



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

SUCCESSION CAUSE NO. 95 OF 2015

IN THE MATTER OF THE ESTATE OF ELISHA OKEA OGOLA (DECEASED)

-BETWEEN-

1. JOB OGINGA OGOLA

2. GEORGE LOCH MBOYA OGOLA.....OBJECTORS/PLAINTIFFS

-AND-

1. FLORENCE MURUNGA OKEA

2. ALLOYCE OBUNGA OKEA.....PETITIONERS/DEFENDANTS

RULING NO. 2

1. This ruling is in respect of two applications. One of the applications is a Summons for revocation of the Grant dated 08/08/2016 (hereinafter referred to as '**the Summons**'). The summons was taken out by *Job Oginga Ogola*, the First Objector herein. The summons was supported by the affidavit sworn by the First Objector on 08/08/2016.

2. The second application is a Notice of Motion dated 17/11/2016 (hereinafter referred to as '**the Motion**'). The Motion was taken out by *George Loch Mboya Ogola*, the second Objector herein. The motion was supported by the affidavit sworn by the second Objector on 17/11/2016.

3. Whereas the Summons prayed for the revocation of the grant issued to the Petitioners in this cause, the Motion prayed for revocation of two grants. They are the grant issued in this cause and the one issued in *Migori Principal Magistrate's Court Succession Cause No. 14 of 1994*.

4. The Summons and the Motions (hereinafter collectively referred to as '**the applications**') were opposed by the Petitioners. The Petitioners relied on the Affidavit sworn by *Florence Murunga Okea*, the First Petitioner herein, on 29/08/2016.

5. The First Objector and the Petitioners were represented by Counsels. The Second Objector appeared in person.

6. On 13/02/2017, upon the concurrence of the parties and approval of this Court, this Court issued directions in this matter. The Summons and the Motion were to be heard together by way of *viva voce* evidence. Timelines were issued within which parties were to file and exchange various documents.

7. The hearing began where the Objectors testified. They were duly cross-examined and re-examined where appropriate. The First Objector called two witnesses. They were *Patrice Saruta Ogola (PW1)* and *Julita Ongute Orimba (PW2)*. The Second Objector did not call any witness. At the close of the Objectors' cases this Court had to stay further hearing of the applications in order to deal with a Notice of Motion dated 19/04/2018. That application had been filed by one *William Ouko Ogola*. The application was dealt with and disposed of by Ruling No. 1 which was rendered on 04/04/2019.

8. The hearing proceeded where the First Petitioner testified and closed the Petitioners' case.

9. The First Objector and the Petitioners filed their respective submissions in support of their rival positions. The Second Objector did not file any submissions. The First Objector and the Petitioners also relied on several decisions. The First Objector referred to **Eldoret Court of**

Appeal Civil Appeal No. 66 of 2002 Mary Rono vs. Jane Rono & William Rono.

10. The Petitioners relied on **Kisii High Court Succession No. 24 of 2003 Charles Otieno Seto & Another vs. Didacus Ojwang Onyango** (unreported) on the aspect of burden of proof. They also relied on other persuasive decisions. Parties opted not to highlight on the submissions.

11. I have carefully considered the applications. Certainly, I have read and understood the gist of the applications and the response, the evidence tendered, the parties' submissions and the decisions referred to.

12. From the foregone, two main issues are for determination. The issues are:

- (i) What is the dispute between the parties; and
- (ii) Whether the applications are merited.

13. I will deal with each issue separately.

The dispute between the parties:

14. As said, I have gone through the applications and the evidence. The dispute between the parties herein has had a chequered history. Parties have litigated before the High Court and the Court of Appeal. Currently, an appeal is pending in the Court of Appeal arising from this Court's Ruling No. 1.

15. To me, the genesis of the problems bedeviling the family of the *Late Daniel Ogolla Sigera alias Loch Ogola* is the manner in which the estate of the said *Daniel Ogolla Sigera alias Loch Ogola* was administered and distributed.

16. *Daniel Ogolla Sigera alias Loch Ogola* was the father of the Objectors and the deceased herein, *Elisha Okea Ogola*. There are of course many other siblings of the Objectors and the deceased involved. Further the *Late Daniel Ogolla Sigera alias Loch Ogola* was survived by several widows which two of them are still alive.

17. The applications and the supporting affidavits sworn by the Objectors as well as the Replying Affidavit sworn by the First Petitioner attest to that.

18. The Petitioners herein are the wife and son of the deceased herein, *Elisha Okea Ogola*. Their common position is that they are administering the estate of their husband and father respectively and that they have nothing to do with what happened to the estate of the *Late Daniel Ogolla Sigera alias Loch Ogola*. Indeed, they were not parties thereto.

19. The estate of the *Late Daniel Ogolla Sigera alias Loch Ogola* was fully administered vide *Migori Principal Magistrate's Court Succession Cause No. 14 of 1994*. The deceased herein was a beneficiary therefrom. The Petitioners are therefore dealing with what was the estate of the deceased herein at the time of his death and not otherwise. Any question as to how the deceased herein acquired his estate may not be properly litigated in these proceedings.

20. The foregone was the rationale behind this Court's stating as follows in Ruling No. 1: -

10. A closer look at the dispute in this Cause has to do with how Migori Principal Magistrate's Court Succession Cause No. 14 of 1994 was administered. I say so because the Applicant, Job and George vehemently believe that the estate of Daniel Ogolla Sigera alias Loch Ogola who was their father still remain unadministered and that the two properties in issue ought to revert back to that estate. However, the correct position is that the estate was duly dealt with in law and if the Applicant, Job and George are intent on challenging that administration then such proceedings ought to be taken in the right matter and not in this Cause.

21. Of importance as well is the ruling by *Muchelule, J* in **Kisii HC Misc. Succession Cause No. 173 of 2005 In the matter of the Estate of Daniel Ogolla Sigera alias Loch Ogola (Deceased) and In the matter of an application by Job Oginga for the distribution of the deceased estate Job Oginga Ogola vs. Elisha Okea Ogola** (unreported). In that matter the First Objector herein sought to have the Court distribute the properties in the Certificate of Confirmation of grant issued in *Migori Principal Magistrate's Court Succession Cause No. 14 of 1994*. The Court held thus: -

Section 47 confers jurisdiction in regard to disputes under the Act to the High Court, but also provides that a subordinate court may be appointed to determine such disputes. I suppose Migori Court had been so appointed by the Chief Justice. If the applicant seeks revocation or annulment of the grant he was to come under rule 44 of the Probate and Administration Rules. Section 40 gives guidance on how to distribute property where the intestate was polygamous.

The respondent attacked the legality and competence of this application in the preliminary objection. For the reasons given in the foregoing, I find the application incompetent and is struck out. However, the conduct of the respondent as outlined is such that he will not get costs.

22. From the foregone, the two High Court Judges were clear on how the Objectors were to deal with their claims.

23. Having said so, the only other way the Objectors herein may successfully challenge the administration of the estate of the deceased in this

Cause is to demonstrate that they are dependants within the meaning of **Section 29** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**LSA**') or that they are otherwise lawful beneficiaries. That is however the realm of the second issue.

Whether the Summons dated 08/08/2016 and the Motion dated 17/11/2016 are merited:

24. Since the applications are seeking the revocation of the grant in this Cause, I must determine whether the applications have attained the threshold in **Section 76** of the **LSA**. The section 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either.

i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

ii) to proceed diligently with the administration of the estate ; or

iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

25. I have as well reiterated the history of this litigation above.

26. The burden is therefore on the Objectors to prove that they are entitled to seek the revocation of the grant herein. (**See Sections 107 and 109** of the **Evidence Act, Cap. 80** of the Laws of Kenya). The Objectors must therefore prove any of the grounds in **Section 76** of the **LSA**.

27. Whereas the Objectors are strongly alleging fraud, defectivity in substance, concealment of material facts and disinheritance, all those allegations are not in respect to the grant in this Cause. Those allegations are in respect to the manner in which the grant was obtained and administered in *Migori Principal Magistrate's Court Succession Cause No. 14 of 1994*.

28. This Cause is different from *Migori Principal Magistrate's Court Succession Cause No. 14 of 1994*. While this cause is in respect of the estate of the late *Elisha Okea Ogolla*, the cause in *Migori Principal Magistrate's Court Succession Cause No. 14 of 1994* relates to the estate of the *Late Daniel Ogolla Sigera alias Loch Ogola*. The two estates are different. They may also be having different beneficiaries.

29. Be it as it may, are the Objectors dependants of the deceased herein in law? **Section 29** of the **LSA** provides as follows: -

For purposes of this part, "dependant" means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half- sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

30. The Objectors testified. They confirmed that they were not among the children of the deceased herein. They also confirmed that they were not maintained by the deceased herein immediately prior to his death. Indeed, the Objectors are brothers to the deceased herein and children to the *Late Daniel Ogolla Sigera alias Loch Ogola*, the patriarch.

31. The Objectors therefore do not fall within the confines of **Section 29** of the **LSA**. They are not dependants to the deceased.

32. The Objectors have also not demonstrated that they are beneficiaries to the estate of the deceased herein. They are not purchasers of any

part of the estate of the deceased either. Further, according to the Certificate of Confirmation issued in *Migori Principal Magistrate's Court Succession Cause No. 14 of 1994* on 03/03/1995 the deceased herein did not hold the properties therein in a fiduciary capacity. (See *Musyoki, J* in **In the Estate of Richard Karanja Javan (2014) eKLR**).

33. The Objectors hence lack the requisite *locus standi* to interfere with the estate of the deceased herein. Their claim, if any, definitely lies elsewhere but not in this Cause.

34. The Objectors have therefore not demonstrated adequate *locus standi* in this matter and have further failed to discharge the burden of proof to warrant the interference of the administration of the estate herein by this Court.

35. Therefore, none of the grounds in **Section 76** of the **LSA** apply in respect of the grant in the estate of the late *Elisha Okea Ogolla* in this Cause.

36. With such a finding, the Summons and the Motion cannot hence stand on the way of the administration of the estate of *Elisha Okea Ogolla*, the deceased in this Cause. The applications are not successful.

37. The Summons for Revocation dated 08/08/2016 and the Notice of Motion dated 17/11/2016 are hereby dismissed.

38. Given the nature of the dispute and the fact it involves close family members and the dispute being far from resolution, each party herein shall bear its own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 3rd day of March, 2020.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of:

Mr. Sagwe Counsel instructed by Messrs. S. M. Sagwe & Company Advocates for the First Objector/Plaintiff.

Mr. Oguttu-Mboya Counsel instructed by Messrs. Oguttu, Ochwangi, Ochwal and Company Advocates for the Petitioners/Defendants.

George Loch Mboya Ogola, Second Objector/Plaintiff in person.

Evelyne Nyauke – Court Assistant