



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 171 OF 2009

KWAMBUKA MAGERI
.....APPLICANT
VERSUS

SAMSON OTIENO OLOO
..... RESPONDENT

RULING

Samson Otieno Oloo, hereinafter referred to as the respondent petitioned the Senior Principal Magistrate's court at Migori for the grant of letters of administration intestate with regard to the estate of one, **Ojwang Onduru**, deceased in Migori, **SPM** succession cause number 148 of 2008. In the said petition, he described himself as a stepson to the deceased. In the affidavit in support of the petition he stated that the deceased died intestate and left him and one, **Margaret Oloo Ojwang** only surviving him. He described **Margaret Oloo Ojwang** as a wife and or widow of the deceased. The only asset due to the estate of the deceased was **land parcel Sakwa/Kadera Kwoya/431**, hereinafter the "**suit premises**". On 13th October, 2008, the grant was duly issued and subsequently confirmed to him on 9th April, 2009. Pursuant to the confirmed grant, the respondent had the suit premises transferred to him absolutely by way of transmission.

By an application dated 24th July, 2009 and filed in court on 29th July, 2009, **Kwambuka Moger** hereinafter "the applicant", sought:-

"i) That the Letters of Administration to Samson Otieno made on the 13th October 2008 vide the Migori SPMCC Succession Cause number 148 of 2008, be annulled and or revoked.

ii) That consequently (sic) upon grant of prayers above, the name of Samson Otieno Oloo be deleted from the land register.

iii) That cost of this application be provided for".

The application was expressed to be brought under section 76 of the **Law of Succession Act** and Rule 44 of the **Probate and Administration Rules**. The grounds in support of the application were that the grant had been obtained fraudulently by making of a false statement and or concealment from the court of something material to the case and secondly, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

In support of the application, where pertinent, the applicant deposed that he was the stepson to the

deceased. The deceased left behind his wife, **Margaret Oloo Ojwang'**, **Abich Mageri** his brother and himself as survivors. He had lived with the deceased since time immemorial and used to take care and support him. He was thus his dependant. That the respondent was not the true next of kin or survivor of the deceased. In any event the respondent ought to have included the applicant's name in the list of survivors. Having failed to include his name and that of his brother, **Abich Mageri**, the respondent thereby obtained the grant fraudulently. Finally he deponed that the respondent had used the confirmed grant to transfer and register in his name the suit premises.

The application was opposed. Two replying affidavits were filed by **Margaret Ojwang**, "*the widow*" and the respondent in response to the application. As far as the widow was concerned, she was the sole widow of the deceased. That the deceased and herself were never blessed with any children during their marriage. However, the two had adopted the respondent, who was a son of her brother-in-law, **Oloo Onduru**, to live with them who in turn greatly assisted them. Upon death of the deceased, the respondent continued to take care of her. However, the applicant who is the son of **Mageri Onduru**, a brother of the deceased threatened her with dire consequences and indeed assaulted her on 20th July, 2009 with regard to inheritance of the suit premises. The applicant's sole desire is to have the suit premises transferred and registered in his name whereupon he would evict her since she had not given birth to any children. Due to the respondent's kindness and assistance towards her, she had conscientiously and knowingly consented to the respondent petitioning for the grant of letters of administration. She denied that the respondent misled her into signing the documents in support of the petition. Consequently, the applicant is not a beneficiary of the deceased's estate whatsoever and could not have been listed as beneficiaries alongside his brother, **Abich Mageri**. That the omission of the names of the applicant and **Abich Mageri** was not informed by any fraud or at all. Besides there was no concealment and or non-disclosure of any material facts. She went on to depone that the applicant neither lived with the deceased nor was he ever taken care of by the deceased.

On his part, the respondent deponed that the applicant was the son of **Mageri Onduru**, who was his uncle whilst he was the son of **Oloo Onduru**. Thus they were first cousins. Though the deceased was married to the widow, they were never blessed with any children. They however took him in as their child. Upon the death of the deceased he continued to reside with and assist the widow in various ways. When the widow was intent on taking out succession proceedings in respect of the estate of the deceased, she invited him to do so having already obtained a letter from the chief. He acted on her instructions and obtained a grant which was subsequently confirmed. All along, the widow voluntarily executed the relevant documents. Consequently allegations that he misled the widow into signing the documents were mistaken. The applicant and his brother were not beneficiaries or dependents of the deceased and therefore could not participate partake in the succession proceedings. He also confirmed that the applicant had on various occasions assaulted the widow with a view to forcing her to abandon the homestead and or agree to them inheriting the estate of the deceased instead.

