



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.248 OF 2011

IN THE MATTER OF THE ESTATE OF ONGENYE OKONGO DECEASED

AND

**IN THE MATTER OF AN APPLICATION BY MARGARET ATIENO ATINGA AND RODA
AUMA ATINGA FOR REVOCATION OF GRANT**

AND

MARGARET ATIENO ATINGA

RODA AUMA ATINGA..... OBJECTORS/APPLICANTS

AND

OURE SOLOMON ATINGA PETITIONER/RESPONDENT

RULING

1. The applicants/objectors herein Margaret Atieno Atinga and Roda Auma Atinga filed a notice of motion for revocation of grant under **Section 76** of the **Laws of Succession Act, Chapter 160 Rules 44, 49, 59 64** and **73** of the **Probate and Administration Rules** seeking:-

- 1. The instant application be certified urgent and the same be heard ex-parte in first instance.*
- 2. Pending hearing and determination of the Notice herein, the honourable court be pleased to issue temporary prohibitory order of injunction restraining the petitioner/respondent from disposing of, selling, alienating and or appropriating the assets of Ongenye Okongo the deceased herein, more particularly **L.R Nos North Sakwa/Kadera Lwala/1693 and 1694** the same being resultant parcels emanating from the original **L.R. No. North Sakwa/Kadera Lwala/107, North Sakwa/Kadera Lwala/1695 to 1698**, the same being resultant parcels originating from **North Sakwa/Kadera Lwala/483, North Sakwa/Kadera Lwala/1699, 1700, 1701, 1702 and 1703** the same being resultant parcels originating from **North Sakwa/Kadera Lwala/788 and North Sakwa/Kadera Lwala/860** in any manner whatsoever and/or however.*
- 3. Pending the hearing and determination of the Notice herein, the honourable court be pleased to grant an order of inhibition, inhibiting any transaction, sale, charge and or any other dealing with the land parcels numbers **North Sakwa/Kadera Lwala/1693 and 1694** the same being resultant parcels emanating from the original **L.R. No. North Sakwa/Kadera Lwala/107, North Sakwa/Kadera Lwala/1695 to 1698**, the same being resultant parcels originating from **North Sakwa/Kadera Lwala/483, North Sakwa/Kadera Lwala/1699, 1700, 1701, 1702 and 1703** the same being resultant parcels originating from **North Sakwa/Kadera Lwala/788 and North Sakwa/Kadera Lwala/860** in any manner whatsoever and/or however.*

4. *The grant of letters of administration granted to the petitioner/respondent on the 24th July 2006 and confirmed on 30th August 2007 vide Homa Bay Senior Resident Magistrate's Succession Cause No.6 of 2005 be revoked.*
5. *That honourable court be pleased to make an order for rectification of the relevant land register in respect of **L.R. No. North Sakwa/Kadera Lwala/1693 and 1694** the same being resultant parcels emanating from the original **LR No. North Sakwa/Kadera Lwala/107, North Sakwa/Kadera Lwala/1695 to 1698** the same being resultant parcels originating from **North Sakwa/Kadera Lwala/483, North Sakwa/Kadera Lwala/1699, 1700, 1701, 1702 and 1703** the same being resultant parcels originating from **North Sakwa/Kadera Lwala/788 and North Sakwa/Kadera Lwala/860** herein after referred to the suit properties in the name of the petitioner/respondent or any other 3rd party be revoked and/or revoked so that the original suit land do revert to the name of the deceased pending institution of a proper succession cause.*

1. The application was supported by a joint supporting affidavit sworn by the applicants. They depone to the fact that the deceased herein Ongenyé Okongo died on the 24th day of August 1986; the deceased had married seven (7) wives namely Gaudensia Opiyo Atinga (deceased), Damaris Gor Atinga (deceased), Leonora Akinyi Atinga (deceased), Lucia Aoko Atinga (deceased), Sara Aoko Atinga (deceased) and the two applicants herein.

2. They further contend that since they were the only widows surviving their deceased husband, they are the ones entitled to succeed the estate of their deceased husband and consequently distribute the same to the beneficiaries and not the petitioner/respondent who is a son to their deceased husband. They also say that the deceased was survived by a number of sons and daughters namely James Choro Atinga, Harrison Omolo Atinga, Solomon Oure Atinga, Francis Ogola Atinga, Joseph Onyango Atinga, Musa Kunga Atinga, Moses Ochieng Atinga, Meresa Atieno Atinga, Doris Anyango, Eunice Adhiambo, Ruth Amoun, Dorcas Aoko and Belinda Amoun. The applicants also contend that the respondent fraudulently misrepresented to the honourable court in his bid to succeed the estate of the deceased that the deceased's sons namely Harrison Omolo Atinga who died in 1976, Daniel Abich Atinga who died in 2004 did not object to him succeeding the estate of the deceased, yet by the time of lodging Homa Bay SRM succession Cause No.6 of 2005 their deceased husband was the registered proprietor of the suit properties.

3. That sometime on 12th January 2006 the respondent commenced succession proceedings in respect of the estate of their deceased husband without notice to other beneficiaries whatsoever; the petitioner was issued with letters of administration in respect of the estate of deceased on 24th July 2006 and the same was confirmed on 30th August 2007. Furthermore, that the petitioner did not seek or obtain the consent/authority of either the applicants or other beneficiaries in administering the estate of deceased and when applying for the confirmation of the said grant, which grant was confirmed in favour of the respondent. Upon confirmation of the grant of letters of administration, the respondent proceeded to subdivide the original suit land into portions as follows:-

- *North Sakwa/Kadera Lwala/1693 and 1694 the same being resultant parcels emanating from the original LR No. North Sakwa/Kadera Lwala/107;*
- *North Sakwa/Kadera Lwala/1690 to 1698 the same being resultant parcels originating from North Sakwa/Kadera Lwala/183;*
- *North Sakwa/Kadera Lwala/1699, 1700, 1701, 1702 and 1703 the same being resultant parcels originating from North Sakwa/Kadera Lwala/788 and North Sakwa/Kadera Lwala/860.*

1. The applicants further contended that the action of the respondent of sub dividing the entire suit land prior to sharing the estate of the deceased with the rest of the beneficiaries smacks of mala fides intention, namely for the fact that the respondent by the time he applied for confirmation of grant of letters of administration did not disclose unto the honourable court the identifies and respective shares of all the beneficiaries of deceased's estate, the estimated value of the 96 hectares suit properties worth about Kshs.4,000,000/= which is more than Kshs.100,000/= which is mentioned in the petition filed by petitioner.

2. Consequently, and for the above reasons, the applicants want the letters of administration together with

the certificates of confirmation thereof revoked and titles issued thereto nullified and returned to the original numbers.

3. The respondent opposed the application vide grounds of opposition and a replying affidavit both dated 17th January 2012. In his grounds of opposition, the respondent states the following:-

1. *The applicants have not filed any documentary evidence to prove that they are the widows of the late Ongenye Okongo which entitles them to be beneficiaries of the estate.*
2. *The applicants have not filed together with their application the consents of the beneficiaries on whose behalf they purport to seek the Grant revoked.*
3. *The applicants have not filed an alternative mode of distribution to overturn the mode that the respondent has adopted.*
4. *The applicants have not provided a valuation report for the properties in question to show and prove that as of 12th January 2005 when the respondent applied for the grant of letters of administration the properties subject matter herein were valued beyond the jurisdiction of the Senior Resident Magistrate's pecuniary jurisdiction then.*
5. *The applicants have not filed any valuation report to show that the value of the properties as of the date of filing this application is beyond the jurisdiction of the Homa Bay SRM's court.*
6. *The applicants have not given any evidence to show that the respondent has put up any of the properties subject matter herein for sale or issued any of the properties subject matter herein of the beneficiaries of the intention to alienate to any third party any of the properties other than the lawful beneficiaries themselves.*
7. *The applicants have not disclosed to court how they have been excluded from benefiting from the estate neither have they exhibited any written demand that they have made to the administrator or the Homa Bay SRM's court disputing or challenging the distribution made as they continue to occupy the land allocated to them by their late husband and the administrator who has generously allocated to their sons their respective portions but who have been uncooperative in the transfer of their respective portions to each of them.*
8. *The applicants have not shown the particulars of fraud as alleged and are only making this application to torpedo the work done diligently by the administrator.*
9. *The fact that the sons of the applicants consented to the making of the application for grant by the respondent and their non participation in seeking the revocation of the grant issued in Homa Bay clearly shows that the motive of the applicants is not in the interests of justice but for selfish ends which such be revealed when the court fully understands the distribution mode adopted by the respondent and which caters for the interests of the Applicants.*

