

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

P & A 48 of 1999

ODONYO MALOBA.....DECEASED

AGAINST

SHABAN OTIENO ODONYO.....APPLICANT

VERSUS

PHILLIP OKWERO.....OBJECTOR

RULING

Shaban Otieno Ogungo, caused a notice to be published in the Kenya Gazette of his petition for a grant of letters of administration intestate of the estate of Odonyo Maloba (deceased) in his capacity as the deceased's grandson. The notice was dated 27th July, 2000 and published in the Kenya Gazette notice no.5396 of 25th August, 2000. It would appear Shaban Otieno Ogungo passed away on 15th September, 1999 before the notice was published. The grant of representation was issued to the deceased's mother Elizabeth Atsieno on 4th October, 2000 in place of Shaban Otieno Ogungo.

By an application dated 23rd April, 2001 Elizabeth Atsieno Siundu applied for the grant of letters of administration allegedly issued to her on 4th October, 2000 to be confirmed. She indicated in the affidavit in support of the application to be the daughter in law of Odonyo Maloba (deceased) and the mother of Shaban Otieno Ogungo (deceased) Pursuant to the provisions of rule 40(b) of the Probate and Administration rules Phillip Okwero Ofisi filed a notice of protest to the proposed confirmation of grant. He set out the grounds in support of the protest in his affidavit he swore on 20th October, 2001.

On the 4th day of May, 2004 this court gave directions to the effect that the protest and the summons for confirmation would be heard together and parties and their witnesses were invited to offer oral evidence at the hearing. Phillip Okwero was called to begin testifying in support of the protest. He told this Court that the Odonyo Maloba (deceased) passed on leaving behind 11 grandchildren under his care while the petitioner was away in Uganda. He told this Court that the petitioner only came to reside on Odonyo maloba's land in 1996 when Shaban Otieno Ogungo (deceased) was sick. He stated that the petitioner was the mother of Shaban Otieno Ogungo (deceased) though she was not married in the family of the late Odonyo Maloba. She averred that the petitioner abandoned the late Shaban Ogungo at the age of 2 years. He was of the view that he ranked first on priority as against the petitioner to be given letters of administration in respect of the estate of Odonyo Maloba (deceased).

Phillip Okwero Ofisi summoned Gerald Musomba Ofisi as his witness in support of the protest. He told this Court that Philip Okwero Ofisi was appointed by the clan to be the guardian of the grandchildren of Odonyo Maloba (deceased) upon his death. He said there was a disagreement between the petitioner and Phillip Ofisi over how the estate should be distributed. He said the petitioner was not married in the family of Odonyo Maloba (deceased). He was of the view that even if she was married to the family their culture did not allow women to administer the estate of the deceased save for male relatives. The petitioner, Elizabeth Atieno Siundu testified and also called one independent witness. She claimed she was married to Gabriel Otieno Ogungo, who died in 1978, a son to the late Odonyo Maloba (deceased). She had two children who are all now deceased. Those children included Shaban Otieno Ogungo (deceased). She said she was a daughter in law to the late Odonyo Maloba hence she ranked first on priority as against Philip Okwero ofisi.

The petitioner called Paulo Obuko Masakhwe as her witness. He said he was related to both Philip Ofisi

and Elizabeth Atsieno. He confirmed that the petitioner was married to Gabriel Ogungo, deceased who was a son to the late Odonyo Maloba. This witness is aged 69 years. He gave the details of the kind of dowry paid to the petitioner's parents when the late Gabriel Ogungo went for her engagement. This witness was of the view that the petitioner ranked first on priority as against Philip Ofisi to inherit the property of the late Odonyo Maloba in her capacity as the deceased's daughter in law.

Two main issues have arisen from the evidence received for my decision. First is who between Elizabeth Atsieno and Philip Okwaro Ofisi ranks first on priority to be entitled to take up letters of representation in respect of the Estate of Odonyo Maloba? Secondly, whether or not the temporary grant of representation given on 4th October, 2000 should be confirmed?

From the evidence received record it is clear that Philip Okwaro Ofisi, filed the notice of protest to confirmation of the grant in his capacity as a distant grandson and the clan appointed guardian of the grandchildren of Odonyo Maloba deceased. This view is also confirmed by his affidavit he swore on 20th October, 2001 in support of the protest notice. His only witness told this Court that Philip Ofisi was appointed by the clan and that he is better placed to be given the grant of representation as opposed to the petitioner because the petitioner was not married to the family of Odonyo Maloba (deceased).

On the other hand, there was evidence that Elizabeth Atsieno Siundu was married to Gabriel Ogungo (deceased) a son to Odonyo Maloba (deceased) hence she was a daughter in law to Odonyo Maloba. I am convinced the petitioner and her witness Paulo Obuko Masakhwe told the truth to the effect that Elizabeth Atsieno Siundu was a daughter in law to Odonyo Maloba (deceased). Philip Okwaro Ofisi lied when he told this court that Elizabeth Siundu was not married to the Gabriel Ogungo deceased. The petitioner and her only witness were able to give the description of the kind of cows given out as dowry to the petitioner's parents.

To finalise this issue, I will apply the provisions of section 66 of the law of succession Act. In this case the petitioner being a daughter in law ranks in preference as opposed to Philip Okwaro Ofisi who is a distant grandson and a clan appointed guardian. I am satisfied that the grant of representation was properly given to her.

The remaining issue is whether or not I should confirm the grant of representation. I have heard both the petitioner and the protester with their witnesses as required under rule 41 (1) of the probate and administration rules. I have considered the application for confirmation of grant dated 23rd April, 2001 and the supporting affidavit of Elizabeth Atsieno Siundu sworn on the same date. I find that she has attempted to identify the beneficiaries and their shares from the estate. There is no dispute against the schedule of distribution she has proposed. I have not been given any reason why I should not confirm the grant. I hereby confirm the grant issued on the 4th day of October 2000. Pursuant to the provisions of rule 41(2) of the Probate and Administration Rules. The protestor Philip Okwaro Ofisi, is condemned to pay costs of the protest which is dismissed in its entirety.

DATED AND DELIVERED THIS 8th DAY OF April 2005.

J. K. SERGON

JUDGE