



NO.780

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND DIVISION

MISCELLANEOUS CIVIL APPLICATION NO.1 OF 2013

IN THE MATTER OF MIGORI PROBATE AND ADMINISTRATION CAUSE NO.123 OF 2008

AND

**IN THE MATTER OF THE ESTATE OF THE LATE GLADIS ODINGA ORINDA LAND
PARCEL NO. SUNA EAST/WASWETA 1/6151**

EUNITA ANYANGO GEKO 1ST APPLICANT

ESTHER ATIENO MAUCHA 2ND APPLICANT

VERSUS

PHILIP OBUNGU ORINDA RESPONDENT

RULING

The Application

1. The applicants' chamber summons dated 15th January 2013 is brought pursuant to **sections 48 and 76 of the Law of Succession Act Cap 160 Laws of Kenya, Rule 44 of the Probate and Administration Rules, Sections 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 40 Rules 1, 2, 3, 4 and 5 of the Civil Procedure Rules 2010** and any other enabling provisions of the law. The applicants seek orders:-
 1. *That there be an order of injunction restraining Philip Obungu Orinda, the Respondent herein by himself, agent or any other person acting on his behalf from intermeddling in any manner whether by sale, lease mortgage, charge or in any other manner detrimental or adverse to the interest of the Applicants herein pending the hearing and determination of this Application.*
 2. *That the Grant of Letters of Administration issued to Philip Obungu*

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Orinda, the Respondent herein by the Migori Senior Resident Magistrate in Succession Cause No.123 of 2008 on 29/10/2008 in the Estate of the late Gladis Odinga Orinda be revoked and or annulled.

3. *Costs of this application e born by the Respondent.*
2. The application is based on the grounds that the grant of letters of administration in respect of the estate of Gladis Odinga Orinda (deceased) to Philip Obungu Orinda on 29th October 2008 vide Migori Senior Resident Magistrate's Court Succession Cause No.123 of 2008 was issued fraudulently and by concealment of material facts to the lower court with the result that the issuance of the said grant was detrimental and adverse to the interest of the beneficiaries of the estate of the said Gladis Odinga Orinda.
3. The applicants further contend that the Respondent has no beneficial interest in the Estate of the late Gladis Odinga Orinda and he is only intent on dis-inheriting the applicants together with all other beneficiaries to the deceased's estate when it is clear that the respondent has his own share of the deceased's estate registered in his name as land parcel No. Suna East/Wasweta 1/4624; hence the instant application.
4. The application is supported by three affidavits by Eunita Anyango Geko, Esther Atieno Maucha and Shadrack Maucha Orinda.
5. Eunita Anyango Geko (Eunita), a female adult of sound mind and a surviving wife of late Gladis Odinga Orinda states that she has a beneficial interest in the suit property known as Suna East/Wasweta 1/6151. She states that she was married in 1970 to the late Gladis Odinga Orinda of Ngege village Kabika sub location within the county

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of Migori in a WOMAN to WOMAN marriage in accordance with Suba customary Laws. That the deceased paid nine heads of cattle to her parents as dowry.

6. She also states that out of the said marriage she has ten (10) children whom she names as Dixon Oyoo, Millicent Atieno, Fidel Ogweno, Gordon Ogweno, Daniel Ogweno, Hellen Adhiambo, Elizabeth Ogweno, Washington Ogweno, Benta Achieng and Chacha Ojwang.
7. According to her Gladis Odinga Orinda (deceased) was the sixth wife of the late Orinda Chacha others being Sewe Orinda, Aringo Maura Orinda, Elizabeth Akeyo Orinda and Margaret Aoko Orinda. She also states that in 1990 Gladis Odinga Orinda married Esther Atieno Maucha in another woman to woman marriage who up to now is her co-wife and that the deceased paid six heads of cattle as dowry for Esther Atieno Maucha (Esther). Further that after Orinda Chacha died his land was subdivided amongst his wives and Gladis Odinga Orinda's house and Margaret Aoko Orinda's house were given one parcel of land being parcel No. Suna East/Wasweta 1/1460 which was registered in the names of the only surviving sons from the two houses, namely Jomo Orinda and Philip Orinda each with ½ share. The photocopy of the green card in respect of the said parcel is annexed as **Exhibit 1** marked "**EAG 1**".
8. Eunita further states in her affidavit that Jomo Orinda died after which Gladis Odinga Orinda (Gladis) conducted succession case in Kisii High Court in respect of parcel No. Suna East/Wasweta 1/460 which was later partitioned into two parcels with resultant numbers being Suna

