



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
SUCCESSION CAUSE NO. 356 OF 2010

IN THE MATTER OF THE ESTATE OF MAGRET OGOYE ORORO-----DECEASED.

AND

DORCUS ODUNGA OGOYE-----PETITIONER

VERSUS

JULIA ALUOCH WESONGA-----OBJECTOR

RULING

1. This court is asked to determine the Summons for Revocation of Grant dated 5th January 2012 in which the Applicant seeks the following prayers;-

- a. **That grant of Letters of Administration issued herein on 5th April 2011 to DORCAS ODUNGA OGOYE and confirmed on 28th September 2011 be and is hereby revoked.**
- b. **That the registration of Dorcas Odunga Ogoye as proprietor of L.R. No. BUKHAYO/MUNDIKA/8593, 8594, 8595, 8598 be cancelled and that the said parcels do revert to the name of MARGARET OGOYE ORORO**
- c. **That a fresh grant of Letters of Administration be issued in the name of JULIA ALUOCH WESONGA**
- d. **That costs of this application be provided for.**

2. From the Grounds on the face of the Summons and the Affidavit in support sworn by the Applicant on 5th January 2012, the Application raises the following grounds:-

- i. **That the grant was obtained fraudulently by making of a false statement and concealment of material facts.**
- ii. **The Grant was obtained by means of untrue allegation of fact essential in point of law.**
- iii. **The Petitioner has disinherited the Applicant.**
- iv. **The Grant was confirmed prematurely before the expiry of 6 months from the date of issue.**

3. In response, the Petitioner swore a Replying Affidavit on 17th October 2012. The Petitioner denies concealing any material facts from Court as both in her affidavit in support of the Petition and the Chiefs letter filed alongside the Petition, the Applicant is expressly named. Further that the Judge who confirmed the grant before the expiry of 6 months was satisfied that it merited such confirmation.

4. In paragraph 6 of the Affidavit, the Petitioner gives the following further reasons as to why the Applicant does not deserve the orders:-

- a. **The Applicant neglected the deceased when she was ailing inspite of being capable of affording the deceased medication and care**
- b. **The applicant did not participate at all in the funeral and burial arrangements for the deceased which duty I undertook single handedly with the help of friends and well wishers (See Annexure DOO2)**
- c. **The applicant refused and neglected to help me fight numerous court cases that involved the deceased's estate (See annexure DOO3).**
- d. **The applicant has only come up after realizing that I have managed to bring the estate to Order.**

5. At the hearing of the Summons, oral evidence was led to supplement the affidavit evidence of the parties herein. It seems to me that both sides called evidence that went beyond the issues raised by the Summons for Revocation. Some considerable energy was spent on the issue of Distribution yet the parties did not task this Court to make a finding on Distribution. If the Court were to do so, then it may be accused of overreaching. For that reason, I shall confine this Decision to the issues raised by Summons. Those issues in my view, are narrow and call for a short Determination.

6. Both the Applicant and the Petitioner are biological daughters of the Deceased. They are in fact the only children of the Deceased. The Deceased did not have a spouse. The Deceased died intestate. The Deceased died on 14th September 2010. The Law applicable to the Administration of the Estate of the Deceased is the Law of Succession Act.

7. It is true that in the Affidavit sworn on 14th December 2010 in support of her Petition, the Petitioner named the Applicant as a daughter to the Deceased. What however the Petitioner may have failed to do was to comply with the provisions of Rule 26(1) and (2) of the Probate and Administration Rules which provide:-

26 (1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default or renunciation, or written consent in Form 38 or 39, by all person so entitled to equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

Both being daughters to the Deceased the Applicant and the Petitioner are persons entitled in the same degree to apply for Grant of Letters of Administration Intestate to the Estate of the Deceased. The Applicant had and has not renounced her right nor had she given consent to the Petitioner to petition alone. Further there is no evidence that the Petitioner had given notice to the Applicant of her intention to Petition for grant (rule 26 (1)) If she had done so and the Applicant defaulted in renouncing or consenting, then the Petitioner would be required by Rule 26(2) to file an Affidavit to that effect. There is no such affidavit by the Petitioner. Clearly then the Petitioner did not comply with the law.

