



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.342 OF 2015

IN THE MATTER OF THE ESTATE OF:

OJWANG NYOGAJA.....DECEASED

IN THE MATTER OF REVOCATION AND/OR ANNULMENT OF GRANT OF LETTERS OF ADMINISTRATION

AND

IN THE MATTER OF SECTION 76 OF THE LAW OF SUCCESSION ACT CAP 160

BETWEEN

LINET AKINYI OUSO.....1ST PETITIONER/RESPONDENT

TALLBERT OTIENO ONGATI.....2ND PETITIONER/RESPONDENT

VERSUS

JULIUS ODHIAMBO ORINDA.....1ST OBJECTOR/APPLICANT

PETER ORINDA OKANGA.....2ND OBJECTOR/APPLICANT

RULING

[1] The summons for revocation of grant dated 3rd February 2017 were taken out by the applicant/objectors, **JULIUS ODHIAMBO ORINDA** and **PETER ORINDA OKANGA**, against the respondents/petitioners, **LINET AKINYI OUSO** and **TALLBERT OTIENO ONGATI**, pursuant to **section 76** of the **Law of Succession Act** which essentially sets out the grounds for revocation and/or annulment of grant.

The impugned grant was issued on 12th January 2016 to the two respondents and was in respect of the estate of the late **OJWANG NYOGALA** alias **OJWANG NYOGAJA** who passed away at the age of sixty (60) years on the 15th April 1979, as per the relevant death certificate.

The affidavit in support of the petition for the grant of letters of administration signed by the respondents indicated that the deceased owned a parcel of land known as **NO. KAGAN/MANYWANDA/654** and was survived by the first respondent as his daughter-in-law, the second respondent as his grandson and **PHELIX OMONDI**, as his other grandson.

[2] The Chief's letter dated 13th July 2015, indicated that the deceased had only one son, late **CHARLES OTIENO OKOKO**, who was husband of the first respondent and father of the second respondent and the person known as **PHELIX OMONDI**. The grant was confirmed on 11th March 2016, prior to the expiry of six months whereupon the estate property was transmitted to both the respondents and Phelix Omondi in equal shares.

About a year after the confirmation, the objectors/applicants took out the present summons for the revocation of the grant and the subsequent certificate of confirmation of grant on the basis of the grounds contained in the supporting affidavit dated 3rd February 2017, deponed by the first objector/applicant.

However, the respondents opposed the application on the basis of the grounds contained in their replying affidavits of the 24th February 2017

and 19th April 2017. The hearing of the application proceeded by way of oral evidence in addition to each parties' affidavit.

Learned counsel, **MR. GEMBE**, appeared for the objectors while **M/S KUKU**, learned counsel, appeared for the petitioners/ respondents.

[3] Evidence on the part of the objectors came from their affidavit and their oral testimonies as **PW1** and **PW7**. They called five witnesses including **SOSPETER OCHIENG OYUGI (PW2)**, **KENNEDY OKOKO (PW3)**, **TERESIA AKEYO OTENGA (PW4)**, **ENOCK SPEKE KOLA (PW5)** and **GRACE ATIENO ODERA (PW6)**.

The respondents called one witness **MARGARET AKOTH MBOYA (DW2)** even as they relied on the averments in their affidavits and the oral testimony of the first respondent (DW1).

From the evidence and the rival submissions of the parties, it is apparent that the bone of contention is founded on the relationship of the deceased with any of the parties. Each party appears to accuse the other of being strangers to the estate of the deceased. In that regard, the objectors imply that the impugned grant was fraudulently obtained by the respondents or was obtained by false representation or concealment of material facts.

[4] Under **Section 76** of the **Law of Succession Act**, 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 that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case "**inter alia**".

While applying for the grant the necessary gazette notice No.9057 of 4th December 2015 was one of the accompanying documents. It refers to this case No.342 of 2015 and indicates that the petitioners/respondent moved the court in their capacity as daughter-in-law and grandson respectively of the deceased known as **OWITI AKEJWANG NYAGAJA**. However, the name of the deceased herein referred is **OJWANG NYOGAJA**. This is the name also referred to in the accompanying death certificate dated 26th June 2015.

[5] It is the name which predominantly features in this case but does not, shockingly, tally with the name appearing in the gazette notice. This therefore meant that the grant which was issued was not that of the estate of Owiti Akeojwang Nyagaja but that of the estate of Ojwang Nyogaja, in which case, the prerequisite gazette notice respecting the estate was never issued thereby rendering the proceedings leading to the grant fatally defective "**ab-initio**".

