



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**Succession Cause No. 75 Of 2013**

**IN THE MATTER OF THE**

**ESTATE OF LATE WANDIGA AYIENYA (DECEASED)**

**BETWEEN**

**FRED OUMA OWINO ..... 1<sup>ST</sup> APPLICANT**

**EDWARD SAGEGE ODONGO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HULDA AKEYO OTIENO ..... 1<sup>ST</sup> RESPONDENT**

**ELIZABETH AKINYI OWINO ..... 2<sup>ND</sup> RESPONDENT**

**HESBON OKOTH OLOGI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The matter before the Court is an application for summons for revocation of the grant issued to Hulda Akeyo Otieno and Elizabeth Akinyi Owino in respect of the estate of Wandiga Ayienya who died on 15<sup>th</sup> July 1977. The grant was issued in ***Rongo Succession Cause No.271 of 2012***.
2. The application has been brought by Fred Ouma Owino and Edward Sagege Odongo. Fred Ouma Owino has sworn an affidavit on 12<sup>th</sup> November 2013 in which he states that he is a beneficiary of the deceased's property Parcel No. **KANYIMACH/KAMRERI/522** which has since been sub divided into Parcels Nos.1332, 1333 and 1334. He accuses the administrators of having disposed of parcel No.1333 to Hesbon Okoth Ologi, the 3<sup>rd</sup> respondent, while the same should have been distributed equally amongst all the survivors of Wandiga Ayienya (deceased) who had two sons; Jeremiah Owino Wandiga and Peter Otieno Wandiga who are also deceased. He deponed that the remaining parcels Nos. 1332 and 1334 are too small and will render all his siblings landless.
3. There are two replying affidavits. Elizabeth Akinyi Owino, in her affidavit of 4<sup>th</sup> August 2014 depones that the area Chief and the 1<sup>st</sup> respondent deceived her into appending her signature in the papers filed in Rongo in order to give Hesbon Okoth Ologi a portion of the land. She alleges that the said Hesbon Okoth Ologi is a stranger hence the succession process done at Rongo is a sham and ought to be nullified.

4. Hulda Akeyo Otieno opposes the application. She avers in her deposition dated 28<sup>th</sup> March 2014 that Wandika son of Ayienya died on 15<sup>th</sup> July 1977 and had a wife by the name of Boyi Nyatenge who begot two sons and no daughters. The two sons were Peter Owino son of Wandika and Jeremiah Owino son of Wandika. She further deponed that Ayienya, the father of Wandika had only two sons, Wandika and Odongo and had given each son his own share of land. Wandika's portion was registered as parcel No. Kamagambo/Kanyimach/522 while Odongo subdivided his portion into three and registered it in the names of his three sons; Edward Sagege Odongo; Parcel No.523, Peter Odira Odongo; Parcel No.524 and Maurice Owiti Odongo; Parcel No.525.
5. She further deponed that she was the wife of Peter Otieno Wandika having married him in the year 1967 and was blessed with one son and five daughters. Her co-administrator, Elizabeth was the wife of Jeremiah Owino son of Wandika who also had another wife Rispa Ajuma Owino.
6. Hulda Akeyo Otieno further testified that the family and descendants of Wandika held a meeting and decided that both her and Elizabeth should apply for grant of letters of administration for the deceased's estate and she did so. Although she admits that there are errors in the application particularly in the description of parties, the same are not fatal and that it is her and Elizabeth who have priority in administering the estate as Fred Ouma Owino is but a son of Elizabeth and derives his share through her and Edward Sagege Odongo has no right to administer the estate.
7. The parties agreed to rely on the deposition and filed written submissions which they adopted. Mr. Agure, counsel for the applicants, submitted that the documents which the applicants used to file the petition were fake. He also pointed out that the proceedings were taken out without the applicant's consent and that the area Chief conspired with the respondents to exclude the applicants in the process.
8. It is the applicant's case that the grant was obtained fraudulently as the 1<sup>st</sup> and 2<sup>nd</sup> respondent are not wives of Wandika Ayienga (deceased) as they were merely daughters in law as their husbands were sons to the deceased who equally died before the succession was done as such the consent of the applicants and one Joseph Gor was necessary. In the circumstances the applicant contended that they had satisfied the provisions of **section 76** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)*.
9. Mr. Okoth, in opposition, was of the view that in accordance with section 56 of the *Law of Succession Act*, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were qualified to be administrators and as their husbands were deceased they were entitled to be named as administrators even though the Court has the final discretion as to the person or persons to whom the grant is issued under **section 66** of the *Law of Succession Act*.
10. The respondents admit that there was non-disclosure of facts in form **P & A 5** as follows:
  - a. Paragraph 4 did not state the names of Petitioner as surviving the deceased.
  - b. The names including that of the 1<sup>st</sup> applicant are of grandchildren of deceased.
  - c. In paragraph 5 the petitioners are described as widows whereas they are daughters in law.
11. Mr Okoth further submitted that even in light of the errors and the flouting of **section 8** and **9** of the *Probate and Administration Rules*, the revocation of the grant will lead to the appointment of the petitioners who in any event have priority over the respondents.
12. As regard the portion of sold to the third respondent, Hesbon Okoth Ologi, counsel contended that plot No. 1333 was sold after the grant had been confirmed and the original property was in the name of the two administrators hence he is protected by dint of **section 93(1) and (2)** of the *Law of Succession Act*.

