



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.210 OF 1994

IN THE MATTER OF THE ESTATE OF:

REBECA NYANGANYI ODOTI DECEASED

AND

ALLOYS NYERERE OMARI PETITIONER

VERSUS

ANN KERUBO OMBACHI 1ST RESPONDENT

ISAAC ONDIMU OBAGA 2ND RESPONDENT

NYAMATO KEBASO JOHN 3RD RESPONDENT

DAVID MOMANYI MOGWASI 4TH RESPONDENT

ZABLON RATEMO 5TH RESPONDENT

DANIEL MISATI KEMUMA 6TH RESPONDENT

RULING

1. The petitioner filed summons under **section 46 and 47 of the Law of Succession Act, Cap 160 of the Laws of Kenya** and **Rule 73 of the Probate and Administration Rules** seeking orders:-
 1. *That this application be certified urgent and service in the first instance be dispensed with.*
 2. *That pending hearing and determination of this application there be an order of temporal (sic) injunction against the respondents by themselves, agents, servants and any person acting under their instructions or authority restraining them from transferring, cultivating, dealing, trespassing, assigning, selling, subdividing, suing or in any manner whatsoever intermeddling with the deceased's estate comprised in West Kitutu/Bomatara/402 which has been unlawfully subdivided into West Kitutu/Bomatara/4234, 4235, 4236 and 4237.*
 3. *That pending hearing and determination of this application there be an order of inhibition directed to the District Land Registrar Kisii Central District, inhibiting the registration of any dealing with land title Number West Kitutu/Bomatara/4234, 4235, 4236 and 4237.*
 4. *That pending hearing and determination of this application there be an order staying proceedings of all cases brought against the deceased's estate comprised in parcel No. West*

- Kitutu/Bomatara/402 now subdivided into West Kitutu/Bomatara/4234, 4235, 4236 and 4237 particularly the Kisii High Court Civil Case No.168 of 2010, the Kisii Chief Magistrate's Court Civil Case No.252 of 2009 and Kisii High Court Miscellaneous Application No.231 of 2009.*
5. *That there be a declaration that any dealing, transaction, subdivision, possession, transfer, assignment or disposition of the deceased property comprised in land parcel No. West Kitutu/Bomatara/402 now illegally subdivided into West Kitutu/Bomatara/4234, 4235, 4236 and 4237 or any other subdivisions and legal proceedings without express authority of the Law or by a grant of representation under the law of succession is illegal, null and void.*
 6. *That the respondents be found to have contravened the provisions of **section 45 of the Law of Succession Act** and be punished in accordance with the Law.*
 7. *That costs of this application be borne by the Respondents.*
2. The application was supported by an affidavit sworn by the petitioner in which he says that a grant of letters of administration of the said estate was made to him in this matter on 26th August 1994, that the said grant has not been confirmed, that in 2009 he was sued by one Ann Kerubo Ombachi in Kisii CMCC NO.252 of 2009 claiming that she was the registered proprietor of the deceased's estate comprised in West Kitutu/Bomatara/402 (the suit land) and sought to have him evicted from the suit land and while the said suit was pending in court the 1st respondent purported to transfer the suit land to the 2nd respondent.
 3. He further averred that the 2nd respondent also brought a suit against him first in **Kisii CMCC No.224 of 2010** which suit was withdrawn and later in the High Court of Kenya at Kisii being **Civil Case No.168 of 2010** which suit is still pending in court. That the said 2nd respondent being aware of the circumstances pertaining to this estate subdivided the estate into several portions and transferred title as follows:-
 - i. *West Kitutu/Bomatara/4234 transferred to 6th Respondent*
 - ii. *West Kitutu/Bomatara/4235 transferred to 4th Respondent*
 - iii. *West Kitutu/Bomatara/4236 transferred to 3rd Respondent*
 - iv. *West Kitutu/Bomatara/4237 transferred to 5th Respondent*
 4. The applicant also averred that he filed a caution with the District Land Registrar, Kisii but that the caution was ignored and the subdivision and transfers effected; that no grant was ever issued to the 1st respondent, that subsequently any transactions done on the deceased's estate by the respondents are all illegal and amount to intermeddling with the deceased's estate within the meaning of **section 45 of the Laws of Succession Act**.
 5. By an order issued by Korir, J dated 7th November 2012, the applicant's application was certified urgent and prayer No.3 thereof was granted for a period of 14 days.
 6. The 1st and 5th respondents on their part filed a memorandum of appearance on the 14th November 2012. The 5th respondent Zablon Ratemo in his replying affidavit dated 27th November 2012 contented that the application by the petitioner is mischievous, misconceived, incompetent, frivolous and an abuse of the due process of the court; that the grant of letters of administration herein to the petitioner was on 25th March 1996 unconditionally revoked by consent, that the revocation arose on account of the applicant's own admission that in securing the grant, the applicant pretended to be a son to the deceased, a fact the applicant knew to have been false, and that by order of court in **Kisii CM's Misc. Civil Application No.10 of 2003**, the Land Register relating to subject parcel of land was rectified by reverting to the name of the deceased son Francis O. Odoti.
 7. That 5th Respondent also averred that another order, made on 21st August 2007 was to the effect that Francis O. Odoti died on 10th September 2007 and was duly succeeded by the 1st respondent vide Kisii Succession Cause No.4 of 2009, that he lawfully acquired title No.West Kitutu/Bomatara/4234 and not 4237 as a bona fide purchaser for value without notice, that the applicant accordingly lacks not only locus standi but also capacity to present the present

- application and that having fraudulently approached the court from the onset, the applicant is tainted with unclean hands and his application is a nuisance.
8. The 1st respondent in addition to adopting the Replying Affidavit of Zablon Ratemo also chose to rely on her supporting affidavit in **Kisii CMCC No.252 of 2009** where she averred that she was the absolute owner of all that parcel of land known as West Kitutu/Bomatara/402, that her mother in-law was known as Rebecca Nyanganyi Odoti (deceased) who died on 3rd September 1992, that her husband was known as Francis Ombachi Odoti though he is now deceased; the said Francis Ombachi Odoti used to work in Nairobi with the Kenya Bureau of Standard (KEBS).
 9. She further averred that due to the absence of her husband from home, the petitioner/applicant used that lacunae to forge documents, act as an imposter and in acute contempt to the honourable court, falsify himself as the son of her deceased mother in-law and blatantly proceed to obtain letters of administration from the High Court and subsequently proceeded to unlawfully obtain a title deed of the subject parcel of land, that the petitioner has never been the son of the deceased nor a brother of her husband Francis Ombachi Odoti and that in the circumstances, the documents filed and made on oath by the petitioner were a gross perjury, unlawful utterances that are misleading to the Honourable Court.
 10. The 1st respondent also averred that the petitioner/applicant proceeded to fraudulently obtain a title deed; that her deceased husband upon learning of the foregoing, proceeded with objection proceedings to the issuance of a grant whereof the said grant was revoked by the High Court on the 29th March 1996, that the title deed obtained by the petitioner had no basis in law and that a transfer was ordered to be done in the name of her husband Francis Ombachi Odoti now deceased and thereafter a proper succession was done wherein she was appointed the administrator of her deceased husband's estate and upon completion of the succession process, she legally obtained the title deed and in the premises the petitioner's claim and position has no basis whatsoever in law.
 11. That consequently, she proceeded to file for an order for eviction wherein the court papers were duly served, the matter proceeded and eviction orders were granted, that the petitioner's application has no basis whatsoever in law and fact; that the petitioner is now using orders obtained on 27th October 2009 to act with impunity and has even threatened not only her life but her son's life as well and that in the circumstances the application dated 26th October 2009 is a collection of perjury, mala fides an abuse of the court process and raises no triable issues.
 12. The application proceeded by way of written submissions; although only the 1st and 5th respondents responded to the application.
 13. In the applicant's submissions dated 30th April 2013 and filed in court on the same date, it is contended that the deceased had 3 sons, namely Dismus Nyakundi Odoti, Francis Ombachi Odoti and John Ayoga Odoti and that during her life time, she had subdivided the land among her said sons and transferred title to Dismus Nyakundi Odoti and Francis Ombachi Odoti as title No. West Kitutu/Bomatara/404 and 403 respectively, while the portion belonging to her last born John Ayoga Odoti remained in her name; though part of it was sold to one Mark Oponga Omari who took possession but died before transfer of title was made to him by the deceased herein.
 14. It is also submitted that upon the death of the deceased, Rebecca Nyanganyi Odoti her son John Ayoga Odoti and one Alloys Nyerere Omari, a son to Mark Oponga Omari filed petition for Letters of Administration to the said estate. The grant was issued on 26th August 1994 but before confirmation of the same, John Ayoga Odoti also died, leaving behind a wife by the name Martha Moraa Ayoga and some children. That the families of John Ayoga Odoti and Mark Oponga Omari continued to live peacefully side by side on the disputed parcel of land until sometime in 2009 when without any notice whatsoever, the Petitioner was forcefully evicted on the strength of orders issued by the Kisii CMC in Civil case No.252 of 2009 filed by the 1st respondent herein, Ann Kerubo Ombachi Odoti. It is submitted that Ann Kerubo Ombachi is the wife of Francis Ombachi Odoti, a brother to John Ayoga Odoti. That though the judgement in Kisii CMCC No.252 of 2009 was set aside, the petitioner has been unable to return to the suit land being West Kitutu/Bomatara/402 which parcel has since been transferred to Isaac Ondimu Obaga. Other suits have since been filed by Ann Kerubo Ombachi namely Kisii CMCC No.224 of 2010 (though subsequently withdrawn) and Kisii HCCC No.168 of 2010 which is still pending determination.

15. It is also submitted that despite the pending litigation, Isaac Ondimu Obaga has subdivided the suit land into 4 separate parcels and had same transferred as shown under paragraph 3 hereinabove. It is alleged by the petitioner that all these transfers have been effected without the involvement and/or knowledge of the family of John Ayoga Odoti though it has transpired that there in the pending application for confirmation of grant, the widow of John Ayoga Odoti is indicated as a beneficiary of the deceased's estate.

16. The Petitioner/applicant has framed 6 issues for determination, namely:-

1. *Did the 1st Respondent acquire title to the deceased's estate comprised in land title No. West Kitutu/Bomatara/402 lawfully?*
2. *If not, could she pass any good title to any other Respondents?*
3. *Do the acts of the Respondents amount to intermeddling with the estate of a deceased person within the meaning of section 45 of the Law of Succession [Act]?*
4. *If yes, what punishment is to be meted against those found guilty?*
5. *What reliefs or prayers is the petitioner entitled to?*
6. *Who bears costs of these proceedings?*

17. The 1st and 5th Respondents also filed their submissions in which they contend that the petitioner herein Alloys Nyerere Omari is masquerading as a son to the deceased; that the grant issued to him was by consent dated 25th March 1996 revoked and that the said revocation stands to date. A copy of the said consent is annexed to the affidavit of Zablon Ratemo and marked **ZRO1**. Interestingly, the court file shows the last record before the matter came up again on 1st November 2012 to be 10th November 1994. The 1st and 5th Respondents also allege:-

- *That the petitioner's action was mischievous, misconceived, incompetent, frivolous, vexatious and otherwise an abuse of the due process of the court.*
- *That the grant to the petitioner/applicant was revoked by consent on 25th March 1996 and that such revocation was as a result of the petitioner's own admission that in securing the grant he had held himself out as a son to the deceased;*
- *That the subject parcel of land has since reverted to the name of the deceased vide an order of the court in Kisii CM Misc. Application NO.10 of 2003 as per annexures ZRO III and ZRO V to Zablon Ratemo Ouko's affidavit dated 27th November 2012.*
- *That Francis O. Odoti died on 10th September 2007 and was duly succeeded by the 1st Respondent vide **Kisii HC Succession Cause No.4 of 2009**.*
- *That 5th Respondent lawfully acquired land parcel West Kitutu/Bomatara/4234 (and not 4237) as a bonafide purchaser for value without notice.*

18. The 1st and 5th Respondents urge this court to find that having come to court with unclean hands, the petitioner/applicant is undeserving of the orders sought; and that in any event, the 1st and 5th Respondents have shown beyond peradventure that they have lawful authorization to partake in the deceased's estate.

19. I have now carefully considered the application as filed, the relevant provisions of the law and the submissions made by the petitioner/applicant on the one hand and the 1st and 5th Respondents on the other hand. From the above, the following issues arise for determination:-

1. *Whether the petitioner/applicant was issued with Grant of Letters of Administration intestate to the estate of Rebecca Nyanganyi Odoti, the deceased herein;*
2. *Whether the said grant was revoked by consent on 25th March 1996 and*
3. *Whether the 1st Respondent took out Letters of Administration for the estate of the deceased to enable her deal with the estate of the deceased?*

20. It is not in dispute that the Petitioner petitioned for Grant of Letters of Administration intestate on the 10th of June 1994. In form P&A 5 (Affidavit in support of petition for letters of administration

intestate), he deponed that John Ayoga and himself were sons of the deceased. On 26th August 1994 a grant of letters of administration intestate was issued by Mbaluto J to the petitioner alone. The first question is therefore answered in the positive that Grant of Letters of Administration intestate was issued to the petitioner concerning the estate of the deceased herein.

