



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.16 OF 2019**

**FORMERLY HOMA BAY SUCCESSION CAUSE NO.874 OF 2015**

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

**JOHN NYAKUMU ARIRO ..... DECEASED**

**AND**

**PENINA MILKA ATIENO OPONDO .....APPLICANT**

**VERSUS**

**KENNEDY JUMA NYAKUMU..... RESPONDENT**

**RULING**

[1] The application dated 6<sup>th</sup> August 2019, by **Penina Milka Atieno Opondo**, through the firm of **Kisaka and Associates advocates**, is made under **Section 26, 29, 76 (a) and 82** of the **Law of Succession Act** and **Rule 44 (2), 49** and **73** of the **Probate and administration Rules** seeking orders to the effect that the confirmation of grant made herein on the 14<sup>th</sup> March 2017 be set aside/revoked and that the respondent, Kennedy Juma Nyakumu, be restrained from selling, charging, leasing or transferring to any person land parcel **No. West Kasipul/ Kanuonga/175**. The applicant also seeks an order that the respondent do furnish the estate's accounts.

[2] The grounds in support of the application are set out in the necessary summons and fortified by the applicant's averments in the supporting affidavit dated 6<sup>th</sup> August 2019 and further affidavit dated 24<sup>th</sup> September 2019 as well as further affidavits deponed by Milka Atieno Opondo on 24<sup>th</sup> September 2019, Charles Moga Nyakada on 24<sup>th</sup> September 2019 and Peter Okech Abang'a, also on 24<sup>th</sup> September 2019.

The respondent opposed the application on the basis of the facts and averments contained in his replying affidavit dated 20<sup>th</sup> August 2019 as supported by the replying affidavits of Bango Okelo, Samson Mbori Odwar, Milka Atieno Odongo and Hellen Akinyi Nyakumu, all dated 20<sup>th</sup> August 2019.

[3] As directed by the court, the application was canvassed by way of affidavit evidence and written submissions which were filed on behalf of the applicant on 20<sup>th</sup> January 2020 and on behalf of the respondent on 13<sup>th</sup> November 2019, through **M/s Oguttu, Ochwangi, Ochwal & Company Advocates**.

Due consideration having been given by this court to the application, its supporting and opposing grounds and the rival submissions, it becomes apparent that the main prayer or order being sought by the applicant is that the confirmation of grant made herein on 14<sup>th</sup> March 2017 be revoked. In other words, the applicant is seeking a revocation of the certificate of confirmation of grant issued by this court on 14<sup>th</sup> March 2019, indicating that the entire estate comprising of land parcel No. West Kasipul/Konuonga/175 be wholly transmitted to the respondent as the sole beneficiary of the estate of John Nyakumu Ariro (deceased).

[4] What was confirmed was the grant of letters of administration intestate issued to the respondent on the 14<sup>th</sup> September 2016. The necessary application was made under the summons for confirmation of grant dated 27<sup>th</sup> February 2017, in which the respondent was identified and listed as the sole beneficiary.

Inasmuch as the certificate of confirmation of grant issued on 14<sup>th</sup> March 2017, is the gravamen of the entire application, prayers (3) and (4) of the necessary summons are invariably dependant on the success or failure of the main prayer (2) which is anchored on **Section 76** of the **Law of Succession Act**, which provides for revocation of grant and by extension, certificate of confirmation of grant, if the grant was obtained in proceedings that were defective in nature or was obtained fraudulently by the making of a false statement or by the concealment

from the court of something material to the case, among other things.

Herein, the applicant has invoked Section 76 (a) of the Act and was therefore required to show that the impugned grant and certificate of confirmation of grant were obtained in proceedings which were defective in substance such that this court's discretion ought to be exercised in her favour.

[5] As this was an intestate succession, the confirmation of the grant was effected pursuant to Section 71 of the Law of Succession Act after the court was satisfied as to the respective identities and shares of all persons beneficially entitled.