If the proceedings to obtain a grant are defective in substance, then that grant would be defective and suitable for revocation or annulment (See **Section 76 (a)** of the **Law of Succession Act**).

The impugned grant would fall in that category and could therefore be revoked by the court of its own motion.

[6] With such a revocation of grant, it would follow that there exists no valid grant respecting the estate of Ojwang Nyagaja or even Owiti Akeojwang Nyagaja. If there was a mix-up of names, no satisfactory explanation came from either the objectors nor the respondents.

Be that as it may, the affidavit dated 6th July 2015, deponed by the respondents in support of the petition refers to the only asset known as **Land Parcel No. Kagan/Manywanda/654**.

However, in the affidavit dated 10th March 2016, in support of the respondents' summons for confirmation of grant, the asset referred to is **Land Parcel No. Kagan/Manywanda/2015**, as applied. This is another demonstration of the defectiveness of the proceedings leading to the issuance of the impugned grant.

[7] The letter of the chief dated 13th July 2015, was a key component of the respondents' petition for grant. It indicates that the deceased **Ojwang Nyogaja** had only one son called **Charles Otieno Okoko** who also passed away and was survived by the first respondent as his wife and the second respondent as his son. Another son was called **Phelix Omondi Otieno**. These three were listed as the only beneficiaries of the estate by the chief called **Kennedy Okoko** who testified herein as **PW3** and indicated that he was misled by the first respondent into giving the information contained in his letter of the 13th July 2015, which he said was corrected or clarified by a subsequent letter to the Deputy Registrar of this court, dated 8th November 2016 in which he disowned the respondents as being relatives of the deceased on the basis of fresh information gathered by himself following complaints relating to the impugned grant.

It is instructive to note that the chief, in his testimony, indicated that he did not even know the deceased **Ojwang Nyogaja**. This meant that his initial letter was based purely on falsehood as communicated to him by the respondents. This also meant that he only became aware of the deceased as a result of the controversy which ensued after the grant was issued. It was then that it became apparent that the deceased was survived by other relatives even if the respondents were also his relatives. It may also have become apparent that the respondents were in fact not related to the deceased. Indeed it was indicated as much by other witnesses including PW2, Pw4 and PW6.

[8] Grace (PW6) indicated that she was the sole wife of the deceased and not the first respondent and that she and the deceased bore two children i.e. one Maureen Adhiambo and one Felix Odhiambo Otieno. It is not clear whether the said Felix Odhiambo Otieno is the same Phelix Omondi Otieno referred to in the application for grant as one of the beneficiaries.

The evidence by the County Registrar for births and deaths (PW5) indicated that two death certificates may have been issued in respect of the same deceased.

In the first death certificate dated 26th June 2015, the date of death is given as 15th April 1979, while in the second certificate dated 8th February 2017, the date of death is given as 22nd September 1987.

Clearly, the existence of two death certificates demonstrates that the impugned grant and the process used in obtaining it was suspect. Either the first death certificate was obtained by unlawful means by the petitioners or the second death certificate was obtained by the objectors by misrepresentation of facts. It is uncertain whether the two certificates relate to the same person or whether the person named in both is the same person known by the name of Ojwang Nyogaja and if he is the same person, then he could not have died twice. A human being only lives and dies once.

[9] In her testimony, the first respondent (DW1) clearly implied that her intention was to apply for grant of letters of administration respecting the estate of her late husband, Charles Otieno Okoko, who was said to have been the only son of the deceased Ojwang Nyogaja. She however, stated that the deceased was her in-law and that he had no child and that her late husband was only living with the deceased as his nephew.

She revealed that she did not actually know the deceased as she was only five years old when he died.. She admitted that she was misled into instituting the present succession cause.

This testimony by the first respondent was yet another demonstration that the impugned grant was improperly obtained and that the entire proceedings leading to its issue and confirmation were defective in substance. All the information given therein by the respondents was based on falsehood and non-disclosure of material facts.

[10] For all the foregoing reasons, the present application is allowed to the extent that the impugned grant dated 12th January 2016 and the subsequent certificate of confirmation of grant dated 11th March 2016 are hereby revoked and any transaction undertaken on account of the two documents is hereby deemed null and void “**ab-in-tio**”.

A fresh succession cause must be instituted if any of the parties desires a fresh grant of representation regarding the estate of the late Ojwang Nyogaja and not Owiti Akeojwang Nyagaja.

Ordered accordingly.

J.R. KARANJAH

JUDGE

12.02.2019

[Read and signed this 12th day of February, 2019].