When the application came before **Muchelule J** for directions on 19th January, 2010 parties consented to having the same canvassed by way of viva voce evidence.

Hearing of the cause commenced before me on 22nd April, 2010. In brief the applicant testified as follows, that the deceased was his uncle, that is, a brother to his father. He passed away sometimes in 1982 aged about 80 years. He had stayed with the deceased since birth. The widow was the younger wife of the deceased and she had been married to the deceased for about 2 years before he passed on. The suit premises belonged to the deceased. For over 68 years that he resided with the deceased, the respondent never claimed the suit premises. As far as he was concerned the suit premises solely belonged to him. The widow never informed him of the succession proceedings. He only came to know of the transfer of the suit premises to the respondent when he checked the records at the lands office, Migori. He denied having been violent to the widow and did not even know where she stayed as she had deserted the matrimonial home. Finally he stated that the respondent had never occupied the suit premises.

Under cross-examination, he stated that the deceased left him the suit premises. He had married 2 wives, **Margaret Atieno Genga** and the widow. He was not blessed with any children with any of them. He had never met the respondent and did not know him. However he knew that he came from

Kabuoch. He denied having told his advocates that the respondent should have included him as one of the survivor's of the deceased in the petition. He confirmed that the widow no longer stayed on the suit premises having deserted the same. He could not tell whether the respondent had inherited the widow in accordance with Luo customs and rites. According to Luo customs, a son could inherit a step mother. Pressed further, he conceded and confirmed that the respondent had in fact inherited the widow as his wife. As the cross-examination proceeded, the applicant became increasingly evasive in his answers to questions put to him by counsel for the respondent. Though he claimed not to have been violent towards the widow, he nonetheless conceded that his son, **Kenneth Okoth** had a case at Rongo Court.

The 2nd witness called by the applicant was **Silvanus Otieno Akumu**. The deceased was his paternal uncle and his parcel of land neighboured the suit premises. The applicant was a nephew to the deceased and stays on the suit premises. The respondent had never stayed on the suit premises. That the family sat after the death of the deceased and resolved that the applicant inherits the suit premises.

Under cross-examination, he stated that the applicant had been in occupation of the suit premises since 1968. The deceased had invited the applicant to stay with him as he had no children of his own. The applicant and his family occupy the suit premises to date. The respondent was a nephew of the deceased. However he hailed from Ndhiwa District whereas the deceased hailed from Rongo District. There had been no dispute between the widow and the applicant. However, the widow had since relocated to Ndhiwa.

The respondent testified that the applicant was his cousin as their fathers were brothers. The deceased had no children with the widow. Since he was born, he had been staying with them. The applicant and his witnesses lied when they stated that they had been staying on the land since 1968. The applicant has his father's land nearby though.

Cross-examined he stated that though he started staying with the deceased when he was 10 years, he no longer stays on the suit premises. He stays at Lwala centre in Ndhiwa District. The suit premises are in Rongo District about 4kms from Lwala centre. He had been chased from the suit premises. He reported the incident to the widow who advised him to leave for the sake of his life. He conceded that the applicant occupied the suit premises. The applicant was his cousin and in law, they rank equally in priority. However, the applicant could not get the suit premises as the widow had already given it to him.

The only witness called by the respondent was the widow. She confirmed having been married to the deceased but had no children with him. She confirmed further having stayed with the respondent since birth – who continued to take care of her. She conceded that the applicant had been in occupation of the suit premises for a long time. His son had previously assaulted her. She preferred that the suit premises go to the respondent as he took care of her. She had been chased from the suit premises by the applicant's elder son. She also testified that the respondent stays in his own parcel of land with three wives and not at Lwala centre.

Under cross-examination, she stated that when she married the deceased in 1995, she found him staying with the respondent as well as the applicant. The applicant used to utilize the suit premises. In December, 2009, she was chased away from the suit premises. The respondent stays on the land he bought and never put up a house on the suit premises. She conceded that the respondent had never occupied the suit premises. On the other hand, the applicant had always occupied the same. She did not however wish the applicant to have the suit premises as he had threatened to kill her. Finally, she was aware that the respondent's father had left him some parcel of land.