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East/Wasweta 1/4624 and Suna East/Wasweta 1/4625, with Suna East/Wasweta 1/4624 being registered in the name of Philip Obungu Orinda while Suna East/Wasweta 1/4625 was registered in the name of Gladis. There is annexed to the affidavit both green cards marked as **EAG - Exhibit 2** and **EAG - Exhibit 3** for the two parcels of land respectively. Further in her affidavit, Eunita depones that after subdivision, Gladis Odinga sold part of parcel No. Suna East/Wasweta 1/4625 to one Samson Noel Onguru with the subsequent subdivision thereof resulting in Suna East/Wasweta 1/6151 and Suna East/Wasweta 1/6152. Green Cards being **EAG – Exhibit 4** and **EAG – Exhibit 5** respectively are annexed to the affidavit.

9. Eunita further swears in her affidavit that the respondent took a loan with Agricultural Finance Corporation using title No. Suna East/

Wasweta 1/4627 after the same was partitioned from Suna East/

Wasweta 1/460 as indicated in **EAG – Exhibit 2**. Samson Noel Onguru also pledged parcel No. Suna East/Wasweta 1/6152 to Development Company Limited after the same was partitioned from Gladis' parcel No. Suna East/Wasweta 1/4625. She together with her co-wife lodged a caution on parcel No. Suna East/Wasweta 1/6151 after Gladis' death since she realized that the respondent was intending to grab the same. It is Eunita's contention that the Grant of Letters of Administration issued to the Respondent vide Migori Senior Resident Magistrate's court Succession Cause No.123 of 2008 was so issued through fraud and/or concealment of material facts and to the detriment of the applicants herein. She contends that the respondent concealed from the

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lower court the fact that he had earlier on been given his own share from the original land parcel No. Suna East/Wasweta 1/460 belonging to Gladis and also that the applicants Eunita and Esther together with their children were the beneficiaries of the estate of Gladis.

10. Eunita is apprehensive that unless the respondent is stopped in his tracks, he plans to get the title deed in respect of the estate of the deceased so that he can use it to secure a loan from Agricultural Finance Corporation with a view to disinheriting the only two surviving wives of the deceased. It is contended that in Succession Cause 123 of 2008 the respondent describes himself in form P&A 5 as son of the deceased which information is deliberately false. However, in the gazette notice the respondent describes himself as step son of the deceased which is correct. Evidence of the proposed loan from AFC by the respondent is annexed and shown as **EAG – Exhibit 9**.
11. Eunita reiterates that the respondent has no beneficial interest in land parcel No. Suna East/Wasweta 1/6151 as he had taken his rightful share in the original parcel of land No. Suna East/Wasweta 1/460 after subdivision of the same after which he got his resulting number Suna East/Wasweta 1/4624 which parcel he has given as security for a loan with AFC. She wants this court to make a finding that the respondent acted fraudulently when applying for the Grant of Letters of Administration Intestate of the estate of the deceased herein.
12. The second applicant Esther also swore an affidavit dated 15th January 2013 in support of the application herein in which she states that she has a beneficial interest in the suit land known as Suna

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East/Wasweta 1/6151 as she is a surviving wife of the late Gladis. Like Eunita, she explains how she got married to Gladis in a woman to woman marriage in accordance with Suba community Laws of marriage. She states that she is a co-wife to Eunita and has one child. Her affidavit corroborates the averments made by Eunita concerning the issue of how the Respondent fraudulently applied for and obtained the Grant of Letters of Administration Intestate in this case, and how he now intends to swindle the rightful beneficiaries of the deceased out of their entitlement to the suit land.

