In re Estate of Walter Henry Odera (Deceased) (Succession Cause 5 of 1970) [2023] KEHC 68 (KLR) (16 January 2023) (Ruling)

Neutral citation: [2023] KEHC 68 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE 5 OF 1970

RE ABURILI, J

JANUARY 16, 2023

RULING

1. Bernard Okich Odera filed summons for revocation of grant dated November 30, 2021 seeking the following orders:

    a. The grant of letters of administration made to the late Albert Odawa on July 23, 1975 and confirmed on November 8, 1995 by Justice Kuloba be revoked.

    b. A fresh grant of letters of administration be issued in favour of Bernard Okich Odera, the intended administrator.

    c. Pending the issuance and grant of letters of administration, an order do issue for restriction of any dealings whatsoever in the deceased properties namely:

        i. L R no 8504/22 Nakuru District

        ii. L R Kisumu/God Abuoro/508

        iii. Kisumu/God Abuoro/108

        iv. L R Kisumu Municipality/Block 5/241

        v. L R Plot no 12 Nyang'oma Market

        vi. L R Kisumu Municipality/Block 5/194

        vii. L R Plot no 8 Wang'apana Market.

        d. Cots of the application.

2. The applicant swore an affidavit deposing that the deceased herein (Walter) died on January 3, 1968 and a grant of letters of administration intestate to his estate was issued to his son Albert Odawa (Albert) who has since also deceased on December 12, 2018. That the grant was issued on July 23, 1975 and that the said grant was confirmed on November 8, 1995. That the said certificate of confirmation's schedule is at variance with the summons for the Confirmation of grant.

3. He deposes that the said Albert concealed from the other beneficiaries of the succession process and never sought their consent. That upon obtaining the representation, Albert proceeded to register land certificates of all the deceased parcels leaving the other beneficiaries destitute and prevented them from cultivating, occupying or using the parcels of; and in whatever manner. He therefore prays that the parcels be distributed equally to other beneficiaries.

4. Eunice Rosemel Mkoko, Albert's widow and the administrator of his estate opposed the application stating that she has never been consulted in the application for the substitution of the proposed Bernard Okich as the administrator of Walter's estate. That she is a farmer cultivating on land parcel numbers Kisumu/God Abuoro/508 and 108 for her livelihood which was given to her by her late mother in-law under the Luo customary practices sometimes in 1990 and has continually occupied the said parcel since then.

5. She deposes that placing restrictions on the parcels will incapacitate her financially, that the beneficiaries of her late husband should benefit from Walter's estate and finally that at the time of her husband's demise, he was in the process of transferring the parcels to other beneficiaries.

6. The application was canvassed by way of written submissions. On the issue of whether the applicant is entitled to an order of revocation, it was submitted that the administrator has since died and since he was the sole administrator, the grant so issued to him ought to be revoked.

7. That the grant as issued to Albert Okich shows that he is the only beneficiary and therefore he transferred all the parcels of land forming the estate of the deceased Walter to himself and finally that the summons for the confirmation of grant is at variance with the certificate of confirmation since the entire estate is to be transmitted to the applicant. Reliance was placed on section 76 of the *Law of Succession Act* and *in re estate of Kiprono Arap Ngetich* [2016]eKLR where the court revoked a grant where distribution was not equitable.

8. On the issue of the grant being issued to the applicant, it was submitted that under section 74 of the *Law of Succession Act* and rule 44 of the *Probate & Administration Rules*, the court after revoking a grant can appoint new administrators in his place as supported by decision *in Estate of Mwangi Mugwe Alias Eliaeza Ngware (deceased)*[2003] eKLR and *Estate of Agwang Wasiro (dceased)* [2020]eKLR.

9. On the issue of restriction, it was argued that the properties are subject to application for confirmation by the respondent in the estate of her late husband yet the estate belongs to Walter. In the circumstances, that the said properties are likely to form the estate of Albert. This contention is supported by authorities in *Ibrahim v Hassan & Charles Kimenyi Macharia, interested party* [2019]eKLR.

10. The respondent (Rosemel) raised the following issues: whether the grant issued to albert ought to be revoked and in his place appointed one or more administrators; and whether the court has jurisdiction to place a restriction on the subject parcels.

11. Elaborating on the first issue, the objector submitted that since a sole administrator had died, the provisions of section 76(e) of the *Law of Succession Act*s comes into play whether the court should revoke the grant and another administrator appointed. That the applicant intends to exclude her late husband and his children from the estate.

12. That while appointing a new administrator, the court should be guided by section 66 of the *LSA* which bestows upon the court the discretion to appoint an administrator without following the order of preference. In this regard, reliance was placed on the authority *in Re estate of Gerorge Ragui Karanja (deceased)* [2016] eKLR.

