



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**Succession Cause 174 of 2001**

**IN THE MATTER OF THE ESTATE OF THE LATE OSIEMO OGETA.....DECEASED**

**AND**

**PACIFICA BONARERI OSIEMO).....APPLICANTS**

**PAUSTINA MAKORI OSIEMO)**

**AND**

**PATRICK M. MOMANYI.....RESPONDENT**

**RULING**

On 18<sup>th</sup> February, 2005 **Pacifica Bonareri Osiemo and Paustina Makori Osiemo** hereinafter referred to as ***“the applicants”*** jointly filed this application pursuant to the provisions of section 76 of the **Law of Succession Act**, rules 44(1) of the **Probate and Administration rules** and section 128 of the **Registered Land Act**. The application was filed against **Patrick Makori Momanyi**; hereinafter referred to as ***“the Respondent”*** In the application the applicants sought that:-

***“(a) An inhibition do issue against the respondent prohibiting***

***him in any way from doing anything on Land Parcel; Central Kitutu/Mwamosioma/779 “the suit premises”***

***b) The grant of letters of Administration issued to the respondent***

***on 25<sup>th</sup> April, 2002 be revoked and or annulled as it was obtained fraudulently by making of a false statement or by concealment from the court of something of material particular.***

***c) There was misrepresentation that the applicant was aware of the proceedings in court.***

***d) Costs of the application.”***

The grounds in support of the application were that the respondent intended to fraudulently obtain from the applicants the suit premises, no citations were issued to the them by the respondent and finally that the respondent was bent on subdividing the suit premises illegally and unlawfully

In support of the application the 1<sup>st</sup> applicant swore a joint affidavit, where in pertinent paragraphs she deponed that they were co-wives and married to one, **Ogega Osiemo**, deceased. The deceased died on 10<sup>th</sup> December, 1986 and a grant of letters of Administration intestate were issued to the respondent by this court on 11<sup>th</sup> September, 2001 and confirmed on 25<sup>th</sup> April, 2002. The said grant was obtained fraudulently and through illegal and unlawful means by making false statement or by concealment of something material to the case. The respondent had also allocated himself 1.5 acres out of the suit premises unlawfully and secretly without the knowledge of the applicants who are the heirs apparent to the estate of the deceased as they were his widows. The respondent lied to the court that he had bought the suit premises and proceeded to obtain another death certificate whereas the applicants were in possession of one. Finally she deponed that the respondent's activities with regard to the petition been secret all along until they received a letter from the District Land Registrar to demarcate the suit premises.

The respondent on being served with the application reacted by filing a replying affidavit. In the main he deponed that he purchased a portion of the suit premises measuring 1.5 acres from the deceased in 1974. The two thereafter proceeded to Bogetutu Land Control Board and obtained the relevant consent to the transfer. A transfer was subsequently executed by the deceased as well as the mutation forms. However the deceased passed on before the transfer was effected. After the death of the deceased, the applicants, their sons, Assistant Chief and the Chief of Mwamosioma respectively and the

respondent attended the District Commissioner's office regarding the aforesaid transaction and it was resolved in his favour. The applicants' having refused to abide and recognize the arbitration by the District commissioner aforesaid, the respondent commenced this succession proceedings and cited the applicants. Upon being cited and served, the applicants took no action and as a result the applicant was issued with letters of administration that were subsequently confirmed. To that extent, the claim by the applicants' that there was something untoward in him obtaining the grant was not true. The application was thus incompetent, embarrassing and an afterthought merely meant to delay the transfer and subsequent registration of 1.5 acres out of the suit premises in the name of the respondent.

On 16<sup>th</sup> July, 2007 the application came before the Deputy Registrar of this court for directions. By consent of the parties it was agreed that the application be canvassed by way of affidavits on record.

These directions were renewed when the application came up for hearing before me on the 25<sup>th</sup> February, 2010. Parties further agreed to file and exchange written submissions in support of their respective positions. This was subsequently done. I have carefully read and considered the said written submissions.

