



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**Civil Case 238 of 2001**

**JUSTO OKELLO .....APPLICANT**

**VERSUS**

**KEPHA DICKENS OBARE .....RESPONDENT**

**JUDGMENT**

This judgment is written with the consent of the parties herein and against the background that this court did not have the advantage of seeing and hearing the witness as they testified during the entire period of the trial which was conducted and concluded by the **Hon. Lady Justice J. Gacheche** who was later transferred to another judicial station before she could write and pronounce her judgment.

The background of the case as may be discerned from the record is that the late **Barnaba Opondo Nyapola** (herein, the deceased) allegedly died on the 8<sup>th</sup> July 1986 at the age of eighty (80) years (see, death certificate number B. 518122 dated 22<sup>nd</sup> November 1999).

Fourteen years later, on the 31<sup>st</sup> May 2000, **Kepha Dickens Obare** (herein, the Petitioner) filed a petition for the grant of letters of administration respecting the Estate of the deceased. He petitioned for the grant in his capacity as a cousin of the deceased. The grant was accordingly issued on the 1<sup>st</sup> August 2000 by the Magistrate's Court at Maseno and was confirmed by the same court on the 31<sup>st</sup> October 2000.

The certificate of confirmation listed **Land parcel number GEM/MARENYO/739** as the only property.

However, the matter took a different turn when **Justo Okello** (herein, the objector) objected to the grant of the letters of administration in favour of the petitioner.

On 11<sup>th</sup> June 2001, the court directed that the objection be heard by way of “**viva voce**” evidence. The objector became the plaintiff and the petitioner became the defendant. The hearing of the objection commenced on 16<sup>th</sup> May 2002 before Gacheche J, and was concluded after several adjournments. When the case came upon on the 2<sup>nd</sup> February 2004, Lady Justice Gacheche had already been transferred from this station. She however ordered that fresh hearing dates be taken in the registry but in the mean time the proceedings be typed so that another judge may take over the matter.

On 27<sup>th</sup> November 2006, the matter landed before the **Hon. Mr. Justice M. Warsame** and a consent was recorded to the effect that the matter be taken over and continue from where it had stopped before Gacheche J.

On 14<sup>th</sup> December 2006, the **Hon. Mr. Justice J. Mwera** ordered that the matter be mentioned before Warsame J, for directions on further submissions. Apparently, what remained before the setting of a judgment date were further submissions by the parties.

On 26<sup>th</sup> April 2007 Mwera J ordered that written submissions be filed by the parties and the matter be placed before

Gacheche J for determination. The parties agreed to that arrangement.

But on the 30<sup>th</sup> May 2007 the matter was placed before the **Hon. Lady Justice M. Mugo** and was stood over to the 26<sup>th</sup> June 2007. It was however mentioned on 27<sup>th</sup> June 2007 when Mwera J, stood it over to 29<sup>th</sup> June 2007 on which date it was confirmed that the parties had filed their written submissions. It was then ordered that the file be forwarded to Gacheche J, at the High Court in Kisii where she had been transferred.

Correspondence in the court file show that the matter was indeed forwarded to Gacheche J, who was at this time based at the Family Division of the High Court in Nairobi.

In a letter dated 20<sup>th</sup> May 2009 by the Principal Deputy Registrar, Family Division High Court Nairobi to the Deputy Registrar of this court, it was indicated that Gacheche J, had noted that on the 27<sup>th</sup> November 2006 the parties had consented to Warsame J, taking over the matter from where it had reached. Gacheche J was of the view that no prejudice would be occasioned by either party if the matter was heard by another judge. Consequently, the matter was referred back to the High Court Kisumu.

On the 22<sup>nd</sup> July 2009, the matter was mentioned before this court and was stood over generally. It was again mentioned on 20<sup>th</sup> January 2010 before the **Hon. Lady Justice A. Aroni** when the learned counsel for the plaintiff, Mr. J. Mwamu indicated that the parties preferred to have a judgment by Gacheche J. The court indicated that the trial judge (Gacheche J.) would be contacted through the Principle Judge in Nairobi. However, on 28<sup>th</sup> January 2010 Aroni J, ordered that the matter be mentioned before this court for directions.

On 18<sup>th</sup> February 2010, the matter was mentioned before this court and it was agreed by both parties that the judgment be written by this court on the basis of the evidence recorded by Gacheche J. This is how this court has had to write the judgment. The decision was taken in order to prevent further delay in this matter. It was appreciated that there has been unnecessary delay in the matter. It was also acknowledged that **“Justice delayed is Justice denied”**. So much for the background of the case.