13. On the second issue, she submitted that the power to place restrictions on land is vested on the Land Registrar by dint of sections 2 and 101 of the *Land Registration Act* and sections 2 and 150 of the *Land Act*. That the issue of disputes after transmission of land is the sole preserve of the Environment and Land Court and not the family court. That this effectively outs the jurisdiction of this court as was held in *Owners of Motor Vessel 'lialian S' v Caltex oil (K) Ltd* [1989] eKLR. It was therefore submitted that the court lacks jurisdiction to hear and determine the matter.

Analysis and determination.

14. The deceased Walter died on January 3, 1968 and according to the petition for grant of letters of administration filed by Albert Okich, the deceased left behind 3 widows and several children. The petitioner also stated that the deceased owned the following properties; plot number 91 Shauri Yako Kisumu, plot Number 12 Nyangoma Market, plot Number 8 Wangapala, plot number 108 God-Abuoro Settlement Scheme and plot Number 1176 Kisumu.

15. The fact of Albert's death is not in dispute, he was the only administrator of the estate and with his death, a new administrator has to be appointed. The applicant proposes that he be appointed upon revocation of grant. This brings into play the provisions of section 76(e) of the *Law of Succession Act* which provides that:

> " A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-
>
> (e) That the grant has become useless and inoperative through subsequent circumstances.

16. On the question of appointment of an administrator, various provisions of the law come into play. Rule 16 of the 5th Schedule to the Act provides that:

> " Where it appears to the court to be necessary or convenient to appoint some person to administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, the court may, in its discretion and having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration, whether limited or otherwise, as it shall think fit."

17. Circumstances such as the one obtaining herein were first discussed in *Bin Rashid Bin Salim El-Rumhy v Haider Mohamed Bin Rashid El Basamy* [1963]1EA438. Subsequently, Khamoni J *in the Matter of the estate of Mwangi Mugwe Alias Elieza Ngware (Deceased)* [2003] eKLR held that:

> " There was no provision in the *law of succession Act* for substitution of dead administrators. The proper procedure ought to be an application under section 76 (e) of the *Law of Succession Act*, not section 71 which is on confirmation of grants asking the court to revoke the grant because 'it has become useless and inoperative through subsequent circumstances."

18. Having perused this extremely old file and the application and response thereto, it is clear that the administrator having died, the grant has been rendered inoperative and rendered useless and since the estate had not been distributed and as it cannot remain unadministered, I hereby proceed to revoke the grant issued to Albert Odawa now deceased and appoint in his place Bernard Okich Odera and

Eunice Rosemel Mkoko the widow to Albert Odawa as joint administrators of the estate of Walter Henry Odera to continue with the process of administration of the estate of Walter Henry Odera.

19. I also take cognizance of the fact that a grant issued to the deceased Albert Odawa way back in 1995 and at the time of instituting this application, the objector did not enlighten the court how far the process of distribution and transmission of the estate had gone. The respondent states that she is in occupation and use of some parcels of land. It was not clear whether the specific parcels occupied by her have been transmitted to her late husband or not.

20. The court cannot therefore conclusively determine the stage of transmission of the estate as no evidence was tendered in court. As such, the issue of distribution will have to await the production of evidence showing the current status of the estate.

21. It is also clear that since the deceased proprietor died before the coming into force of *Cap 160*, I find that the evidence of distribution of the estate will have to proceed under the Luo customary practices. Evidence on this has to be taken for a proper determination by the court.

22. On the issue of restrictions, I am of the view that since the challenge herein emanates from a succession matter, and as the property is under administration, it cannot be said that the proper court is the ELC at this stage as this court exists to protect estates of deceased persons from being intermeddled to the detriment of bona fide beneficiaries.

23. The respondent states that the properties she cultivates were given to her by her mother in law. It was not clear whether the same were subsequently transferred to the deceased Albert. In light of the scanty evidence tendered, the court cannot conclusively determine the status of the said properties. However, an order protecting the assets of the estate from possible intermeddling is necessary.

24. Accordingly, I make the following orders:

    a. The grant of letters of administration intestate granted to Albert Odawa (deceased) is hereby revoked.

    b. A fresh grant of representation is hereby issued to Bernard Okich Odera and Eunice Rosmel Mkoko as joint administrators of the estate of the deceased Walter Henry Odera.

    c. The parties are hereby directed to file all ownership documents /certificates of official search of all parcels of land listed in the P&A form and the status of occupation pertaining to the assets of the estate be filed by way of an affidavit within 30 days from the date hereof.

    d. To preserve the estate, I order that status quo be maintained on parcel numbers L R no 8504/22 Nakuru District, L R Kisumu/God Abuoro/508, Kisumu/God Abuoro/108, L R Kisumu Municipality/Block 5/241, L R plot no 12 Nyang'oma Market, L R Kisumu Municipality/ Block 5/194 and L R plot no 8 Wang'apana Market pending the hearing and determination of this Succession Cause.

    e. Parties to file Summons for confirmation of grant within 30 days of today, listing all assets and beneficiaries and shares of each beneficiary.

25. Each party to bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF JANUARY, 2023.

R E ABURILI

JUDGE