



IN THE MATTER OF THE ESTATE OF THE LATE TOM O’OMUOMBO ALIAS THOMAS OCHIENG OMUOMBO – DECEASED

ALICE ATIENO OCHIENG APPLICANT

VERSUS

GREGORY OTIENO OGOLA RESPONDENT

RULING

MS ALICE ATIENO OCHIENG (the Applicant), is an adult female whose marriage to **TOM O’OMUOMBO (the deceased)** was dissolved on 6th July 1992 before the deceased died on 15th August 2007. The Applicant **applied** to this court on 13.8.2009 by summons of that date seeking an order that **reasonable provision** be made in her favour as a dependant out of the deceased’s net estate as the court thinks fit. In her affidavit sworn on 13th August 2009 in support of the said application, the Applicant averred that she had 7 children with the deceased and that her relationship with them is strained. She averred that she has not remarried. In paragraph 12 of her said Affidavit, the Applicant alleges that the property known as **LR KISUMU MUNICIPALITY/BLOCK 12/202** which is part of the estate of the deceased was given as a gift to her by her aunt, one Claris Akinyi Omino, during the Applicant’s wedding to the deceased on 29th June 1968. She alleged that the deceased was registered as the proprietor of the property with her permission. The Applicant further alleges that two other properties that form part of the deceased’s estate, **to wit LR 209/8294/41, Nairobi** and **a parcel of land in Siaya Township** on which stands a 7 roomed house whose LR number was not given were acquired by the deceased during his marriage to the Applicant. In paragraph 14 of her Affidavit, the Applicant states that the latter two properties **“should be given to her.”** She does not state the legal basis on which the Administrators of the deceased’s estate should give to her the said properties although she contends that it would be fair and just. She further contends that a sum of Shs.3-4 million should be given to her to enable her construct a house on the plot in Siaya Township. Again, she does not give the legal basis why the money should be given to her other than the fact that she is a dependant.

The Application is premised on Section 26 of the Law of Succession Act, Cap 160 of the Laws of Kenya. Section 26 of the Law of Succession Act States:

S.26 Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court may think fit shall be made for that dependant out of the deceased’s net estate.

A dependant is defined in S.29 of the Law of Succession Act thus:

S.29. 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 deceased's parents, step-parents, grant-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

According to Black's Law Dictionary 9th Edition, a **dependant** is a person who relies for support or necessities on or is sustained by another person and **dependency** is the relationship between the two persons.

Section 30 of the Law of Succession Act unequivocally bars the making of application for dependency after Confirmation of Grant. The Section states:

"S.30 no application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71."

Mr. Amos Oyalo, the learned counsel for the Applicant, urged the court to grant the Applicant's application. He drew the court's attention to the Applicant's two other affidavits sworn on 18.1.2010 and 31.5.2011 in support of the application. I have perused them. In the Affidavit sworn on 18.1.2010, the Applicant acknowledges in paragraph 3 that Section 30 of the Law of Succession Act does not allow an application for dependency to be brought after a grant of representation in respect of the estate to which the application refers has been confirmed under Section 71 of the said Act. Further, the Applicant concedes the fact that the Law of Succession Act does not make provision for a former wife of a deceased person save that Section 29 of the Act does define a dependant as including a former wife or wives. It is the contention of the Applicant that she is entitled to seek dependency under Section 29 (supra). In paragraph 12 of her Affidavit sworn on 18.1.2011, the Applicant claims to have contributed to the acquisition of property No.209/8294/41 which is part of the deceased's estate and to be entitled to a share of it. It is the Applicant's contention that **The Married Women Property Act of 1882** of England has relevance to all proceedings instituted under the Law of Succession Act.

In her affidavit sworn on 31.5.2011, the Applicant came out more robustly and stated that she is a dependant within the meaning of Section 29 of the Law of Succession Act not least because a consent said to be dated 22.8.2008 included her name as dependant and further that she belongs to a category of dependants who do not have to prove or show that she was being maintained by the deceased immediately prior to his death. Although the Grant in this Cause was made on 30th November 2010 to the deceased's children, **Gregory Otieno Ogola, Apha Beatrice Achieng, Emily Apamo Adera and Christine Atieno Omwambo**, it had not been confirmed and it is the Applicant's contention that her claim for dependency should be determined first. Her claim, she contends, is premised on **Part III (S.26)** of the Law of Succession Act. In paragraph 10 of her affidavit sworn on 31.5.2011, the Applicant states that her son, Gregory Otieno Agola, who is the former sole administrator of the estate of the deceased, had proposed that the Applicant be given Shs.800,000/= from the deceased's estate's bank account and properties Numbers L.R. NO.L.R.Siaya Karapul Ramba/523, 2106 and 209/8294/41. The consent dated 8.11.2010 containing this proposal was not signed by the other beneficiaries and it remains the sole administrator's proposal and nothing more. It seems however that the application for Confirmation of the Grant was withdrawn on 15.11.2011 and an order to this effect was endorsed by the Honorable Lady Justice Wanjiru Karanja, then a Judge of the High Court.

Mr. Kuloba, the learned counsel for the 1st Administrator, opposed the application as did **Messrs Oongwe and V. Odera**, the learned counsel for the 2nd administrator and the 3rd and 4th Administrators, respectively.

Mr. Oongwe contended that the Applicant's application is spent by dint of the fact that there is an

application for Confirmation of the Grant dated 13.8.2009 in which the Applicant has been named. Mr. Kuloba opposed the application and relied on the affidavit sworn on 14.1.2010 by his client. He drew the attention of the court to the marginal notes in Section 26 of the Succession Act and submitted that the Applicant had not shown that she had not been adequately provided for in the proposed distribution contained in the application for Confirmation of the Grant. It was his contention that the Applicant was enjoined to file an affidavit of protest pursuant to **Rule 40(6) of the Probate and Administration Rules** objecting to the Confirmation of the Grant if she was not satisfied with the proposed distribution. He urged the court to dismiss the application.

Mr. Oonge aligned himself with **Mr. Kuloba's** submissions as did also **Mr. Odera**.

The Applicant in this case bases her claim for dependency on Section 26 of Part III of the Law of Succession Act. She contends that she is a dependant and is entitled to provision notwithstanding that immediately prior to his death, the deceased did not maintain her. She also claims to be entitled to those properties in the estate whose acquisition she alleges she contributed to. She invokes **The Married Women Property Act of 1882**. The claim for dependency cannot go hand in hand with a claim under the Married Women Property Act of 1882 and the two are not founded on like legal basis. The Application for dependency is by summons and is expressed to be under Section 26 of the Law of Succession Act and Rule 45 of the Probate and Administration Rules. The invocation of the Married Women Property Act of 1882, ostensibly an afterthought on the Applicant's part, is misplaced. In the first place, such a claim may only be brought by an originating summons away from succession proceedings which are designed to determine succession to the estate of a deceased person. The two have no co-relation not least because a claim under The Married Women Property Act 1882, is premised on contribution made by an Applicant in acquisition of property acquired during marriage while in succession proceedings, it hinges on the right of an heir to inherit an estate of a deceased person or part thereof. In the latter case, the right arises where the claimant is recognized by law to be an heir by dint of the relationship obtaining between the deceased and such claimant and in the former case, the parties are man and wife and the claim hinges on contribution in acquisition during marriage of the property claimed. The provision in **Article 159 (2) (d) of the Constitution** which requires application of the principle that justice shall be administered without undue regard to procedural technicalities does not advocate disobedience of or non compliance with rules of procedure in statutes, which serve as the hand-maidens of justice. Rather, it discourages slavish adherence to such rules so as to obviate miscarriage of justice on impeding dispensation of justice. In the context of the instant case, it would be unhelpful to invoke Article 159 (2)(d).

The Applicant has made a claim premised on Section 26 of the Law of Succession Act, on the basis that she is a dependant. Has she satisfied the court that she has a claim as a dependant under the Law of Succession Act or as an heir?

