



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Succession Cause 417 of 2001

IN THE MATTER OF THE ESTATE OF : NYATOGO OPONDO --- DECEASED

AND

IN THE MATTER OF AN APPLICATION BY:

JAMS OBANDE OWUORPETITIONER

AND

**IN THE MATTER OF REVOCATION OF GRANT APPLICATION BY: KENNEDY OUMA
NYATOGO**

RULING

Coram:

J. W. Mwera Judge

D. Otieno, Advocate for the applicant/objector

Airo for the petitioner/respondent

Raymond CC.

The determination about to follow is a consequence of a summons to revoke the grant of letters of administration issued to one James Obande Owuor over the estate of one Nyatogo Opondo. The summons was dated 22.7.2002 and the two objectors who described themselves as the beneficiaries of the late Nyatogo Opondo are Kennedy Ouma Onyango and Isaiah Juma. Later it transpired that Isaiah is not an objector but only a neighbour of Kennedy. Kennedy Ouma swore an affidavit to support the summons in essence deponing that the petitioner, James Obande Owuor was not one of the five (5) named relatives of the deceased and so ought not have petitioned and obtained the grant to administer the estate of the late Nyatogo. The petitioner replied to Kennedy’s depositions but because the court directed that the summons under review be heard by way of *viva voce* evidence, reference to the affidavits in the determination will be as limited as the court will find appropriate.

The grant being contested started with the petitioner, James Obande Owuor, filing due probate and administration papers in court on 11.7.2001. He described himself as:

“---- the surviving adult nephew, BENEFICIARY OF LAND PARCEL NUMBER

KABONDO/KODUMO EAST/392, REGISTERED IN THE DECEASED'S NAME."

The deceased Nyatogo Obongo was said to have died at Kodumo East Sub-Location on 11.12.1999. The petition was guaranteed (P & A 57) by Gabriel Odwar and Lukas Ombura. To all those, was appended a letter dated 11/7/2002 by a "chief" supporting information by his assistant chief Kodumo – East, that the petitioner was the "next of kin" of Nyatogo.

After due processes the petitioner was issued with a temporary grant to administer the estate herein on 3.9.2001. On 18.3.2002 the grant was confirmed and by it he proceeded to succeed PLOT NO. 392 after Nyatogo. When the objector eventually got to know of this state of things, he filed the summons for revocation now under consideration, as provided for under section 76 of the Law of Succession and Rule 44 there-under.

On 15.10.2008 the court was poised to take oral evidence from the parties. Mr, Oguttu appearing alongside D. Otieno informed the court Mr. Oyoo, Advocate who had entered appearance for the petitioner, now styled the defendant, had been served with the necessary hearing notice but as at the time the cause was called out in the morning, he had not shown up yet. The hearing was pushed to 2 pm in the afternoon. At 2.25 pm Mr. Oyoo had not shown up, and the court being satisfied that he had been duly served with the hearing notice, proceeded to hear the objector/plaintiff ex parte. Kennedy Ouma Nyatogo (PW1) climbed the witness box.

PW1 told the court that the deceased died on 11.12.1999 (Exh. P1) and was buried in his village. He left three sons and a daughter. PW1 did not know James Obande Owuor (the petitioner). He was never the deceased's nephew. Yet James got registered over plot 392 (Exh. P2), the witness did not know how. Prior to coming to court a neighbour, Isaya Juma, had informed PW1 that James was about to take over their land. So he moved to court to get orders revoking the grant issued to the petitioner so that the land can revert to the deceased's family.

Jacob Onyango Otieno (PW2), the present chief of West Nyakach location was an assistant chief of Kadianga sub-location, in the same area since May 1998. PW2 knew the deceased Nyatogo Opondo for many years – with PW1 as his eldest son besides 3 other children. When the saga started the deceased's sons approached PW2 who gave them a letter dated 21.11.2006 (Exh. P3).

