



IN THE MATTER OF THE ESTATE OF FRANCIS OUMA ODERA (DECEASED)

JUDGMENT

There are two petitions for Grants of Letters of Administration in this estate. The 1st one was filed as Succession Cause No. 102 of 2001 by Albert Odawa and Benard Okich Odera, described as the deceased's brother and a grant was issued on 5th April, 2001. It was subsequently advertised in the Kenya Official Gazette of 23rd February, 2001.

The second case being Succession Cause NO. 612 of 2001, was filed by one Catherine Ochieng' Olang'o, and her brother Bernard Joshua Olang'o. Catherine described herself as a "wife" of the deceased. The deceased's brothers and sister filed an objection to the making of a Grant, as far as the petition by Catherine was concerned. They also filed Summons for Revocation or Annulment of the Grant issued to Catherine, jointly with her brother. They claimed in the affidavit sworn by the 2nd objector on 11th March, 2002 that "Catherine Ochieng' Olang'o was never married to their deceased's brother, the late Francis Ouma Odera under Luo Customary Laws, as alleged". The affidavit further states at para 10, that "the deceased and the dependent only cohabited for 4 months between June and September 2000 at South C estate,". Catherine on her part claimed that she was a widow of the deceased Francis Ouma Odera, married under Luo Customary Law on 3rd June 2000". According to her further, she cohabited with the deceased after their marriage for nearly 2 years prior to his death.

Because the issue of marriage was so contentious, I decided to record oral evidence from the parties to the two Succession Causes. Benard Okich Odera, the deceased's brother had sworn 2 affidavits dated 18th October, 2001 and another one dated 11th March, 2002, respectively. He was crossexamined on their contents. He described Catherine and her brother with whom she petitioned for the grant to the deceased's estate, as "total strangers" to him, as far as the estate of the deceased's was concerned, as he only knew her as his late brother's girl friend, and not a wife as no dowry was paid for her to make her a wife under Luo customary law.

He answered further that Catherine cohabited with her brother for only four months, during which time the deceased persuaded his employer to give Catherine a medical cover, as he had done before with his other girlfriend, whom he was employed by the USIU The witness recalled that Catherine did not attend the funeral service in Nairobi, but arrived home (Nyanza) on the morning of the burial of the deceased. She was accompanied by five women and a tall man who just took pictures of the events. Benard explained further that when Catherine arrived home on the burial day as aforesaid he asked her if she wanted to talk on behalf of the friends from Nairobi, and she agreed, so she was immediately included in the list of speakers and she did give a speech though she appeared very drunk. She could not remember what she said.

The deceased's family paid funeral expenses and debts, due to the estate, using the temporary grant issued to them by the Court. He referred to para 29 of his affidavit, which showed all the properties already sold and transferred, including the land where the deceased is buried. This answer made me direct Benard to file a further affidavit and give details of the sale of the 5 items as he claimed.

Benard answered further that he was not aware of what Catherine had done with the temporary grant she

obtained from court, though he was aware that she tried to get money from USIU, using the grant. She did not succeed, as she was told that money had been paid to the rightful beneficiaries. Again, she tried to use it to obtain money from Jubilee Insurance, but this too was stopped as the deceased had named two beneficiaries in the 2 insurance policies he had with Jubilee Insurance. Benard was questioned further on the contents of his affidavit sworn on 11.3.2002. He said that Catherine knew of the objection he had filed, before she was issued with a grant on 21.9.2001, that is why she termed the issuance of that grant, “illegal”.

Benard denied that his brother is survived by any wife or children, and maintained that they had to sell the deceased properties to pay off debts amounting to Kshs.1.5 million. They have an understanding with the person who bought the plot where the deceased is buried that he will give them limited access, to review the grave periodically. About the various photos annexed to Catherine’s affidavit, Benard referred to the first set of 3 as photos taken in his late brother’s house, when he availed it to Catherine for purposes of holding a Holy Communion party after Catherine’s daughter had been confirmed. Benard was present at the party, which was held in his late brother’s house, at Catherine’s request. He denied that his brother and Catherine, ever lived together.