On confirmation, such beneficiaries and their respective must be included in the grant.

Herein, the subject grant was confirmed in the proceedings of the court on the 13<sup>th</sup> March 2017, in which the court noted that no objection to the grant had been made at the lapse of six (6) months from the date of issue.

Apart from the respondent/petitioner, no other beneficiary was present in court on that date and none had signed any consent to confirmation other than the petitioner himself. Not even affidavits in support of the summons for confirmation of grant were deponed and signed by the beneficiaries save the petitioner/respondent who indicated in his affidavit that he was the sole beneficiary of the estate just like he had indicated in the material petition for grant of letters of administration dated 24<sup>th</sup> September 2015.

[6] Indeed, the chief's letter dated 24<sup>th</sup> September 2015, indicated that the deceased was married to one wife i.e. Askar Auma Nyakumu, who died in 1997 and that the two were blessed with only one child i.e. the petitioner/respondent. The court considered and allowed the petitioner's summons for confirmation of grant after being satisfied that the petitioner was the sole beneficiary of the estate. As there was no other beneficiary or beneficiaries brought to the court's attention, no other consent to confirmation of grant or supporting affidavits were required. It would therefore follow that the proceedings of the 13<sup>th</sup> March 2017, in which the grant was confirmed and a certificate of confirmation of grant issued were not defective.

[7] **Section 76 (a)** of the **Law of Succession Act** was therefore inapplicable in the present circumstances.

However, in his replying affidavit dated 20<sup>th</sup> August 2019, the respondent disclosed that the deceased had two children i.e. himself as the only son and two daughters, **Hellen Akinyi Nyakumu** and **Milka Atieno Odongo**. This fact was confirmed by Samson Mbori Odwar and Bongo Okelo, in their respective replying affidavits dated 20<sup>th</sup> August 2019.

The two daughters also confirmed the fact in their respective affidavits dated 20<sup>th</sup> August 2019, in which they affirm to forfeit to the respondent their inheritance rights respecting the estate of their late father. This notwithstanding, the respondent was under obligation to identify and list them as beneficiaries of the estate when petitioning for the grant and/or applying for confirmation of grant. He did not do so. Therefore he obtained the grant and indeed the certificate of confirmation of grant by concealing the material fact that the deceased's daughters were also beneficiaries of the estate. In the circumstances, Section 76 (b) of the Succession Act would be most applicable.

[8] The chief's letter dated 24<sup>th</sup> September 2015, under which the respondent petitioned for the grant did not provide accountable and/or two information regarding the surviving dependents/beneficiaries of the estate. It was on the basis of that letter and the respondent's supporting affidavit in the petition for grant that the respondent was considered and treated as the sole beneficiary of the estate, yet he was not. He clearly omitted to include his sisters as beneficiaries and misled the court into confirming the grant to the extent of transmitting into his sole name the estate parcel of land.

Even though this omission is not the subject of the present objection, it cannot be allowed to stand especially with respect to the certificate of confirmation of grant dated 14<sup>th</sup> March 2017, which must and is hereby revoked with an order that the respondent must in the next three (3) months from this date hereof take out a fresh certificate of confirmation of grant in which the two daughters of the deceased shall be included as beneficiaries in the share of the estate.

[9] The applicant/objector indicated that she was also a beneficiary and/or dependant of the estate by virtue of her marriage to one **Jared Opondo Okech** (deceased) who was said to be a nephew or "adopted" son of the deceased. However, she did not avail tangible and/or credible evidence to prove dependency. What came out clearly in her affidavit evidence was a question regarding an alleged beneficial interest in the estate parcel of land by the applicant's late husband. Such a question would best be answered in the Environment and Land Court rather than this Succession Court. In sum, the objection by the applicant is unsustainable.

Otherwise, the certificate for confirmation of grant dated 14<sup>th</sup> March 2017 shall stand revoked for reasons stated hereinabove.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**13.02.2020**

[Delivered and dated this 13<sup>th</sup> day of February, 2020]