Andrew Abong Awang (PW3) now retired was an assistant chief of Kodumo East between 1988 and 2008. The witness knew both the petitioner and the deceased as residents of Kodumo East. The deceased owned but did not live on land parcel no. 392 Kodumo East. This witness denied that he wrote any letter to support James Obadne's petition that he, Obande, was Nyatogo's relative. The two were not relatives. James Obande, though is the registered owner of plot no. 392. Nyatogo's family lives at Nyakach and it is yet to succeed that parcel of land. PW3 infact wrote a letter dated 22.11.2006 (Exh. P4) denying chief Albion's claim that he, PW3, had told the chief that James Obande was the late Nyatogo's nephew. That closed the plaintiff's case. Perhaps it is correct to remark that it may have been in error to feature in the summons dated 22.7.2002 tht Kennedy Ouma Nyatogo and Isaiah Juma were joint in that summons. However be that as it may. The plaintiff/objector's case rested there and Mr. Oguttu proposed to file submissions on 22.10.2008. A day before the submissions, on 21.10.2008 to be precise, Mr. Ochieng Advocate, holding brief for Mr. Makokha for the petitioner, came with an application of the same date signed by M/s Airo & Company Advocates for orders that there be a stay of proceedings which commenced on 15.10.2008, with a view that the same should be set aside. In the alternative the court was asked to grant leave to the petitioner to cross – examine the objector's witnesses and also be allowed to call his own witnesses. The reasons given for the orders sought included non – attendance of the petitioner's advocate on 15.10.2008 having been caused by circumstances beyond his control; that lawyer had advised the petitioner that the hearing would not go on. And that if the court did not grant the orders sought, all would work great prejudice and injustice to the petitioner.

On that application being presented ex parte, it sounded meritorious and so the court directed that the application be served for hearing on 22.10.2008.

On 22.10.2008 Mr. D. Otieno for the objector told the court that Mr. Airo was not properly on record to file the application dated 21.10.2008. Mr. Ochieng took some time to ascertain that issue and later told the court that on 14.10.2008 Mr. Airo filed a notice of appointment and thus the application of 21.10.2008 should go on. Mr. Otieno responded that his side had filed submissions following the ex parte proceeding of 15.10.2008, along a preliminary point of objection. The court directed that the application dated 21.10.2008 be fixed for hearing in 21 days whereat the preliminary objection would be taken up. However, that was not to be because on 12.11.2008 the petitioner filed and served a notice withdrawing his application dated 21.10.2008. That then gave way to determine the summons for revocation following the hearing of 15.10.2008.

The objector's submissions were that this court had some six points to determine which points can be condensed into four only: Was the petitioner a nephew of the deceased? Did the petitioner conceal the true identities of the beneficiaries to the estate of Nyatogo; was he fraudulent? And should the grant be revoked? The objector further proposed that if the court found for him the, petitioner plus all those who supported his petition be investigated, arrested, charged and tried for their criminal acts.

In this court's opinion considering the evidence, oral and by affidavit, the submission and appreciation of the law, first the objector's evidence stands uncontroverted. There was nothing in rebuttle from James Obande Owuor. The court was thus satisfied that James Obande the petitioner was never a nephew or in any other capacity, a relative of the deceased Nyatogo, entitled to petition to administer the deceased's estate. He seemed to have particularly targeted plot no 392 of all other assets of the deceased. The court heard that the land was unoccupied. The proper beneficiaries to succeed Nyatogo were/are Kennedy (PW1) and his 3 siblings. The petitioner did not seek their consent to petition as he did and that was concealing material facts pertaining to the deceased's estate. That act amounted to fraud as even the replying affidavit does not point to any other basis why the petitioner moved to succeed parcel no. 392. Accordingly this court finds that the grant of letters of administration issued to James Obande Owuor ought not have issued. It is therefore annulled together with all other aspects consequent to it. The objector proposed that on so finding, this court do direct the police to launch investigations with a view to prosecute. This court can and could do that as part of its duty. But on this occasion the same end would be achieved in the event the objector made a formal complaint to the police, in case he desires to.

Otherwise he gets his orders, with costs. The registration of plot no. 392 in the petitioner's name should be cancelled. The title reverts to the deceased Nyatogo until the rightful heirs succeed him. The local land office to be informed. However this court is minded to remark that had James Obande Owuor appeared before it personally on any occasion, it would have firmly pointed out some indiscretions on his part during these proceedings. But be that as it may.

Orders accordingly.

Delivered on 23.1.2008.

J. W. MWERA

JUDGE

JWM/hao