



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 183 OF 2010

**IN THE MATTER OF THE ESTATE OF: CHRISTOPHER OJALA ODONGO aka OJALA
ODONGO.....DECEASED**

AND

MARGARET ADEDE OJALA.....OBJECTOR/APPLICANT

VERSUS

ELISHA RICHARD OTIENO.....PETITIONER/RESPONDENT

J U D G M E N T

- 1). By her application dated 26-2-2014 the applicant/objector prayed for the following orders:
 1. **The court be pleased to annul the grant of letters of administration issued to the petitioner on 21-5-2013.**
 2. **The court be pleased to revoke registration of 13-8-2013 relating to land parcel No. Siaya/Abom/1507 into the names of the petitioner/respondent.**
 3. **An order of rectification of title in respect to land parcel number Siaya/Abom/1507 be issued rectifying the register so as to remove the name of the petitioner/respondent herein as the proprietor thereof.**
 4. **Pending the hearing and determination of this application, an order of inhibition be registered against the title to land parcel No. Siaya/Abom/1507 inhibiting any transfer to a third party or any other dealing in the said land by the respondent/petitioner and others.**
 5. **The honourable court be pleased to issue a restraining order against the petitioner/respondent and others through themselves, their agents or servants from interfering with the applicant's peaceful use and occupation of the land parcel No. Siaya/Abom/1507.**
- 2). The application is supported by the affidavit of the applicant Margaret Adede Ojala sworn on the even date.
- 3). The respondent did file a response to the said application vide the replying affidavit dated 22-5-2014 together with the relevant annexures. At the close of the pleadings the parties agreed to dispose the objection proceedings by way of written submissions.
- 4). It is better at this juncture to delve into the history of this matter as per the pleadings. The deceased herein died on 12-4-1995 intestate and the only surviving child was the objector who apparently was already married and staying far from the deceased.

- 5). After his death one John Ngesa William Alot did apply for letters of administration in respect to the deceased estate vide Bondo Succession Cause No. 3 of 2006. The petitioner herein filed objection proceedings and that petition was dismissed on 20-3-2008. The petitioners cross petition was equally dismissed. Apparently, the applicant herein was equally aware of the Bondo cause and its results.
- 6). Subsequently, the respondent filed citation proceedings against the applicant/objector but still she did not apply for the letters of administration in respect to the estate of his father. This prompted the respondent to apply for the same and despite filing a response to the said citation proceedings she did not pursue it and this court eventually granted the respondent orders to apply for letters of administration. This was done under the cover of Miscellaneous Application No. 524 of 2009.
- 7). From the record also it appears that at the period of confirmation of the said grant land parcel No. Siaya/Abom/1507 was transferred to the respondent while land parcel No. North Sakwa/Abom/1598 to the applicant.
- 8). Subsequently, and after a long period the applicant/objector realised this and proceeded to file the objection proceedings herein arguing that she is the only child to the deceased and therefore entitled to the estate of her deceased father.
- 9). The respondent has countered this argument by stating that the application is brought in bad faith and contrary to the applicant's assertion, she had all along been aware of the proceedings and never bothered to take any action. He contended that he had purchased the suit land from the deceased and it was only due to some technical reasons that the land was not transferred to him. He further contend that he had also sold his cow to the deceased for a sum of Kshs. 8000/= which was still outstanding. He deponed that apart from being a creditor the deceased was his cousin by virtue of their ancestral lineage.
- 10). I have carefully read through the entire pleadings and submissions herein. There is no dispute that the applicant is the deceased daughter. I am equally satisfied by the fact that the respondent has demonstrated the process which he has undertaken all through so as to have the suit property transferred to his name.
- 11). The question that needs to be answered is whether the respondent is indeed a creditor to the estate. From the annexures to the replying affidavit, the sale agreement dated 10-8-1994 clearly indicates that he purchased the land for a total purchase consideration of Kshs. 18000/=. Although the applicant disputes this, I do not see any basis for her objection. In any case and as deponed in her affidavit she got married far away from the deceased and I presume whatever the deceased was undertaking daily may not be within her knowledge.
- 12). The other question is whether the respondent was a cousin to the deceased. Annexure ERO1 in his replying affidavit has not been opposed by the applicant. So in terms of the degree of consanguinity, the respondent can still be counted as being related to the deceased.
- 13). Having established so, what is the position of the applicant here. It appears that the only reason which the applicant inches her application is that of being the deceased only surviving daughter and that there respondent is not a beneficiary at all. I do not think, respectfully, that the applicant learned of succession proceedings herein on 10-10-2013. There is sufficient evidence that the applicant was served with the relevant hearing notices including that of 28-2-2013 as per annexure ERO 12 in the respondent's replying affidavit. I am further satisfied that by virtue of responding to the succession case No. 524 of 2009 (citation proceedings) she was well aware of the issues relating to her father's estate.
- 14). For the grant to be annulled or revoked pursuant to the provisions of section 76 of the Succession Act cap 160, one has to establish the following:
- a. **the proceedings to obtain grant were defective**
 - b. **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.**

- c. **The grant was obtained by means of the untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.**

15). I have carefully read the application herein, and I do not find any reason as advanced by the above section. Although it is quoted as the provisions of the law the application is premised there is no sufficient evidence that:

- a. **the proceedings were defective**
- b. **there were fraud and material non disclosure**
- c. **there were untrue allegation by the respondent.**

16). From the outset there is sufficient evidence to point out that the respondent acknowledged the existence of the applicant herein and that is exemplified even at the time of confirmation where the applicants portion was clearly indicated. Secondly and of great significance is the establishment by the applicant of his entitlement to the deceased estate.

17). Although the deceased did not transfer the land to the respondent during his lifetime, I do not think the provision of the Land Control Act alone apply herein. The respondent has been able to establish that he is both a creditor and a relative therefore capable of being a beneficiary in terms of section 66 of the Succession Act.

18). There was also an allegation by the respondent that the applicant without obtaining the letters of administration did transfer the deceased parcel of land namely Siaya/Abom/1589 to herself then to one Johannes Otieno Angela as per the attached green card marked ERO 13. This was veinly contested by the applicant. However, I do not think that this can be wished away. Even though the respondent lays no claim against the said property it behoves this court to mention that the same was illegal from the word go.

19). In light of the above observations I do not think the application is meritorious. I am not convinced that the provisions of section 76 of the Succession Act have been met. The threshold of that section is so clear that any party proving any of them shall render the proceedings invalid and capable of being annulled. Neither do I believe that the applicant was ignorant of what was taking place in her father's estate from the date of his death. I am satisfied that respondent did take every precaution including filing objection successfully in the Bondo cause to ensure that the deceased estate is well secured. He further demonstrated this by filing the citation proceedings which were apparently ignored by the applicant despite being notified.

20). For the foregoing reasons the application is disallowed. Let the respondent enjoy the fruits of his labour and the applicant to enjoy the use and benefits of land parcel No. North Sakwa/Abom/1598 and by extension land parcel No. North Sakwa.Abom/1589. Each party to bear their respective costs.

Dated, signed and delivered at Kisumu this 20th day of April, 2015.

H.K. CHEMITEI

JUDGE

