



No. 2745

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO. 552 OF 2009

IN THE MATTER OF THE ESTATE OF MAGDALENA ONYUKO AND OSAMBO RAYOLA – (BOTH DECEASED)

AND

IN THE MATTER OF AN APPLICATION BY STANSLAUS MBAI NAYMIEL FOR REVOCATION AND ANNULMENT OF

GRANTS ISSUED TO TOM MBOYA OLUM AND RICHARD ODIYO ODONGO

STANSLAUS MBAI

NYAMIELAPPLICANT

-VERSUS-

TOM MBOYA OLUM.....1st

RESPONDENT

RICHARD OPIYO ODONGO.....2nd

RESPONDENT

RULING

Stanslaus Mbai Nyamiel, hereinafter “*the applicant*” on 7th October, 2009 filed an application dated 5th October, 2009. That application was expressed to be brought under section 76 (a) of the **Law of Succession Act** as read with rules 44 (1) and 73 of the **Probate and Administration rules**. He prayed in the main that the grant of letters of administration intestate issued to **Tom Mboya Olum** on 25th August, 2009 and to **Richard Opiyo Odongo** on 18th September, 2009 hereinafter “*the respondents*” as the

administrators of the estate of the late **Osambo Rayola** and **Magdalena Okendo Onyuka** be annulled. The other two prayers sought in the application are readily not available to the applicant at this stage. In any event, I would imagine that they may follow the event.

The application was taken out on the grounds that the proceedings in succession cause number 69 of 2002 to obtain the grant were defective in substance in that the grant was issued on 25th August, 2003 before the publication of the succession cause in the Kenya gazette as required. The relationship between **Richard Opiyo Odongo** and the deceased's persons was not stated and that the grant failed to take into consideration the rights of the applicant as the proprietor in common of the undivided shares in land parcel No. **Kanyada/Kotieno – Katuma "A"/799** with the deceased persons. Arising from the foregoing it was also the feeling of the applicant that the grant was obtained fraudulently by making false statements and by concealment from court of that fact. Despite the said grant still being alive, the 2nd respondent had yet again filed another succession cause no. 42 of 2008 in the same court for a joint grant of letters of administration with regard to the estates of **Osambo Rayola** and **Magdalena Okendo Onyuka** who died at different times and dates. Final ground advanced by the applicant for the annulment of the grant is that the grant has become useless and inoperative through subsequent circumstances.

The applicant swore as well an affidavit in support of the application. Where pertinent he deposed that:

"1.

2. The above named Magdalina Okendo Onyuka died on the 8th day of January, 1995 and a grant of letters of administration intestate of Magdalina Okendo Onyuka was made to Tom Mboya Olum of Kotieno sub location, P.O Box 388 Homabay by this honourable court on the 25th day of August, 2003.

3. The above named Osambo Rayola died on 6th may, 1976 and an application for a grant of letters of administration has been applied for by Richard Opiyo Odongo in succession Cause No. 42 of 2008 who has again obtained a separate grant of letters of administration on the 18th September, 2008 despite the earlier grant already issued to Tom Mboya Olum.

4. The first grant was not confirmed since the petitioner having received the objection from the applicant intimated that he intended to withdraw the petition as a result whereof the objector did not file answer to petition and as well gazettement of the notice had not been published by the time of issuing a grant of letters of administration and has been done belately on the 10th day of November, 2008.

5.

6. That the applicant herein is registered as a proprietor in common of equal undivided shares with the deceased persons, namely, Osambo Royola and Magdalina Okendo Onyuka in land parcel No. "Kanyada/Kotieno-Katuma'A'/799 and ipso facto is an interested person in the administration of the estate of the said proprietors now deceased..".

From my reading of the record herein the undisputed facts appears to be that land parcel No. **Kanyada/Kotieno-Katuma 'A'/799** was first registered in the joint names of **Stanslaus Mbai Nyamiel**, **Osambo Rayola** and **Magdalena Okendo** as joint proprietors, hereinafter the "*suit premises*". The three persons were all jointly registered as such proprietors on first registration. On or about 6th May 1976

Osambo Rayola died leaving **Stanslaus Mbai** and **Magdalena Okendo** surviving him in respect of the proprietorship of the suit premises but the two survivors did not apply for a grant of letters of administration intestate with regard to his estate as the area was still undergoing land adjudication. On 8th day of January, 1995 while the adjudication process was still ongoing **Magdalena Okendo** also passed on thus leaving only **Stanslaus Mbai Nyamiel** as the surviving registered proprietor of the suit premises. She died leaving no spouse or child surviving her.

