



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO.1 OF 2000

IN THE MATTER OF THE ESTATE OF BOSIRE ONGARO AYIENDA
DECEASED

AND

JEMIMA BOSIBORI ONGARO PETITIONER

VERSUS

SAMUEL ONTITA ONGARO APPLICANT/OBJECTOR

RULING

The applicant SAMUEL ONTITA ONGARO prays for the following orders:

1. That the administrator of the Estate, JEMIMA BOSIBORI ONGARO be restrained from interfering with the estate of the deceased and in particular disposing, alienating, selling or in any way dealing with the property of the Estate.
2. The administrator be compelled to account for the proceeds of the Estate, and
3. The grant of representation to JEMIMA BOSIBORI to be annulled. He also prays for any other relief the court deems necessary.

The deceased in this cause BOSIRE ONGARO AYIENDA died on 29th September 1998. On 4th January 2000 JEMIMA BOSIBORI ONGARO his widow filed this succession cause. She was granted letters of administration on 6th July 2000. Apparently they have not been confirmed.

The applicant is the eldest son of the petitioner/respondent and the deceased. He deponed and was submitted that when the petitioner/respondent applied for letters of administration she did not inform the other beneficiaries who are all adults. They did not consent that she be granted the letters of administration.

Further it was deponed and submitted that the said letters of administration were obtained fraudulently and through a false statement that the beneficiaries were all minors. The grant should therefore be annulled.

Further court was told that the petitioner/respondent has already transferred the deceased's land into her name though there was no confirmation. She is also felling and selling trees on the land and she has not accounted for proceeds from tea sales.

Application was opposed. Respondent submitted that she properly applied for grant of letters of

administration as the widow of the deceased. In form P&A 5 she clearly indicated the beneficiaries and the name of the applicant is there as a son. There are four sons and four daughters named. She said that she never indicated the beneficiaries are minors. There are two forms P&A5 in the file. She said she did not at all indicate that beneficiaries are minors. She further said that she had the land transferred in her name on transmission pending the confirmation of the grant. Further she said the applicant is infuriated by the fact that she included her two married daughters as beneficiaries.

I will first deal with the issue of annulment. The main ground canvassed by the applicant is that the petitioner gave false information and concealed material facts. I however, with respect, did not find the submissions of any merit. There is no dispute that the respondent is the widow of the deceased.

S.66 of the Law of Succession Act gives a general guide as to the preference of the persons to be given priority in granting letters of administration. On top is the spouse of the deceased. The respondent therefore has the first preference even over the applicant who is the eldest son. She was the right person to apply for the letters of administration.

The applicant deponed that the respondent did not obtain consent from the other beneficiaries before filing the cause. This may be so though there was no prove of the same. However there is no law, which required that she should first obtain their consent. Consent would have only been needed if there was another person entitled to the grant in the same degree or in priority with the respondent. Then she would have been required to give a notice to such a person in conformity to provisions of Rule 26 Probate & Administration Rules. The applicant was not and is not in the same degree or priority with the respondent who is the spouse of the deceased. The issue of consent therefore is irrelevant.

It was submitted at length that the respondent concealed a material fact and give false information by stating that the beneficiaries are minors. She has denied this. Indeed there are two forms P&A 5 one showing beneficiaries as minors. She has denied this. As stated by counsel for the respondent it is clear that the word "minors" was an addition in different ink.

In any case I don't think the mere fact of referring the beneficiaries as minors is such a material misrepresentation to warrant annulling the grant. If this statement was made during confirmation it would be different. The grant has not been confirmed yet and that issue should be addressed at that stage. Suffice to say that the petitioner named all the beneficiaries and even obtained a letter from the chief confirming the same. There is no material fact, which was concealed. There was no fatal false misrepresentation.

The applicant in one of his grounds supporting the affidavit raised the issue that the petitioner included names of his married sisters as beneficiaries. He is perhaps ignorant of PART V of the Law of Succession Act. That as it may be that issue he may address it during confirmation.

From the above therefore I find no good reason to annul the grant. The petitioner being the administrator of the Estate of the deceased should continue to administer the same. It would not make sense to restrain her from dealing with the Estate. The prayer for injunction therefore must fail.

Court was told that the petitioner/respondent has already transferred the land to her name. This was wrong though she explained that it was a transmission. She should have waited until the grant is confirmed. The grant was made in the year 2000 and is not yet confirmed. I direct her to take immediate steps to have the same confirmed and the Estate distributed to the beneficiaries. The issue of accounts will have to be addressed during the time of confirmation.

All in all I find application has no merit and the same is dismissed. Each party to bear his/her own costs.

KABURU BAUNI

JUDGE

6/7/2004

Dated and delivered on 6th July 2004. Mrs. Asati for Respondent. N/A for applicants.

KABURU BAUNI

JUDGE

6/7/04