1. In his replying affidavit, the respondent confirmed that he was given a grant of letters of administration of the deceased's estate on 30th August 2007 by Senior Resident Magistrate's court which has countrywide territorial jurisdiction and pecuniary jurisdiction of up to Kshs.300,000/= under **Section 3 (2) and 5 (1) of the Magistrate's Court's Act Cap 10.**

2. That the applicants never objected during the statutory 30 days period after gazettelement of the petition and neither did they raise any objection during the statutory 6 months prior to confirmation of grant. Furthermore, that he was chosen by the family to apply for grant of letters of administration of the deceased's estate as the oldest surviving son and also he was older than even the applicants when they were married by the deceased as he was already mature and consulting with the deceased over family issues thus he was considered the best suited person because of his understanding of the family history.

3. He justified his reasons of distributing the land according to sons and not mothers because after the death of Leonora Akinyi in 1970 and Sara Aoko in 1982, his brothers Samuel Otieno and Harrison Omolo in 1983 nearly killed each other over Plot NO. North Sakwa/Kadera Lwala/860 and the deceased after consultations with clan members decided to subdivide the land among the sons fencing each parcel with euphorbia plants.

4. He explained that since he was given the grant he has been able to distribute the estate as follows:-

- *Hermanus Ogola Atinga – North Sakwa/Kadera Lwala/1699*
- *Oure Solomon Atinga – North Sakwa/Kadera Lwala/860 and 1703*

1. That the other assets of the estate yet to be distributed are as follows:-

- *North Sakwa/Kadera Lwala/1693-1698, 1700-1702 (9 parcels of approx. 1.066 hectares each) which were created from the subdivision of the parcels mentioned in the certificate of grant namely North Sakwa/Kadera Lwala/483, 860, 107 and 788 for the reason that the recipients have not made any effort to have him obtain the necessary consents of the Land Control Board for transfer to them respectively as they have to sign the necessary application forms and give copies of their National Identity Cards.*

1. The respondent also avers that the beneficiaries who have been allocated but not yet had their share of inheritance transferred from the estate are as follows:-

- *Musa Kungu Atinga – North Sakwa/Kadera Lwala/1702 – 1.0066 Hectares*
- *Joseph Onyango Atinga – North Sakwa/Kadera Lwala/1696 – 1.066 hectares*
- *Moses Ochieng Atinga -North Sakwa/Kadera Lwala/1693-1.066 hectares*
- *Samwel Otieno Atinga – North Sakwa/Kadera Lwala/1700-1.066 Hectares*
- *James Chor – North Sakwa/Kadera Lwala/1701, 1697 and (962 and 690) – 1.702 Hectares*
- *Harrison Omolo – North Sakwa/Kadera Lwala/1694 – 1.066 Hectares*
- *Daniel Abdi Atinga – North Sakwa/Kadera Lwala/1698, 1694 (Plot No.906 – 1.006 hectares*

2. The respondent also admitted that the deceased had 7 wives as enumerated in paragraph 4 of the supporting affidavit and also revealed that the 1st applicant Margaret Atieno Atinga was brought as a surrogate mother to her blood sister Sarah Aoko Atinga who could not herself get a son. Margaret Atieno Atinga bore the following sons:-

- *Musa Kungu Atinga – North Sakwa/Kadera Lwala/702*
- *Samwel Otieno Atinga (deceased) – North Sakwa/Kadera Lwala/700*
- *Daniel Abich Atinga (deceased) – North Sakwa/Kadera Lwala/1698 and 1694.*

1. The respondent also contended that the deceased allocated the Homa Bay Town plot on which stands a rental house to Rhoda Auma Atinga, the 2nd applicant together with the late Daniel Abich Atinga, the son of the 1st applicant which property was not affected by the distribution shown above.

