



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.30 OF 2016

IN THE MATTER OF THE ESTATE OF NYAGILO OBENGA (DECEASED)

SAMSON APAYA AOKOAPPLICANT

VERSUS

NYAGILO OBATRESPONDENT

RULING

1. Upon the death of **NYAGILO OBENGA**, the lower court record shows that **SAMSON APAYA** (Applicant) and **NYAGILO OBAT** (Respondent) applied for and obtained letters of administration in their joint names on 27th March 2013. Subsequently the asset which was land parcel **NO. KABUOCH/KACHIENG/942** was registered in their joint names and were issued with a title deed on 31st May 2013.
2. The applicant now seeks that the grant so issued be revoked and a fresh grant be issued to him alone in his capacity as the only surviving brother of the deceased. At the time of applying for the grant of letters of administration, the parties did so in their capacity as brother and cousin to the deceased.
3. The applicant laments that the respondent without any reasonable basis caused himself registered with the applicant as joint owners of the land, and he has subsequently failed to produce the Title Deed for the said parcel
4. In the supporting affidavit, the applicant deposes that the respondent advised him to file a Succession Cause in respect of the Estate of his late brother, and upon request, he gave the respondent Ksh 50,000/- so as to file the cause. The applicant entrusted the respondent with the responsibility of processing the Succession Cause at Ndhiwa Law Courts.
5. Later on, the Chief of South Kabuocho location summoned him and requested him to allow the respondent to be included as a beneficiary-he declined, saying he was the only one entitled to benefit from the estate.
6. After some time the applicant went to inquire from the respondent about the progress of the cause- instead the respondent assaulted him with a metal rod, leading to his hospitalization.
7. He reported the matter to Ndhiwa police station and the Respondent was arrested and prosecuted at Ndhiwa Law Courts.
8. When the Applicant went to Ndhiwa Law Courts registry to make inquiries about the cause, he learnt

that the grant was issued to him and the respondent jointly in **NDHIWA SUCCESSION CAUSE NO 1 OF 2013**. Upon conducting a search, at the Lands Registry in Homa Bay, he was surprised to see that a Title deed had been issued in their joint names. Thereafter, the respondent has completely refused to hand over the title document to him.

9. He contends that the Respondent illegally took up the administration of the estate of the deceased and has deprived him of income or share thereof.

10. The respondent confirmed that the deceased was his cousin and a brother to the applicant as they shared a grandfather. He stated that when the deceased was fencing his land in 1972, he also fenced land belonging to the Respondent's father being parcel **NO KABUOCH/ KACHIENG /942**. He maintains that when he obtained the letter from the Chief, he was accompanied by the applicant and his sister Atieno, and they jointly applied for the grant of letters of administration and were jointly appointed administrators.

11. The respondent did not file a replying affidavit and the court directed that in the interest of justice and to avoid delay the matter proceeds by way of *viva voce* evidence. The respondent denies misleading the applicant, saying that was not possible because the applicant is older than him and is literate. After obtaining grant, the Respondent learnt that the deceased had in fact sold the land to one **PENINA OKELLO** and one **OGANYO**. When the applicant realized that the only part of the land left was what belonged to the Respondent's father, he pleaded with the Respondent to give him money so that he could marry and build a house. The respondent gave the applicant money, and as far as he is concerned, that meant the applicant had sold his share of the land, and the respondent retained his. The agreement was reduced to writing showing that the respondent paid the applicant Ksh 150,000/-. He also produced a sale of land agreement signed by the applicant dated 3rd January 2014 (D Ex 1) showing that the applicant was selling the same land in question to the respondent).

12. When the Succession Cause was filed in Ndhiwa, the parties herein are shown as having jointly signed Form P&A 12 (The affidavit of justification of proposed administrator). Of course there is no telling whether the thumb print on the document was made by the applicant. A document dated 14/12/2012 was presented to the trial court as minutes of a family meeting where the Applicant is recorded as having consented to the Respondent taking up the entire Succession Cause and getting a share of the estate. This at least confirms what the applicant says that he left it to the Respondent to pursue the Cause on his behalf. There was no indication in those minutes that the reason for including the Respondent as a beneficiary was because part of the asset forming the deceased's estate belonged to his father. Indeed the search document presented to the trial court shows the parcel was registered in the name of **NYAGILO OBENGA** in the year 2002, and title issued on 10th September 2007. If the parties cannot agree on an amicable arrangement, and the Respondent genuinely believes part of land parcel **No KABUOCH KACHIENG 942** belongs to his father, he can file a suit against the administrator of the Estate –he does not have to be listed as a beneficiary.

13. Did the parties jointly attend court for the confirmation of the grant? A perusal of the lower court record shows that on 27/03/2013, the Magistrate **N.C. ADALO** directed that the parties were to take a hearing date for mode of distribution before the grant would be given. Oddly enough, on the same date the grant of letters of administration was issued. I cannot begin to guess what transpired, but on the face of the record it is clear that applicant never physically featured anywhere in court so as to confirm that he had accepted the proposed mode of distribution. In the absence of such a record, then it is reasonable to conclude that the grant referred to was obtained in an irregular manner.

14. The Respondent's claim that the deceased had sold part of the land to **PENINA OKELLO** has nothing to support it as:-

- (i) the land remained registered in the deceased's name and there was no transfer of the same
- (ii) there is no evidence whatsoever that such a transaction ever took place

(iii) there is no evidence that the said **PENINA OKELLO** even exists, and if she does, she has not come to court to confirm what the Respondent alleges.

15. There is the convoluted explanation about the applicant requesting for Ksh 150,000 from the Respondent so as to marry and build a house then reference is made to a document purported to be sale agreement signed by the Applicant. It must be pointed out that such a claim was never put to the Applicant during cross examination so that he could confirm or deny the state of affairs. In any event the said document was not even shown to the Applicant and was only produced by the Respondent when presenting his case-this kind of trial by ambush reeks of mischief.

16. It is quite telling that the persons alleged to have witnessed the sale did not even swear affidavits or testify to confirm what the Respondent claims. I can only infer that the document was tailored by the Respondent to suit his own agenda-it is thus rejected.

17. Consequently I am satisfied that the grant issued on 27th March 2013 was irregularly obtained through fraudulent presentation and it is hereby revoked. The County Land Registrar is directed by a copy of this ruling to amend the register so that the parcel reverts to name of the original owner **NYAGILO OBENGA**.

18. The applicant is at liberty to file a fresh application for grant of letters of administration

Delivered and dated this 21st day of **December, 2016** at Homa Bay

H.A. OMONDI

JUDGE