow gets four (4) parcels of land, the second widow, **Eris**, gets 8 parcels, the third (3) widow, **Rose**, gets three (3) portions while the fourth (4) widow, **Eunice**, gets two parcels. In cross examination, the witness admitted that the cause was initially filed in **Kisumu** and that he used to attend court during proceedings. He also admitted that the objector was his step-mother and that she also used to attend court. He lamented that he had not been given his share since the grant was confirmed.

11. DW1 **Thomas** (2<sup>nd</sup> petitioner) on the other hand told the court that the grant was confirmed on 25<sup>th</sup> March, 2004, and the certificate of confirmation issued on 30<sup>th</sup> April, 2004, and that all beneficiaries were in court during confirmation of Grant but never raised objections to the mode of distribution. On the summons for revocation he told the court that distribution of the estate was done in accordance with houses after they all agreed. In his view, **Eris** has never objected to the mode of distribution. He also told the court that **Eunice** was given one (1) acre because she never had a child with the deceased. He testified that **Parcel Number Nakuru Municipality Block 29/209** is in his name and was never in the deceased's name.

In cross examination, **Thomas** told the court that the family proposed the mode of distribution which was approved by the court, admitted that the deceased's estate was reasonably large, and that **Parcel Number Nakuru Municipality Block 29/209** was purchased by the deceased but in the name of the witness. He told the court, that **Rose** had divorced the deceased but her daughter **Joan** got one (1) acre.

12. DW2, **Joshua**, 1<sup>st</sup> petitioner, testified that the deceased was his brother, that they applied for a grant which was made to **Thomas** and him and thereafter confirmed. He never told the court which said he supported.

13. At the close of their respective cases, learned counsel **Miss Wilunda** and **Mr Omukunda** submitted orally, while **Miss Arunga** filed written submissions, **Miss Wilunda** Counsel for 2<sup>nd</sup> objector and holding brief for **Miss Arunga**, submitted that the deceased was a polygamist, left behind four widows, **Jeffreys, Eris, Rose** and **Eunice**. Learned counsel submitted that the deceased died intestate and urged the court to apply provisions of **sections 35-40** of the Act in determining how the estate should be shared out, should the court decline to follow their proposal in the affidavit by **Mophat**. Learned counsel was particularly of the view that **section 35** should apply so that all widows and children are put together and, the estate shared equally with the widows having a life interest in the estate. Counsel ruled out the application of **section 40** of the Act, saying that the number of children in each house had not been established.

14. **Mr Omukunda**, learned counsel for **Thomas**, on his part, submitted that submissions by counsel the objectors are not in line with the evidence by parties. According to counsel, **Eunice's** case was that she takes the parcel she is residing on, **Mois Bridge 240**. Counsel further submitted **Mophat** had attended court throughout and was present when the grant was confirmed. Counsel submitted that the mode of distribution was agreed at a family meeting by all beneficiaries which could be deduced from the time lapse since confirmation and when objections were filed.

15. In counsel's view, that **Rose** was divorced and therefore was not the deceased's widow at the time the deceased died. However her daughter **Joan** was provided for. He therefore urged the court to dismiss the twin summons for revocation of Grant.

16. I have considered the protest, summons for revocation, opposition thereto and submission by counsel on both sides. I have also considered the authorities cited. There are two summons for revocation of grant. **Eunice** moved the court by summons dated 22<sup>nd</sup> November, 2006 under **section 76** of the Law of Succession Act, **Eris** filed summons dated 26<sup>th</sup> February, 2013 under **section 76(d)(ii)** for failure to proceed diligently.

17. Both **Eunice** and **Eris** are widows to the deceased. According to the certificate of confirmation dated 30<sup>th</sup> April, 2004, the deceased's estate was shared amongst the three widows and **Joan**, daughter to **Rose**. **Eunice** and **Joan**, got one (1) acre each which now **Eunice** says was inadequate. The certificate of confirmation shows that the estate of the deceased was shared according to houses. Each house was given some priorities but **Eunice**, the 4<sup>th</sup> widow and **Joan**, a daughter, were given one (1) acre each. It is not clear where **Joan** is but there is no doubt that she is the deceased's daughter.

18. The petition for Grant has names of three widows and three sons. It is not clear which to house these sons belong. It is also known that **Rose** had one daughter and that **Eunice** did not have a child. Although **Eunice** says that she was not aware of these proceedings, nonetheless, she appears on the list of widows left behind by the deceased.

