



IN THE HIGH COURT AT HOMA BAY
SUCCESSION CAUSE NO. 78 OF 2013
IN THE MATTER OF THE ESTATE OF
JULIUS NYATOGO OPONDO (DECEASED)

BETWEEN

JAMES OBANDE OWUOR APPLICANT

AND

ENOCK ONYURO NYATOGO RESPONDENT

RULING

1. James Obande Owuor (“Obande”) has filed the summons for revocation of grant dated 11th November 2013 seeking revocation of the grant of letters of administration issued in *Oyugis Succession Cause No. 173 of 2010* in the matter of Julius Nyatogo Opondo.
2. The summons is supported by the affidavit of Obande sworn 11th November 2013 and on the grounds set out on the face of the summons as follows:
 - a. That the proceedings to obtain the grant were defective in substance.
 - b. That the court lacked the requisite jurisdiction over the Estate.
 - c. The respondent concealed other pending proceedings being *Kisumu Succession Cause No. 417 of 2001* and a pending appeal in the Court of Appeal at Kisumu being *Civil Appeal No. 75 of 2012*.
 - d. That the respondent misrepresented to the court that the deceased owned the subject parcel of land at the time of his death.
 - e. That the grant was obtained fraudulently by making of false statements, concealment of material facts and untrue allegations of facts essential.
3. The summons is opposed by way of the affidavit of Enock Onyuro Nyatogo (“Onyuro”) sworn on 25th March 2014 in which he narrates the history of the matter and the various court cases that have been cited by the applicant to support the application.
4. From the grounds set out above and the parties’ depositions it is clear that there have been previous proceedings concerning the deceased’s estate and it is necessary to set out the background in order to appreciate and deal with the issues in dispute.
5. Julius Nyatogo Opondo (“the deceased”) died on 11th December 1999. He left behind one property, land parcel Kabondo/Kodumo East/392 (“the property”). Obande then filed a petition in

- respect of the estate of the deceased being ***Kisumu Succession Cause No. 417 of 2001***. In his application for the grant he stated that he was a nephew of the deceased. After the grant was issued, Kennedy Ouma Nyatogo, a son of the deceased, applied to revoke the grant on the grounds that Obande was not a direct beneficiary of the deceased, a fact he did not disclose when he applied for the grant. After hearing the application and in ruling dated 23rd January 2009, Mwera J., was satisfied that Obande was not entitled to administer the estate as he was neither a nephew or in fact a relative of the deceased. He concluded that the proceedings were fraudulent and held that the proper beneficiaries were Kennedy and his three siblings. He therefore revoked the grant and cancelled the registration of the title to the property which was in the name of Obande.
6. After the grant was revoked, Obande moved the High Court through a Notice of Motion dated 5th October 2009 to set aside the proceedings and decision issued by Mwera J. The grounds for seeking to set aside the proceedings were, in a nutshell, that his advocate was never served with notice of proceedings and that he failed to attend court for good reason and that it was in the interests of justice that the decision be set aside. The application was opposed. In a ruling delivered on 23rd November 2014, Nambuye J., declined to set aside the decision. It appears that it is that ruling that precipitated the filing of an appeal being Court of Appeal ***Kisumu Civil Appeal No. 75 of 2012*** which is still pending.
 7. After the grant issued to Obande was revoked, Onyuro, acting on behalf of his brothers, made an application for grant of letters of administration for the estate of the deceased in ***Oyugis Succession Cause No. 173 of 2010***. According to the petition (Form P & A. 80) he stated that he was the son of the deceased. The court issued the grant of letters of administration on 15th November 2010 and confirmed the same on 4th August 2011. By virtue of the certificate of confirmation, the property devolved to Philip Otieno Owuor who, with the consent of the deceased beneficiaries, purchased the property. Obande filed an application in the Oyugis court to revoke the grant but the application was dismissed on 18th July 2014 for want of jurisdiction.
 8. The grant of confirmation issued to court was surrendered on 27th February 2014. The parties agreed that this matter proceed by way of affidavits and written submissions which were highlighted.
 9. Mr Okoth, counsel for the applicant, submitted that in view of the existence of pending proceedings at the Kisumu High Court and Court of Appeal the grant issued at the Oyugis Court be revoked and that an interim relief of inhibition against the property be issued until all these matters are settled by the Court of Appeal.
 10. Mr Sagwe, counsel for the respondents, submitted that ***Kisumu Succession Cause No. 417 of 2001*** which was heard and determined disposed of the Obande's grievance and he could not re-open it by filing the present application for revocation. He further submitted that the title to the suit property had been transferred to a third party who was not a party to the summons as such the court could not grant relief.
 11. The applicant invites the court to exercise its jurisdiction under **section 76** of the ***Law of Succession Act (Chapter 160 of the Law of Kenya)*** which provides as follows:

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

- a. *That the proceedings to obtain the grant were defective in substance;*
- b. *That the grant was obtained by the making of a false statement or by concealment of from the court of something material to the case.*
- c. *That the grant was made by an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*
- d. *The person to whom the grant was made has failed, after die notice and without reasonable cause either:-*

- i. To apply for confirmation of the grant within a year from the date thereof or such longer period as the court has ordered or allowed; or
 - ii. To proceed diligently with the administration of the estate; or
 - iii. To produce to the court, within the time prescribed any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of section 83 or has produced such investigation or account which is false in any material particular; or
- e. That the grant has become useless and inoperative through subsequent circumstances.

12. The applicant has the burden of proving any of the grounds affirmatively before the court can revoke the grant. Did the petitioner in **Oyugis Succession Cause No. 173 of 2010** obtain the grant fraudulently without disclosing material facts or concealing material fact?

13. The answer can only be in negative in light of the history of the matter I have outlined. Onyuro only filed the petition in Oyugis after the High Court had revoked the grant issued in favour of Obande. The result of those proceedings was that Obande was not a person entitled to administer the deceased's estate. It was therefore not material to disclose that fact to the court in Oyugi's. The High Court had disposed of the status of the Obande and there was no order of stay or injunction preventing the beneficiaries of the deceased from filing the petition to administer the deceased's estate.

14. I have perused the original file in **Oyugis Succession Cause No. 173 of 2010** to determine whether there was any defect in the proceedings. The file shows that the Onyuro petitioned for grant of letters of administration on 22nd October 2010 after the Obande's grant issued in Kisumu was revoked. The petition was published in the Kenya Gazette and the grant issued confirmed on 4th August 2011. Onyuro disclosed that Kennedy Ouma Nyatogo and John Odhiambo Nyatogo, his brothers, were co-beneficiaries of the deceased's estate.

15. The summons for revocation of grant is an attempt to re-litigate the issues that were determined in **Kisumu Succession Cause No. 417 of 2001** in which Mwera J., identified the petitioner and his two brothers as the beneficiaries of the estate of the deceased and held that, "*James Obande Owuor, the petitioner was never a nephew or in any other capacity, a relative of the deceased Nyatogo, entitled to petition to administer the deceased's estate.*"

16. In the result I find that the applicant's summons is frivolous and an abuse of the court process. I therefore make the following orders;

- a. The Summons for revocation or annulment of grant dated 11th November 2013 be and is hereby dismissed.
- b. The applicant shall bear the costs of the application.
- c. That the Certificate of Confirmation of Grant surrendered to court be returned to **Enock Onyuro Nyatogo**.

DATED and DELIVERED at HOMA BAY this 27th day October of 2014.

D. S. MAJANJA

JUDGE

Mr Okoth instructed by Enock Anyona Miruka and Company Advocates for the applicant.

Mr Sagwe instructed by S. M. Sagwe and Company Advocates for the respondent.