Sometime in July, 2002 **Tom Mboya Olum**, the 1st respondent applied for a grant of letters of administration intestate for the estate of the said **Magdalena Okendo Onyuka** in succession cause No. 69 of 2002 in the Senior Resident Magistrate's court at Homa-bay. On 22nd August, 2003 the grant was duly issued to him. The petition had however, by then not been gazetted in the Kenya Gazette as required by law. It was however, subsequently gazetted on 10th November, 2008. To the applicant, this act of omission or commission on the part of the 1st respondent alone rendered the grant earlier issued as aforesaid **void ab initio**. That grant void as it has to date not been revoked and or annulled. When the application was served on the respondent, they reacted by appointing **Messrs Moriasi osoro & Co. Adv.** to represent them. Other than filing notice of appointment of advocates, no other follow up action was undertaken in this cause by the said firm of advocates. No papers in opposition to the application were filed. Eventually when the application came up for hearing on 12th November, 2010, the advocates involved consented to have the same canvassed on the basis of the affidavits on record and written submissions. Again only the applicant filed his submissions which I have carefully read and considered them.

Under section 76 of the **Law of Succession Act**, a grant of representation, whether or not confirmed can at any time be revoked or annulled if the court so decides either on the application by any interested party or of its own motion on the grounds that:

“a. That the proceedings to obtain the grant were defective in substance;

b. That the grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the case;

c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either –

i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

ii. To proceed diligently with the administration of the estate; or

iii. To produce to the court, within the time prescribed, any such inventory or account of administration as it required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e. That the grant has become useless and inoperative through subsequent circumstances”.

In the instant application, the applicant has anchored his complaint on grounds (a), (b) and (e) above. Has

he however discharged the burden of proof? On the unchallenged and unrebutted depositions of the applicant and his written submissions, I think he has. As I have already stated, the respondents never filed papers in opposition to the application. Further, though parties agreed to file and exchange written submissions, again, the respondents failed to do so for reasons which are not readily apparent on record. So that at the end of the day what the applicant has deponed to and stated in his submissions is uncontroverted and must therefore be true. This court has no other alternative but to act on the same. Section 118 of the **Registered Land Act** provides as follows:

“If one or two or more joint proprietors of any land, lease or charge dies, the registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register”.

Sections 102 (1) (b) and 103 (1) of the same **Act** are also relevant. Section 102(1) (b) is in these terms:-

“...On the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly....” Whereas section 103

(1) provides interalia: ***“...Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate...”***.

From the foregoing the submissions of the applicant on the issue of his proprietorship of the suit premises cannot be faulted. The surviving proprietor who is the applicant would under the law therefore remain as the registered proprietor of the whole suit premises. In this case two of the joint proprietors have died leaving only the applicant, **Stanslaus Mbai Nyamiel**. If the registrar is duly informed and deletes the names of **Osambo Rayola** and **Magdalena Onyuka**, the only registered proprietor would be the applicant. Further since the ownership is joint the interest of the dead under the law automatically vests in him. In the event however, that the ownership is common, the applicant's share upon the death of other common owners of the suit premises has to be dealt with separately and cannot be the subject of distribution as part of the estate of the deceased.

The upshot of the foregoing therefore is that any succession cause concerning the inheritance of the suit premises or any portion thereof must bring on board the applicant as an interested proprietor thereof. Consequently a petition made concealing the name of the applicant and or his interest in the suit premises as happened here can only qualify as concealment from court of material facts and a grant issued as a result can rightly be said to have been obtained fraudulently.

Section 7(4) of the Law succession Act provides:

“(4) the registrar shall cause to be inserted, at the cost of the applicant, in the Gazette and, if he so decides, in a daily newspaper, and to be exhibited, conspicuously in the court house attached to the registry where the application is intended to be made, a notice of the application for the grant in form 60 inviting objections thereto to be made known to that registry within a period to be specified in the notice, of not less than 30 days from the date of the last of such publications...”.

The above provision of the law makes publication of the petition in the Kenya Gazette before hearing and granting the letters of administration intestate mandatory. In the instant case, it would appear that the court issued a grant to the 1st respondent before the publication thereof in the Kenya as required. Indeed that publication from the record was only subsequently made five (5) years later on the 10th day of

November, 2008 and yet the grant had been issued to the 1st respondent on the 22nd day of August, 2003.

Finally Succession Causes Nos. 69 of 2003 and 42 of 2008 were defective in substance in that the respondents erroneously made a joint application for the two deceased persons whereas they died on different occasions and dates. Furthermore the making of an application for a grant of letters of administration by **Richard Opiyo Odongo** in succession cause No. 42 of 2008 when a grant of letters of administration had been issued to **Tom Mboya Olum** in the year 2003 with regard to the same estate was in itself, irregular, mischievous, illegal and is contrary to rule 58 (1) of the **Probate and Administration rules**. The first cause No. 69 of 2002 having been filed no other fresh cause could be filed in the same registry over the same estate save as provided by rule 44 of the **Probate and Administration rules**.

For all the foregoing reasons the grants issued to the respondents on different occasions in respect of the estates of the same deceased person are hereby annulled with costs to the applicant

Ruling dated, signed and delivered at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE