

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Succession Cause 53 of 2000

IN THE MATTER OF THE ESTATE OF ELIZABETH A. OKACHI (DECEASED)

BETWEEN

1. JOSEPH A. OMUYONGA

2. ATSHON W. OMUYONGA.....PETITIONERS/RESPONDENTS

A N D

PETRO MATUKHO OKACHI.....OBJECTOR/APPLICANT

RULING

In his Summons dated 15.6.2006 for revocation of the Grant under section 76 of the Law of Succession Act, Cap 160, and Rule 44(1) of the Probate and Administration Rules, the Objector, **Petro Matukho**, sought orders that the Grant of Letters of Administration intestate made to **Joseph Omuyonga** and **Atsoni W. Omuyonga** not on 3rd May 2000 as stated but on 2-5-2000 and confirmed on 11-3-2003 be revoked on the grounds that the objector, as the son of the deceased, **Elizabeth A. Okachi**, ranks in priority to the Petitioners who are grandchildren to the deceased. The Objector averred that this fact was concealed from the court.

The affidavit of the Objector shows that Elizabeth A. Okachi, the deceased, had three sons, namely the **Objector, Samson Omuyonga Okachi** and **Abudalla Eshiwani Okachi**. It also shows that the Petitioners, **Joseph A. Omuyonga** and **Atshoni N. Omuyonga** are sons of the late Samson Omuyonga Okachi. The Objector alleged in his affidavit that they left his name out when they petitioned for Letters of Administration and that they did so secretly. The deceased died owing land parcel No. **Butsotso/Bukura/433** which constituted her estate. When the Grant was confirmed, the whole of the said land was passed to one **Atshon W. Omuyonga** alone who is neither a son nor a grandson of the deceased.

In paragraph 8 of his affidavit sworn on 5-8-2004, Dishon Wemali (Amuyonga), the 2nd Petitioner, conceded that the Petition herein was made without the knowledge of the Objector, whose name was not included in it.

On the basis of this admission, it is my finding that the requirements of section 76 (b) and (c) were met. When the Objection proceedings came up for hearing before me on 22-5-2007, the Objector testified and was cross examined. The petitioners who had been in court did not testify as they vanished and their counsel, Mr. Ondiek, was at a loss to explain their whereabouts.

In his evidence in court, the Objector testified that he was the 2nd born son of the deceased, while Samson Omuyonga was the 1st born. The 3rd born, he said, was Abdalla Eshiwani. Both the 1st and the 3rd born sons of the deceased are dead. He contended in his evidence that the land left by his mother, namely Butsotso/Bukura/433, should have been inherited by him and his two deceased brothers each taking 1/3 of the estate. He was surprised, he said, that the whole land went to one Atshon W. Omuyonga. He conceded that he had sold part of his share and that he needed to pass title to the buyer. But he had no capacity to sell nor could he pass good title. It was the Objector's evidence that the Petitioners had lied to the court when they stated that they were sons of the deceased.

Mr. Ashioya, learned counsel for the objector, urged the court to revoke the Grant and the Confirmed Grant. Mr. Ondieki, learned counsel for the Petitioners, told the court that he had no evidence to offer.

I have perused the application and given due consideration to the evidence placed before the court. It is my finding that the Petitioners misled the court when they stated in the Petition that they were the only heirs. It is also my finding that the Petitioners obtained the Grant fraudulently by making that false statement and by concealing from the court that the objector was the deceased's son while they were her grandchildren, facts that were material to the case. It is further my finding that the Grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

In the premises, I have no hesitation in allowing the Summons which I hereby do. I revoke and annul the Grant made on 2-5-2000 to **Joseph A. Muyonga** and **Atshon W. Omuyonga** and the Certificate of Confirmation of the said Grant dated 11.3.2003. I further order cancellation of the registration on 14.3.2003 of Atshon W. Omuyonga as the proprietor of the land title No. Butso/Butso/Bukura/433 or of any other person claiming through him. I order restoration of the title to the said land into the name of the deceased, Elizabeth Akwabi Okach, who as at 15.4.2003 was the registered proprietor. The Petitioners shall bear the costs of these objection proceedings. It is so ordered.

Dated at Kakamega this 8th day of November, 2007.

G. B. M. KARIUKI

J U D G E