19. I have perused the record of proceedings for 25<sup>th</sup> March, 2004, leading to confirmation of Grant. When the matter came up before **Warsame J.** (as he then was), **Mr Omukunda** appeared before court but the record is silent on whether beneficiaries were in court on that day, and if so, who they were. Although the petitioner told the court that **Eunice** was in court, the record is silent on that. It is therefore not clear except what is told by **Thomas** that, that **Eunice** was aware of these proceedings and that she consented to the mode of distribution which was approved by the court. It is also important to note that whereas the first two houses got several parcels of land, **Eunice** and **Joan** got only one (1) acre each. There is no explanation why this is so except that she had no child. It is also not know how many children each of the other two houses had. **Rose** was according to **Thomas** divorced which perhaps explains why she never got a shares. I have no reason to doubt that Rose was divorced because no one controverted the evidence by **Thomas**.

20. The Grant herein was issued to a brother to and a son to the deceased respectively. **Section 66** of the Act gives general guidelines on the priority to be followed in making a grant of representation. First in line is a spouse or spouses of the deceased, children, other beneficiaries on intestacy with priority according to respective beneficial interest, Public Trustee and Creditors.

According to **Section 71** of the Act before confirmation, beneficiaries and their respective shares must be ascertained. Once confirmed the certificate of confirmation should contain names of beneficiaries and their respective shares. It is not clear whether the properties mentioned in the certificate of confirmation belong to the deceased. This is because, Exhibits PEx1-9 do not include several properties that appear in the certificate of confirmation but whose searches have not been produced. I must state here that **Parcel Number Nakuru/Municipality/Block 9/209** does not form part of the deceased's estate.

21. In the present case, although there are widows alive, the grant was made to a brother and son to the deceased respectively. It cannot also be said that a full list of beneficiaries of the deceased was disclosed. It is not known how many children the deceased had who they are and which house they belong to. The certificate of confirmation does not therefore comply with section 71 of the Act., thus keeping widows at bay.

22. **Eris** sought revocation of Grant on the ground that the administrators had failed to perform their duties since the grant was confirmed in 2004. Her complaint is that despite the fact that the grant was confirmed and beneficiaries shares ascertained, the administrators have not transmitted the shares to the beneficiaries despite her effort to that effect.

23. **Thomas** has not comprehensively responded these concerns both in his replying affidavit and oral evidence. Although the grant was confirmed in March, 2004, there is no explanation why no effort was made to have the parcels transmitted to the beneficiaries even before summons for revocation was filed by **Eunice**.

**24. Section 83(g)** of the Act requires a personal representative to complete administration six (6) months from the date confirmation of Grant or within such longer period as the court may allow. It is evident, therefore, that the personal representatives did not comply with the requirements of **section 83(g)** of the Act in the performance of their duties

**25.** The court has a wide discretion in deciding whether or not to revoke a grant. However, it must be satisfied that there is evidence, either that proceedings leading to making of the grant were defective in substance, the grant was fraudulently obtained by concealment from court material facts, by the making of a false allegation of fact in point of law or that the personal representative has failed to proceed diligently. See **Matheka & Another v Matheka**, [2005] KLR 455.

26. From the record and what I have alluded to above, I am satisfied that the personal representatives did not proceed diligently to conclude administration. Even though a summons for revocation was filed by **Eunice**, the same was filed in 2006, yet the grant had been confirmed in March, 2004. No effort was made to conclude administration within six (6) months as required by **section 83** of the Act, a failure to proceed diligently under **section 76(d)(ii)**.

27. The court has been urged to share the estate equally with counsel for the objectors saying that it has not been established how many children each house had. One will note that the first and second widows were given parcels of land together with their children. It was not ascertained how many children each house had and who they were, to enable the court decide how to distribute the deceased's estate. It is a requirement under **section 71** that beneficiaries be ascertained as well as their respective shares. The number of children would obviously determine the share for each house. Even where the court applied section 40 of the Act, each house would still retreat to section 35 to distribute its share amongst its units, a fit it cannot achieve without certainty of the number of children.

28. Consequently, and for the above reasons, summonses dated 22<sup>nd</sup> November, 2006 and 26<sup>th</sup> February, 2013 are hereby allowed and I make the following orders:-

- 1) The grant of representation made to **Joshua Anakoli Okonda** and **Thomas Nathaniel Okonda** on 22<sup>nd</sup> October, 2002 is revoked, the order confirming the grant made on 25<sup>th</sup> March, 2004 set aside, and the certificate of confirmation issued on 30<sup>th</sup> April, 2004 cancelled.
- 2) A new grant is hereby issued to **Eunice Opindi Keah** and **Eris Abucheri Sawanga**, widows to the deceased.
- 3) **Eunice Opindi Keah** and **Eris Abucheri Sawanga** do file summons for confirmation of Grant with a detailed list of all children of the deceased and attach searches of all the deceased's properties with a new mode of distribution within sixty (60) days from the date hereof and serve the same on **Thomas Nathaniel Okonda**.
- 4) Each party do bear their own costs.

**Dated and delivered at Kakamega this 30<sup>th</sup> day of November, 2016.**

E.C. MWITA

JUDGE