



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**SUCCESSION CAUSE NO. 399 OF 2015**

**FORMERLY HOMA BAY SRM SUCCESSION CAUSE NO. 38 OF 2013**

**IN THE MATTER OF THE ESTATE OF**

**YUNIA OKAYO OGOLA (DECEASED) &**

**RUBEKA ODERA OGOLA (DECEASED)**

**BETWEEN**

**SAMWEL OTIENO OGOLA ..... 1<sup>ST</sup> APPLICANT**

**PHILIP OBUYA GOR ..... 2<sup>ND</sup> APPLICANT**

**GORDON OUMA RONGA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**JOHNSON GOR OGOLA ..... PETITIONER/RESPONDENT**

**RULING**

1. The matter before the court is a summons for revocation of grant issued to Johnson Gor Ogola (“Johnson”) on 1<sup>st</sup> September 2005 and confirmed on the same day in *Homa Bay SRM Succession Case No. 220 of 2004* in respect of the estates of Yunia Okayo Ogola (“Yunia”) and Rubeka Odera Ogola (“Rubeka”).
2. Rubeka was the mother of Yunia. Rubeka died on 5<sup>th</sup> August 1997 while Yunia died on 8<sup>th</sup> November 1993. The reason for filing for the joint petition was that both of them owned two properties in equal shares; **KANYADA/KONYANGO KALANYA/3131** and **KANYADA/KONYANGO KALANYA 3371**.
3. After their respective deaths, Johnson obtained a letter dated 23<sup>rd</sup> August 2004 from the Office of the Chief, East Kanyada Location stating that the said Johnson should apply for letters of administration in respect of the respective estates to enable him transfer the plots to himself. The chief did not name the survivors of each deceased.
4. Johnson proceeded to lodge a petition (Form P & A 5) in which he stated that he was a son and brother of the respective deceased. On Form P & A 8, he named the following as survivors of the deceased;

- a. Johnson Gor Ogola – Son (applicant)
  - b. GOO – Son (minor)
  - c. WOO – Son (minor)
  - d. JOO – Son (minor)
5. When he applied for confirmation of the grant, Johnson became the owner of the two properties of the deceased except for 0.04 Ha. of Parcel No. 3131 which was given to Paul Omolo Okumu.
  6. The summons for confirmation has been brought under **section 76** of the ***Law of Succession Act (Chapter 160 of the Laws of Kenya)*** by Samwel Otieno Ogola (“Samwel”), Philip Obuya Gor and Gordon Ouma Ronga (“Gordon”) on the ground that the grant was obtained fraudulently without disclosing the true beneficiaries of the deceased and that strangers were included as beneficiaries of the deceased.
  7. I directed that the summons be heard by oral testimony and what emerged from the parties’ was largely common ground. It is not in dispute that Yunia was the only daughter of Rubeka. Rubeka had two sons; Johnson and Walter Opiyo Ogola (“Walter”). Yunia died without any children while Walter died but he left behind two children; G and WO O.
  8. Walter Opiyo died without issue. According to the evidence, Samwel was a cousin to Yunia and Johnson as their mothers were sisters. The third applicant, Philip Obuya Gor, is a son of Johnson and in his testimony he disclaimed any interest in the property.
  9. It emerged from the evidence that Yunia was once married and that she left her husband after being assaulted seriously sometime in 1975. She was hospitalized and after divorce, she returned to her parents’ home. Samwel laid claim to Yunia’s estate on the ground that when Yunia was unwell, him and his family contributed to her well-being which enabled her go into business and acquire the plots. He stated that before her death, Yunia expressed her desire that he should benefit from the properties.
  10. Johnson insisted that he was entitled to the entire estate as he is the one who assisted Yunia acquire the properties when she was alive. He testified that when she returned home, he gave her capital to start her business which enabled her to purchase the properties. He also stated that the applicants have benefitted from ancestral land which they have since sold hence their desire to acquire the property.
  11. The issue for determination in this case is whether the Samwel and Gordon are beneficiaries of the respective estates of the deceased. It is not in dispute that Rubeka died intestate leaving behind children but no spouse. In such circumstances, her property devolves in line with **section 38** of the ***Law of Succession Act*** which provides that in such a case, the property devolves to her children; Johnson, Walter and Yunia in equal shares. Since Walter and Yunia are deceased, the share owned by Rubeka devolves to Johnson and the only surviving son of Walter; Gordon. As Samwel is not a child of Rubeka, he is not entitled to the estate.
  12. Yunia died intestate without any spouse or children. The distribution of her estate is governed by **section 39** of the ***Law of Succession Act*** which provides that in such circumstances the net estate shall devolve upon kindred of the intestate first to the father and if he is dead to the mother and if she dead to the brother and sisters of the intestate in equal shares. It is therefore clear that Yunia’s property devolves to Johnson and Gordon in equal shares. Samwel, not being a brother to Yunia, is not entitled to her estate.
  13. I also reject the claim by Samwel based on his assistance to the deceased. She did not make a gift *inter vivos* to him during her lifetime or make an oral will in which he would have proved. Likewise Johnson cannot claim entitlement to the entire estate of Yunia on the basis of giving her capital to start her business. If she wanted to give him part of the plots during her lifetime on account of his investment, she would have registered the plots in their joint names during her

lifetime. Furthermore, Johnson did not claim the monies he invested to purchase the property as a creditor of Yunia's estate.

14. From Form P & A 5, Johnson declared that G and his brother W were minors. Another minor, JOO, was also included. The court did not make any inquiry into or make provision for them as minor beneficiaries. It was improper for the court to issue a grant to Johnson alone contrary to **section 41** of the *Law of Succession Act* when there was a continuing trust in favour of the minors. The parties herein also disclaimed any knowledge of JOO. It is also not clear how Paul Omolo Okumu acquired an interest in the property without the consent of the court yet he was not a named beneficiary or survivor of the deceased.

15. For the reasons I have set out, I find that there is sufficient grounds to revoke the grant of letters of administration intestate issued and confirmed on 1<sup>st</sup> September 2005 in *Homa Bay SRM Succession Cause No. 220 of 2004* and I hereby revoke the same. I accordingly re-issue the same to **JOHNSON GOR OGOLA** and **GORDON OUMA RONGA**. As there are only two beneficiaries of the deceased, they shall share the properties equally. As Johnson sold part of the property, his share shall be reduced by that of the purchaser.

16. The final orders are therefore as follows;

- a. The grant of letters of administration intestate issued and confirmed on 1<sup>st</sup> September 2005 in *Homa Bay SRM Succession Cause No. 220 of 2004* and be and is hereby revoked.
- b. A grant be and is hereby issued to **JOHNSON GOR OGOLA** and **GORDON OUMA RONGA**.
- c. The grant issued is hereby confirmed on the following terms;
  - i. **KANYADA/KONYANGO KALANYA/3171** to **JOHNSON GOR OGOLA** and **GORDON OUMA RONGA** in equal shares
  - ii. **KANYADA/KONYANGO KALANYA/3131** to **GORDON OUMA RONGA (0.075Ha)**, **JOHNSON GOR OGOLA (0.071 Ha.)** and **PAUL OMOLO OKUMU (0.04Ha)**.
- d. There shall be no order as to costs.

**DATED and DELIVERED at HOMA BAY this 30<sup>th</sup> day of November 2015.**

**D.S. MAJANJA**

**JUDGE**