



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Succession Cause 311 of 2006**

IN THE MATTER OF THE ESTATE OF:

ONGERA MATARA ..... DECEASED

AND

PIRIAH ONGERA ..... PETITIONER

BEN OMBWORI ONGERA ..... 1<sup>ST</sup> OBJECTOR

**VERSUS**

DAVID ONGERA ..... 2<sup>ND</sup> OBJECTOR

**RULING**

This is an application for revocation of grant of letters of administration with will annexed. The application was made on the grounds, *inter alia*, that:

- €€€€€€€€ The grant of letters of administration which was issued to the petitioner was obtained by fraud and without a consent of all the beneficiaries of the late Ongera Matara, hereinafter referred as to the deceased.
- €€€€€€€€ That the proceedings leading to the grant of letters of representation were defective in substance.
- €€€€€€€€ That the grant was obtained fraudulently by making of false statement and/or concealment from court of material facts.
- €€€€€€€€ That the person in whose favour the grant was issued is incapable of administering the estate of the deceased owing to the existence of a grudge between the administrator and the rest of the beneficiaries of the deceased’s estate.

Although the petitioner was duly served with a hearing

notice, she did not attend court when this matter came up for hearing on 22<sup>nd</sup> March 2010.

Mr. Oguttu, the objectors’ advocate, informed the court that the 1<sup>st</sup> objector died on 25<sup>th</sup> August 2007 and therefore it was only the 2<sup>nd</sup> objector who was pursuing the matter.

**David Omoganda Ongera (PW1)**, the 2<sup>nd</sup> objector, was at the time of the hearing residing in the United States of America. He

moved there on 23<sup>rd</sup> September 2005. Before then he was working as the District Elections Co-ordinator, Nyamira. He testified that the deceased died on 7<sup>th</sup> of April 2005. Sometimes in the year 2002 the deceased was diagnosed with prostate cancer and was taken to various hospitals for treatment. PW1 further testified that by the year 2004 the deceased was very sick and started getting confused. By then he was living with the petitioner. PW1 used to visit the deceased frequently but his memory was very poor such that at times he could not even remember him, his own son.

Around April 2004 the deceased was admitted at Nairobi Women's Hospital and remained there for about one month. After his discharge the deceased was taken to the house of **Mogeni Ongera**, a step brother of PW1. PW1 continued to visit him regularly. All along there was no indication that the deceased had made any Will.

After the burial of the deceased the petitioner did not disclose to the objectors and other beneficiaries of the deceased's estate that the deceased had left behind a will. The objectors decided to apply for letters of administration and they informed their uncle known as **Matwere** who summoned all the family members of the deceased to his home but the petitioner and her children failed to show up. Thereafter the area Assistant Chief, **Evans Matara**, convened a meeting of all the deceased's family members in the Chief's office but again the petitioner and her children did not turn up. A third meeting was convened by the Chief and once again the petitioner and her children failed to attend.

The clan elder and Matwere went to see the area District Officer who summoned all the deceased's family members sometimes in July 2005. This time round the petitioner and her family members attended. The petitioner produced a photocopy of what she said was the deceased's will. The same is dated 18<sup>th</sup> September 2004 and bears a signature that was said to be that of the deceased. The alleged will did not name the executor of the same. It was witnessed by **Johnson Omanwa Mayaka** of P.O. Box 69, Sotik and **Charles Barongo Mokiye** also of P.O. Box 69, Sotik. The Will is shown to have been drawn by Miller & Company Advocates of Nairobi. PW1 said that as at 18<sup>th</sup> September 2004 the deceased was not in a state of mind that would have enabled him to execute a will. PW1 added that his two sisters, **Josephine Ongera** and **Rachel Bonareri Nyachienga** are not included in the list of beneficiaries of his father's estate.

Sometimes in September 2005 the objectors instructed Ms Oguttu Mboya and Company Advocates to lodge a citation to propound a document as a will and the citation was filed on 13<sup>th</sup> September 2005. The petitioner was served with the citation and filed a replying affidavit on 3<sup>rd</sup> October 2005.