13. I have considered the depositions and submissions and I find that the genealogy outlined by Hulda has not been contested. I therefore find that the deceased, Wandika Ayienya had two sons; Jeremiah Otieno Wandika and Peter Wandika who are the husbands of Hulda and Elizabeth respectively. Since their husbands are the persons who are ordinarily entitled to apply for the deceased grant are dead, their wives take priority. As regards Fred Ouma Owino, he the son of Fred Owino hence he has no priority over his mother. On the other hand, Edward Sagegi Odongo being a nephew of the deceased has no right to apply for administration. I therefore agree with applicants that no purpose will be served by revoking the grant.

14. It is agreed that the beneficiaries were not named or identified. The proviso to **section 71** of the **Law of Succession Act** states that,

*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.*

It was thus improper for the court to give the respondent the whole of the property when the other beneficiaries were entitled to specific shares. Furthermore under **section 35** of the **Law of Succession Act**, the applicants as wives of the deceased have a life interest and hold the property in trust for specific identifiable persons. In the circumstances, it was necessary to identify the specific shares due to children of Peter Otieno Wandika and Jeremiah Owino Wandika.

15. As regards the 3<sup>rd</sup> respondent, it is clear that he obtained his title after the grant was confirmed. He is therefore protected by **section 93** of the **Law of Succession Act** which states as follows;

*93(1) Every person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defects or circumstances whatsoever affecting the validity of the grant.*

*(2) Where a grant of representation is revoked or varied, payments and dispositions made in good faith to a personal representative under that grant before the revocation or variation thereof shall be a valid discharge to the person making the same, and a personal representative who has acted under the revoked or varied grant may retain and reimburse himself in respect of any other person to whom representation is afterwards granted might have properly made:*

*Provided that a personal representative who so acted shall account for all payments, dispositions, retentions or reimbursements made by him to the person or person to whom representation is afterwards granted.*

Both applicant and to the title holders had the capacity transfer a valid title and although the 2<sup>nd</sup> respondent stated that she was duped into executing the application for grant of letters of administration, she did not state anything regarding the transfer to the 3<sup>rd</sup> respondent.

16. For the reasons I have set out, I revoke the grant issued in **Rongo Succession Cause No.271 of 2012** and re-issue the same to **Hulda Akeyo Otieno** and **Elizabeth Akinyi Owino**. They shall therefore apply for confirmation in respect of **KAMAGAMBO/KANYIMACH/1332** and **1334**.

17. There shall be no order as to costs.

**DATED and DELIVERED at HOMA BAY this 24<sup>th</sup> day of April 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Odero for Agure Odero and Company Advocates for the applicants.

Mr Okoth instructed by G. S Okoth and Company Advocates for the respondents.