



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SUCCESSION CAUSE NO.8 OF 2018

IN THE MATTER OF THE ESTATE OF: OMOLO ONYANDO OMBORODECEASED

IN THE MATTER OF REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION

BETWEEN

ALPHONCE ATIENO OMOLO OBJECTOR/APPLICANT

VERSUS

PETER OBONYO OMOLO PETITIONER/RESPONDENT

RULING

1. The summons for revocation of grant dated 16th March 2018, was taken out by the Objector/Applicant, **ALPHONCE ATIENO OMOLLO**, in his capacity as a son of the late **Omolo Onyando Omboro** and a beneficiary of his estate comprising of a parcel of land described as **Kalanya/Kanyango/987**, which was wholly transmitted to the petitioner, **Peter Obonyo Omolo**, on the basis of the grant obtained by him respecting the estate of the deceased on 15th December, 2005.

The said grant was confirmed on the 9th September 2009, in respect of the aforementioned property even though it reflected the existence of a second parcel of land described as Kalanya/ Kanyango/989.

2. In this application, the objector alleges that the grant was obtained fraudulently and by concealment of material facts in that, there was contravention of **Section 66** of the **Succession Act** with regard to the order of preference in applying for the grant and that the objector who ranks first in priority to the petitioner did not give his authority or consent to the petitioner to obtain the grant.

All these grounds are fortified in the objector's averments in his supporting affidavit dated 16th March 2018 and 20th July 2018, but are vehemently opposed by the petitioner on the basis of his grounds of opposition dated 9th July 2018 and his replying affidavit dated 20th July 2018.

3. As directed by the court, the application was canvassed by way of affidavit evidence and in that regard, the objector filed his written submission dated 29th January 2019, through **Mose Nyambega & Co. Advocates** while the petitioner did likewise through **C.A. Okenye & Co. Advocates**.

The rival submissions were given due consideration by this court in the light of the application and its supporting grounds as well as those in opposition.

4. Apparently, the basic issue for determination was whether the impugned grant was obtained fraudulently and by concealment of material facts in terms of **Section 76 (b)** of the **Law of Succession Act** which provides that 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 the making of a false statement or by the concealment from the court of something material to the case.

5. The applicant/objector submitted that in his petition for grant of letters of administration respecting the estate of the deceased, the petitioner/respondent did not involve his brothers and in particular, the objector. That, the estate plot No.987 was to be shared between the petitioner and other beneficiaries including the objector while plot No.989 was to be shared between other beneficiaries who did not include the petitioner or the objector.

That, the petitioner embarked on fraud and defrauded the rest of the family members of the deceased by failing to disclose that the deceased was a polygamist and was survived by some of his children and wives.

6. The objector further submitted that the petitioner took out the impugned grant without the consent and co-operation of other family members and is bent on using it and the title obtained from it to disinherit and disadvantage other beneficiaries. He thus contended, that the petitioner is a fraudster and intermeddler of the estate of the deceased, **Omolo Onyando Omboro**.

In his supporting affidavits, the objector disclosed that the petitioner is his step brother as their late father had five wives and a total of eleven (11) children. That, the first wife, **Agnes Abuya Omolo**, had four children including the objector. The second wife, **Dorca Bala Omolo**, had one child i.e. the petitioner. The third wife, **Clementina Oguttu Omolo**, had three children. The fourth wife, **Margaret Kola Omolo**, had three children, while the fifth wife, the late **Okun Omolo**, had one child.

7. It was also disclosed in the supporting affidavit that the surviving children of the deceased are from the deceased's first, third and fourth houses and that being the eldest son, the objector upon the demise of their father sub-divided his estate into nine portions based on the number of the children. That, he has been occupying one of the portions for the last twenty-seven years and only came to learn of the impugned grant when the petitioner was in the process of confirming the grant for distribution purposes.

The objector further contended that the proceedings to obtain the grant were defective in substance and prayed that the same be revoked. He placed reliance on the decisions of **JAMLECK MAINA NJOROGE –VS- MARY WANJIRU MWANGI (2015) e KLR, A.S. AND 2 OTHERS –VS- S.A.M (2014) e KLR** and **RE- ESTATE OF SIAMETO OLE MUNGUTI (Deceased) (2015) e KLR**.

8. On his part, the petitioner submitted that the objection is not merited and ought to be dismissed as the subject matter in this case is also the subject in **CMCC (ELC) No.49 of 2018**, due for hearing on the 26th April 2019. That, this cause was dealt with openly and with the full knowledge of the objector and all affected person in **CMCC Succession Cause No.102 of 2005 at Homa Bay**. That, the estate property parcels No.987 and 989 did not fall within the ancestral land which was distributed to all members of the deceased family save eight survivors including the petitioner.

That, all the beneficiaries and the entire estate property were disclosed in the proceedings to obtain the grant. That, the petitioner pursued the land parcel No.987 as it was specifically given to him by the deceased during his life time to share with a church called Pefa Church in which all members of the deceased family attended and are members.