In her replying affidavit the petitioner deposed that she had already lodged a petition for grant of letters of administration on 30<sup>th</sup> September 2005 but she did not divulge the details of the alleged succession cause. A copy of the petitioner's affidavit was produced as an exhibit. However, that allegation was not correct because it later transpired that she filed the succession cause on 6<sup>th</sup> October 2005, that is, **Succession Cause No. 2774 of 2005** in the High Court of Kenya at Nairobi.

In the citation that was filed by the objectors, all the beneficiaries of the deceased's estate were enumerated. The deceased's first house has 9 beneficiaries, 3 of whom were minors as at 13<sup>th</sup> September 2005. The second house, represented by the petitioner, has 11 beneficiaries, 2 of whom were minors as at the date of filing the citation.

On 27<sup>th</sup> December 2005 the petitioner obtained grant of probate of written will vide Succession Cause No. 2774 of 2005 at Nairobi. PW1 urged the court to revoke the same as it was obtained fraudulently and without disclosure of material facts.

Mr. Oguttu submitted that the petitioner obtained the said grant when she had not been named as the executrix of the estate of the

deceased. He further submitted that it was incumbent upon the petitioner to issue a citation to the rest of the beneficiaries of the deceased's estate before filing the succession cause. She however proceeded to obtain the grant in a secretive manner.

Counsel further submitted that the petitioner knew that some of the beneficiaries were minors and that being the position no grant of representation could issue to a single administrator in terms of the provisions of **section 58 (1) (b)** of the **Law of Succession Act**. The aforesaid section provides as hereunder:

**“No grant of letters of administration with the will annexed shall be made to one person alone except where-**

- (i) that person is the Public Trustee or a Trust Cooperation; or**
- (ii) in the will the testator has appointed one or more trustees for continuing trust who are willing and able to act.”**

I agree with Mr. Oguttu that there was a continuing trust

and therefore the mandatory provisions of **section 58 (1) (b)** quoted above were overlooked. That omission renders the grant null and void.

One other serious defect about the grant of probate is that it states that the petitioner was named in the will as the executor which is not the case. The petitioner knew that he had not been appointed as the executor of the deceased's estate and she misrepresented herself before the court as having been duly named as the executor. **Section 6** of the **Law of Succession Act** does not make it mandatory for a testator to appoint any executor in his will. In the text known as **“Law of Succession”** by W. M. Musyoka at page 122, the learned author states that:

**“Executors are usually expressly appointed by the will. Section 6 of the Law of Succession Act provides that a testator may appoint his executor or executors by will. The appointment of executors is not a mandatory requirement, but in practice a will is considered incomplete or badly drafted if it omits to appoint executors.”**

Looking at the alleged will of the deceased, I entertain some doubt that it was drawn by the renown firm of Miller & Company Advocates. A will that is ordinarily drawn by an Advocate would most likely indicate who the executor or executors are. The foot of the alleged will bears the inscription:

**“Drawn and Filed by  
Miller & Company  
Advocates,  
Bruce House,  
3<sup>rd</sup> Floor,  
P.O. Box 45707,  
Nairobi.”**

From the evidence of PW1, it is also doubtful whether the deceased had the mental capacity to execute the alleged will. There is evidence that as at September 2004 the deceased's memory was very poor to the extent that he could not even recognise his children. The test of mental capacity over the testator is judged by his ability to understand the nature of the will he is making. In **BANKS –VS- GOOD FELLOW** (1870) L.R. 5 Q P 549, Cockburn, C.J held as follows:

**“He must have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature**

**of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them.”**

Some of the deceased's beneficiaries were excluded in the alleged will. I do not think that it would have been the intention of the deceased to exclude some of his children as beneficiaries of his estate. And where that happens this court is empowered by the provisions of **section 26** of the **Law of Succession Act** to make reasonable provision for the dependants who were left out.

In view of the foregoing, I agree with the 2<sup>nd</sup> objector that the grant of probate of written will issued to the petitioner on 27<sup>th</sup> December 2007 ought to be annulled, which I hereby do. The petitioner shall bear the costs of these proceedings.

**DATED, SIGNED AND DELIVERED AT KISII THIS 15<sup>TH</sup> DAY OF APRIL, 2010.**

**D. MUSINGA**  
**JUDGE.**