



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPL. NO.162 OF 2003

IN THE MATTER OF ESTATE OF OYUGI LWENDO – (DECEASED)

JOSHUA OSWERE OYAMO APPLICANT.

VERSUS

JOHN ODHIAMBO AGORO RESPONDENT

RULING

The applicants application is brought under S.76 (b) & (c) of the Law of Succession Act and seeks Orders to annul the grant and confirmation of the same in Migori Succession Cause No.99 of 2000 to JOHN ODHIAMBO AGORO.

The said JOHN ODHIAMBO AGORO filed the said Succession Cause in respect of the Estate of the late OYUGI who died in 1974. By then he was the registered owner of land No.KAMAGAMBO/KANYIMACH/753 John Odhiambo – now the respondent indicated he was the sole beneficiary to the Estate of the deceased. He was granted letters of administration which were confirmed after one month. He had the land transferred to his name.

The applicant Joshua Oswere Oyano depones that he is the only son and surviving relative of the deceased and that the respondent was not at all a beneficiary to the Estate of the deceased. He therefore misrepresented to court to whom he said he was a beneficiary of the Estate. He colluded with the area chief who wrote a letter showing him as a beneficiary.

In replying the respondent submitted through his counsel that the application is defective as it does not comply with provisions of Order 50 rule 15(2) CPR. It was further submitted that the supporting affidavit does not state the place of abode of the deponent as provided in Order 18 rule 4 CPR.

Further it was stated that applicant should have filed objection before Migori Court.

I have considered the application. Though in the affidavit it was stated that there were annexures none were filed. Nonetheless the court quite well understood the sequence of events. The applicants main ground is that the respondent is not a beneficiary of the Estate of the deceased. He therefore cheated the court. He did not indicate to the court that there were other beneficiaries. The Respondent throughout his submissions did not attempt to answer those allegation and only dwelt on the defectiveness of the application. The applicant stated he was a son of the deceased. He deponed that the respondent was not a beneficiary to the estate of the deceased. This again as not answered by the respondent. The only conclusion one can reach therefore is that all what the deponent has stated is true. As a son of the deceased and the only surviving heir he was the right person to be given a grant to the Estate. If he had refused or ignored to do so he should have been cited. This was not done.

It was therefore fraud and misrepresentation for the respondent to inform the court that he was the sole beneficiary of the Estate and failing to disclose there were other heirs.

The respondent stated that Order 50 rule 15(2) was not complied with. This is true but I do not feel that being merely omitting to include the words shown in that rule makes this application defective. The Respondent was served with the application. He appeared on the hearing date and was heard and no orders were made in his absence.

The spirit of the rule is to give a way to those who fail to attend on the hearing date.

As for the affidavit the first line clearly states the address of the deponent and the town. That is enough description of the deponent's about.

True the applicant could have filed an objection in Migori Court but that is assuming that he was aware of the matter. He deposed that the grant was confirmed after only one month instead of the stipulated 6 months. The Respondent did not try to explain this. In any case the fact that he did not file an objection before Migori Court does not stop him from coming to this court.

The upshot of the above therefore is that the application is well merited.

The grant and confirmation in Migori Succession Cause No.99 of 2000 was obtained by fraud and misrepresentation. The same is annulled and all subject orders or actions set aside. Costs to the applicant.

KABURU BAUNI

JUDGE.

12/2/04