



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

Succession Cause 217 of 2006

IN THE MATTER OF JARED ODHIAMBO K'OBUNGAH - DECEASED

-AND-

**IN THE MATTER OF THE PETITION BY
LILIAN ABONGO & GEORGE DANIEL OBUNGA**

AND

IN THE MATTER OF AN APPLICATION BY:

JENNIPHER ABONGO OBUNGA 1ST APPLICANT

ANNE ATIENO OBUNGA 2ND APPLICANT

RULING

Coram:

J. W. Mwera J.

D. Otieno for the applicant/objector

Ms. A. Omollo for the defendant

Raymond Court Clerk/Inter.

By the summons brought under S. 76 of the Law of Succession Act (Cap 160) and Rule 44 of the Probate and Administration Rules, the principal prayers before the court were:

- i) That an interim order do issue so that the petitioners do not enforce/use a grant issued to them on 9.8.2006 and they should not interfere with the estate involved.
- ii) That the petitioners should not transfer/dispose of any part of the estate.
- iii) That the petitioners be ordered to render accounts on all the deceased's properties.

- iv) That the petitioners be ordered to deposit any receipts from the deceased's estate with the court or such account as to be directed.
- v) The grant of probate with a written will be revoked or annulled.
- vi) That interim orders issued as per the above be served on institutions, tenants, creditors etc where the deceased held funds or accounts etc.

This summons, essentially to revoke the grant given to Lilian Abongo Olango and George Daniel Oluoch Obunga, was brought by two objectors – Jennipher Abongo Obungah and her daughter Anne Atieno Obungah.

The grounds on which the summons rested included, one, that the petitioners (Lilian and George) secretly sought a grant of probate from this court to administer the estate of the late Jared Odhiambo K'Obunga, without informing the objectors (Jenipher and Anne). Two, that in fact there was no will left by the deceased to disinherit the objectors and in any case the purported will was a forgery and invalid. And with all that the petitioners were moving to tamper and intermeddle in the deceased's estate.

Jennipher swore an affidavit in support of the summons. Directions were given that viva voce evidence be taken and so she gave evidence as PW1.

On 17.8.2006 Warsame J. gave interim orders that there was to be stay of enforcing of the probate issued on 9.8.2006 and the petitioners would not interfere in any manner with the deceased's estate until the present summons to revoke was determined. The order of stay would be served on all institutions, tenants, debtors, registries – whoever held funds/property of the deceased. And the petitioners were given 3 days to prepare to argue the application inter partes.

A replying affidavit sworn by the 2nd petitioner (George) was filed on his own behalf and on behalf of the 1st petitioner. But since he gave evidence orally (DW1), what that affidavit contained need not be gone into.

In the proceedings that followed, both sides were agreed that the deceased Jared Odhiambo married Jennipher as a first wife and he also married Lilian as a second wife. Jenipher had one daughter, Anne while Lilian had more children. It was not seriously put to the test that in fact it was Jennipher who suggested to Jared to marry Lilian and that is how she was brought in as a second wife. While Jennipher lived all the time at Kericho, Lilian lived at various places including Nairobi and Mombasa and by the time of Jared's death she had settled at Nakuru. It was also not in dispute that Jared owned properties in Kisumu, Nakuru and other places. And George, the 2nd petitioner was Jared's elder brother. In these proceedings Mr. D. Otieno Advocate appeared for the objectors while, first M/s. Anne Omollo and later Mr. H. Wasilwa, Advocates represented the petitioners.

Jennipher (PW1) told the court that after 18 years in their marriage with Jared, the couple had Anne, the only daughter. So she agreed that Lilian do come in as a second wife to give Jared more children. That happened in 1992 and Lilian bore 3 children. Prior to that Jennipher and Jared, who died on 4.3.2006 (Exhibit P.1) had bought properties at Kisumu and Nakuru. Other properties were at Oyugis. PW1 contributed ksh. 50,000/= to buy the property in Langa Langa area, Nakuru. Some of the properties were developed – before Lilian came along.

When Jared died and was buried at Kakelo village Rachuonyo District, PW1 was present as the first wife with Lilian as a co-wife. Both performed such duties as fell on them. Family meetings were held with George in attendance as the deceased's elder brother. Apparently George and Jared did not get on so well as brothers but there it is. George was referred to also as Dan. That at the funeral, George or Dan/Daniel did not disclose that Jared left a will. Neither did Lilian. Jennipher thus had no idea of existence of any will. Otherwise during the funeral time Jennipher and Lilian with their children got on well, until one day George/Dan seemed to have influenced Lilian to the extent that the two widows began to pull apart. Lilian's children did not eat food that PW1 prepared any more. However, some funeral contributions