2. For reasons above stated, the respondent contends he does not understand why applicants have also brought in their married daughters to share in the estate with their brothers which is not only alien to Luo cultural practice despite the provisions of the Constitution of Kenya, 2010, but also detrimental to the welfare of the very beneficiaries who the applicants now pretend to represent as it will lead to an erroneous mode of distribution that will only end up bringing family feuds of which the applicants are timorous. He says that the applicants have been blinded by their sheer greed with the only intention of benefiting their biological children to the detriment of the other families.

3. The respondent confirmed that all daughters of the deceased are married and named them against each mother as follows:-

- *Gaudensia Opiyo Atinga – 3 daughters – Ariyo, Oyier and Okoth*
- *Damaris Gor Nyakoth – Nil*
- *Leonora Akinyi – 2 daughters – Achieng and Monica*
- *Lucia Aoko Atinga - 2 daughter – Wangare and Grace*
- *Sara Aoko Atinga – 3 daughters – Anyango, Nyandago and Nyongesa*
- *Margaret Atieno Atinga – 3 daughters – Adoyo, Akinyi and Aludo*
- *Roda Auma Atinga – 6 daughters – Meresa, Doris, Eunice, Ruth, Dorcas and Belida.*

1. Finally, the respondent contended that a lot of money has been expended in this matter in terms of

court, survey, subdivision, registration fees, travel and all other expenses attendant to the administration of the estate and revocation of all the work that has been done on flimsy grounds shall amount to great waste of the estate as any misunderstanding or correction should be done within the succession cause already in place instead of starting the whole process afresh. It is also the respondent's case that some beneficiaries like himself are advancing in age and would not like to be dragged through the courts again when the issues can be expeditiously dealt with in the matter before Homa Bay court.

2. This matter was by consent canvassed by way of written submissions. Both parties duly filed and exchanged their respective submissions. After carefully reading through the written submissions, the following are the issues to be determined by this court:-

- *Have the applicants proved that they were wives to Ongenye Okongo (the deceased).*
- *Who lies in priory of taking grant of letters of administration according to the Succession Act to justify revocation of grant.*
- *Is the respondent guilty of misrepresentation/concealment of material facts in the information he gave to the court when he applied for and took out the letters of administration to the estate of the deceased?*

1. Regarding the first issue the respondent confirmed in paragraph 16 of his replying affidavit that indeed the deceased had 7 wives but that the 1st applicant was brought in as a surrogate mother to her blood sister Sarah Aoko Atinga. However, even if the 1st applicant was a surrogate mother, according to **Restatement of African Law of Kenya vol.1, the Law of Marriage & Divorce** by Eugene Cotran, the author explains at page 172 on special types of marriages under Surrogate and substitute unions that:-

“A wife may be replaced by a sister or other relative either:-

- **where the wife dies; or**
- **where the wife is barren or has no male children”**

2. In both cases a husband is entitled to receive a substitute wife, but only if the woman concerned and her father accept such an arrangement.

3. In the instant case, even if the 1st applicant was a surrogate mother to her blood sister Sarah Aoko Atinga, she was still a wife to the deceased and therefore a direct Dependant of the estate of the deceased. So both applicants have proved that they were wives to the deceased Ongenye Okongo.

4. Secondly, on the issue of who lies in priority to taking grant of letters of administration in order to administer the estate of the deceased, **Section 66** of the **Law of Succession Act** provides that preference is to be given to certain persons to administer where deceased died intestate and stipulates:-

“66. when 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:-

- **surviving spouse or spouses, with or without association of other beneficiaries;**
- **other beneficiaries entitled to intestate with priority according to their respective beneficial interests as provided by Part V;**
- **the public Trustee; and**
- **Creditors.**

1. In **Re Kibiego [1972] EA 179** Madan J (as he then was) held:-

“Whatever Cotran's source of Nandi law may be, I am of the opinion that in today's Kenya in the

absence of a valid reason such as grave unsuitability a widow of whatever race living in the county is entitled to apply to the court for the grant of letters of administration more so when the children, as in the instant case, are minors. A widow is the most suitable person to obtain representation to the deceased husband's estate. In the normal course of events she is the person who would rightfully, properly and honestly safeguard the assets of the estate for herself and her children. It would be going back to a medieval conception to cling to a tribal custom by refusing her a grant which is obviously unsuited to the progressive society of Kenya in this year of grace. A legal system ought to be able to march with the changing conditions fitting itself into the aspirations of the people which it is supposed to safeguard and support.”

2. In his characteristic and forward looking approach, Madan J truly lived beyond his time for today his thoughts have found their way into concrete provisions in the **Constitution of Kenya 2010, the Land Registration Act No.3 of 2012** and other provisions of the law that safeguard the interests of women in general and widows in particular.

3. In the instant case, the respondent did not indicate anywhere in the forms he filled before letters of administration were given to him that the deceased left behind 2 surviving widows and neither did he even indicate that the deceased had daughters. His explanation for this I believe is what he stated in paragraph 6 of his replying affidavit where he contended:-

“That I was chosen by the family to apply for the grant of letters of administration of the estate of our late father because I was the oldest surviving son and also happened to be older than even the applicants herein who were married when I was already mature and consulting with our late father over family issues hence was considered the best suited person because of my understanding of the family history.”

4. From the above explanation by the respondent, his reasons for not considering the applicants as ranking higher in priority before himself in administering the deceased's estate was simply because of their age compared to his, nothing more. In my humble view, age is immaterial according to **Section 66** of the **Law of Succession Act** as it does not matter the age of the widow, the fact remains that the applicants were wives to the deceased and could themselves administer the deceased's estate or consent to the respondent to administer the estate. The respondent did not seek the applicants' consent either before or after obtaining the grant of letters of administration intestate.

5. Thirdly on the issue of whether the respondent is guilty of non-disclosure of material facts when he applied for the grant of representation **Section 76** of the **Law of Succession Act** states that:-

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

a)

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.”

1. In **Samuel Wafula Wasike -vs- Hudson Simiyu Wafula [1993] LLR (CAK)** (Kwach, Omolo and Tunoi JJA) held:-

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

2. In any event **Rules 26 and 40 (8)** of the **Probate and Administration Rules** are quite clear that letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree as or in priority to the applicants. The force of those rules is clear from the sentiments expressed in **the Matter of the Estate of Ngari Gatumbi alias James Ngari Gatumbi (deceased) Nairobi High Court Succession Cause No.783 of 1993** where Koome J as she then was persuasively held:-

“A grant will be revoked where a person who is entitled to apply is notified by the petitioner of their intention to apply and that persons consent to the petitioners application is not sought.”

3. In the instant case, it is indisputable that the applicants' consent was never sought to allow the petitioner to petition for grant to the estate of the deceased. Secondly, I have taken a look at the form P&A 5, the affidavit in support of petition for letters of administration intestate and find that the applicants and respondent's sisters do not feature anywhere in the list of the persons surviving the deceased which simply means they were not aware of the application for grant by the respondent nor did they consent to it.

4. Further, the respondent put the names of Harrison Omolo Atinga, Daniel Abich Atinga and Samwel Otieno Atinga who died in 1996, 2003 and 2004 respectively prior to the respondent applying for grant in 2005 as persons who did not object to the taking of the grant by the respondent. What greater concealment or misrepresentation of facts could be worse than this.!

5. All the above actions by the respondent amount to concealment of material facts in line with **Section 76 (b)** of the **Law of Succession Act**. It is immaterial at this point as to how much the net estate of the deceased was worth because none of the parties has presented a valuation report to this court as to how much the suit properties of the deceased were worth.

6. It is my humble view therefore that the issuance of grant and subsequent confirmation of the same to the respondent was irregular having been obtained through fraudulent misrepresentation of material facts and same should be revoked. I therefore allow prayers 4 and 5 of the notice of motion dated 13th December 2011. What I am saying here is that the grant of letters of administration granted to the petitioner/respondent on 24th July 2006 and confirmed on 30th August 2007 vide Homa Bay SRM's Court on 30th August 2007 be and is hereby revoked. Prayer 5 of the application is also allowed in terms of the prayer. The respondent shall bear the costs of these objection proceedings.

Delivered, dated and signed in open court at Kisii this 22nd day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Nyanyaki for Owade for Applicants

Mr. C.A. Okenye for Minda & Co. Advocates for Petitioner

Mr. Bibu - Court Assistant