13. Mr. Shadrack Maucha Orinda (Shadrack), one of the surviving sons of the late Orinda Chacha also swore an affidavit in support of the application in which he states that the late Gladis was his step mother being the sixth wife to the late Orinda Chacha his father. That after the death of his father the family sat down and subdivided the land amongst the six wives namely Sewe Orinda, Gladis Odinga Orinda, Atieno Orinda, Margaret Aoko, Aringo Maura Orinda and Elizabeth Akeyo Orinda.
14. He further states that the late Gladis and Margaret Aoko Orinda were given one portion of land registered as number Suna East/Wasweta 1/460 and registered in the names of Jomo Orinda and Phillip Obungu as the sons of Gladis and Margaret Aoko Orinda respectively with each being entitled to half ($\frac{1}{2}$) share of the land that comprised approximately 4 hectares. After Jomo Orinda died his late mother Gladis conducted succession to his estate vide Kisii High Court in respect of

land parcel No. Suna East/Wasweta 1/460 being

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succession cause No.138 of 1986. It is shown and marked “SMO – Exhibit 1 ABCDEFGH” a bundle of court proceedings.

15. Shadrack also states that after the succession of Jomo Orinda’s estate, land parcel No. Suna East/Wasweta 1/460 was subdivided into two parcels i.e. Suna East/Wasweta 1/4624 and 4625 with parcel No. Suna East/Wasweta 1/4624 being registered in the name of Philip Obungu Orinda as his rightful half share hence he had his full share in the family property. He further states that he knows both applicants herein who were married to the late Gladis in woman to woman marriage in accordance with Suba Customary Laws of marriage. That Gladis died on 27th June 1998 and grant of letters of administration made to the respondent vide Migori Senior Principal Magistrate’s Court succession cause No.123 of 2008 and the same are yet to be confirmed and administered.
16. It is also Shadrack’s contention that the grant issued to the respondent herein was based on concealment of material facts from the court by the respondent. He prays that the grant be revoked and/or annulled so that Eunita and Esther together with their eleven children who are the rightful beneficiaries to land parcel No. Suna East/Wasweta 1/6151 after the death of Gladis can get their share.
17. Despite being served with the summons herein, the Respondent, did not file any replying papers. The application therefore proceeded ex-parte.

Submissions by the Applicants

18. Mr. Odhiambo filed written submissions on 20th July 2013 on

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behalf of the applicants. These written submissions were to buttress the oral submissions earlier presented to the court on 24th May 2013. The submissions were accompanied by a number of authorities.

19. It is submitted that the applicants’ marriage to Gladis was governed by Suba Customary Laws of marriage which allowed woman to woman marriages. Such marriages were also said to be practiced by the Luos, the tribe from which Gladis came and that in light of the Suba and Luo customs, Gladis was the applicants’ husband. Reference was made to “**Restatement of African Law Kenya Vol.1**” by Eugene Cotran and at p. 13 thereof, the learned author says of the Kikuyu:-

“WOMAN-TO-WOMAN MARRIAGE:- where a husband dies leaving

a childless widow, who is past child – bearing age, the widow may marry a wife. The widow pays ruracio (marriage consideration) to the family of the woman selected, and arranges for a man from her deceased’s husband age set to have intercourse with her. Children resulting from such intercourse are regarded as the children of the widow’s deceased husband.”

20. Concerning woman-to-woman marriages among the Luo, Cotran’s Restatement at page 172 says:-

“WOMAN-TO-WOMAN MARRIAGE (chi mwandu). Where a husband

dies leaving a childless widow or a widow with no male children, the

widow may marry a wife by giving dho I keny (marriage

consideration) to her family in the usual way. The widow then selects a man from her late husband's clan to have sexual intercourse with her wife, and any children resulting from such intercourse will be regarded as those of the widow's deceased husband."

21. Counsel for the applicants submitted that once a woman-to-woman marriage has taken place, and the marriage consideration paid in accordance with the custom, then in the case of death of the woman-husband, issues of succession arise and such issues must be dealt with

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in accordance with the custom under which the marriage was celebrated. See **Millicent Njeri Mbugua –vs- Alice Wambui Wainaina [2008] e KLR** and **Agnes Kwamboka Ombuna –vs- Birisila Kerubo Ombuna – Kisii High Court Civil Appeal No.132 of 2008.**

22. In the **Millicent Njeri Mbugua case**, the respondent contended that she was married to the wife of Murachia Burugu (deceased) according to Kikuyu custom. This was a wife to wife marriage. After the said marriage, she cohabited with the deceased and his wife. Later her **"husband"** the deceased's wife passed on and she was left caring for the deceased. Her deceased husband, Priscilla Wanjiru was buried on the suit premises. At that point, the appellant surfaced and was given a portion of the suit land to utilize. The suit land was later subdivided into two portions that were used by the appellant and the respondent respectively. The respondent wanted a share of the deceased's estate to be distributed to her, claiming that she was not a mere employee of the deceased without inheritance rights.