He identified the second set of photos, 3 in number, as those taken in his house in South C when Catherine came to visit the deceased who was by then staying with Benard. He denied that there was any birthday party in his house. The last set of photos, he said were taken on the day of the burial in Fort-Tenan. Catherine brought the photographer herself. It was Benard who gave Catherine a chance to address the mourners to represent the deceased’s friends from Nairobi. That no photograph showed her pouring soil in the grave, which would signify that she was the widow.

Benard was visited by his brother frequently, and knew that he (the deceased) only lived with Catherine, in her house in the last 4 months but they did not have any children. It was Benard who took the deceased to the hospital – Avenue Nursing Home on a Monday. He became very sick, he had been transferred to Nairobi hospital where he died on a Thursday of the same week. To further questioning, Benard gave the details of their rural home as Kogelo village, Nyang’oma sub-location in South East Alego, Siaya District, and NOT in Ngiya which is in a different location. He confirmed that the deceased personal effects are with Catherine, a number of household items plus a vehicle, No KRV 688, a Honda Civic. That Catherine said they were stolen, though in her affidavit she says that she has them.

The funeral arrangements according to Benard, was a family affair between himself, his brother and sister. There were no funeral meetings in Catherine’s house to his knowledge. The deceased’s body was not taken to Catherine’s house after the funeral service at All Saints Cathedral. Instead, the body stayed overnight at Albert’s house. The deceased died on 22.9.2000. Benard, his brother and sister petitioned for a grant to his estate on 24.1.2001, and this was gazetted on 23rd February, 2001. He challenged the grant issued to Catherine because they had lodged an objection to the Issuance of the Grant to Catherine, yet the same was issued without hearing their objection.

Secondly, he claimed that Catherine knew that they already had a grant, because he quoted the number of their Succession Cause – i.e. 612 of 2001, whilst lodging a caveat in the title to the deceased’s land. That there being another Succession Cause in existence already, Catherine should not have filed another case. He referred to Catherine’s brother as a complete “stranger” to the deceased’s estate who should not have applied for a grant. Benard has met a child, Queenie Atieno Odera. He met her in Catherine’s house, when his late brother was staying there. She was by the aged about 11 years old. According to Benard, this was not his late brother’s daughter as Catherine also confirmed so in her affidavit dated 2nd November 2001 at para 9, except that she said the deceased “recognized and maintained her including payment of school fees”. Benard however, denied that the deceased opened a jumbo account for this child. That the same was done by Catherine who put the deceased’s name on the account.

Catherine Ochieng’ Olang’o, too, was cross examined on the contents of the affidavit which she has sworn. She met the deceased in March 1998, she was already a single mother with a daughter. According to her, they started living together in April the same year. She described the deceased as her “husband”. Catherine’s answers on how she was issued with a Grant when there was an objection to the petition she

filed are on the file. She does not know how grants are issued. Catherine instructed her lawyer to lodge a caveat to the deceased's property listed in H.C. Succession Cause No. 102 of 2001. The caveat is dated 9.9.2001, lodged on 11.10.2001. According to Catherine, she did not understand the contents of the Succession Cause No. 102 of 2001. She only became aware after she petitioned for a Grant in the 2nd file, which Grant was issued to her on 21.9.2001.

She denied knowledge of the existence of another Grant before she was issued with one. She did not object to the Grant in H.C Succession Cause No. 102 of 2001. She pursued her own grant. Catherine comes from Sakwa Location, Bondo District. She obtained a letter from the Chief of South Sakwa Location, who said that she was the deceased's wife. On questioning on this point she answered "the chief of Sakwa did not know the deceased in person but was aware when the deceased paid dowry...".

Catherine said that dowry of 3 cows, 2 goats and some cash money was paid for her, but she did not know how much. She recalled that the deceased together with the 2 objectors and an old man went to her home in Bondo. They came with the driver of the late Dr. Ooko Ombaka and their cousin in a trooper vehicle. The animals were brought the evening before the function. According to Catherine further, "the deceased came to pay dowry and I can call my father to confirm this".