totaling ksh. 218,070/= (Exh P-3, minutes) were shared among the 2 widows and their children. A local chief presented a letter (Exh. P-4) showing the objectors in their respective relationship to the deceased. The funeral ended. Lilian with her children left for Mombasa. She had funeral contributions from there and she had to clear some liabilities there e.g. payment of rents. Jennipher travelled to Mombasa. There she learned that Lilian and George had travelled to Nairobi to chase after Jared's benefits with his former employer (the National State & Intelligence Services). Lilian's children locked PW1 out of the Mombasa residence. She travelled back to Kericho, still unaware of Jared's will. It was only later that PW1, Lilian and George visited the DC's office Rachuonyo to collect some money, that it was disclosed that Jared left his will with George. George had never said such a thing at the funeral and this will was not read while all 3 were at the DC's office (Rachuonyo). It was until 17.5.2006 that George brought it into PW1's house and a local chief read it there. She was not shown or given a copy of it. Then she learnt that the two petitioners had applied for a grant from this court. Jennipher sought legal advice and the two widows were advised to move jointly in the succession process (Exh. P-5) PW1 did not think it proper that Lilian with George had obtained the grant now in question. Lilian did not like the idea that Jennipher had consulted a lawyer and she said so in her letter of 2.7.2006 (Exh. P-6) adding that PW1 had never asked for a copy of the will. PW1 only saw the said will in the hands of her lawyer. It was dated 15.6.2004. The witness referred to its contents but maintained that the will (Exh. P-7) was not signed or witnessed. That at some stage Lilian claimed that Jared had transferred some of the Nakuru properties to her, and her lawyer, Ms. Omollo wrote to PW1 on 26.9.2006 (Exh. P-8) that the other Nakuru property was in the deceased's name. Another similar letter dated 7.10.2006 (Exhibit P-9) disclosed that plots no. NKU BLOCK 1/1756 and 1757 at Langa Langa belonged to the deceased. Jennipher knew them. However with effect from 6.6.2006 the plots bore Lilian's name. She had excluded them from P & A 5 form while applying for the grant here. Also excluded were five plots at Oyugis, two at Kaburini and Dunga in Kisumu. Motor vehicle reg. KKK 147 was also not listed in form P & A5.

The witness then went over George/Daniel's (2nd petitioner) replying affidavit which essentially denied all that Jennipher said in her affidavit that the 2 plots at Nakuru were transferred to Lilian long before Jared died. She had never been given account of any money, although she had proposed that rents paid on Nakuru properties be utilized as fees for the children. The 2 petitioners collected large sums of money in rents and only twice gave Jennipher ksh. 10,000/= then ksh 6,000/= Lilian lived in one property. Then the prayers in the summons (above) were repeated.

In cross – examination PW1 said that she could not say that Jared transferred the 2 Nakuru properties to Lilian despite the municipality receipts that the witness was shown (MFI Ds). Rents were paid on some plots at Nakuru while Lilian occupied one block. PW1 did not object to that.

The witness told the court that because of some misunderstandings between Jared and George, the former could not give a plot at Kaburini (KSU) to the latter. Jennipher and all children were listed in P & A 5 form but Lilian could not get the grant without the first wife (PW1) or make George a beneficiary of the estate of Jared. He had his own property. All due documents were kept by Lilian and she did not account for the rental income.

It was the turn to hear the petitioners and Daniel/George Obunga (DW1), the 2nd petitioner began. To him both Lilian and Jennipher were his late brother's wives. But Jennipher was troublesome. Between 1990 – 1992 she ran away from home. When Jared fell sick Jennipher visited him once only then he stopped her. When Jared was hospitalized in India, only Lilian visited him there.

When on his sick bed in Mombasa, on 26.2.2006 Jared gave DW1 a sealed envelope containing the now disputed will. It could be read two days after his burial. That Jennipher never concerned herself with the deceased. All she was after was his wealth. But she must have known of the will. DW1 distributed the money he got from burial/funeral contributions to Jared's family. Then on 17.5.2006 the sealed envelope was opened in the presence of 22 people and a local chief, who read out the contents as to the distribution of the estate. At least PW1 said so in her testimony. Developed properties at Nakuru would go to the deceased's children for their welfare and up-keep.

During his lifetime, Jared helped George acquire a plot at Kaburini (Kisumu) – PLOT NO. 641,

in 1999. Two plots at Langa Langa (Nakuru) were given to Lilian. Jennipher appears as a beneficiary in the grant and earmarked for a plot at Kericho. DW1 denied that he was creating friction between Jennipher and Lilian – the widows. He produced some receipts (Exh. D2) evidencing deposits made for the benefit of the children and some payment receipts for rent at Mombasa where Jared once lived. To him Lilian is the suitable person to administer the estate of the late Jared. Then there followed long cross – examination. After some preliminary family details, DW1 maintained that he was a married and responsible person who educated and cared for his children and Jared did not disagree with him over this at all. And it was him not Jennipher who recommended to Jared to marry Lilian. That Jared was right – handed and he signed the will (Exh. P-7) detailing his wishes about various properties, with the 2 at Langa Langa having been transferred to Lilian. DW1 had nothing to do with that. One property was transferred to her on 6.6.2006 after this petition was filed. Any properties excluded from the petition e.g one at Archers Post or the one at Dunga (Kisumu) did not mean that fraud was being perpetrated. DW1 was not aware of Exh. P-8 a letter from Ms. Omollo talking of one of the Nakuru properties being in the name of the deceased. And that only George’s step brother, one Joseph Ogola, not Jennipher objected when the will was read. There were other letters (Exh. P5, 6) but DW1 had no idea about them. He told the court that Lilian knew about them. In one she expressed surprise that PW1 had taken the matter to a lawyer without first trying a family resolution. Indeed by the time of writing Exh. P6, the petitioners had already obtained a temporary grant from the court – a course Lilian is said to have informed Jennipher about. She was not interested and she was not involved. But she was listed as a survivor.

In re - examination DW1 said that the Kaburini Estate Makasembo II (Plot 357) was acquired by him in 1999. He paid rates to the local authority (Exh. D7, 8). After examination, cross – examination and re – examination as the justice of the case required, DW1 stepped down from the witness box.

After several adjournments Lilian (1st petitioner) did not show up to testify. Even her lawyer (s) did not appear in the last days set for further hearing. The trial was closed and Jennipher’s lawyer submitted.

Mr. D. Otieno went over the history of this cause, the material brought on record file by either side then to the evidence adduced here. The court was told that the petitioners did not give evidence as to why PW1, who was the first wife, was not one of the petitioners. That all the properties that belonged to the deceased, up to his death, ought to be disclosed. Those that yielded rents and the petitioners took, the court should order for an account to be rendered. The 2 petitioners committed acts of fraud against the estate and so Lilian particularly should not be a co-administratrix. This court should so find. And the case of Re Estate of Wamari (2000) KLR 12 was cited to stress the status of PW1 in a similar case.

After hearing all the above, this court was satisfied that the objectors – Jennipher and her daughter, Anne, had made out a valid case against the petitioners – Lilian and George. As stated earlier, it was not in dispute that Jennipher and Lilian were co-wives of the deceased Jared. But it looks like after Jared’s burial, George 2nd petitioner “resolved” to link up with Lilian specifically to exclude Jennipher from the succession process as a petitioner. The two filed the petition without informing her. She said all that in her otherwise straight forward testimony and all George (DW1) would say in reply is that she, Jennipher, was not interested in the filing of the petition. A “will” was annexed to that petition. Its validity or otherwise was not specifically put to this court to determine but it appears that, it was read before 22 family members and neighbours after the burial of Jared, this court was inclined to believe that. It is not clear whether Lilian was present. That the will’s existence was never disclosed to Jennipher until after the burial. She was never given a copy. She only saw it in the hands of her lawyers – long after this tussle started. Jennipher doubted its authenticity.

The court was also satisfied from the evidence that not all the properties of Jared were listed in P & A 5 form which the 2 petitioners filed. It was also apparent that excluding from that form plots nos. NKU/MUN/BLOCK LANGA – LANGA, 1756, 1757 smacked of some underland deal on the part of Lilian, and George. One would have thought that as Jared’s elder brother, George should have endeavoured to put the two widows (Jennipher, Lilian) together with their children to have them fully and fairly enjoy Jared’s estate. He seemed instead to side with Lilian and his language about Jennipher was rather unjustifiably strong. A family meeting would have sorted all this out, after all the 2 widows had started off by cooperating during the funeral and sharing funeral collections.

In the interest of this matter and as the law permits, this court finds that the grant issued to Lilian and George should and is hereby revoked. Although Lilian seemed to work in concert with George to do acts that would even amount to fraud or other, a new grant do issue to the deceased's two wives, Jenipher and Lilian. George does not appear to add any value to this petition.

Both parties to put forth for the sake of P & A 5 all the properties/motor vehicles etc. that Jared owned before his death. This is for the purpose of eliminating any error or omission. A final list to be agreed upon and filed as a basis of finally distributing the estate.

And before George leaves the stage, he and Lilian to render a full and satisfactory account of the rents from any of the properties that Jared had from the time of his death to date. This to be done in the next 45 days, showing all the sums collected and how they were spent or kept.

From thereon the parties to agree on how rents will be collected, kept and applied until this cause is finally determined with the distribution of the estate.

In sum, the objection is sustained in the terms of the orders made above. This court would have been minded to condemn the petitioners in costs. However the estate will bear them. And the 2 widows should cooperate in this matter to its finalization. The family members should chip in where necessary.

Parties to take a mention in court to follow up with the effecting of the above orders.

Orders accordingly. Delivered on 29.5.2008.

J. W. MWERA

JUDGE