Section 76 of the **Law of Succession Act** allows a grant of representation, whether or not confirmed at any time to be revoked or annulled either on application by any interested party or the court on its own motion on the grounds:-

**(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 to produce to the court, within the time prescribed, any such inventory or account of administration as it is required by the provisions of paragraph (e) and (g) of section 83 or has produced any such in 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 circumstances of this case, the applicants are the widows of the deceased. Thus they are interested parties to the goings on with regard to the administration of the estate of the deceased. In law therefore, they are perfectly entitled to mount the instant application.

Who is entitled to petition for a grant of letters of Administration? It appears from my reading of section 56 of the **Law of Succession Act** that anybody save for a minor, a person of unsound mind, a bankrupt, a body corporate and or its nominee can petition the court for grant of letters of administration intestate. However the public trustee and a trust corporation are an exception to the aforesaid requirement.

The petition herein was filed by the respondent in or about 4<sup>th</sup> July, 2001. He had presented the petition in his capacity as a purchaser. In law therefore, there was nothing wrong in the respondent

petitioning for a grant of letters of administration. After all he had an interest in the estate of the deceased in particular a portion of the suit premises measuring 1.5 acres which he had purchased from the deceased before his demise.

The applicants would want the grant issued as aforesaid to be revoked and or annulled on the grounds that it was obtained.

- (i) *Fraudulently by making of a false statement***
- (ii) *By concealment from court of something material and,***
- (iii) *Misrepresentation that the applicants were aware of the proceedings.***

I have gone through the affidavit in support of the application and to my mind does not really support any of the above contentions. The nearest that the said affidavit comes close to supporting any of the above allegation is the disposition that the respondent allocated himself a share of 1.5 acres unlawfully and secretly and without the knowledge of the applicants who are the heirs to the estate of the deceased. They further claim that the respondent concealed to the court that he had bought the suit premises and also proceeded to obtain a death certificate when the applicants already had one. Finally it is deposed that the respondents activities with regard to the estate of the deceased were shrouded in secrecy. The applicants only came to know of the cause when they received a letter from the District Land Registrar to demarcate the suit premises.

The applicants are not being candid when they claim that the respondent allocated himself a share of 1.5 acres out of the suit premises unlawfully, secretly and without knowledge. The record shows that the respondent's interest in the portion of the suit premises had been the subject of previous engagements between the respondent and the applicants together with their families. The letter from the chief of the area dated 11<sup>th</sup> March, 2002 addressed

to this court attests to this fact. There are also copies of the sale agreements between the respondent and the applicants' deceased husband. Pursuant to the sale agreements aforesaid the respondent and deceased appeared before Bogetutu Land Control Board and obtained its consent to the transfer. This court is aware and takes judicial Notice of the fact that before the consent of the relevant land control board is granted the owner of the land seeking the consent ordinarily appears with his wife(s) and members of his family who must give their approval to the transaction. There is nothing on record to suggest that Bogetutu Land Control Board departed from this well beaten path. I also doubt very much that the deceased would have sold a portion of the suit premises without the knowledge of the applicants and or members of his family. There is yet again a letter dated 17<sup>th</sup> April, 2001 addressed to both the respondent and the applicants amongst others by the District Commissioner. The reference in the letter is given as "**RE: OFFICIAL CONSULTATIONS-PARCEL NO. CENTRAL KITUTU/MWAMOSIOMA/779.**" The letter was categorical that the consultations were to touch "***.....on the above parcel number in view of the on going dispute since, 1989 and the facts are well know to you all.....***" There is nothing on record to suggest that the applicants did not receive the letter. The letter is categorical that the applicants were conversant with the dispute.

From the foregoing it is quite apparent that the applicants were well aware of the respondent's interest in the deceased's estate to the tune of 1.5 acres. To date he has not demanded anything more than what he thinks he is entitled to as aforesaid. The applicants cannot therefore be heard to claim that the respondent allocated to himself the said acreage out of the suit premises fraudulently, unlawfully and without their knowledge. They were in the know if the record aforesaid is anything to go by. For the same reasons the applicants too cannot be heard to say that the respondent misled (or concealed as they prefer calling it) to court that he had bought the suit premises.