Her further is now retired and lives in Nairobi West in his own house. Her mother died in 1990's. Catherine said that the deceased and herself lived in Nairobi West from March 1998 to 1999 when they moved to Parkview Estate in South C, until the deceased died. Catherine said that she now saw that her lawyers were aware of the objection filed by her brother in law, before she petitioned for the grant in another file. She nevertheless lodged a caveat in H.C Succession Cause No. 102 of 2001 on 9.9.2001, and subsequently filed her own Succession Cause and was issued with a temporary grant on 21.9.2001.

She still claimed that she was not aware of the existence of another Succession Cause, but only discovered that there was another Grant when she went to collect her husband's dues at H.F.C. of Kenya Ltd, but discovered that the same had been collected by her brothers in law. Catherine's answer repeatedly was that the deceased paid dowry for her on 30.6.2000, in Bondo that by June, 1999 the deceased had no officially married her. That the deceased died 3 months after paying dowry for her. Catherine has personal documents of the deceased as well as personal effects of the deceased – i.e. a TV, Honda Civil car, a video, gas cooker, fridge, a music system, sofa set. Catherine has a daughter aged 13 years old. She was aged 10 years old, when the deceased died. She confirmed that the deceased was not her biological father.

Catherine paid school fees for her daughter, but after she met the deceased, he took over and started paying the fees. Upon his death Catherine resumed payment of her daughter's school fees once more. According to her, she lived with the deceased for about 2 years as husband and wife. The photos according to Catherine show that she was a member of the Odera family. Catherine went through the photographs attached to her affidavit and explained them, when and under what circumstances they were taken. At the conclusion of the oral evidence, both parties made written submissions by consent.

Having considered the evidence filed in court by way of affidavits and answers given during cross examination by parties as well as the written submissions I now have to decide what I consider is crucial to this case, that is, the "status" of Catherine, as far as the deceased was concerned. She says she was married to the deceased under Luo Customary Law, and therefore a widow of the deceased but the deceased's family deny this. Her evidence to support this "marriage" is already on record. It was her word, against Benard's word, there was no corroboration of her evidence. This could have been provided, in my view, by Catherine's own father, who, according to Catherine is retired and lives in Nairobi West. After all, it was to him that dowry was paid in Sakwa, Bondo. It is not clear why he did not come to court to confirm what was paid to him by the deceased and his family, in terms of dowry on 3rd June, 2000. I found this to be a serious omission.

Because the matter of marriage was seriously contested I scrutinized every evidence that might assist the court in making a finding and to this effect I turned my attention to the people who were present at the gathering on that day. Obviously 2 of the objectors, Benard and his brother Albert, if they were present as

Catherine said in her oral evidence, they would not admit so, and indeed they denied the fact in their affidavit. However, Catherine averred to the fact that a particular driver of the late Dr. Ombaka drove this group to her home in Bondo.

This driver too, was not called to confirm or deny this fact which was both in the affidavit and oral evidence. Then there was the Chief from Catherine's home in Bondo, who was said to have been aware of the ceremony of the payment of dowry on 3.6.2000 to Catherine's father. He too did not come to court to confirm this. The next issue that I want to consider is the filing of the 2 Succession Causes by the deceased's family and Catherine. Evidence of this is on record and submissions too have been made on it. The deceased's family filed their Succession Cause first, a Grant was issued on 5.4.2001, after the estate had been advertised in the Kenya Official Gazette of 23rd February 2001, Succession Cause No. 102 of 2001, the estate of Francis Ouma Odera, late of Nairobi, who died in Nairobi hospital on 22.9.2000. The deceased's brothers and sister did not mention Catherine in their petition. Their petition to which the temporary grant was issued was supported by a letter from Chief James Ojwang' Obalo of South East Alego location who said,

"The above named Mr. Francis Ouma Odera was a residence in my location from childhood until he passed away on 22nd September 2000. The Odera family is well known to me and I would like to confirm that Francis Ouma Odera never married any women either by customary or statutory law throughout his life....." Catherine petitioned for a grant to the deceased's estate. The petition was advertised in the Kenya Official Gazette of 25th May 2001, as Cause No. 697 of 2001.

