



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

SUCCESSION CAUSE NO. 6 OF 2016

IN THE MATTER OF THE ESTATE OF NICODEMUS (alias NICODEMO) AWANGE (DECEASED)

HOSEA OGOYE AWANGEAPPLICANT

VERSUS

SAMWEL OREDO ONYANGORESPONDENT

JUDGMENT

1. Vide Summons for revocation of grant dated 21st November, 2016, the applicant **Hosea Ogoya Awange** seeks from this Court Orders: -
 - a. *That the grant of letters of Administration Intestate made to the Petitioner Samuel Oredo Onyango on 9th January, 2015 and confirmed on 14.8.2015 be revoked.*
 - b. *That Samuel Oredo Onyango be condemned to bear the costs of the application.*
2. The Summons for revocation of grant is predicated on the grounds that:
 - a) *The proceedings to obtain the grant were defective for non-compliance with the requisite statutes;*
 - b) *The said grant was obtained fraudulently by concealment from the Court of a material fact that there were other beneficiaries and properties excluded from the petition.*
 - c) *The sole objective of the Respondent in obtaining the said grant, fraudulently as he did, was to intermeddle and waste the estate of the deceased and*
 - d) *It is in the interest of justice that the subject application be allowed as prayed.*
3. The summons which were taken out pursuant to the provisions of section 47 and 76 of the Law of Succession Act; Rules 44, 49 and 73 of the Probate and Administration Rules and all other enabling provisions of the law was supported by an affidavit sworn by the applicant Hosea Ogoya Awange on 21st November 2016. In the said affidavit, the applicant deponent deposes that he is the biological son to the late Nicodemo Awange Oguna whereas the Respondent petitioner is the grandson to the said deceased and a nephew to the applicant. That the Petitioner/Respondent, without the knowledge of the applicant and that of his co-beneficiaries proceeded to the High Court at Kisumu and obtained a grant of Letters of Administration to the Estate of the deceased without consulting or involving the other beneficiaries and that the impugned grant was subsequently confirmed on 14.8.2015, whereby the Petitioner/Respondent unilaterally allocated himself the parcel of land No. South Gem/Kambare/116 Measuring approximately 1.8 hectares.
4. It was further deposed that vide citation No.337/2016 the applicant and other beneficiaries sought to cajole the Respondent who had declined to cooperate with the applicant and other beneficiaries in filing the petition and that by a replying affidavit sworn and filed in response to the said citation, the applicant admitted that he unilaterally filed succession to the estate of the deceased for purposes of transferring some of the assets to his name.
5. The applicant further deposes that the sole purpose of the Respondent in obtaining such grant was to intermeddle and waste the deceased's estate yet he was aware of the dispute between beneficiaries over the rightful inheritors of the suit land.
6. He further deposes that neither the applicant nor his co-beneficiaries consented to the Respondent applying for the grant yet they rank in priority over the Petitioner/Respondent hence the proceedings leading to the issuance of grant were defective in substance and process.

7. In addition, the applicant states that the Respondent/Petitioner failed to disclose to the court the fact that there were other properties of the deceased which he did not list in the Petition for Letters of Administration.
8. It was further deposed that the Respondent is unsuitable and untrustworthy to administer the estate of the deceased as he deceived the beneficiaries by denying that he had instituted these succession proceedings, yet in the degree of consanguinity, he ranks further down the time of person with the right to petition for grant of letters of administration of the deceased's estate.
9. The applicant further claims that the Petitioner's actions border on criminality to fraudulently disinherit the beneficiaries of the deceased.
10. To the said affidavit, the applicant annexed a letter dated 19.9.2016 written by the Chief South Gem location listing beneficiaries of the besieged estate ; the grant issued on 19.1.2015 by justice H.K. Chemitei in Kisumu H.C. Succession Cause No.1014/2014 to Samuel to Samuel Oredo Onyango to administer Land Parcel No. South Gem/Kambare/116, Certificate of Confirmation of grant dated 14th August 2014; Affidavit of Samuel Oredo Onyango in citation 337/2016 sworn on 17.10.2016 listing 8 properties, parcels of land left behind by the deceased Nicodemo Awange; copy of minutes of a meeting held over a dispute concerning L.R. No. South Gem/Kambare/116 by family members of the deceased Nicodemo Awange; and a decision thereof by an undisclosed Panel; letter dated 23.9.2016 by the Petitioner to Ken Omolo and Company Advocates regarding the Estate of the deceased Nicodemo Awange.
11. The Petitioner/Respondent opposed the summons for revocation of grant and filed a replying affidavit sworn on 3rd April 2017 wherein he gives the family history of the family of the late Nicodemo Awange Oguna and deposes that he is the grandson to the deceased and that his father is the late Tobias Onyango Awange while his mother is mama Teresia Odero Onyango.
12. That his father was the eldest son to the late Nicodemo Awange and Isabella Olal Awange (1st wife). That his late grandfather was married to 4 wives and that for each house, they were allocated land, whereupon, his grandmother's house was allocated Gem/Kambare/555 and 116 to be shared by Tobias Onyango Awange and Gedion Obuya whereas the other houses were given their separate parcels of land.
13. That his father Tobias Onyango and Gedion Obuya died hence, according to the Luo custom, the applicant is entitled to inherit his father's portion since the deceased Nicodemus Awange divided his properties to his 4 wives and houses, to be shared among his children according to each house. that his family occupies the portion given to his grandmother's house. That the applicant is a beneficiary to the portion allocated to his biological mother the late Helina Oyugi Awange.
14. Further, that the court gave them as a family an opportunity to hold a meeting and discuss the issue but that the applicant disregarded a meeting called by his elder brother Hezekiel Owiny Awange as shown by copy of invitation letter annexed.
15. That the applicant also refused to honour an invitation by the area Assistant Chief. That parcel No. South Gem/Kambare/116 was the homestead of the late Isabella Olal and that it is not the entire estate of the late Nicodemo Awange.
16. According to the Respondent, the late Tobias Onyango Awange who was his father remained the sole occupant and developer of parcel No. South Gem/Kambare/116 before and after the death of the late Nicodemo Awange for almost 50 years to date.
17. That the said late Nicodemo Awange blessed a home for the late Tobias Onyango Awange in Parcel No. South Gem/Kambare/116, and that it is in the same parcel where Tobias Onyango Awange, Isabella Olal and Nicodemo Awange are buried.
18. That the applicant's mother the late Helina Oyugi Awange is buried in her homestead parcel No. South Gem/Kambare/112 that belongs to his father.
19. The Respondent maintained that the Succession process was done openly and gazette vide Gazette Notice No. 1014 of 2014 on 28th November 2014 but that no objection to the making of such grant leading to its confirmation on 14th August 2015 was lodged by the applicant who was all along in Kenya.
20. The Respondent also contended that the status of the parcel of Land No. South Gem/ Kambare/116 remains the same except the administrator. Further, that in 2010 the applicant filed a suit against the Respondent's father Tobias Onyango Awange in respect of South Gem/Kambare/555 and that in that case he confirmed that Parcel of land No.South Gem/ Kambare/116 belonged to the said Tobias Onyango Awange.
21. The respondent denied that he agreed to have the land registered in his name retransferred to the deceased Nicodemo Awange hence the application for revocation of grant by the applicant is made in bad faith, is malicious and lacks merit.
22. The parties also gave oral evidence in court. PW1 Hosea Ogoye Awange testified on oath and told the court that he wants the court to nullify the grant issued and confirmed in favour of the respondent to enable the family of the deceased redo succession by involving all the beneficiaries of the estate. He stated that the grant was obtained in a wrong way as the respondent did not get the consent of all the beneficiaries of the estate of the deceased. He relied on the filed affidavit in support of the Summons for revocation of grant and stated that he had to clear a loan taken on the said land to avert the auction. He also sought for costs of these proceedings. As he had spent money coming to court.
23. On being cross-examined by the respondent, the applicant stated that when the respondent's father was alive there was a case before the tribunal. He also stated that all children of the deceased Nicodemo Awange have a right to share parcel No 116. He stated that they allowed the respondent to bury his father on the subject land because it was their father's (Nicodemo's) land and not the respondent's land. He also stated that they were to do succession later. He also stated that although the respondent's father's homestead was on parcel No. 116 but that he had another parcel given to him by the late Nicodemo to which the respondent had refused to move to. He stated that albeit his mother

was buried on parcel No 112 but that they were all living on parcel No. 116. He maintained that although the respondent's father was buried on parcel No 116 but that that was not the respondent's land and that the tribunal gave to the respondent's father land parcel No 555 where the respondent should settle. He denied having a stake in parcel No. 555 and maintained that his mother gave him the consent to succeed land parcel No. 116. He acknowledged that his father was never the registered proprietor of Parcel No. 11.

24. The Respondent/ Petitioner gave sworn testimony and stated that he was a teacher and resides in Nairobi. He confirmed that he was issued with a grant of letters of administration on 9/1/2015 and that the said grant was confirmed on 14th August 2015. He maintained that his grandfather Nicodemo Awange gave parcel No. 116 to the Respondent's father but that at the time of his death he had not obtained title. He also acknowledged that the applicant is his stepfather born of his third grandmother (paternal uncle).

25. He stated that he was aware that his late father had disputes with the applicant over parcels Nos 116 and 555. That the applicant is the only person claiming the said parcels of land and that the applicant has refused to have the dispute resolved amicably. He urged the court to dismiss the Summons for revocation of grant.

26. On being cross examined by the applicant, the respondent stated that his mother had no title to the land but that she consented to the respondent filing for succession since she was a legitimate wife of his father who had a right to the land in question. He admitted that when he carried out succession proceedings, he did not consult the family including the surviving sons of Nicodemus Awange. He also admitted that he was not the only grandson of the deceased Nicodemus Awange. He stated that he was legally on the land until the court proves him otherwise. Further, that he was to withdraw the grant in good faith as long as the applicant agreed to sit with the family to resolve the dispute but that the applicant refused.

27. He maintained that parcel No 116 belonged to his father as per the tribunal proceedings conducted in 2010. He stated (evasively) that he could not concede or deny that he had grabbed more land because there was no case filed against him claiming that he had grabbed more land than other beneficiaries. He stated that when his father was alive, they lived peacefully on the disputed land and developed it and that the only dispute was over parcel No. 555, but that after his father died is when the applicant started laying claim to No. 116. He denied ever seeing his father beat up his grandfather. He stated that he was born on parcel No. 116.

DETERMINATION

28. I have considered the application, the response in opposition by the respondent petitioner and the oral evidence adduced in court by both parties. In my view, the main issue for determination is whether the application is merited.

29. As earlier stated, the Summons for revocation of grant is brought under sections 47 and 76 of the Law of Succession Act, Rules 44, 49 and 73 of the Probate and Administration Rules.

30. It is not in dispute that the applicant is the biological son of the deceased Nicodemo Awange whose estate is in issue. It is also not in dispute that the respondent petitioner is the son to one of the sons of the deceased Nicodemo Awange. The question therefore is whether a grandson can petition for letters of administration intestate when the son or sons of the deceased are alive.

31. The respondent conceded in his evidence and affidavits that he was the grandson of the deceased Nicodemo Awange. However, he believes that he was entitled to petition for letters of administration intestate because the parcel of land which he was concerned with and which was the subject of succession proceedings is parcel No 116 which was given to his late father and where his late father was buried. Further, that his mother consented to him obtaining a grant in respect of the said land as the said land was developed by his father.

32. On the part of the applicant, he was firm that there are other beneficiaries of the estate of the late Nicodemo Awange and that in addition, the respondent did not obtain consent of other beneficiaries to enable him obtain grant. Further, that the respondent petitioned for grant in respect of only one parcel of land yet the deceased Nicodemo Awange had many other pieces of land and therefore an estate which was not administered.

