



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO.225 OF 2013

IN THE MATTER OF:

**THE ESTATE OF JUDA AGORO ODIETO alias AGORO DIETO
DECEASED**

AND

**IN THE MATTER OF: REVOCATION/NULIFICATION OF GRANT OF LETTERS OF
ADMINISTRATION**

AND

IN THE MATTER OF: SECTION 76 OF THE LAW OF SUCCESSION ACT, CAP 160

AND

**IN THE MATTER OF: RULES 44, 63 AND 73 OF THE PROBATE AND ADMINISTRATION
RULES**

BETWEEN

LUCIA ADEYA ANJELINA APPLICANT

VERSUS

PATRICK ODHIAMBO AKONGO RESPONDENT

RULING 2

1. The applicant herein Lucia Adeya Angelina through the firm of M/s Oguttu Mboya & Company Advocates filed a summons for revocation of grant brought under **Sections 48 and 76** of the **Law of Succession Act and Rules 44, 49, 59, 63 and 73** of the **Probate and Administration Rules** seeking:-

1. *Spent.*
2. *Pending the hearing and determination of the summons herein, the Honourable Court be pleased to issue a Prohibitory Order of Injunction and/or conservatory order, restraining the respondent from disposing of, alienating, selling and/or appropriating the Assets of Juda Agoro Odieto alias Agoro Diето, the deceased herein, more particularly, LR NO. KAMAGAMBO/KONGUDI/470, measuring 0.8 Ha., in any manner whatsoever and/or howsoever.*

3. *The Grant of Letters of Administration granted to the Petitioner/Respondent on the 2nd day of February 2007 and confirmed on the 26th day of March 2007 vide Migori PMCC Succession Cause No.472 of 2006, be revoked and/or annulled.*
4. *The Register in respect of LR NO. KAMAGAMBO/KONGUDI/470, be rectified and the name of the respondent and/or any other beneficiary thereof, be rescinded and/or deleted therefrom and same do revert to the names of Juda Agoro Odieto alias Agoro Diето, the deceased person herein.*
5. *The Respondent herein, do tender accounts in respect of the state of the Estate of Juda Agoro Odieto alias Agoro Diето, the deceased person herein, more particularly, the obtaining extent of the Administration so far taken.*
6. *Costs of the application be borne by the respondent.*
7. *Such further and/or other orders be made as this Honourable Court may deem fit and expedient.*

2. The application is premised on 25 grounds that appear on the face thereof and is also supported by the applicant's affidavit sworn on 3rd October 2013. From the grounds and the averments in the affidavit, the following information is relevant:-

- *The deceased herein Juda Agoro Odieto alias Agoro Diето died on the 13th April 1999.*
- *The deceased left behind one widow and 4 children, 2 sons and 2 daughters, the widow being the applicant herein Lucia Adeya Angelina while the 4 children are Evelyne Adhiambo, Serfin Auma, Stephen Ochieng and Erick Ouma.*
- *Subsequently, the respondent herein proceeded to and indeed applied for and obtained Grant of Letters of Administration and had the same confirmed vide Migori PMCC Succession Cause No.472 of 2006.*
- *The Grant of Letters of Administration which was issued on 2nd February 2007 was confirmed on 26th March 2007.*
- *Subsequent to the confirmation of grant, the only asset of the deceased's estate, namely LR No. Kamagambo/Kongudi/470, hitherto registered in the deceased's name was transferred into the respondents name on 25th April 2007 and title was thereafter issued on 3rd May 2007.*
- *The petition for Grant of Letters of Administration Intestate, its subsequent confirmation and the transfer of the deceased's estate into the name of the Respondent was done without the knowledge and/or consent of the true beneficiaries of the deceased's estate namely the applicant herein and the 4 children of the deceased.*

3. The applicant therefore contends that the Grant of Letters of Administration issued to and confirmed in favour of the respondent is null and void ab initio, the same having been obtained fraudulently and based on concealment of material facts from the Court and should be revoked and/or annulled. The applicant also contends that the respondent is not a relative of the deceased nor does he fall within the degree of consanguinity in accordance with the law so as to entitle him to benefit from the estate of the deceased.

4. Though the application was duly served upon the respondent, the respondent did not file any replying papers. The application therefore proceeded ex parte by way of written submissions. The submissions, dated 19th May 2014 and filed in court on 21st May 2014 have framed the following issues for determination:-

- a. *Whether the respondent herein was related to the deceased;*
- b. *Whether the true details and identifies of the heirs of the deceased was disclosed to the Honourable Court;*
- c. *Whether there was concealment and/or non-disclosure of material facts; and*
- d. *whether the proceedings leading to the issuance of Grant were defective and a nullity.*

I wholly adopt these issues for purposes of this ruling.

5. Regarding the first issue, **Section 29** of the **Law of Succession Act, Cap 160 Laws of Kenya** (the Act) sets out the persons who are entitled to apply for and/or commence succession proceedings in respect of a deceased person. It is not anybody who can make the application. Such person(s) must,

when drawing the petition indicate their true relationship to the deceased.

6. From the un rebutted affidavit evidence that is before me, the respondent herein did not indicate his relationship to the deceased. He simply indicated on Form P&A 80 that he was presenting the petition in his capacity as Administrator.

7. It is worth of note that one does not become an Administrator of a deceased person's estate until and unless the court confers such capacity on him/her through Grant of Letters of Administration. There is no doubt in the instant case that as at the time of petitioning for the Grant, the respondent was yet to become administrator of the deceased's estate.

8. From all the foregoing, the applicant has proved that the respondent herein was not related to the deceased save as an “**Administrator**” which in my considered view is a misnomer. Consequently, the respondent was not the proper person to petition for Grant of Letters of Administration in respect of the estate of Yuda Agoro Odieta alias Dieta or at all.

9. Counsel for the applicant referred the court to the case of Law Society of Kenya -vs- Commissioner of Lands & 2 others [2001] KLR 706 for the proposition that a person must have a sufficiency of interest to sustain his standing to sue in a court of law. In the instant case, the respondent Patrick Odhiambo Akong'o, has not shown that he had then nor does he have now a sufficiency of interest in the estate of the deceased herein to sustain his standing to have commenced or to commence succession proceedings in respect of the estate of the deceased.

10. With regard to the second and third issues combined, counsel for the applicant submitted that the respondent was under a duty, assuming that he had the locus standi in the matter, to avail to the court a list of all the beneficiaries of the deceased's estate as he petitioned for the Grant of Letters of Administration and to further indicate the rightful share of each beneficiary when applying for confirmation of Grant. In the instant case, although the respondent purported to comply with **Section 45 (2)** of the **Act**, it has now transpired through the evidence of the applicant that the letter issued by the Assistant Chief of Kadieto Sub Location, S.A. Owino on some unknown date was infact a fraud. In the said letter attached to the applicant's affidavit and marked “**LAA5**”, the respondent was indicated as the only legal survivor of the late Juda Agoro Odieta thus entitling the respondent to inherit the deceased's parcel of land known as Kamagambo/Kongudi/470.

11. It is clear from the letter dated 4th July 2011 issued to the applicant by the Chief of East Kamagambo Location, one John Ogolla, that infact the deceased was survived by the applicant herein and 4 children, 2 sons and 2 daughters.

12. There is therefore no doubt in the mind of this honourable court that the respondent is guilty of concealment of material facts, first by not giving notice to the applicant and the deceased's 4 children pursuant to **Rule 26 (1)** of the **Probate and Administration Rules**. Both the applicant and the 4 children of the deceased, who were in priority to the respondent were entitled to the notice. Although the respondent knew that the applicant and the 4 children of the deceased were all alive, he did not disclose this fact to the honourable Principal Magistrate's court at Migori. He gave himself as the only person entitled to the deceased's estate. It would also appear to me that at the stage of confirmation of Grant, the application and the 4 children of the deceased were not served with the application nor notified that the same was coming up. This can explain the speed with which the Grant of Letters of Administration intestate were processed from date of issuance on 2nd February 2007 and date of confirmation on 26th March 2007. The certificate of title shows that by the confirmed grant, the respondent inherited the entire 0.8 Ha. Piece of land comprised in LR NO. Kamagambo/Kongudi/470 thereby disinheriting all the other beneficiaries. Reliance was placed on the case of **Joseph Waitiki Ndegwa & another -vs- Dancan Nderitu Ndegwa & another – Court of Appeal, Civil Appeal No.179 of 2002** (unreported).