21. The second issue is whether the said grant was revoked. From the court file, the objector one Francis Ombachi Odoti filed an objection dated 25th July 1994 on grounds that the petitioner was not entitled to letters of administration as he was not the son of the deceased nor did he belong to their kinship. There is also a photocopy of an order dated 25th March 1996 to the effect that by consent the grant issued to the petitioner was revoked. However, the court proceedings leading to the revocation of the grant are not in the court file. In the petitioner's written submissions there is evidence to the effect that the petitioner's relationship to the deceased was that of a purchaser in that the petitioner's father had bought part of the suit land from Rebecca Nyanganyi Odoti the owner of the suit land who is now also deceased. This only means that the Petitioner lied in the affidavit in support for grant of letters of administration when he held himself out as a son to the deceased. I therefore agree with counsel for the respondents that the petitioner's action was punishable under **section 52 of the Law of Succession Act** which clearly stipulates:-

“Any person who, in an application for representation willfully or

recklessly makes a statement which is false in any material particular shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.”

22. Therefore, even if there is doubt as to whether or not the grant issued to the petitioner was revoked, my considered view is that it should be revoked under **section 76 (b) of the Law of Succession Act Cap 160** which provides that:-

“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. -----
- 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. -----
- d. -----
- e. -----.”

23. In this case what the petitioner should have done was to file a citation against the beneficiaries of the deceased's estate. In **Maamun Bin Rashid bin Salim El-Rumhy –vs- Haider Mohamed Bin Rashid El Basamy [1963] EA 438**, Pelly Murphy J stated:-

“Any person who has an interest in having an estate administered may

apply for a grant of representation, but if there are persons who have a superior right to obtain the grant, the applicant must cite them calling upon them to apply for the grant. If the person cited fails to apply for a grant or renounce his right to it, the grant may be given to the citor.”

24. Proceeding by way of citation was the proper cause of action since the petitioner was not a son to the deceased. For the reasons that the petitioner used the wrong procedure and lied in the process of trying to have the grant issued to him, such a grant cannot and should not stand. As the court file does not have the order for revocation, I order that the grant issued to the petitioner on 26th

August 1994 be and is hereby revoked.

25.Thirdly, on the issue of whether or not the 1st respondent took out letters of administration to administer the estate of her deceased husband (one Francis Ombachi Odoti) by which she later sold the suit land to the 1st respondent who sold it to the rest of the respondents is doubtful because the 1st respondent has not adduced any evidence to support the fact that she filed for grant of letters of administration in respect to the estate of her deceased husband and one wonders how she managed to sell the said suit land to the rest of the respondents.

26.**Section 45 of the Law of Succession Act** deals with intermeddling which is the unauthorized handling of the property making up the estate of a deceased person without authority. In **Gitau and two others –vs- Wandai and Five Others [1989] KLR 231** (Tanui J) held:-

“Any act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate.”

27.In **The Matter of Wilson Nzuki Ngolo (deceased) Machakos High Court Probate and Administration Cause Number 152 of 2000** (Mwera J) held that:-

“Only a person who has a grant or other legal authorization may handle the property of a deceased person.”

28.The actions therefore of the 1st respondent in particular as a wife to the deceased’s son amounts to intermeddling as she has not filed any documents to support the fact that she applied for letters of administration on behalf of the estate of her deceased husband. This means that the consequential sale of and subdivision of the suit land is a nullity as these acts can all be termed as meddlesome acts. I therefore grant prayer No.5 of the application dated 29th November 2012 and order each party to bear their own costs.

29.Regarding the meddlesome acts by the petitioner and the 1st respondent, I find that each party may have been overzealous in trying to get a share of the deceased’s estate. Though I find each guilty of the offence under the relevant sections of the law of **Succession Act**, I grant each an unconditional discharge under **section 35 (1) of the Penal Code, Cap 63 of the Laws of Kenya**.

30.Orders accordingly.

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

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Moracha for Ombachi (present) for Petitioner

M/s Nyatundo & Co. (absent) for Respondents

Mr. Bibu - Court Clerk