



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
SUCCESSION CAUSE NO. 443 OF 2000

FLORENCE ACHIENG OKOLA1ST APPLICANT

NICHOLAS OUMA OKOLA 2ND APPLICANT

VERSUS

HENRY MICHAEL OCHIENG OBIERO RESPONDENT

RULING

1. There are several applications pending in this cause but the one before me for ruling is the Summons for revocation or Annulment of Grant dated 19th December, 2013 and filed herein on 20th December, 2013. The summons seek orders that the Limited Grant of Letters of Administration ad colligenda issued to **Henry Michael Ochieng Obiero, Mark Antony Owaga and Leandri Oyule Ochieng** on the 18th August, 2000 be revoked and/annulled and further that the Grant of Letter of Administration issued to **Mark Antony Owaga, Leandri Oyule Ochieng and Henri Michael Ochieng Obiero** on the 23rd July, 2003 be revoked and/or annulled.
2. The application which is brought under **sections 47 and 76** of the **Law of Succession Act and Rules 44 and 73** of the Probate and Administration Rules is premised on the following grounds:-

(a) That the proceedings to obtain the Limited Grant of Letters of Administration ad colligenda bona and grant of letter of Administration were defective for the reason that they are premised upon the fact that the deceased died intestate when in fact the grant aforesaid was the result of a Petition for Grant of Probate of a written will by Marc A. Owaga, Leandri Oyule Ochieng and Henry M. Obiero.

b) That the affidavit in support of the petition for the grant of written will was in fact an affidavit in support of a petition for letters of administration.

c) That the petition for grant of probate of written will together with all accompanying documents was not executed by one of the executors of the will known as professor David Wasawo as required by law.

d) That one of the alleged administrators of the estate of the deceased Michael Ochieng Obiero was not appointed as one of the executors of the estate of the deceased. There is no legal basis upon which he became one of the administrators of the estate of the deceased.

e) That the administrators of the estate of the deceased having mischievously failed to produce to the court a full and accurate inventory of the assets and liabilities of the deceased's estate and a full and accurate account of all dealings therewith upto date of account as required by law.

f) That there is a real danger of the estate of the deceased being wasted in the event that the orders sought herein are not granted.

3. These grounds are reiterated in the supporting affidavit of **Rose Dalima Ndong**, the applicant, sworn on 19th December, 2013 in which she further deposes that in any event the administrators did not include her as a beneficiary when they applied for letters of administration intestate.

4. The application was opposed and in the replying affidavit of **Henry Michael Ochieng Obiero** (undated) but filed herein on **17th June, 2014** he deposes inter alia that as long as the validity of the deceased's will is not in question the executors cannot be stopped from administering the estate; that at paragraph 5 of the will the testator gave the executors and/or trustees a power to appoint new trustees and it is upon that power that they so appointed him. In response to the applicant's complaint that she was not in any event listed as a beneficiary in the affidavit in support of the petition for the letters of administration intestate" his response is that in his life time the deceased had given her a house in **Milimani, Kisumu** and that the mere lack of provision for a dependant in a will does not invalidate the will and does not further invalidate the entry into probate of that will. As regards letters of Administration intestate issued on 23rd July, 2013 he disputes that the same were obtained fraudulently and deposes that all documents filed in support thereof indicated that there was a will. He contends that the mistake ought not to be attributed to any of the executors and urges its discretionary power under **Section 76** to annul the letter of administration intestate and to direct that the grant of probate be substituted in its place.

5. As for the Grant obtained on 18th August 2000, he deposes that the same is spent as it had a specific purpose only. At **paragraph 10** he denies that the estate has not been administered in accordance with the will.

6. When the summons came for hearing before me on 8th July, 2014 there was disagreement between the parties whether to proceed by way of the affidavits on record or through **viva voce** evidence and so we adjourned for the advocates to settle that matter. However, on 25th September, 2014 the court was informed that directions had been given that parties file written submissions. From the record only those of the applicant were received. This ruling was supposed to be delivered on 6th November, 2014 but due to pressure of work it was not to be. Notices were issued that it would be delivered on 3rd December and again on 26th February but again the court was pressed for time. I do sincerely apologise for this and for any inconvenience the delay may have occasioned the parties.

