



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.13 OF 2017

MARY ATIENO OUMA.....APPELLANT

VERSUS

HANNAH ANYANGO OCHUNG...RESPONDENT

(Being an appeal from the Ruling of Hon. M. Ochieng, SRM delivered on 1st March, 2017 in Ndhiwa SRM's court Succession Cause No.41 of 2016)

JUDGMENT

[1] The late **BENADUS OUMA** (deceased), was a resident of North East Kanyamwa Location within Ndhiwa-Homa Bay County and as per a letter dated 3rd June 2016, addressed to the Senior Resident Magistrate's Court at Ndhiwa by the area chief the deceased passed away in the year 1982 leaving behind his wife, **MARY ATIENO OUMA** and two sons viz- **GEORGE OUMA OMBOGO** and **SAMWUEL MUOK OUMA**. He owned a parcel of land measuring 1.2 hectares being parcel **NO. KKK/KAKAETA/365**, a portion of which was allegedly sold to **HANNAH ANYANGO OCHUNO**, who applied for grant of letters of administration respecting the estate of the deceased pursuant to an order of the court made on 5th May 2016, in **SUCCESSION CAUSE NO.333 OF 2015** at the High Court in Homa Bay.

[2] The court order was as a result of a citation taken out by **Hannah Ouma Ombogo** (citor) against the deceased's surviving widow and sons (citees).

Armed with the order, the citor obtained the aforementioned chief's letter and petitioned for the necessary grant vide **Succession Cause No.41 of 2016**, at the Senior Resident Magistrate's Court, Ndhiwa, filed on 3rd June 2016.

[3] However, on the 15th June 2016, the citee widow of the deceased, **Mary Atieno Ouma**, filed an objection to the making of grant of letters of administration intestate on grounds "**inter-alia**"

that the citor/petitioner was not a proper person to whom a grant of representation can issue and that she has no interest whatsoever in the estate of the deceased.

This was seemingly followed by the citee's notice of motion filed on 22nd June 2016 in High Court Succession Cause No.333 of 2015, for review and/or setting aside of the impugned court's order made on 5th May 2016 and not 5th June 2016.

[4] Documents annexed to the various applications included a death certificate showing that the deceased, **Benadus Ouma Ombogo**, actually died on the 20th October 1974 and not in the year 1982 as indicated in the chief's letter of the 3rd June 2016. He was at the time of his death aged sixty five (65) years.

The record is not clear on what became of the application by the citee to have impugned court order reviewed, set aside or vacated. Nonetheless, her objection to the making of grant in favour of the citor was heard by way of "**viva voce**" evidence as directed by the trial court. She was thus deemed to be the plaintiff and the citor/petitioner, the defendant. Both testified without calling witnesses and at the end of the trial, the learned trial magistrate in a judgment dated 1st March 2017, dismissed the objection and advised the parties to co-operate and have the grant issued and confirmed without any further delay.

[5] Being aggrieved by the decision of the trial court, the plaintiff/objector filed the present appeal on the basis of the grounds contained in the memorandum of appeal filed herein on 1st March 2017. The appeal was heard by way of written submissions and in that regard, **Nyauke**

& Co. Advocates, appeared for the objector/appellant while **Sam Onyongo & Co. Advocates**, appeared for the petitioner/respondent.

The duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **ABDUL HAMEED SAIF –VS- ALI MOHAMED SHOLAN [1955] 22 EACA 270** and **SELLE –VS- ASSOCIATED MOTOR BOAT CO. [1968] EA 123**).

[6] From the evidence adduced at the trial and the submissions of the parties herein, it is apparent that the entire case turned on whether or not the petitioner was the right person to petition for grant of letters of administration respecting the estate of the deceased without being a dependant of the deceased or in any manner related to him.

[7] Generally, this was an intestate succession. Intestacy under **Section 34** of the **Law of Succession Act** means a person who dies without making a will capable of taking effect in respect of all his free-property.

It would herein appear that the only free property owned by the deceased was the parcel of land known as **NO.KKK/KAKAETA/365** for which the petitioner lays an interest on account of a purchase of a portion thereof for value.

Whether or not the said purchase was valid and lawful was not an issue for determination by the trial succession court. Such an issue fell within the ambit of the law of contract and land law where the purchase resulted in a charge of ownership of the subject matter.

[8] Be that as it may, under **section 66** of the **Law of Succession Act**, preference is given to certain persons to administer estate where deceased died intestate so that, **“when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the following order of preference –**

(a) Surviving spouse or spouses, with or without association of other beneficiaries;

(b) Other beneficiaries entitled on intestacy, with priority, according to their respective beneficial interests as provided by Part V;

(c) The public trustee, and

(d) creditors -----“

[9] Clearly, the petitioner/defendant did not fall within any of the preferences aforementioned and it was in recognition of the fact that she commenced citation proceedings against the objector and her two sons for purposes of protecting her alleged interest in the estate property.

Rule 22 of the **Probate and Administration Rules**, provides for citation to accept or refuse to take a grant. Such a citation may be issued at the instance of any person who would himself be entitled to the grant in the event of the person cited renouncing his right thereto.

[10] Under **Rule 22 (4)**, a person cited who is willing to accept or take a grant may petition the court for a grant on filing an affidavit showing that he has entered an appearance and that he has not been served by the citor with notice of any application for a grant to himself and under **Rule 22 (5)**, if the time limited for appearance has expired and the person cited has not entered an appearance, the citor may petition the court for a grant to himself.

This is the procedure which was undertaken by the petitioner prior to petitioning for grant of letters of administration in this matter.

[11] It would appear that the objector despite being aware of the citation failed to defend it and this resulted in the impugned order of the court made on 5th May 2015 in which the petitioner was allowed to take out letters of administration respecting the estate of the deceased.

Indeed, the process to obtain the grant was commenced by the petitioner but was put on hold by the objection raised by the objector/plaintiff even though it was a special process arising from an order of the court which was neither set aside nor vacated.

The petitioner’s standing in the matter was on account of the operation of the law and not on account of her relationship or lack of it with the deceased.

[12] Being alive to all the foregoing factors, the trial court acted correctly in dismissing the objection and advising the parties to co-operate and have the grant issued and confirmed without any further delay.

It is therefore the finding of this court that all the grounds raised by the objector/appellant in support of this appeal must fail.

In sum, the appeal be and is hereby dismissed. Each party shall bear their own costs. However, given the peculiar circumstances of this case and the fact that the estate of the deceased has remained un-administered since his demise in 1974, the ends of justice shall be met by an order that the Grant of Letters of Administration Intestate be issued forthwith in favour of both the objector/appellant and petitioner/respondent but the same be confirmed only after the issue pertaining to the purchase of part of the estate property by the petitioner is settled either by consent or otherwise.

Ordered accordingly.

J.R. KARANJAH

JUDGE

05.02.2019

[Delivered and signed this 5th day of February, 2019]