The applicants too have alluded to the respondent obtaining a another death certificate of the deceased when they already had one in their possession as evidence of fraudulent conduct of the respondent as well as concealment of material facts. I do not think that there is anything wrong with an interested party to the estate obtaining a death certificate to enable him petition for a grant. I know of no provisions of law that restricts or limits the issuance of a death certificate to only one. At least counsel for the applicants did not point out to me any such law. A death certificate can be issued to whosoever applies for it provided he meets the requirements set out in the **Births and Deaths Registration Act**. It has not been suggested that the respondent misled the registrar of births and deaths in issuing him with the death certificate. Nor has it been demonstrated that the information in the certificate of death issued to the respondent is any different from that issued to the applicants. The record shows that the respondent had beseeched the applicants to no avail to take out letters of administration intestate so that he could pursue his claim to the estate to the extent of 1.5 acres out of the suit premises. The applicants by their own admission had a death certificate in their possession but for reasons best known to themselves opted not to pursue succession proceedings with regard to the estate of their deceased husband. What was the respondent who had a perfect claim to the estate of the deceased supposed to do. The applicants cannot be allowed to hide behind and or seek to benefit from their own mischief.

The applicants too claim that the applicant's conduct with regard to the estate was not beyond reproach. That he kept to himself the petition and the subsequent grant. That they only became aware of the same when they received a letter from the District Land Registrar to demarcate the suit premises. There is however evidence that the petition was actually Gazetted in the Kenya Gazette. Indeed it appeared as Gazette Notice number 5249 in the Kenya Gazette of 3<sup>rd</sup> August, 2001. The rational behind

Gazetting a succession cause in the Kenya Gazette is to inform and alert whoever has an interest in the estate so that he may take appropriate steps to vindicate his claim to the estate. The assumption too is that every person accesses and reads routinely the Kenya Gazette. Ofcourse we are aware that the opposite is actually the case. However, the assumption applies. If they did not read the Kenya Gazette then they cannot blame it on the respondent. Accordingly, the allegation by the applicants that they were not aware of the succession proceedings holds no water at all. This reasoning would apply equally also to the applicant's claim that they were never served with the citation. Ofcourse the story would have been different had the succession cause not been Gazetted.

The court record also shows that before the grant was issued and subsequently confirmed, the court was satisfied as to the service of the same on the applicants. When the temporary grant was issued on 11<sup>th</sup> September, 2001 **Wambilyanga J** was satisfied that the petition had appeared in the Kenya Gazette and the court's Notice Board from 12<sup>th</sup> July, 2001 to 12<sup>th</sup> August, 2001 and their being no objection lodged he issued the grant. When the temporary grant came up for confirmation on 25<sup>th</sup> April, 2002, the same judge is recorded thus:-

*“.....25/4/2002*

***Coram: Wambilyanga J***

***Petitioner –present***

***Beneficiaries-absent though served***

***Order: the grant is confirmed as prayed.....”***

The foregoing clearly illustrates that the applicants were kept in the loop of events in this cause despite their deposition to the contrary:

A party who seeks court's discretion and or indulgence as the applicants herein should not be seen to be less than candid in their presentations. I have no doubt in the circumstances of this case that the applicants have been less than candid to this court. Much as they proclaim to not having been cited, I have no doubt in my mind that indeed they were so cited. They failed to challenge the citation for reasons best known to themselves.



The upshot of all the foregoing is that the applicants have not been able to satisfy me that the respondent obtained a grant to the estate of the deceased through fraud, making of a false statement, concealment of material facts and or misrepresentation. That being my view of the application the same is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Kisii this 24<sup>th</sup> March, 2010.**

**ASIKE-MAKHANDIA**

**JUDGE**