23. The appellant opposed the respondent's claim to a share of the deceased's estate on grounds that the respondent was a mere employee of the deceased. The trial court found for the respondent and the appellant appealed to the High Court.

24. In his judgment, Hon. M.S.A. Makhandia, J (as he then was) rightly observed that for a woman-to-woman marriage to be valid, certain basic parameters must be in place, namely:-

- *the husband of the woman marrying another woman must have died;*
- *the woman marrying must have been left childless by her deceased husband;*

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- *the woman marrying must be past child bearing age;*
- *the woman-husband must pay dowry (ruracio in Kikuyu);*
- *the woman-husband must also arrange for a man from her deceased's husband age group to have intercourse with her wife.*

25. For reasons that were advanced by the learned Judge on appeal, which reasons are not relevant to the instant case, the appeal was allowed. What is of essence from the above decision is that woman-to-woman marriages do occur among certain communities in Kenya and once the set parameters are fulfilled, the law of succession as enshrined in the **Law of Succession Act, Cap 160** of the **Laws of Kenya** applies to such marriages upon the death of the woman-husband.

26. Counsel for the applicants herein also submitted that once bride price has been paid by the woman-husband, she becomes the social and legal father of her wife's children and that any property transmitted to her upon the demise of her husband can devolve to the son(s) of her wife in order to carry on the name of her deceased husband. Counsel urged the court to find that in the instant case, the applicants, as supported by their step son Shadrack have demonstrated beyond doubt that they are entitled to inherit the property left behind by their husband, Gladis and that in the circumstances, the grant issued to the Respondent herein, for the sole purpose of disinheriting

them should be revoked and/or annulled.

Findings and Conclusions

27. In the instant case, there is uncontroverted evidence that Gladis paid 9 heads of cattle as dowry for Eunita and 6 head of cattle for Esther, the 1st and 2nd applicants respectively. There is also

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uncontroverted evidence that Gladis was left without male child after her only son died. It is also in evidence that by the time her husband died, Gladis was past child bearing age and that after she married each of the applicants, she arranged for a man of her husband's age set to have intercourse with her wives and as a result thereof, the two wives bore 11 children between them. The issues that now arise for determination are:-

1. *Whether the applicants and their 11 children were dependants of Gladis so as to be entitled to a share of her estate;*
2. *Whether the respondent was the rightful heir of the estate of Gladis ;*
3. *If the answer to (2) above is in the negative, whether the Grant of Letters of Administration Intestate in respect of the estate of Gladis issued on 29th October 2008 vide Migori SPM's Court in Migori Succession Cause No.123 of 2008 should be revoked on account of fraud and the making of a false statement;*
4. *Who shall bear the costs of these proceedings?*

Whether the applicants and their 11 children were dependants

of Gladis Odinga Orinda.

28. The word “**dependant**” is defined in **section 29** of the **Law of Succession Act** in the following terms:-

“For the purposes of this part, “dependant” means –

- a. **the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
- b. **Such of the ----**
- c. **Where the deceased ----**

29. It is already established by evidence on record that the applicants herein were wives of Gladis as at the time of her demise. The 11 children are therefore the children of Gladis and were all therefore

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beneficially entitled to her intestate estate. A case in point cited by counsel for the applicants is **Mombasa High Court Succession Cause No.212 of 2010 – Monica Jesang Katam –vs- Jackson Chepkwony & another [2011] e KLR**. In the case, Ojwang J (as he then was) held, and I wholly agree with him, that “**relationships arising from woman-to-woman marriages**” can be adopted and read into the broad frame work of the Law of Succession Act. The learned judge observed in part of his judgment:-

“The sacrosanct line of devolution of a deceased person’s estate is

constructed around dependency” the legal entitlement to take under that estate. The scheme of entitlement, in this regard is set out in S.29 of the Law of Succession Act (Cap 160 Laws of Kenya) ---- This custom (of woman-to-woman marriages), I

hold, is to be read into the scheme of s.29 of the Law of Succession Act (Cap 160) placing the petitioner and her children in the first line of inheritance; the petitioner herself for being wife” of the deceased (woman-husband), and her children for being children of the deceased (woman-husband).”

30. Taking the evidence adduced by the applicants in the instant case side by side with the provisions of **section 29 of Cap 160 Laws of Kenya**, I am persuaded that the applicants herein and their respective children are in the first line of inheritance in relation to the estate of Gladis Odinga Orinda.

Whether the Respondent was the rightful heir of the estate of Gladis Odinga Orinda.

31. Having found that the applicants and their respective children are the first in the line of inheritance in relation to the estate of Gladis Odinga Orinda, I also find, that the respondent was not and is not the rightful heir in relation to the estate of Gladis Odinga Orinda. The

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respondent has had his own share of the estate of his late father, Orinda Chacha, the title to which the respondent has given as security for a loan from Agricultural Finance Corporation.

Whether the Grant of Letters of Administration issued to the Respondent in relation to the estate of Gladis Odinga Orinda should be revoked and/or annulled.

32. There is abundant evidence on record to show that the respondent obtained the Grant of Letters of Administration Intestate in relation to the estate of Gladis Odinga Orinda through fraud and false misrepresentation of facts. In Form P&A 5, being Affidavit in Support of Petition for Letters of Administration Intestate, the respondent represented himself as the only son of Gladis Odinga Orinda. That fact was not correct. Apart from the fact that the respondent was only a step son to Gladis, there is other evidence which is uncontroverted and which is accepted by the court that the applicants herein and their respective children were surviving spouses and children of Gladis Odinga Orinda, their late woman-husband and woman-father. In the premises, and as correctly submitted by counsel for the applicants, the applicants and their respective children are to be preferentially granted any lawful Letters of Administration intestate in respect of the intestate estate of their late woman-husband and woman-father Gladis Odinga Orinda.

33. Further, the provisions of **section 66 of Cap 160** place the applicants and their respective children ahead of any other claimant to the estate of the deceased. The section provides:-

“When a deceased has died intestate, the court shall, save as otherwise

expressly provided, have a final discretion as to the person or persons

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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 rule 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;**
- d. **Creditors.”**

34. Taking all the circumstances, the law and the evidence herein into account, no other beneficiary

stands above the *locus standi* of the applicants as regards the estate of their woman-husband, Gladis Odinga Orinda, not even the respondent who was a step son to Gladis. In the circumstances I find and hold that the respondent lacked the *locus standi* to petition for the Grant of Letters of Administration Intestate of the estate of Gladis in the face of the applicants herein who rank first in priority for the grant of the Letters of Administration.

35. Secondly, because the respondent intended to disinherit the applicants and their respective children, through misstatement of facts to the court that issued the grant, I have reached the conclusion that the Grant of Letters of Administration Intestate issued to the Respondent on the 29th October 2008 vide Migori SPMC Succession Cause No.123 of 2008 was obtained fraudulently and is thus only fit for revocation and/or annulment. It is also on record that the respondent intended to perpetrate the fraud in this matter further by seeking to have the grant issued to him confirmed before the expiry of the statutory six (6) months and without proof of the existence of any special circumstances warranting such an application.

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36. In conclusion therefore, I allow the Chamber Summons dated 15th January 2013 and order that that Grant of Letters of Administration issued to Philip Obungu Orinda, the Respondent herein by the Migori Senior Resident Magistrate in Succession Cause No.123 of 2008 on 29th October 2008 in the estate of the late Gladis Odinga Orinda be and is hereby revoked and/or annulled.

37. As to costs, the Respondent shall pay costs arising from this application to the applicants.

38. Orders accordingly.

Dated and delivered at Kisii this 11th day of July, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Owade for Odhiambo Roch for Applicants

In person (absent) for Respondent

Mr. Bibu - Court Clerk

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