This was H.C Succession Cause NO. 612 of 2001. A temporary Grant of Letters of Administration was issued to her jointly with her brother on 21st September 2001. Her petition for Grant was supported by the relevant forms, including a letter from the Chief of South Sakwa Location Amoyo Chief's camp stating that Catherine was "the real and true widow of MR OUMA ODERA. Kindly assist the widow with any possible assistance she requires". Prior to Catherine being issued with a Grant, the deceased's brothers had filed "objection to the Issuance of Grant to Catherine and her brother," on 20th June, 2001. The issuance of the Grant to Catherine and her brother made the deceased's brother move the court to revoke the same. Finally for consideration is the matter of the caveat lodged by Catherine's lawyer to the deceased's estate, stating, "Let nothing be done in the estate of the above named FRANCIS OUMA ODERA (deceased) who died intestate on 22nd September 2000, without notice to CATHERINE OCHIENG OLANG'O.....".

The caveat is dated 9th September 2001, and refers to Cause No. 102 of 2001 filed by the deceased's family. Though Catherine's oral evidence was not clear on whether she knew of the existence of the Succession Cause filed by the deceased's brothers, the fact of the matter is that if she did not, then her lawyer did because the numbers of the case were quoted in the caveat. Her lawyer, was in, any event, acting on her instructions. From all the evidence I have considered, I have come to the conclusion that Catherine has failed to "prove" that she was married to the late Francis Ouma Odera under Luo Customary Law, which she relied on. Photographs taken at various functions including the day of the burial of the deceased, cannot on their own prove a Luo Customary Law marriage, in the absence of evidence to that effect.

Secondly, I find that Catherine's petition for Letters of Administration supported by a letter of the Chief of South Sakwa Location, Amoyo Chief's camp, is irregular and misleading because the Chief did not know the deceased and his family circumstances. The deceased was not a resident of that location, and was not buried there. Thirdly, I consider the lodging of a caveat in the estate of the deceased by Catherine dishonest for 2 reasons,

(i) One, she knew of the existence of a Grant of Letters of Administration having been issued to the deceased's brothers and sister in H. Court Succession Cause No. 102 of 201, and she did not move to revoke it, and (ii) two, the caveat she lodge dated 9th September 2001, did not specify the capacity in which she was lodging it because she must have known that the matter of her marriage to the deceased was "contentious", and was disputed by the deceased's family. Catherine moved the Court for a Grant of Letters of Administration which was subsequently issued to her on 21st September 2001, AFTER she had

lodged the caveat.

Finally is the issue of the “objection to the Making of a Grant”, by the deceased 2 brothers and sister the objectors herein. I am satisfied from evidence on record that Catherine was aware of this objection, but nevertheless went ahead to petition for a Grant to the deceased’s estate jointly with her brother. This, I find was further evidence of dishonesty on her part. I must mention a matter which came out during the hearing of the Succession cause, the admission by Benard, the deceased’s brother that certain properties of the deceased were sold before the Grant issued to the objectors was confirmed. This would be irregular under the Succession Act, as the court’s leave should have been sought.

That notwithstanding, I proceed to REVOKE the Grant of Letters of Administration issued to Catherine Ochieng Olang’o, jointly with Benard Joshua Olang’o in Succession Cause No. 612 of 2001, as the same was issued without disclosure of material facts by the 2. I must also find as a fact that the “objection to the Making of a Grant” filed by the objectors herein was overtaken by events, as the Grant was issued to Catherine and her brother, the objection notwithstanding. The same should therefore be considered abandoned.

Dated at Nairobi this 22nd day of June, 2005.

JOYCE ALUOCH

JUDGE