



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE NO. 57 OF 2010

**IN THE MATTER OF THE ESTATE OF ONYANGO OMITI
OJUNG’A.....DECEASED**

BETWEEN

JEFF SULEIMAN ABDALLA)

SAUM ABDALLAH

ONYANGO.....PETITIONERS

=VERSUS=

DUNCAN OTIENO

OGWANG.....OBJECTOR

RULING

The petitioners were by virtue of a grant of letters of Administration intestate dated 29th April, 2010 appointed the administrators of the estate of the late **Onyango Omiti Ojung’a** hereinafter, “**the deceased.**” The objector was not happy with the appointment. Accordingly on 7th September, 2010, he moved this court to have the said grant revoked on the grounds that it was obtained by means of fraud, misrepresentation and concealment of material facts. The objector claims that his father bought a portion of land parcel **central Kapsul/Kamuma/1429** hereinafter “**the suit premises**” measuring approximately 100ft by 100ft at a consideration of Ksh.36,000/= vide sale agreements dated the 8th November and 13th December, 1986 respectively. The petitioners failed to disclose this fact to the court when they petitioned for the grant. According to the objector, failure by the petitioner to inform the court that the objector had been staking a claim over a portion of the suit premises which formed part of the assets of the deceased, constituted a fraud. His father had fully paid the purchase price, unfortunately, the deceased passed on without transferring the portion to his father. The objector further contended that the transaction aforesaid was a liability to the estate of the deceased and that if the grant is confirmed, his suit against the 1st petitioner being **Oyugis SRM CCC no.3 of 2010** wherein he is claiming the said portion of land may be rendered nugatory if the grant is confirmed. He also, indicates that he has since registered a caution over

the suit premises.

From the above, it is apparent that the objector's main concern is that the grant should be revoked or not confirmed until his claim on behalf of his late father is heard and determined vide the civil suit which he has lodged in the SRM's court at Oyugis.

The petitioners as expected, vehemently opposed the application. The salient grounds advanced in opposing the application are that the property claimed by the objector is part of the estate of the deceased and therefore available for administration; the claim by the objector can only be addressed by way of an ordinary suit since his claim over the suit premises has not coalesced into any enforceable rights in so far as it is the subject of trial vide **Oyugis SRM CCC no.3 of 2010**, which suit is yet to be heard and determined on merit. Besides, the objector's claim is well taken care of since he has already registered a caution over the suit premises, which caution can only be removed pursuant to a court order or by his consent. That in any event, the objector has orders of injunction issued on temporary basis and which orders are in place. Therefore the allegations that his interests will be defeated if the grant is not revoked are unfounded and mischievous. At any rate, the objector's claim over the suit premises is misconceived since the alleged sale was void as no consent of the relevant land control board was obtained. Further, the purported contract of sale was statute barred in so far as the same is alleged to have been executed in 1986, and cannot therefore be a basis of any legal claim whatsoever. That the estate of the deceased was bound to suffer waste in the event that the petitioners are denied opportunity to administer and manage the estate of the deceased. It would be unjust to subject the estate of the deceased to uncertainty awaiting the hearing and determination of the objector's claim which may at the end of the day be dismissed. Finally, it is the contention of the petitioners that there was alternative and adequate machinery to address the objector's grievances and the same was never meant to be addressed by way of succession cause since the objector is not a dependant of the deceased and his claim is yet to qualify as a credit to the estate of the deceased since he has no title over the land he claims and his interest is subject to proof through a legal process.

Section 76 of the **Law of Succession Act** sets out grounds upon which a grant of representation, whether or not confirmed may be revoked or annulled. Those grounds are:

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

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. 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 is 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...”.

The objector seems to have anchored his application on ground (b) above. Having looked at and considered the pleadings herein, I cannot see how the petitioners can be accused of having obtained the grant fraudulently or by making of a false statement or by the concealment from court of something material to the case. An allegation of fraud is a serious charge to make. The standard of proof as we all know is not on balance of probability. It is much higher. The mere fact that the petitioner failed to capture the objector's interest in the petition cannot amount to fraud. Nor can they be accused of making a false statement on the same basis. At this stage, I do not think that the petitioners were bound to disclose if at all, the objector's interest in the estate. That claim in my view can only be ventilated at the confirmation stage of the grant. It cannot therefore be the basis for the revocation or annulment of the grant. Therefore fraud, concealment or making of a false statement alleged and attributable to the petitioners by the objectors remain unproved.

The objector did not have any direct dealings with the deceased. It is his late father who did. The objector cannot therefore be considered as the creditor to the deceased's estate as envisaged by section 66 of the **Law of Succession Act**. In the circumstances, his remedy lies elsewhere. Indeed the objector has already mounted such suit in Oyugis SRM's court. That however cannot be the basis to stall this succession cause pending the hearing and determination of the suit. In any case, that is not one of the grounds for annulment or revocation of the grant.

Further and as already stated elsewhere in this ruling, the objectors claim if at all, can only be adjudicated upon at the confirmation stage. Nothing bars the objector from filing a protest in the event that his claim to the portion of the land is not recognized by the petitioners once they apply for the confirmation of the grant. It is at this stage that the court determines who the beneficiaries of the estate are, the assets and liabilities of the estate and the mode of distribution to be adopted.

Arising from the civil suit in Oyugis, the objector has obtained an injunction preventing the 1st petitioner from selling or interfering with the portion of land in dispute and the interest of the objector is secured so that in the event that the court allows the grant to remain in place or goes ahead to confirm the same, there is no prejudice that may result. Besides, in the event that the objector ultimately gets a decree in his favour in the case in the subordinate court, he will be able to execute the same against the 1st **petitioner**. In any event, the objector's claim is inchoate. Such inchoate claim cannot be a justifiable cause for keeping the administration of the estate of a deceased person in abeyance till unknown future date. The objector's suit may as well crumble.

The objector too has lodged a caution on the parcel of land. As such his claim if at all is again well secured and cannot be rendered nugatory. If the succession cause is allowed to proceed to its logical conclusion, no prejudice will befall the objector, since even any instrument issued by this court will only be registered after the lifting of the caution in accordance with the law and not otherwise and the injunctive orders having been duly discharged as correctly submitted by counsel for the petitioners.

In a nutshell, the objector has failed to demonstrate to the court's satisfaction, that in obtaining the temporary grant, the petitioners did so through fraud. All steps required in law to be followed by the

petitioner before such grant was issued were scrupulously followed. There is no evidence that the petitioners obtained the grant by misrepresentation as claimed by the objectors. They were relatives of the deceased and not imposters. In any event, the objector has not detailed such misrepresentation in the application and the affidavit in support thereof. Nor do I discern concealment of material facts to this court. Accordingly the application for revocation and or annulment of the grant dated 6th September, 2010 is dismissed with costs to the petitioner.

Ruling **dated, signed** and **delivered** at Kisii this 4th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE