



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**PROBATE & ADMINISTRATION NO.11 OF 2019**

**IN THE MATTER OF THE ESTATE OF:**

**AGAN ONDIEK.....DECEASED**

**BETWEEN**

**BEATRICE AKOTH NYANDIKO.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**JOYCE AKINYI KICHE.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**AND**

**ABEL ONDIEK OYOO.....OBJECTOR/APPLICANT**

**RULING**

1. Abel Ondiek Oyoo, the applicant herein, moved the court by way of summons for revocation of grant dated 17<sup>th</sup> February, 2021 under sections 47, 48, 58, 76, & 82 (d) of the Law of Succession Act, CAP. 160 Laws of Kenya, Rules 44, 49, 59, 63 & 73 of Probate and Administration Rules and Articles 10 (2), 22 (1), 23 (1), 27 (1), 47, 48, 50 (1) & 159 of the Constitution of Kenya. The applicant is seeking the following orders:

- a) The grant of letters of administration issued on the 19<sup>th</sup> day of September 2019 and the certificate of confirmation issued on the 6<sup>th</sup> day of October, 2020 to the petitioners/respondents, be revoked and/or annulled.
- b) Consequent to prayer (4) hereof, being granted the Honourable court be pleased to revoke, nullify and/or otherwise the transfer *vide* transmission and the registration of LR.NO. CENTRAL KASIPUL/KAMUMA/493 in the names of the petitioners/respondents, which was effected and/or carried on the 13<sup>th</sup> day of October 2019, *albeit* prior to and before the confirmation of grant of letters of administration.
- c) The Honourable court be pleased to revert the Title over and in respect of LR.NO. CENTRAL KASIPPUL/KAMUMA/493 to and/or in favour of the name of the deceased, namely Agan Ondiek, deceased, pending issuance and confirmation of Grant of Letters of Administration.
- d) The honourable court be pleased to proceed and issue grant of letters of administration to and in favour of the objector/applicant and same be confirmed, to facilitate distribution of the estate of the deceased.
- e) The petitioners/respondents herein, do tender accounts in respect of the estate of Agan Ondiek, the deceased person herein, more particularly, the obtaining extent of the administration so far taken.
- f) Costs of the Application be borne by the Petitioners/Respondents.

2. The application is premised on the following grounds:

- a) The deceased herein died intestate on the 4<sup>th</sup> day of May 1989.

Prior to and during the death of the deceased, same was registered was the proprietor of LR NO. CENTRAL KASIPUL/KAMUMA/493.

- b) Pursuant to the death of the deceased, the suit property herein formed and/or constituted the estate of the deceased.