7. I have now had ample opportunity to consider all the material placed before me and I must say that I have painstakingly perused the record and my finding is that the summons for revocation has merit. As admitted by the parties the deceased in this cause left "**a will**". I say "**will**" because at paragraph 2 of the supporting affidavit the applicant refers to it as the "**alleged will**". That being the case the court ought to have been approached by way of a petition for Grant of Probate. Indeed the record shows that a petition in that manner was filed on 17th August, 2000 by **Mark Antony Owaga, Leandri Oyule Ochieng and Henry Michael Ochieng Obiero** (see their joint affidavit in support of petition for Grant of Probate sworn on 17th August 2000). The record however, further shows that the next day 18th August 2000 an Amended Chamber Summons is what was placed before the Judge. The same sought a limited grant to enable the executors to withdraw some money from the Bank and also an order that a sum of ksh. 75,000 from funds held by one **Olago Aluoch & Co. Advocates Kisumu** be released to the widow of the deceased. The record shows that the application was successfully canvassed before the judge and that he ordered a limited grant for the purposes of getting the sum of **ksh. 75,000/-** from **Ms Olago Aluoch & Co. advocates** for the purposes of meeting the burial expenses. It is therefore dumbfounding that what came out of this order was the Limited Grant of Letters of Administration ad Colligenda bona dated 18th August, 2000 "limited to the purpose only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same until further representation be granted".

That clearly was an error. The order granted by the judge was only limited to getting the ksh. 75,000/- from the aforesaid firm of advocates and nothing else and became spent as soon as that was done. The Respondents now admit this fact in paragraph 9 of their replying affidavit and cannot be heard to say that they administer the estate on the strength of that grant. The same can be said for the letters of administration issued on 23rd July, 2003. Clearly the proceedings to obtain the said Grant were defective in substance. Contrary to the respondent's deposition that all the documents in regard to that application indicated there was a will, the resultant grant was of letters of administration intestate. The gazette Notice **No. 4048 of 20th June, 2003** was for grant of letters of administration intestate. It is also noteworthy that whereas the said Notice gave 30 days within which to lodge objections the grant of letters of Administration intestate was issued before the lapse of that period. Time would obviously run from the date the publication of the notice in the gazette but not from the date of the notice and the notice itself states so. Section 76 of the law of Succession Act provides that where the proceedings to obtain the grant were defective in substance the court may revoke or annul the grant as the case may be. I have been asked by the respondents to annul the grant and substitute it with a Grant of Probate. I do hesitate to do that as I would have no basis to do so. Secondly, the locus standi of the person asking me to do so is suspect as he is not one of the Trustees/executors named in the will and neither was the procedure to appoint him as such followed. The persons named are **Professor David Wasawo, Mark Owaga and Leandri Oyule Ochieng**. It is alleged that Professor David Wasawo renounced the executorship. However, **Section 59** of the Law of Succession Act provides that he could only do so by oral declaration before the court or by writing under his hand. It has not been demonstrated that he did either and under **Section 62** of the Act Letters of Administration could not issue to any other person until a **Citation** had been issued calling upon him to renounce his executorship. There is nothing to show that this was done either. Indeed what is decipherable from the record is that by the time this cause was filed in court Henry Ochieng Obiero was already purporting to act as an executor. It is noteworthy that under **Section 53(a)(i)** of the Act the probate of the will could be granted to one or more of the executors and it was not therefore mandatory to appoint a third.

8. In the end, I do allow the summons for revocation of the grant if indeed there was one and order that the executors shall be at liberty to apply afresh. There shall be no order for costs.

E.N. MAINA

JUDGE

Dated, signed and delivered and at Kisumu this 19th day of March 2015

In the presence of

P.J. Otieno for applicants (holding brief for Mukele)

Mr. Onyango for Respondent (holding brief for Mr. Olel)

Moses Okumu- Court clerk

