



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**SUCCESSION CAUSE NO. 405 OF 2009**

IN THE MATTER OF THE ESTATE OF:  
LIVINGSTONE OKENYE ORINA ..... DECEASED  
AND  
NAFTALI ONTWEKA OKENYE ..... APPLICANT  
-VERSUS-  
MARCELLAH NYANGAU OKENYE .....OBJECTOR

**RULING**

This application is brought by the objector vide rule 49 of the **Probate and Administration Rules**. It seeks orders that:

- a. *The name of the applicant herein be deleted and/or cancelled as the administrator of the estate of the deceased in respect of land parcels no's South Mugirango/Nyataaro 185, 3 and 374.*
- b. *Costs of the application be provided for.*

The objector/applicant one **Marcellah Nyangau Okenye** states in her affidavit in support of the application that one, **Naftal Ontweka Okenye** filed and obtained a grant in respect of the deceased's estate on 29<sup>th</sup> September, 2009. Upon obtaining a grant he proceeded to the lands office and got registered as the proprietor of land parcel nos. **South Mugirango/Nyataaro/185, 3 and 374**. Subsequently, he voluntarily withdrew from the succession cause.

Though dated 4<sup>th</sup> January, 2010 and filed on 18<sup>th</sup> January, 2010, under certificate of urgency, the application was for reasons not apparent to the court not prosecuted until 7<sup>th</sup> October, 2011 when it came before **Sitati J.** who directed the applicant to file a further affidavit.

The application then came before me on 14<sup>th</sup> October, 2011. The objector/applicant was represented by **Mr. Soire** while the respondent did not attend court despite having been served.

In his brief address to court, **Mr. Soire** stated that he wished to rely on the affidavit dated 4<sup>th</sup> December, 2009 and a further affidavit dated 13<sup>th</sup> October, 2011 both sworn by **Marcellah Nyang'au Okenye**, the applicant in the instant summons.

I have perused the affidavits and indeed the entire court record in respect of this matter. I make the following observations:-

i. That a successful attempt was made by the applicant, one **Naftali Ontweka Okenye** to obtain Letters of Administration in respect of the estate of one **Livingstone Okenye Orina**, the deceased. The grant was issued by the **Hon. Muchelule J.** on 29<sup>th</sup> September, 2009. In her affidavit, the applicant alleges that the process of obtaining the grant was fraudulent as the said **Naftali Ontweka Okenye** did not disclose material facts in his petition and in particular that he left her out of the list of beneficiaries. These allegations have not been challenged.

ii. The present applicant **Marcellah Nyangau Okenye** has deponed that she is the widow of the deceased and that **Naftal Ontweka Okenye** is her second born son meaning that he does not rank first in priority in the succession of her deceased husband's estate. This must be taken to be true as the same has not been controverted.

iii. **Naftal Ontweka Okenye** proceeded to use the grant to transfer the deceased's property into his name and thereafter purported to withdraw from the succession cause by giving a notice to court vide his letter dated 1<sup>st</sup> December, 2009. It is my conviction that the purported withdrawal was meant to defeat the application by the widow, **Marcellah Nyangau Okenye** for the revocation of the grant issued to him. Indeed he did succeed as when the application came before this honourable court on 10<sup>th</sup> December, 2010, **Ali Aroni J.** directed that there was no suit pending and therefore the court had no basis for granting prayers sought in the application dated 3<sup>rd</sup> November, 2009.

The present application has been triggered by the conduct of **Naftal Ontweka Okenye** (applicant in the Succession Cause) and respondent in the present application. To reiterate, upon obtaining the grant on 29<sup>th</sup> September, 2009 he proceeded to transfer the deceased's properties **South Mugirango/Nyataaro/185, 3 and 374** respectively into his names on the 22<sup>nd</sup> October, 2009. This was only possible because of the grant issued to him. Indeed it is the grant that gave him the legal basis for the transaction in the land register. The applicant, (**Marcella Nyangau Okenye**) prays that the name of **Naftal Ontweka Okenye** be deleted and/or cancelled as the administrator of the estate in respect of land parcels Nos. **South Mugirango/Nyataaro 185, 3 and 374**. She does not pray that the grant issued to him be annulled in its entirety. It is however my considered opinion that to the extent that the conduct in question was facilitated by the grant, and to the extent that the said grant though not confirmed has neither been annulled nor revoked, it continues to be a valid legal document. I therefore move in the interests of justice under section 3A of the **Civil Procedure Act** and section 76 of the **Law of Succession Act** to revoke the grant issued to **Naftali Ontweka Okenye** in respect of the estate of **Livingstone Okenye Orina**, deceased. I further order that the Land Register in respect of Land Parcel Nos. **South Mugirango/Nyataaro/185, 3 and 374** currently in the names of the respondent **Naftal Ontweka Okenye** revert to the deceased's estate.

**Ruling dated, signed and delivered at Kisii this 14<sup>th</sup> day of October 2011.**

**R. LAGAT KORIR**  
**JUDGE**