When the formal hearing of the cause concluded, parties agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them alongside cited authorities.

The issues for determination in this application are two fold, whether the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the case and secondly, whether the grant was obtained by means of untrue allegation of a fact essential in

point of law to justify the grant. Essentially these are the grounds upon which the application was made. It is trite law that this court may on its own motion or on application by an interested party revoke the grant whether confirmed or not on several grounds set out in section 76 of the **Law Succession Act**.

From the evidence on record, it is common ground that both the applicant and respondent are cousins. They were all nephews to the deceased. Therefore neither of them was a son or stepson of the deceased. It is also common ground that the deceased was married to 2 wives. One however pre-deceased him and it is only the widow who survived him. It is also common ground that the deceased never sired children with any of his 2 wives aforesaid. It is also common ground that being nephews to the deceased neither of them ranks superior to the other in terms of priority to his estate.

From the evidence on record, it emerges that the applicant as opposed to the respondent had been staying on the suit premises since he was a young boy. This is as per the evidence of the applicant, his witness as well as the widow. Much as the respondent equally claimed to have stayed with the deceased, and the widow on the suit premises, the contrary came through his evidence. It emerged in evidence that in fact the respondent had never resided on the suit premises. Under cross-examination the widow was categorical that when she married the deceased he found him staying with the applicant. The respondent was staying on his land that he had bought. He had never built a house on the suit premises. In deed the respondent had never occupied the suit premises. On the other hand, the applicant had always been in occupation of the suit premises with his family.

What then was the basis of the applicant's occupation of the suit premises? It can only be as claimed by the applicant that it was at the invitation of the deceased. As at the time the deceased passed on, the applicant had been in occupation of the same in excess of 68 years. It would appear that since the deceased did not have children of his own he took in the applicant and treated him as his own. On the other hand, it would appear that the respondent was a son of **Oloo Onduru**, a brother of the deceased who migrated to Kabuoch. Accordingly, the respondent was born and grew up in Kabuoch. He never stayed on the suit premises. If anything he stayed in Ndhiwa District as opposed to Rongo District where the suit premises are situate.

When the respondent petitioned for a grant of letters of administration, the applicant was in occupation of the suit premises and was indeed utilizing a portion thereof. That occupation could not simply have been glossed over by the respondent. For whatever its worth, it had to be recognized in the pleadings. That was the reality on the ground. The respondent was a cousin of the appellant. In terms priority, his claim to the suit premises was not superior to the applicant's. If anything by virtue of his occupation of the suit premises, his entitlement was more pronounced as opposed to the respondent who came in the picture very late in the day and who had never occupied the same. It matters not that the widow clothed him voluntarily with the authority to initiate and prosecute the petition for a grant of letters of administration intestate. Even if the widow herself had prosecuted the petition, the applicant's occupation of the suit premises could not have been overlooked nor ignored. To the extent that the petition for a grant letters of administration intestate failed to recognize the applicant's long presence on the suit premises, must have been obtained fraudulently by making of a false statement and concealment from the court of something material the case. The applicant could as well have been a dependant and or a survived the deceased.

I have also carefully perused the petition for letters of administration intestate filed in the Senior Principal Magistrate's court at Migori. In that petition, the respondent described himself as a stepson of the deceased. In other words he presented the petition in his capacity as a stepson. Further in the affidavit in support of the petition for letters of administration intestate, he still described himself as a stepson. From the evidence on record however, that description is not correct. The respondent was a nephew and not a stepson of the deceased. That description in its own was an untrue allegation.

As already stated both the applicant and respondent were nephews of the deceased and since none ranked higher in priority, with regard to the estate of the deceased then both would have been entitled to a share of the estate. In any event, the case for the applicant was more pressing by virtue of the fact that he had been residing on the suit premises since time immemorial as opposed to the respondent. In fact during

cross-examination, the widow confirmed that the applicant too ought to be given part of the suit premises since he had nowhere to go.

In view of all the foregoing I find that the application is merited. Accordingly it is allowed in terms of prayer one. Since this is a dispute involving family members, there shall be no orders as to costs.

Judgment dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA
JUDGE