



IN THE MATTER OF THE ESTATE OF CAROLINE ADHIAMBO OBONGO (DECEASED)

FRANK HEINZ WEHAGE.....OBJECTOR/APPLICANT

VERSUS

EVALINE ATIENO OBONGO.....1ST PETITIONER

WICKLINE AKOTH OBONGO.....2ND PETITIONER

RULING

The Chamber Summons dated 4th August 2008 was fixed for hearing on 11th November 2009. The date was taken ex parte by Counsel for the Objector/Applicant. The Petitioners gave their address for service as P.O. Box 4093 Kondele. They were served with the application for interim orders and they filed grounds of opposition and a Replying Affidavit. After perusing the affidavit of service sworn by Michael Kioko Maundu I was satisfied that the Petitioners were served through registered post and had not appeared to defend the application. The Chamber Summons is brought under the provisions of section 35(1) and (2), 66 and 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules. It seeks orders that the Grant of Probate to Evaline Atieno Obongo and Wickline Akoth Obongo be revoked.

It is founded on the grounds that:-

- “1. The Grant was obtained fraudulently by making false statement by concealment from the court of facts material to the administration cause.**
- 2. That the grant was obtained by means of untrue allegation of facts essential in points of law to justify the Grant aforesaid.**
- 3. THAT the Applicant is the beneficiary of the Estate of the late Caroline Adhiambo Obongo by virtue of being a surviving spouse.**
- 4. THAT the Estate of Caroline Adhiambo Obongo being plot No. 774 Section III Mainland North has been illegally transferred.**
- 5. THAT the said estate was held in trust for the Applicant by the Public Trustee.”**

The facts as deponed in the affidavit of the Applicant are that the Applicant was married to Caroline Adhiambo Obongo. Marriage certificate was annexed as exhibit “FHW-1”. That the Applicant together with his deceased wife acquired the suit property known as plot No. 774 Section III Mainland North. That his wife passed on 20th January 2001 and him being a German National appointed the Public Trustee to administer the Estate on his behalf. Exhibit “FHW-4” is bundle of correspondences between the Public Trustee and the Applicant. That the Petitioners/ Respondents applied for Letters of Administration without mentioning the Applicant or the surviving issue. That the Petitioners masqueraded as daughters of the deceased which they were not. That the Applicant was not in Kenya when the Petition was gazetted.

The Respondents were issued with Letters of Administration on 10th January 2008 and the same was confirmed on 1st July 2008. On 12th June 2008 the Respondents fraudulently obtained title and transferred the suit property to a third party. That the Applicant returned to Kenya and found that the suit property had been transferred to a third party. The Applicant contends that the transfer was illegal as the Grant had not been confirmed.

In their Replying Affidavit the Petitioners contend that they are not aware of their mother's marriage to the Objector. The Objector was a mere boyfriend as no dowry was ever given to the grandmother in accordance with Luo tradition. That the suit property belonged to the deceased and that she left the title deed in their custody before her demise. That they are not aware that the Objector had instructed the Public Trustee. The Public Trustee ought to have Objected to the application for Letters of Administration. That the marriage is not known and that the certificate could not be authentic.

I have considered the pleadings and it is clear that the Applicant was a spouse going by the attached certificate of marriage. The marriage was celebrated on 5th May 1995. The certificate of title annexed as exhibit "FHW-2" shows that the deceased was registered as proprietor on 30th November 1994. It is not clear how the property was purchased jointly whereas the record indicates that before marriage the deceased was already owning the suit property. It has been suggested that the Petitioners are imposters and are not daughters to the deceased. The Petitioners have not produced any birth certificates in support of their relationship to the deceased. It is however not unrealistic to expect that the deceased could have given birth to the two going by the letter from the Area Chief. According to the marriage certificate the Deceased was married at the age of 26 years in the year 1995. This gives her year of birth to be around 1969. The first petitioner was born in 1981 when the deceased was around 12 years old. The 2nd petitioner when the deceased was 17 years old. The deceased could have failed to disclose the existence of her children to the Applicant.

Taking into account that the property was acquired before marriage of the deceased to the Petitioner and the fact that the Respondents claim to be daughters of the deceased and they did not know of the existence of the Applicant as father I find that the Applicant has not shown that the Respondents acted fraudulently or willfully concealed material facts while making application for Grant of Letters of Administration. One cannot disclose what he does not know. Furthermore, the property has been transferred to a third party whom the Applicant did not seek to enjoin in this suit. In the interest of justice instead of revoking the Grant I will order that the Grant issued to the Petitioners on 10th January 2008 be rectified to include the Objector as Administrator. The certificate of confirmation issued on 1st July 2008 is hereby set aside and the parties to file a fresh application for distribution of the Estate. It is so ordered.

Dated and Signed At Nairobi on This 6TH Day Of AUGUST 2012.

M. K. IBRAHIM

JUDGE

DATED AND Delivered At Mombasa on This 30TH DAY Of AUGUST 2012.

J.W. MWERA

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JUDGE

Delivered in the presence of: