



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 56 OF 2012

IN THE MATTER OF THE ESTATE OF ALEXANDER OCHWO (DECEASED)

-between-

SAMWEL ATETWE ALEXANDER PETITIONER

-and-

MICAL KALAKA OCHWO.....OBJECTOR/APPLICANT

RULING

1. **ALEXANDER OCHWO**, the deceased herein married **MICAL KALAKA OCHWO**, the Objector herein. They were blessed with three children being the Petitioner herein **SAMUEL ATETWE ALEXANDER**, **JESCAH MUNDE** and **RUTH ASIKO**.
2. When the deceased eventually passed on, **SAMUEL ATETWE ALEXANDER** petitioned for and was granted the administration of the Estate of **ALEXANDER OCHWO** who was his father. The grant was thereafter confirmed and the sole property in the deceased's estate being **WEST BUNYOLE/EBUSIEKWE/424** devolved unto the Petitioner herein wholly.
3. When **MICAL KALAKA OCHWO**, the widow and the mother to the Petitioner found out the foregone acts by the Petitioner, she filed the Summons for Revocation and/or Annulment of the Grant which is dated and duly filed on 25/01/2012. She challenged the issuance of the Grant and the confirmation thereof as having been undertaken without either her involvement as the widow and the other children of the deceased.
4. The Objector deponed that when the deceased passed on she was inherited by the deceased's brother whom she had five more children with but remained, upto date, staying in her matrimonial home which is on the land known as **WEST BUNYOLE/EBUSIEKWE/424**. It is her contention that pursuant to the Luhya customs on wife inheritance she remained the wife to the deceased and all the eight children which she gave birth to are all the deceased's children.
5. The Petitioner and his two sisters, **JESCAH MUNDE** and **RUTH ASIKO** are of the contrary view. They hold that upon the Objector being inherited by their father's brother, the Objector's interest on the deceased's land was determined and that the children the Objector had thereafter cannot inherit from their father, but only from their biological father.
6. The foregone remain the contention and the subject of the Summons for Revocation.
7. When the application for revocation of the grant came up in Court on 26/09/2013 parties agreed

that due to the issues involved therein, the application was to be heard by way of oral evidence and appropriate directions were issued. Two or so years down the line, the hearing had not began and when parties again appeared before Court, on 10/03/2015, they set-aside the earlier directions and opted to dispose of the application by way of Affidavits and written submissions. Both parties complied with the directions hence paving way to a ruling.

8. As parties did not highlight on their submissions, this Court did not benefit from the parties' rich history on the dispute. Be that as it may, I have carefully perused the record alongside the submissions. It is clear that the issue which forms the basis of the application is whether the Objector upon being inherited and having other children still has any entitlement, either as herself or her other children, in respect to the deceased's estate. This issue is anchored on some customs.
9. Looking at the state of the Affidavit evidence and the submissions filed, this Court would not be doing justice to the parties herein when it purports to determine this application based on the current record. There is need for an in-depth approach to the issue at hand and that can easily be achieved by parties adducing oral evidence. The parties were indeed on the very right path when they, in the first instance chose that route.
10. The dispute before the Court may appear simple, but it is not. It deals with customs and whether they stand the test of the Constitution of Kenya 2010. Parties have taken hard positions including possible evictions from the land in issue. With respect to all parties, I am of the view that such grave matters ought to be well ventilated and evidence thoroughly tested. That will, without saying, lead to the determination of the dispute in finality.
11. Arising to the call of Article 159 of the Constitution and Section 45 of the Law of Succession Act, Chapter 160 of the Laws of Kenya, this Court shall make the following orders in relation to the Summons for Revocation/Annulment of the Grant dated 25/01/2012:-
 - a. ***The Summons for Revocation/Annulment of the grant shall be heard by way of oral evidence;***
 - b. ***The Objector herein shall be deemed as the Plaintiff and the Summons for Revocation deemed as the Plaint whereas the Petitioner shall be deemed as the Defendant and the Replying Affidavit sworn on 21/06/2012 deemed as the Defence;***
 - c. ***Parties be at liberty to file any further affidavit(s), if need be;***
 - d. ***Parties to file and serve Witnesses Statements and Lists of Documents by 15/09/2015;***
 - e. ***A hearing date shall be fixed within the Court's next term, that is between September to December, 2015.***

Orders accordingly.

DELIVERED, DATED and SIGNED at Kakamega this 23rd day of July, 2015.

A. C. MRIMA

JUDGE