- c) However, the deceased herein was neither survived by a widow nor children.
- d) Nevertheless, the deceased herein was/is survived by step-brother and sister in law, respectively, namely, Monica Atieno Kiche, now deceased.
- e) In the premises, the immediate heirs and/or beneficiaries of the estate of the deceased, comprise of Monica Atieno Kiche, now deceased and the objector/applicant, respectively.
- f) However, upon the death of Monica Atieno Kiche, now deceased, the only surviving beneficiary and/or heir of the estate of the deceased, is the objector/applicant.
- g) On the other hand, the petitioners/respondents herein, do not have any relationship and/or nexus to the estate of the deceased.
- h) In any event, the estate of the deceased herein can only be administered and/or distributed in favour of the heirs thereof in terms of priority and not otherwise.
- i) Be that as it may, the petitioners/respondents herein, who are not related to the deceased and in any event do not rank in priority to the objector/applicant, have since taken out grant of letters of administration.
- j) On the other hand, the petitioners/respondents have similarly proceeded to and caused the suit property to be transferred and registered in own names, prior to and/or before confirmation of the grant of letters of administration.
- k) Notwithstanding the foregoing, the petitioners/respondents herein, did not take out and/or issue citation against the objector/applicant.
- l) In any event, the petitioners/respondents who do not rank in priority to the objector/applicant, also did not procure and/or obtain the requisite consent to administer the estate of the deceased.
- m) In the premises, the petition by and/or on behalf of the petitioners/respondents, other than being mounted by persons without the requisite *locus standi*, was also taken in contravention of the probate and administration rules.
- n) Notwithstanding the foregoing, the petitioners/respondents have also concealed and/or failed to disclose the true identities of the heirs of the deceased.
- o) On the contrary, the petitioners/respondents have enlisted and/or otherwise enumerated persons who do not fall within the cadre and/or cluster of beneficiaries of the deceased.
- p) In the premises, the grant of letters of administration, issued to and/or in favour of the petitioners/respondents was issued by concealment and/or non-disclosure of material facts.
- q) In any event, the petitioners/respondents failed to procure, secure and/or obtain the consent of the rest of the beneficiaries of the estate of the deceased.
- r) Nevertheless, the petitioners/respondents herein have also procured and/or obtained a fraudulent letter of introduction from the area chief, Oyugis town location.
- s) The chief's letter dated 22<sup>nd</sup> may 2019, used by the petitioners/respondents which premised the succession proceedings was false, doctored and/or fraudulent.
- t) Consequently, the grant of letters of administration herein by and/or on behalf of the petitioners/respondents has since been procured and/or obtained by fraud and in connivance with the area chief.
- u) In the premises, the petition for grant of letters of administration by the petitioners/respondents is wrought and/or fraught with fraudulent misrepresentation.
- v) In any event, the grant of letters of representation, issued to the petitioners/respondents was obtained by fraud, concealment of material facts and/or deliberate misrepresentation.
- w) Grant of letters of administration was obtained fraudulently by the making of a false statement and/or by concealment from the court of a material fact.
- x) The grant of letters of administration and the certificate of confirmation of the grant, was obtained by means of an untrue allegation of fact, essential in point of law to justify the grant, notwithstanding that the allegation was made in ignorance or inadvertently.
- y) At any rate, the procedure used and/or applied in respect of the successions proceedings sought to be impugned, is wrought and/or fraught with illegality.

z) In the premises, the grant of letters of administration and the certificate of confirmation of grant, are a nullity ab initio.

aa) It is expedient and in the interest of the beneficiaries of the estate, that the grant of letters of representation herein be revoked and/or annulled.

bb) In the premises, the petitioners/respondents are intent on misappropriating and/or abusing the assets of Agan Ondiek, deceased, to the detriment of the objector/applicant.

cc) In any event, the petitioners/respondents are not a fit persons to administer the estate of Agan Ondiek, deceased, whatsoever.

3. The respondents were represented by Nyatundo & Company Advocates. Their application was opposed on the following grounds:

a) That the application is not legally tenable.

b) That the applicants failed to disclose some material facts.

4. After perusing the application and the submissions of the parties, these are the issues for determination:

a) Whether at his death Agan Ondiek was survived by any spouse or children;

b) Whether or not the applicant is a beneficiary;

c) Whether or not the respondents are beneficiaries; and

d) Whether or not the grant ought to be revoked.

5. Both parties acknowledge that Agan Ondiek, the deceased herein was not survived by any spouse or child. Section 39 of the Law of Succession Act provides as follows:

**1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority**

**(a) father; or if dead**

**(b) mother; or if dead**

**(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none**

**(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none**

**(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.**

**(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.**

6. The respondents have averred that the deceased herein was their paternal uncle and a step-brother to the objector. This has not been denied. That being the case, the objector would have become a beneficiary if the respondents did exist as envisaged under section 39 (1) (c) of the Law of Succession Act. This is the only time section 39 (1) (d) of the Law of Succession Act would be applicable. This is not the case herein.

7. Section 76 (b) of the Law of Succession Act provides as follows:

**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—**

**(a) that the proceedings to obtain the grant were defective in substance;**

**(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

8. The Objector/applicant has not satisfied the court that the above cited section was breached. There is therefore no reason as to why the

application would be allowed. The same is dismissed with costs.

9. On 16<sup>th</sup> March, 2021 the petitioners/respondents herein filed an application by way of Notice of motion under section 3A & 63 (e) of the Civil Procedure Act and Order 50 Rules 1 & 17 of the Civil Procedure Rules. They are seeking the following orders:

- a) That this application be certified as urgent
- b) That service be dispensed with in the first instance.
- c) That the court be pleased to vacate, vary and/or in the alternative stay execution of the interim orders of the **Hon. JUSTICE A.K. NDUNGU** issued on the 24/2/2021 most importantly an order of mandatory injunction compelling the removal of the fence placed round the suit property pending the hearing and determination of this application.
- d) That costs be provided for.

10. The application is premised on the following grounds:

- a. The Objector/Applicant has obtained the said orders of injunction dated the 24<sup>th</sup> day of February, 2021, by way of concealment and misrepresentation of material facts from the Court.
- b. The Objector/Applicant herein has also failed to disclose to this Honorable Court that we are the only surviving daughters of **MONICA ATIENO KICHE ONDIEK** (deceased).
- c. The Objector/applicant herein deliberately has lied to the Honorable Court that he is the only surviving beneficiary and/or heir of the estate of the deceased despite knowing very well that we are the only surviving beneficiaries from the 2<sup>nd</sup> House of the deceased.
- d. On the other hand, the Objector herein has also failed to disclose to this Honorable court that he is the only surviving heir from the 1<sup>st</sup> house and that we are the only surviving heirs from the 2<sup>nd</sup> house and thereby rank in priority to him.
- e. Besides, it is surprising that the Objector/Applicant herein is claiming that we are not related to the deceased despite being fully aware that we are daughters of **JOSEPH KICHE ONDIEK** and **MONICA ATIENO KICHE** (all deceased) who rank in order of priority to the objector/applicant in taking out Grant Letters of Administration.
- f. In any event it is the Objector herein who has failed to disclose the true identities of the true heir of **AGAN ONDIEK** (deceased) who held the property in trust of our later father **JOSEPH KICHE ONDIEK** (deceased) who was young at the time.
- g. Be that as it may, the Objector herein in attempt to mislead this Honorable Court he also failed to disclose that he had petitioned for Letters of Administration to the Estate of the deceased and issued with a grant dated 17<sup>th</sup> July 2018 together with certificate of Grant dated 30<sup>th</sup> June 2018 which were later revoked by the order of **Hon. Justice Karanja** dated 9/5/2019.
- h. In the premises, the said interim orders were obtained based on material non-disclosure solely to defeat justice to the detriment of the petitioners/respondents herein who were in conformity with the law in obtaining Letters of Administration.
- i. Nevertheless, the interim order as issued on 9/2/2021 could affect the subject matter particularly, **LR. NO. CENTRAL KASIPUL/KAMUMA/493** which property the Petitioners/Respondents have been in occupation, possession and using to the exclusion of the Objector herein who got himself alone **LR.NO.CENTRAL KADIPUL/KAMUMA/492** measuring approximately one decimal five (1.5) hectares while the second house to which **AGAN ONDIEK** (deceased) and **JOSEPH KICHE ONDIEK** (our deceased father) both belong got which is smaller measuring approximately zero decimal nine (0.9) hectares for two brothers.
- j. The Honorable court went ahead and issued orders in the interim that could adversely affect the Petitioners/Respondents despite being a preliminary stage which orders are bound to affect their interest in the suit premise.
- k. It is the interest of justice that the said orders vacated, set aside and/or stayed pending inter-parte hearing wherefrom the Honorable court may make such orders it deems fit.
- l. There has been no delay in making this application and no prejudice will be suffered by the Respondent.

11. The application was opposed.

12. In the case of **Priscilla Vugutsa Kamaliki vs. Mary Runyanyi Ochieng [2016] eKLR Judge Nekoye Sitati** said the following:

**The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is**

**therefore fit for striking out.**

13. The instant application was brought under the wrong provisions of the law. The application is struck out with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JULY, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**