



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1297 OF 2010**

**IN THE MATTER OF THE ESTATE OF BONIFANCE OKACH (DECEASED)**

**FLORENCE OKACH.....1<sup>ST</sup> APPLICANT**

**GRACE ATIENO OKACH.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**WINNIE WANGOMA OKACH.....1<sup>ST</sup> RESPONDENT**

**JACK ODERA OKACH.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. BONIFANCE OKACH died intestate in Rongo. The respondents said he died in 1968 and the applicants said he died in 1970. He left a son JOHN NYAGADO OKACH and daughter MIRIAM OKACH. MIRIAM OKACH got married in Tanzania and there is no evidence that she has been involved in any of these proceedings. JOHN NYAGADO OKACH died on 9<sup>th</sup> July 1988. When he was alive he married two wives. These were the 1<sup>st</sup> respondent WINNIE WANGOMA OKACH and the 1<sup>st</sup> applicant FLORENCE OKACH. The children of the 1<sup>st</sup> respondent by the deceased JOHN NYAGADO OKACH are the 2<sup>nd</sup> respondent, JOE NGOJE OKACH, FRED NYAGADO OKACH, TOM CLIFF OKACH, BRIAN OKEYO OKACH, BETTY MAGOLO OKACH, ANNETTE ASIGO OKACH and NGELA ODEKA OKACH. The 1<sup>st</sup> applicant said she was the first wife and that she got five children with the deceased. They included EMMANUEL OKACH and the 2<sup>nd</sup> applicant GRACE ATIENO OKACH. The 1<sup>st</sup> respondent's case was that the 1<sup>st</sup> applicant and JOHN NYAGADO OKACH got only three children (the deceased RUTH AKUMU OKACH, 2<sup>nd</sup> applicant and EMMANUEL OKACH) following which the couple divorced in **District Magistrate's Court Divorce No. 2 of 1976** at Nairobi ("WVO-4"). The 1<sup>st</sup> applicant went on to get other children by other people. The fact of divorce was denied by the 1<sup>st</sup> applicant.

2. This Succession Cause was filed by the respondents on 29<sup>th</sup> June 2010 in respect of the deceased BONIFANCE OKACH. In the affidavit sworn to support the petition, the 1<sup>st</sup> respondent named herself, her children and EMMANUEL OKACH as the only persons surviving the deceased. On 3<sup>rd</sup> March 2011 a grant was issued to the respondents. An application for Confirmation of the Grant was allowed on 6<sup>th</sup> December 2011 in which the named beneficiaries were each determined to have an equal share in the estate which comprised land parcel KAMAGAMBO/KABUORO/416. A certificate was issued.

3. The applicants filed summons under **section 76(b) and (c) of the Law of Succession Act (Cap 160) and rule 44(1) of the Probate and Administration Rules** for the revocation of the grant and for the preservation of the estate. The application was defended by the replying affidavit sworn on 5<sup>th</sup> November 2014 by the 1<sup>st</sup> respondent. The complaint by the applicants was that the Cause had been secretly filed by the respondents without informing and involving them and that that had resulted in their being disinherited. Secondly, the respondents had failed to disclose they had in **High Court Succession Cause No. 1569 of 1996 at Nairobi** applied for and got a grant in respect of the same deceased, which grant had been confirmed but that on the application of EMMANUEL OKACH it had been revoked. The respondents had gone on to secretly file the instant Cause without letting the Court know of the previous proceedings.

4. I called for the **High Court Succession Cause No. 1569 of 1996** file and confirmed that it was filed in respect of the deceased BONIFANCE OKACH by the respondents. A grant was issued to them and was later confirmed. EMMANUEL OKACH successfully applied to have the grant annulled/revoked. The orders were granted on 2<sup>nd</sup> December 1999. This is how the 1<sup>st</sup> respondent responded to these issues:-

*“19. THAT I applied for grant of letters of administration to the estate of BONIFANCE OKACH in HIGH COURT NAIROBI SUCCESSION CAUSE NO. 1569 OF 1996 and the grant was revoked following an application by EMMANUEL OKACH, the son of the 1<sup>st</sup> applicant, which application was heard in my absence.*

*20. THAT the application for grant of letters of administration herein and the application for Confirmation of Grant herein was made with full knowledge and participation of the said EMMANUEL OKACH and he has been duly provided for in the distribution of the estate of BONIFANCE OKACH.”*

5. The 1<sup>st</sup> respondent died in August 2013. On 11<sup>th</sup> April 2014 the 2<sup>nd</sup> respondent brought the present application under **sections 45 and 81 of the Law of Succession Act and rules 44(3), 49 and 61 of the Probate and Administration Rules** seeking that the applicants be restrained and barred from selling, disposing, alienating, leasing, developing and/or otherwise dealing with KAMAGAMBO/KABUORO/416; any sale of the property by the applicants be declared null and void; directions be given regarding the manner of hearing of the application by the applicants for the revocation of the grant; and that, henceforth, the application for the revocation of the grant does proceed against the said respondent only, now that the 1<sup>st</sup> respondent has died.

6. The 2<sup>nd</sup> applicant swore a replying affidavit to oppose the application. She stated that, now that the 2<sup>nd</sup> respondent has died;

*“by operation of law the 2<sup>nd</sup> respondent assumes responsibility as the sole administrator and no leave of court is required...”*

Indeed, under **section 81 of the Act:**

**“Upon the death of one or more or several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them.”**

It follows that prayer 5 of the application was not necessary. Following the death of the 1<sup>st</sup> respondent all her powers and duties have become vested in the 2<sup>nd</sup> respondent.

7. Following the Confirmation of the Grant to the respondents, the deceased's land was distributed and respective title deeds issued. This is evident from the affidavit sworn by the 1<sup>st</sup> respondent to oppose the application for the revocation of the grant. It follows that land parcel KAMAGAMBO/KABUORO/416 that is the subject of the instant application no longer exists. Further, the application seeks to restrain the

applicants from developing, excavating and otherwise dealing with the estate land. In the replying affidavit by the 1<sup>st</sup> respondent that I have referred to in the foregoing she stated as follows:-

*“15. THAT upon the death of my husband JOHN NYAGADO OKACH, the 1<sup>st</sup> applicant returned to the family home and forcefully and without any consent erected a building on the family land being KAMAGAMBO/KABUORO/416 where she continues to live with the said CALEB ONGUNGO. (Annexed and hereto marked ‘WVO-5’ are photos of the applicant’s house.)*

*16. THAT the 1<sup>st</sup> applicant has unlawfully sold approximately 3 acres of family land to third parties who have occupied the same and erected structures and buildings thereon. (Annexed and hereto marked ‘WVO-6’ are photos of the pieces of land sold to third parties.)”*

The affidavit was sworn on 5<sup>th</sup> November 2012. The deceased JOHN NYAGADO OKACH died in 1988. It means that the 1<sup>st</sup> applicant has lived on this land, cultivating and developing it for over 20 years. Would an injunction issue against her? Can she alienate parcels of land whose titles have already been registered in the names of the beneficiaries? I find no merit in prayers 3 and 8 of the application. In any case, land transactions are usually formal in nature. Land cannot be sold to unknown person. The said respondent should have shown any agreement of sale, or any evidence of consent being sought or obtained, or any transactions at the lands registry. If a third party has since occupied any portions of the estate land, his/her identity can be obtained.

8. The only prayer that I grant is the one seeking that henceforth all beneficiaries shall be served by the applicants in respect of the summons dated 1<sup>st</sup> October 2012 and 4<sup>th</sup> October 2012 seeking the revocation of the grant. Otherwise, the application dated 10<sup>th</sup> April 2014 is dismissed with costs.

9. Before any direction can be given regarding the mode and manner of hearing and disposal of the application for revocation, I order that this matter be mentioned before me on 25<sup>th</sup> November 2014. Counsel to address me on the competence of these proceedings in view of **High Court Succession Cause No. 1569 of 1996 at Nairobi.**

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> November 2014**

**A.O. MUCHELULE**

**JUDGE**