The deceased was the Applicant's husband. The parties got married on 29.6.1968. They were blessed with seven children. The marriage went on the rocks and on 6.7.1992 it was dissolved. The deceased died 15 years later on 15.8.2007 after 24 years of marriage. Admittedly, the relationship between the Applicant who states that she has not remarried and the children is strained. There is no evidence that the Applicant ever sought or obtained from the deceased any support or necessities to make her a dependant when the deceased was alive. On the plain construction of the word "dependant" the Applicant cannot qualify to be described as such. Section 29 of the Law of Succession Act acknowledges that a former wife of a deceased person is a dependant whether or not maintained by the deceased immediately prior to his death. It is implicit from the wording of Section 29 of the Act that to qualify for dependency as a former wife of a deceased person, an Applicant must show that she is a person who had enjoyed dependency at some point in time even if not immediately prior to the deceased's death. An Applicant who has never been dependent on the deceased during the latter's life time cannot legitimately claim to be entitled to support as a dependant by the deceased's estate. It matters not that such person was at one time married to the deceased if she/he cannot show dependency at some point in time before the death of the deceased. In the case of a former wife who was long divorced before the deceased died, she must show that after the dissolution of her marriage and before the deceased died, she received the latter's support. Unless she does so, she cannot qualify to be a dependant. This is implicit from Section 29 of the Law of Succession Act. To hold otherwise would be perilously close to equating a non-dependant to an heir. But where one

is a former wife as in the instant case, the date of dissolution of the marriage from which the relationship of man and wife was brought to an end places the former wife in the same position as any other stranger to the deceased unless she can show that after the dissolution of the marriage and before he died the deceased offered her some support. Their relationship was based on law by dint of the marriage. Once it is severed, the wife ceases to be an heir and, in the case of dependency, she must demonstrate that the deceased supported her or gave her necessities before his death. In the absence of this, it cannot be legitimately argued, in my view, that the former wife is necessarily a dependant merely because she was once the wife of the deceased. If this were not the case, then Section 29 (a) of the Law of Succession Act would not have used the words “immediately prior to his death” in relation to being maintained. The Applicant has not shown that she is an heir or that she qualifies to be described as a dependant of the deceased because she has not shown that after the dissolution of her marriage to the deceased, the latter ever gave her any support.

But Gregory Otieno Ogola, the then sole administrator of the Estate of the deceased, had described the Applicant as a dependant of the deceased in an affidavit sworn on 8.11.2010 in support of an application by summons dated 8.11.2010 seeking confirmation of the grant which (application) was withdrawn on 15.11.2010. The reference made to the applicant as a dependant cannot *ipso facto* make the applicant a dependant. None of the other beneficiaries in the estate were privy to the reference made of the applicant as a dependant. The applicant is enjoined to prove dependency existed at some stage in time after the dissolution of the marriage and before the deceased died. Moreover, the said application was withdrawn and there is no suggestion that the affidavit in the withdrawn application binds the administrators of the estate of the deceased. I find no evidence on the basis on which it can be said that the Applicant ever received support from the deceased after dissolution of the marriage so as to qualify her to be a dependant.

There is an application for confirmation of the grant made by the administrators of the estate of the deceased. It was made on 6.12.2011. In paragraph 9 of its supporting affidavit sworn by administrator Gregory Otieno Ogola, the Applicant is identified as a person entitled to share in the estate and her share is identified as Shs.800,000/=. The Applicant filed an affidavit of protest against this on 13.3.2012 ostensibly pursuant to Rule 40 (6) of the Probate Administration Rules. Whether or not she will get a share of the Estate is a matter for determination by the court after the court has heard evidence of the claimants.

To the extent to which the Applicant seeks dependency, her application is misplaced and has no merit. As the hearing of the application for confirmation of the grant is in the offing, I do not wish to pre-empt the court determination on it and therefore I will say no more. Suffice it to state that the application dated 13.8.2009 is dismissed with costs to the administrators of the estate. It is so ordered.

Dated at Milimani Law Courts, Nairobi, this 7th day Of June 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. A. Oyalo Advocate, of A. O. Oyalo & Co. Advocates for Applicant/Former wife of deceased

Mr. Kuloba advocate of A. S. Kuloba & Wangila & Co. Advocates for 1st Administrator

Mr. Oonge Advocate of M. N. Oonge & Co. Advocates for 2nd Administrator

Ms V. Odera Advocate of Mugoye & Associates Advocates for the 3rd and 4th Administrators