33. Section 76 of the Law of Succession Act provides the grounds upon which a grant can be revoked among them is non-disclosure of material facts to the court by the petitioner at the time of applying for the grant. In this case, it is clear that the Petitioner is not a primary beneficiary of the estate. He is a grandson to the deceased Nicodemo Awange whose estate is in issue. In addition, he did not obtain any consent of the primary beneficiaries of the estate namely, the children of the deceased Nicodemo, before filing for succession. Thirdly, he did not include all the assets and or liabilities of the estate. Instead, he only petitioned to administer part of the estate of the deceased which is parcel No 116 on the grounds that his father had been allocated this parcel by his grandfather and that his family settled on the said land which his father was buried on. He also claims that the tribunal gave his father the subject land.

34. In my humble view, the grant issued to the respondent and as confirmed was defective in substance in that the respondent concealed material facts to the court that the deceased had other assets that needed to be administered apart from parcel No 116. Secondly, he failed to disclose to the court that there were other beneficiaries to the deceased's estate, who were his biological children. If the respondent felt that the applicant and other beneficiaries had refused or delayed applying for a grant, he should have cited them to take out letters of administration and not usurp powers of the beneficiaries as is the case here.

35. The respondent did not disclose to the court that there were other properties left behind by the deceased and neither did he disclose the existence of the beneficiaries like the applicant herein.

36. The law of intestate administration makes the children the ultimate destination of their parent's property. See sections 35 and 40 of the Law of Succession Act. Under section 40 of the Act, all children of the deceased person, whether male or female are beneficiaries and should have equal shares in the deceased's estate unless any of them opts not to take a share in the father's estate. In this case, the applicant and his other brothers and sisters have not renounced their interest in their father's estate and neither did they consent to the respondent

petitioning for a grant of letters of administration intestate.

37. Sections 35 and 40 above do not mention grandchildren nor do they discriminate the gender for purposes of determining beneficiaries.

38. Albeit the respondent claims that the portion of land in issue was given to his late father and that his mother consented to him obtaining a grant, the evidence on record is clear and the respondent conceded that his father had not title to the said land and that the said land was still registered in the names of the deceased Nicodemo Awange. Furthermore, his mother had no capacity to consent to the respondent administering the estate of her father in-law, as the portion of land had not been transferred in the name of her husband the late Tobias Onyango.

39. As a grandchild of the deceased Nicodemo Awange, the applicant is not an heir to the estate of the deceased so long as his father whether alive or dead left an estate to be administered. Only his father's estate would benefit from the estate of Nicodemo Awange. He is also not a dependant of the estate as he did not apply as such under section 26 of the Act. This is so because under section 29 of the Act, a grand child can only be a dependant of the state if he or she applies under the section and prove that he or she was dependent on the grandparent immediately before his death.

40. In this case, however, as the respondent's father is deceased, then the person who is next in line to claim part of that estate is the respondent's mother who must collaborate with the children of the said deceased Nicodemo and obtain a grant and share the estate in accordance with the law. (See section 66 of the Act).

41. Accordingly, I find and hold that the respondent was not a proper person to whom a grant of letters administration intestate should have been issued and or confirmed. In the end I find and hold that the grant of letters of administration intestate issued to the respondent Samuel Oredo Onyango on 9/1/2015 and confirmed on 14/8/2015 was materially defective and improperly issued. The same is hereby recalled and revoked. Title to the parcel of No. South Gem/ Kambare/116 which was registered in the respondent's name pursuant to the said grant as confirmed is hereby revoked and reverted to the name of the deceased Nicodemo Awange Oguna. The beneficiaries to the estate of Nicodemus Awange Oguna to file for a fresh grant touching on the entire estate following the legal process.

42. As the parties hereto are close family members and in order to promote harmony among them, I hereby order that each party shall bear their own costs of these proceedings.

Dated, Signed and Delivered in open court at Siaya this 18th Day of February, 2019.

R.E. ABURILI

JUDGE

In the presence of: