



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Succession Cause 490 of 2000**

**IN THE MATTER OF THE ESTATE OF JACKSON ANDREW ONZER KAVIHITSA
ABUBAKAR (DECEASED)**

A N D

NIFA NYANGWESO ONZERE

JAMES JUMBA ONZER PETITIONERS

A N D

ZIPPORAH OMENDA OBJECTOR

JUDGMENT

A Grant of Letters of Administration Intestate was on 7th February, 2001 made to NIFA NYANGWESO ONZERE and JAMES JUMBA ONZERE to administer the estate of the late JACKSON ANDREW ONZERE who died on 2nd March, 2000. Nifa Nyangweso Onzere was the mother of the deceased and James Jumba Onzere was the deceased's brother.

On 22.3.2001, by a summons for revocation of the Grant dated 21.3.2001, ZIPPORAH OMENDA, applied for revocation of the Grant of Letters of Administration Intestate made on 7.2.2001 to Nifa Nyangweso Onzere and James Jumba Onzere. The summons was premised on the grounds that the said Grant was obtained fraudulently by the concealment from the court of something material to the case and was supported by an affidavit sworn on 21.3.2001 by Sippora Omenda.

Under section 76 of the Law of Succession Act, Chapter 160 of the Laws of Kenya, the court has jurisdiction to revoke or annul at any time either on application or on its own motion any Grant of representation whether or not confirmed. The procedure for applying for the revocation or annulment of the Grant is set out in Rule 44 of the Probate and Administration Rules made under section 97 of the Law of Succession Act. That procedure was followed by Zippora Omenda (hereinafter called "the Objector") in her said application for the revocation of the Grant.

On 7.7.2003, Nifa Nyangweso Onzere filed a replying affidavit on her own behalf and on the authority of her co-administrator cum son, James Jumba Onzere. After directions under Rule 44 (3) of the Probate and Administration Rules, the summons for the revocation of the Grant came up for hearing before me on 3.4.2006 and again on 13.3.2007. The Objector testified and called one witness, Rodgers Okalo, the Objector's brother. The deceased's mother, Nifa Nyangweso Onzere (hereinafter called "the 1st petitioner") and her son James Jumba Onzere (hereinafter called "the 2nd petitioner") gave evidence. The dispute for determination is whether the Objector was the wife of the deceased or not. If she was, the court shall have to find that the 1st and 2nd petitioners concealed this fact in their petition for the Grant of Letters of Administration Intestate and shall consequently revoke under section 76 (b) of the Law of

Succession Act, Cap 160 the said Grant on the ground that it was obtained fraudulently by the concealment from the court of something material to the case.

The evidence of the Objector and her brother, Rodgers Okalo, who were PW1 and PW2, respectively, showed that the Objector works with Sameer Africa, formerly Firestone E.A. and was married in 1994 to the deceased under African Customary Law of the Maragoli following which the couple lived for six months in Kisumu where the deceased worked with Barclays Bank. The Objector was working in Nairobi at the time and she had to commute save when she was on leave. After six the months period, the deceased was transferred to Nairobi and the couple cohabited there until the deceased died on 2nd March, 2000.

During the cohabitation, the deceased held himself as the Objector's husband and introduced himself to the Objector's parents as such. He also introduced the Objector to his parents as his wife. Both visited their respective parents' homes from time to time. In 1995, the deceased visited the Objector's parents at their home and brought his cousin whose name the Objector did not give in evidence. During that visit the deceased introduced himself as the Objector's husband. The deceased and the Objector got their first child, Nifa Mical Kalevera on 23.2.97 and their second child, Laura Owendi Afandi Abubakar on 10.11.98. The Objector testified that her mother in-law, the 1st petitioner, shaved the first born child's head at her home as is the custom of the Maragoli people and this signified that she accepted the marriage between the deceased and the Objector.

Dowry, testified, the Objector, was paid on 10.3.2000 after the death of the deceased on 2.3.2000 when the parents of the deceased took two cows and Shs.1000/= to the parents of the Objector. It was the Objector's evidence that this was done after the death of the deceased so as to recognize the marriage under the custom. She testified that dowry could not be paid earlier as the Objector was expectant with the two children and according to Maragoli custom, dowry is not paid during pregnancy. The payment of the dowry was preceded by negotiations from both sides which resulted in a written agreement for ten animals and Shs.50,000/= which has not been paid in full. This testimony was confirmed by Rodgers Okalo, PW2.

The Objector produced as exhibits Birth Certificates for the two children in which the deceased is shown as the father of the children. Barclays Bank, the deceased's employer, recognized the Objector as the wife of the deceased as was exemplified by exhibit No. P2. The deceased's NHIF Card also reflected the Objector's name as the wife. It was produced as exhibit P3.

The Objector testified that the 1st and 2nd petitioners did not inform her when they were applying for the grant. Yet they knew she was the wife of the deceased and had been introduced as such during his lifetime and at his funeral where she spoke qua wife of the deceased and featured as such in the printed funeral programme.

In her cross-examination, the Objector testified that she had gone to the home of the deceased in 1994, 1995, 1997, and 1998. She told the court that the deceased agreed to pay dowry when he was alive and after his death a written agreement was made between the Objector's parents and the deceased's parents on how the ten animals and 50,000/= would be paid. That agreement was in the hand of the Objector's brother, Rodgers Okalo. It was produced as exhibit P4. The Objector told the court in her evidence that she was capable of administering the estate of the deceased and urged the court to revoke and annul the Grant and issue another Grant in her name.

In his evidence, the Objector's witness and brother, Rodgers Okalo (PW2), a Navigation Air Inspector teaching at E.A. School of Aviation confirmed the evidence of the Objector. He confirmed being there when part of the dowry of two animals and Shs.1000/= was paid. He confirmed having written exhibit P4.

In their evidence, the 1st and 2nd petitioner denied that the Objector was married to the deceased. They both in their respective evidence stated that the Objector was a girl friend to the deceased. But they acknowledged having met the Objector and confirmed that Nifa – Mical Kalevera and Laura Owendi

Afandi Abubakar were the deceased's children. The 1st petitioner also confirmed having shaved one of the children. The 1st petitioner claimed that she met the objector only after the death of the deceased. She told the court that she was concerned only with the deceased's two children and the estate. She conceded that the Objector was in the deceased's funeral but refused to answer simple questions in cross-examinations where the answers appeared likely to show the Objector and the deceased were or lived as man and wife. Asked to say who was introduced as the wife of the deceased during the funeral, the 1st petitioner remained mum. She said she knew nothing about the dowry. I observed her give evidence and my observation was that she was not a person of truth and she told lies without feeling any qualms. She told the court the estate of the deceased should go to her. Asked about the deceased motor vehicle registration No. KAB 857A, she said she had sold it for Shs.100,000/= and that it was no longer available as part of the estate of the deceased. Yet her son and co-petitioner said in evidence that he was keeping the car at home and denied that the 1st petitioner had sold it. Although a little less blatant than the 1st petitioner, the 2nd petitioner suppressed the truth and was less than honest and it seemed clear he did not wish to contradict his mother. Their evidence was not credible and compared with that of the Objector and her witness, the Objector's evidence was the more credible and preferable.

The Objector lived openly with the deceased as man and wife and the whole world knew and treated them as man and wife. Their marriage was under African Customary Law of the Maragoli tribe. Its validity did not depend on whether the entire dowry had been paid. Their two children knew them as father and mother and were regarded by all as having been born in wed-lock. On the material before me, I cannot but find that the Objector was married to the deceased under the African Customary Law of the Maragoli. At any rate, even under common law, the evidence clearly shows that there was a valid common law marriage between the Objector and the deceased. In these circumstances, it is my finding that the Objector was the wife of the deceased. It is also my finding that the 1st and 2nd petitioner knew of that marriage and concealed from the court in their petition the fact that the deceased was married to the Objector. That was a fraudulent concealment as they definitely knew that the Objector would have a superior claim to theirs in the estate and to the Grant.

In the result, it is my finding that the Objector has satisfied section 76 (b) of the Laws of Succession Act Cap 160. I accordingly revoke and annul the said Grant. I order that a fresh Grant shall issue in the name of the Objector.

Dated at Kakamega this 7th day of June, 2007

G. B. M. KARIUKI

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