At the trial, the plaintiff / objector **Justo Mathias Okello (PW1)** stated that he was born in 1922 and hailed from Kanyibuor Sagam. He knew the deceased as his brother as he (deceased) was the son of his uncle. He said that the deceased did not have any children and had been separated from his wife. He also said that the deceased lived with him when he (deceased) fell sick and eventually passed away in 1987.

The objector further stated that he obtained a burial permit for the deceased as well as the death certificate. He thereafter followed up the issue of the deceased's estate as the deceased had declared him the sole beneficiary. He informed the deceased's brother Gilbert Nyapola about the inheritance. He also informed the deceased's mother and told her that he would point out a place where the deceased's younger brother (Gilbert) will construct his house. He was certain that the deceased died in 1987 and not in 1986 when he registered himself as a KANU member in South Nyanza. The registration card was tendered in court.

The objector went on to state that the ownership of the material parcel of land belonging to the deceased was not claimed by anybody in 1987. He did not therefore bother to establish ownership of the land at the land Registry. He said that after the death of the defendant's parents the defendant claimed ownership of the land whose number he (plaintiff) could not remember and could not even tell its acreage. He (plaintiff) ploughed the land after the death of the deceased but had already started ploughing it in 1955 while the deceased was away in Kisumu and South Nyanza. He was left with a copy of the land certificate which described the land as **North Gem/Marenyo/739**. He produced the certificate in court. He reported to a village elder called **Nicholas Obiero** when the defendant started interfering with the land. He thereafter took the matter to court after learning that the defendant had already expressed the intention to apply for letters of Administration respecting the Estate of the deceased. He was declared the sole beneficiary by the deceased in the presence of one **Edward Ochola Oloo**, one **William Onyango** and **Gilbert Nyapola**. The deceased reduced the

declaration in writing made in the dholuo language. The document was translated into English as directed by the court and was tendered in evidence.

The objector contended that the defendant was not related to the deceased and was not supposed to inherit anything as the deceased had a younger brother. He (objector) also contended that the deceased and the defendant did not share a first great grand father and that he (objector) was a member of the deceased's wider family.

The objector prayed for the revocation of the grant issued to the defendant as well as the revocation of the registration of the land in his name as he is not a member of the deceased family.

**William Abara Okello (PW2)** is a son of the objector. He said that the deceased was his uncle and on his death on 11<sup>th</sup> April 1987 left behind his mother and brother Gilbert. He (deceased) was buried at the material parcel of land but the defendant did not attend the ceremony although he later laid a claim to the land after applying for the grant of letters of administration at the Maseno court.

On conducting a search at the land registry, William found that the land had been transferred to the defendant. He then instructed his lawyers to file the present case. He contended that the objector is not a stranger to the estate of the deceased and that there was no relationship between the deceased and the defendant.

William further contended that the deceased died in 1987 and not 1986 as alleged by the defendant and that the objector / plaintiff is the right person to inherit the material parcel of land.

**Petro Gilbert Nyapola (PW3)** said that he was a brother of the deceased who died on 11<sup>th</sup> April 1987 and was buried at the material parcel of land which initially belonged to their grand father called **Sula**. He said that he shares with the plaintiff a great grand father called **Oranga** and that he is not at all related to the defendant. He also said that the plaintiff should have been registered as the proprietor of the material parcel of land because he was very close to the deceased who was sickly. He however, acknowledged that he ought to have benefited as the proprietor of the land. He further stated that the defendant started ploughing the land after the death of the deceased but prior to that, the plaintiff was the one ploughing it.

**William Onyango Oluoch (PW4)**, said that the deceased owned the material parcel of land and that he lived with the plaintiff who was his elder brother. He (PW4) could not tell whether or not the plaintiff and the defendant's father were related. He said that he had never seen the defendant nor his father developing the material land.

**Edward Ochola alias Ochola Oloo (PW5)** confirmed that the deceased had three brothers including Nyapola (PW3) who was the only one alive. He said that he was a neighbour of the plaintiff who was left with the material parcel of land after the death of the deceased.

**Nelson Ogola Otieno (PW6)** was an assistant land Registrar in Siaya. He said that the material parcel of land North Gem/Marenyo/739 was first registered on 28<sup>th</sup> November 1967 in the name of the deceased but on the 20<sup>th</sup> December 2000 it was registered in the name of the defendant by way of succession.

**Jackton Herbert Oloo (PW7)**, a brother of the plaintiff said that the deceased was their cousin and that he (deceased) had a brother, Peter Gilbert Nyapola (PW3) who lived in Eldoret. He (PW7) contended that the defendant featured nowhere in their family tree and was not their relative but petitioned for letters of administration of the estate of the deceased without the consent of the family of the deceased.

**Jared Omondi Awere (PW8)** was the Chief of Yala Township location. He produced a burial permit which had been issued by his predecessor the late **Joseph Obiero Obura**. He confirmed that the deceased Barnabas Opondo Nyapola died on 11<sup>th</sup> April 1987 and not in 1986.

**Stephen Keptherir Meli (PW9)** was the Siaya District Civil Registrar. He confirmed that two death certificates were issued in respect of the deceased and each had a different date of death. One gave the date as 8<sup>th</sup> July 1986 and another as 11<sup>th</sup> April 1987. He (PW9) found it strange that two death certificates with different dates of death could be issued in

respect of one person. He however, could not tell how the anomaly occurred.

**Dickson Anyul (PW10)**, an advocate practicing in Kisumu translated the document written in the Dholuo language into English after it was handed over to him for that purpose by the plaintiff's legal counsel. He prepared a typed translation and certified it. He then forwarded it for commissioning.

The foregoing evidence by all the aforementioned witnesses formed the basis of the plaintiff's case against the defendant.

In his denial of the allegations made against himself by the plaintiff and in his contention that the plaintiff's objection is not merited, the defendant **Kepha Dicken Obare (DW1)** stated that the deceased was his distant cousin in that their great grand parents were brothers. The deceased died on 8<sup>th</sup> July 1986 and he (DW1) obtained a death certificate which he produced in court. He did not obtain the burial permit because he registered the deceased's death belatedly. He petitioned for the disputed grant of the letter of administration after finding out that the material parcel of land belonging to the deceased had been registered in the name of someone else who was William Abara (PW2), the son of the plaintiff. He (DW1) raised the issue with the land Registrar and the title deed issued to William was recalled. He said that when he applied for the grant he gave information that the deceased was his cousin and had no dependants. He contended that the plaintiff was not closely related to the deceased and that he was closer to the deceased than the plaintiff. He confirmed that the only living brother of the deceased was Nyapola (PW3) although the deceased had other cousins some of whom were still living. He was not sure whether or not the deceased died on 11<sup>th</sup> April 1987 and was not aware that the deceased left a will which was in possession of the plaintiff. He said that the plaintiff never objected when he applied for the grant.

**Ignatius Omolo Ojak (DW2)**, a retired Chief of East Gem Location said that he was known to both the plaintiff and the defendant and that both came from a place called Sagam within Marenyo sub Location. He said that he did not know the deceased and even though his name ( DW2's) appeared in the document written in the dholuo language (i.e. P. E. X 7) he was not familiar with it and saw it for the first time in court. He contended that he did not witness the writing of the document by the deceased and that he did not know the relationship between the deceased and the plaintiff although he heard that they were brothers.

**Wellington Opiyo (DW3)**, said that he did not know the deceased and that Ochola Oloo (PW5) was his cousin while the defendant was his maternal uncle. He said that the plaintiff was not related to him and that he was not present when the "will" (P. EX 7) was made by the deceased.

**Andrea Mbadi (DW4)** said that he knew both the plaintiff and the deceased and that the defendant and the deceased were from the same sub-clan. He said that the defendant was the closest relative of the deceased than the plaintiff and that although the deceased had a brother his whereabouts were unknown.

**James Woga (DW5)**, said that he was related to the plaintiff whom he referred as his uncle. He said that the defendant was a closer relative of the deceased than the plaintiff. He denied having signed an affidavit as surety to the application for grant by the defendant. The foregoing evidence by the defendant and his witnesses summarized the defendant's case in opposition to the plaintiff's objection.

A consideration of the evidence in its totality clearly shows that ideally this was a case for the revocation of the grant issued to the defendant respecting the estate of the deceased rather than an objection to the issuance of a grant. Objection proceedings and revocation proceedings are not the same. They are distinct and serve different purposes. Herein, the basic issue for determination is whether the grant issued to the defendant by the Magistrate's court at Maseno should be revoked.

In that connection it would not be farfetched to proceed on the basis that the deceased died fully intestate as it is evident that the alleged "Will" (P.EX 7) would not pass the test for validity and execution.

A grant of representation is essentially an order issued by the court to confirm that a particular person is to act as a

personal representative of the deceased.

The issuance of the disputed grant by the magistrate’s court at Maseno was not irregular. It was done in accordance with the jurisdiction conferred by Section 48 of the **Law of Succession Act (Cap 160 Laws of Kenya)**

Section 76 of the said Act provides for the revocation or annulment of a grant and states in part that:-

**“A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or if its own motion-**

- (a) **That the proceedings to obtain the grant were defective**
- (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) .....
- (e) .....

The record from the Maseno court shows that the defendant in his petition for the grant of the letters of administration respecting the estate of the deceased availed a death certificate issued on the 22<sup>nd</sup> November 1999 showing that the deceased died on the 8<sup>th</sup> July 1986 aged 80 years.

The evidence by the plaintiff showed that the deceased died on 11<sup>th</sup> April 1987 and was still alive in the year 1986 when he obtained his KANU registration card (P.EX4).

The plaintiff produced a second death certificate (P. EX3) issued on 17<sup>th</sup> May 2000 confirming that the deceased died on 11<sup>th</sup> April 1987 aged seventy nine (79) years. The District Civil registrar (PW9) was at a loss to explain how two death certificates could be issued in regard to a single deceased person.

In his evidence, the defendant was clearly uncertain as to the actual date of the deceased’s death. He merely implied that the death certificate in his possession was obtained by his father. It was further confirmed by the retired assistant chief of Marenyo Sub Location (PW4) and the deceased’s surviving brother (PW3) that the deceased died on 11<sup>th</sup> April 1987 and was buried at the material parcel of land.

It may therefore be safely stated that the deceased died on the 11<sup>th</sup> April 1987 as depicted in the second death certificate ( P. EX 3) produced by the plaintiff.

The first death certificate which was relied upon by the defendant in applying for the disputed grant may not be genuine. This strongly implies that the certificate was fraudulently obtained.

Apart from the suspect death certificate which was relied upon for the grant of the letters of administration, there was the affidavit filed by the defendant in support of his petition for the grant. It is dated 31<sup>st</sup> May 2000. It contained an averment indicating that the deceased died intestate without leaving behind any survivors. However, the evidence herein shows that the deceased was survived by a younger brother in the person of Petro or Peter Gilbert Nyapola (PW3) who said that he was not related to the defendant neither was his consent sought by the defendant in applying for the grant of his late brother’s estate.

Gilbert (PW3) categorically stated that he should have been the person to benefit from the estate of his late brother. He cannot be said to have been disinterested in the estate. His ignorance regarding the devolution of his late brother’s estate was very evident and was what led the defendant and even the plaintiff to exploit or attempt to exploit it for their own selfish ends.

The defendant came from **“out of the blues”** to lay claim to the estate of the deceased while the plaintiff was under the mistaken belief that having taken care of the sickly deceased prior to his death he was entitled to the estate of the deceased. He (plaintiff) could not rely on a document said to be the deceased’s Will (P.EX7) to claim the estate. As

earlier noted, the document was suspect and invalid “**ab-initio**”. It could not be legally enforced.

In his application for the grant, the defendant indicated that he presented his petition in his capacity as a cousin of the deceased. The evidence has however shown that he had no family relation with the deceased as confirmed by the deceased’s brother (PW3). The defendant said that he was a distant cousin of the deceased. This was not clearly ascertained by the evidence available and even if he was such cousin he had no priority in law to apply for the grant and indeed may not have had any beneficial interest in the estate to enable him apply for the grant.

The plaintiff’s family relationship with the deceased was also not clearly ascertained by the available evidence. He too may not have had any beneficial interest in the estate in order to be entitled to the same.

Section 39 (1) of the Succession Act provides that where an intestate has left no surviving spouse or children his net estate devolve upon the kindred in the order of priority, that is, father, mother, brothers and sisters or their children, half brothers and half sisters or their children or any relative who are in the nearest degree of consanguinity .

Neither the defendant nor the plaintiff fell under the aforementioned categories of relatives if at all they were related to the deceased.

Under Section 66 of the same Succession Act, the court has a final discretion as to the person or persons to whom a grant of letters of administration shall be made in the interest of all concerned. The provision provides a general guide on the order of preference, that is, a surviving spouse or spouses with or without association of other beneficiaries. Herein, the deceased was not survived by a spouse or spouses who would ordinarily take preference over everybody else. Therefore, it would be fair and just to resort to blood relatives in terms of Section 39 of the Succession Act.

Neither the plaintiff nor the defendant fell in any order of preference for either to be possessed of proper capacity to apply for the grant of the estate of the deceased.

In the circumstances and quite naturally, the person who should and ought to have been granted the letters of administration is the deceased’s surviving brother (PW3).

The grant of the letters to the defendant by the Maseno Court was improper in so far as it was based on defective proceedings, false statements and concealment or non disclosure of material information as established by the evidence adduced herein.

Therefore, in the interest of all those concerned, the grant issued to the defendant dated 1<sup>st</sup> August 2000 and prematurely confirmed on 31<sup>st</sup> October 2000 must and is hereby revoked and in the interest of justice and for the prevention of further abuse of the court process, a new grant be issued to the deceased’s brother Petro or Peter Gilbert Nyapola (PW3) and/or any of his adult children.

Ordered accordingly.

**Dated, signed and delivered at Kisumu this 12<sup>th</sup> day of March 2010.**

**J. R. KARANJA**  
**JUDGE**

JRK/aao