REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO 281 OF 2006

IN THE MATTER OF THE ESTATE OF ISAAC OLE OIYIE (DECEASED)

MARY WANGUI OIYIE……..……..……PLAINTIFF

VERSUS

PHYLIS WANGUI OIYIE ……...……...…… DEFENDANT

RULING

1. Isaac Ole Oiyie, the deceased to whose estate these proceedings relate died intestate on 11th May 1998. The widow Phyllis Wangui Oiyie applied for grant of letters of administration, which were issued to her by this court on 25th November 1998 and later on confirmed on 11th March 2014 for Phyllis and her children. The same listed the deceased's assets as Plot No.224 Narok Town, Plot No. 462 Narok town (Now plot No.226) block 6, Plot No. 131 Narok Town (Now plot No. 160) block 2 and L.R. No. C is Mara Rotian/178. Mary Wangui on 10th February 2006 sought to revoke the said grant of letters of administration on grounds that she and her children were dependents of the deceased and had been left out of as beneficiaries in the said grant of letters of administration. Justice Onyancha on 17th February 2009 allowed the application revoking the said grant of letters of administration and held that Mary Wangui Oiyie was the 1st wife of the deceased and no evidence had been adduced that the deceased had divorced her or abandoned his children. He advised the parties to meet discuss and agree on distribution of the deceased's estate. Subsequently a grant of letters of administration was issued to Mary Wangui Oiyie and Phyllis Wangui Oiyie on 17th February 2009 and subsequently confirmed on 11th March 2014 with Phyllis Wangui Oiyie and her children taking up Plot No. 224 Narok Town and L.R. Cis Mara Rottian/178 while Mary Wangui and her children were get Plot No. 462 Narok Town (Now plot No.226) Block6 and Plot No.131 Narok Town (Now Plot No. 160) Block 2.

2. Phyllis Wangui Oyie in the application dated 16th June 2014 sought cancellation of the certificate of confirmation of grant issued on 11th March 2014 and sought the court to order the beneficiaries to appear before the Honorable Court for listing of the deceased's assets of the deceased afresh and distribution of the same. This court in its ruling dated 6th March 2015 held that, ***"from the evidence adduced it appears that there are no copies of the title documents relating to the parcel of land said to belong to Phyllis Oiyie or the deceased. In this regard I find that the evidence before me is insufficient to lead me to give a decision on issue of what properties form the deceased's estate at this interlocutory. I find that this Court needs to hear the parties viva voce and parties need to avail the appropriate copies of the title documents to the said properties to enable this Court make a determination of this matter on the listing of the assets forming the estate of the deceased and distribution of the same if need be."***

3. This court further on 13th April 2015 gave directions that parties precede viva voce and the objector

ordered to file and serve their documents within 7 days and the respondent to file their documents within 21 days.

4. This is what prompted the applicant Mary Wangui to file the application coming for consideration dated 4th May 2015, seeking the following orders; the court be pleased to set aside its orders made on 6th March 2015 pending inter-partes hearing of this application; the court be pleased to set aside its orders made on 6th March 2015 and consequential orders. That the honorable court orders that this petition is Res-judicata.

5. The application is based on grounds that the respondent in her petition for grant of letters of administration in Narok Law Court vide petition no.8 of 1998. Though the deceased had two wives, the petitioner listed only herself failing to disclose the respondent and her children. Further, in the said petition she listed Narok/Township/224, Narok/Township/462, Narok/Township/131 and Narok/as-Mara/Rotation. The said grant was confirmed and she was allocated the said deceased's assets as sole beneficiary. This prompted the applicant to file summons for revocation of the same and the court allowed the same and ordered that the said grant so issued be revoked and a fresh grant be issued to both the applicant and respondent and parties advised to call all parties involved to identify the assets forming the deceased's assets. The new grant was subsequently confirmed on 17th February 2009 and subsequently confirmed on 11th March 2014 with Phyllis Wangui Oiyie and her children taking up Plot No. 224 Narok Town and L.R. Cis Mara Rottian/178 while Mary Wangui and her children were get Plot No. 462 Narok Town (Now plot No.226) Block6 and Plot No.131 Narok Town (Now Plot No. 160) Block 2. Subsequently, Phylis Wangui Oyie filed the application dated 16th June 2014 seeking cancellation of the certificate of confirmation of grant issued on11th March 2014 and sought the court to order the beneficiaries to appear before the Honorable Court for listing of the deceased's assets of the deceased afresh and distribution of the same which this court allowed in its orders of 6th March 2015. These are the orders the applicant seeks to set aside and argues that the same are res-judicata adding that the same can only be re-opened by review appeal or revocation of grant prayers she argues the respondent did not make. That the applicant has used the misinterpreted instructions to transfer the property solely to herself and evict tenants in plot no. 131(160 block 2) Narok town.

6. Section 7 of the Civil Procedure Act provides that, *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

7. The question I ask myself is whether the issues raised by the parties have been heard and determined so as to term the petition as *res judicata*. The court in regards to this cause never heard nor determined the issue of what amounts to the deceased's estate or the issue of who is the owner of the property in question.The parties as per the orders of Justice Onyancha on 17th February 2009 had only urged the parties to meet and agree on what constituted the deceased's assets. I find this was not achieved and necessitated the application by Phylis Wangui Oyie dated 16th June 2014 which resulted to the ruling of 6th March 2015 the applicant seeks to set aside. In its ruling this court could not ascertain what assets formed the estate of the deceased and called on parties to be heard viva voce as well as adduce evidence to support their claim. I find that the applicant's argument that by entertaining the said application the matter was res judicata is misplaced and so is her argument that this court lacks jurisdiction. By the said ruling the court merely seeks to determine the matter conclusively by hearing both parties. In the case of ***MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206***, at page 210, this Court stated as follows: ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

Further Rule 73 of the Probate and Administration Rules provides that, *"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."* I find that the application to set aside lacks merit and dismiss the same. Parties to proceed for hearing as per this court order of 6th March 2015. Cost in the cause. It is so ordered.

Dated, signed and delivered this ***29th*** day of ***October*** 2015.

R. E. OUGO

JUDGE

In the presence of:-

…….…….For the Applicant

……...…….…….…..For the Respondent

Ms. Charity Court Clerk