13. In light of all the above, I am satisfied that the true details of the identities of the heirs of the deceased were not disclosed, no notice of the succession proceedings were given to all those who were entitled to such notice and as a result, there was clearly concealment and/or non-disclosure of material facts from the

court by the respondent.

14. The last issue for determination is whether the proceedings leading to the issuance of Grant were defective and a nullity.

15. **Section 76** of the **Act** is in revocation or annulment of grant and provides:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

- a. **that the proceedings to obtain the grant was defective in substance;**
- b. **that 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. **that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”**

16. From the findings made in the preceding paragraphs of this ruling, the Grant of Letters of Administration issued to the respondent was obtained fraudulently by the making of false statements that the respondent was the sole beneficiary of the deceased's estate. It is also proved that the respondent did not notify other beneficiaries of the deceased's estate of either the impending or actual succession proceedings, nor did he obtain the requisite consents of the applicant and the 4 children of the deceased.

17. I rely on **Section 66** of the **Act** which sets out the order of preference to be given in petitioning for the grant. **Section 66 (a)** and **(b)** of the **Act** provides:-

“(a) Where a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -

- a. **surviving spouse or spouses, with or without association of other beneficiaries;**
- b. **other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- c. **the Public Trustee; or**
- d. **Creditors.**

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

18. Further I rely on **Rule 7 (7) (a), (b)** and **(c)** the **Probate and Administration Rules** provides:-

“(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate, he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has:-

- a. **grant; or**
- b. **consented in writing to the making of the grant to the applicant; or**
- c. **been issued with the citation calling upon him either to renounce such right or to apply for a grant.”**

19. In the instant case, since the affidavit evidence presented by the applicant was never rebutted by the respondent, the respondent was not a Dependant/survivor of the deceased nor did he rank higher than the applicant in obtaining grant of letters of administration intestate in accordance with **Rule 7 (7)** of the

Probate and administration Rules.

20. There is also **Section 71** of the **Act** which provides:-

“71(1) After the expiration of a period of six months, or such shorter period as the court may direct under sub section (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”

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3. The court may on the application of the holder of a grant of representation, direct that the grant be confirmed before the expiration of six months from the date of the grant if it is satisfied:-

- a. **that there is no Dependant as defined by section 29 of the deceased; or**
- b. **that only Dependants are of full age and consent to the application;**
- c. **that it would be expedient in all the circumstances of the case so to direct.**

21. I have already noted that the Grant issued on 2nd February 2007 confirmed on 26th day of March 2007. That is to say that the grant was confirmed way outside the provisions of **Section 71 (1)** and without justification as provided under **Section 71 (3)**. There is no evidence that Respondent applied for nor obtained court orders in terms of **Section 71(3)** of the **Act**.

22. Since the petitioner/respondent did not in anyway rebut all the allegations contained in the applicant's affidavit, and based on the findings hereinabove, I make the following orders:-

- 1. *The Grant of Letters of Administration granted to the petitioner/ respondent on the 2nd day of February 2007 and confirmed on the 26th day of March 2007 vide Migori PMCC Succession cause No.472 of 2006 be and is hereby revoked and/or annulled.*
- 2. *The Register in respect of LR NO> KAMAGAMBO/KONGUDI/470 be rectified and the name of the respondent and/or any other beneficiary thereof be rescinded and/or deleted therefrom and same do revert to the names of Juda Agoro Odieta alias Agoro Dieta, the deceased person herein.*
- 3. *Costs of the application shall be borne by the respondent.*

Orders accordingly.

Delivered, dated and signed at Kisii this 29th day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Ochwangi for Applicant

Absent (in person) for Respondent

Mr. Bibu - Court Assistant