8. In paragraph 3 of the Petitioner's witness evidence affidavit of 28th January 2014, the Petitioner makes the following statement:

"That I never concealed to Court that the Objector was a beneficiary to the Estate of the Deceased as I clearly included her in my petition before this Court"

That may be so, but what she told Judge Onyancha at the confirmation proceedings is really to the contrary. These are the proceedings on 28th September 2011.

28.9.2011

Before Onyancha, J

Mutai Clerk

Applicant:

“I seek confirmation of Grant issued on 5.4.2011. I am sole beneficiary.”

ONYANCHA

J U D G E

Order: “Grant issued on 5th April 2011 is hereby confirmed to the sole beneficiary

ONYANCHA

J U D G E.

28.9.11

Taken against her averment of 5th January 2014 (quoted above) what the petitioner told the Judge on 28th September 2011 was not true. And that falsehood was in respect of the very heart of proceedings and it was certainly material.

9. No doubt therefore this Court is for Revoking of Grant of Letters of Administration issued to the Petitioner on 5th April 2011 and confirmed on 28th September 2011. Am I also to grant the other two orders, that is;

b) That the registration of Dorcas Odunga Ogoye as proprietor of L.R. Nos. Bukhayo/Mundika/8593, 8594, 8595, 8598 be cancelled and that the said parcels do revert to the name of MARGARET Ogoye Ororo.

c) That a fresh grant of letters of Administration be issued in the name of Julia Aluoch Wesonga.

10. In respect to the cancellation of the registration of the Petitioner as the proprietor of the named land parcels, Counsel for the Petitioner submitted as follows;-

Having considered the foregoing, it is apparent that the objector has not established a reason to warrant the cancellation of the registration of the petitioner as the proprietor of the stated parcels of land. The objector did not prove that the said parcels of land exist and or are presently registered in the petitioner’s name. Without such proof the court could be making orders in vain.

This Court does not share that view. In paragraph 4 of the Applicant’s Affidavit of 5th January 2012 in support of the Application, the Applicant avers:-

“That the Petitioner has pursuant to the said grant obtained registration as proprietor of L.R. No. BUKHAYO/MUNDIKA/8593, 8594, 8595 and 8598.”

The Applicant was making a specific averment that the Petitioner had obtained registration of the said land parcels. This is not denied by the Petitioner in her Replying affidavit or testimony to Court. And in the Court file, I have come across Form R.L. 7 (Transfer of Personal Representative to Person entitled under a will or on intestacy) for transfer of the land parcels to the Petitioner. Although the copy of the Form is not registered at Lands, it may be an indication that the allegations by the Applicant, in the absence of specific denial by the Petitioner, is not idle. As I have found merit in Revoking the Grant, I shall also order the Cancellation of the transfers made in favour of the Petitioner pursuant to the now impeached Grant.

11. As to prayer (c), although the Petitioner has shown, through her conduct, that she may not be worthy of appointment as Administratrix, I take the view that she should hold that position jointly with the Applicant. Both shall henceforth be the Administratrixes to the Deceased's Estate. I reach that Decision because they are the only two survivors to the Deceased and from the evidence before Court they do not share a Common view on how the estate should be distributed. It only makes sense that they both Administer the Estate until it is distributed.

12. These therefore are my final Orders:-

- i. Prayer (a) and (b) of the Summons for Revocation of Grant dated 5th January 2012 are hereby allowed.
- ii. Dorcas Odunga Ogoye and Julia Aluoch Wesonga are hereby appointed joint Administratrixes to the Estate of the Deceased.
- iii. The Applicant shall have costs of the Application.

13. It is the hope of this Court that going forward, the two will agree on Distribution failing which either Administratrix is at liberty to seek the Court's intervention.

Dated, signed and delivered at Busia this 25th day of November 2015.

F. TUIYOTT

J U G D E

In the presence of :-

Oile - Court Assistant

.....for the Petitioner

.....for the Applicant