9. The petitioner requested that this succession cause be held in abeyance to await the outcome of the **land case No.49 of 2018** at the magistrate's court in Homa Bay since the two cases deal with the same subject matter. That, in the land case, the objector and his witnesses acknowledged that the petitioner was appointed the administrator of the estate of the deceased meaning that he was aware of the succession cause and the distribution of parcel No.987 to the petitioner. That, the objector was also aware that parcel No.989 was left for him and other beneficiaries.

The petitioner therefore contended that there was no fraud in the petition for grant of the impugned letters of administration.

10. In the replying affidavit, the petitioner indicated that there were only six beneficiaries of the estate including the petitioner and the objector. All the said beneficiaries were sons of the deceased save the last beneficiary **Akinyi Owiti Omolo**, who was a daughter-in-law of the deceased. That, the grant was confirmed on 9th September 2009, yet none of the beneficiaries had raised any objection until the present application was filed on 16th March 2018. That, the estate of the deceased comprised of the stated plots No.987 and 989 with the first plot measuring 0.24 Hectares and the second plot 0.56 Hectares. That, the first plot No.987 was given to the second house of the deceased to share with Pefa Church and is the subject matter in the land case. That, the confirmation of the grant in respect of the said plot No.987 was in conformity with the wishes of the deceased.

The petitioner therefore prayed for the dismissal of the objection with costs.

11. From all the foregoing, the basic issue arising for determination was whether the impugned grant was properly and lawfully obtained by the petitioner.

On the outset, the law of succession deals with inheritance to property and is normally operationalized by the death of the property owner and the devolution of property to the heirs and beneficiaries.

The Law of Succession Act (Cap 160 LoK) provides for mechanism by which property devolves from the deceased owner to the people who are left behind by him. It seeks to ensure that the right persons inherit the property of the deceased and the procedure for doing so.

It deals with both testate and Intestate Succession which applies as in this case where the deceased died without making a Will or having made a will that is invalid.

12. The Rules of intestacy determine which relatives inherit the property of a person who dies intestate. Normally, immediate family members such as spouses and children come first in the priority of inheritance and are followed by distant relatives such as parents, cousins, nephews and nieces.

The administrator is the person appointed by the court to manage the property of the deceased. He derives his authority from the document called a grant of letters of administration. It is such document that was obtained by the petitioner on 15th December 2005 which is the subject of the present dispute between the petitioner and the respondent, both sons of the deceased therefore equal in priority for purposes of

petitioning for the grant even if the objector is the eldest of the two. It is however, the objector's contention that the grant was not properly obtained as the petitioner concealed material facts in the process.

13. This is confirmed as much by evidence adduced herein showing that the deceased was a polygamist who was married to more than one wife but not less than five wives.

Being the son of the deceased's first wife, the objector was a step brother of the petitioner who was the only child of the deceased's second wife. All the five houses of the deceased save the fifth house were blessed with children male and female. The evidence was not clear as to whether all the sons and daughters of the deceased were consulted prior to the petitioner obtaining the grant. However, there was strong suggestion that not all beneficiaries were consulted for their consent by the petitioner. He indicated in his evidence that some of his male siblings were consulted but not the female siblings.

14. There was also evidence showing that the estate property available for distribution were two parcels of land i.e. **plots No.987 and 989**, but in the certificate of confirmation of grant dated 9th September 2009, only plot No.987 was availed for distribution and was wholly distributed to the petitioner notwithstanding the fact that he was not the only beneficiary and that the deceased had more than one house and therefore, any distribution of his estate ought to have been in accordance with **Section 40 of the Law of Succession Act**.

The evidence by the petitioner proceeded as if this were a land rather than a succession dispute and that is why he requested in his submissions that this succession cause be held in abeyance to await the outcome of a land case in the Environment and Land Court involving the estate property hereinabove aforementioned.

15. It is evident that the land dispute is a reflection of the petitioner's improper manner of obtaining the impugned grant by holding himself out as the sole beneficiary of the estate of the deceased and in particular plot No.987 which is seemingly shared with a church called Pefa on the wishes of the deceased.

Clearly, the deceased died intestate and that is why the petitioner approached the court for the first time for a grant of letters of administration intestate. If the deceased had already distributed his property before his death, then the present case would have been unnecessary as there would have been nothing available for distribution to his heirs and beneficiaries.

16. For all the foregoing reasons, it is apparent that the impugned grant was obtained by the petitioner by misrepresentations and concealment of material facts., In doing so, he acted improperly and unlawfully with the intention of disinheriting the other beneficiaries of the deceased's estate.

Consequently, the present application is merited and is hereby granted to the extent that the grant dated 15th December 2005 and the certificate of confirmation of grant dated 9th September 2009, both issued to the petitioner be and are hereby revoked with orders that a fresh grant shall forthwith issue in the name of the petitioner, the objector and one representative from the third and fourth house of the deceased and be confirmed after the expiry of six (6) months from this date hereof subject to an agreed mode of distribution in accordance with **Section 40 of the Law of Succession Act**.

Ordered accordingly.

J.R. KARANJAH

JUDGE

12.03.2019

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