



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 148 OF 2014

IN THE MATTER OF THE ESTATE OF NANGA OKUNGU (DECEASED)

BETWEEN

ANDREW ODHIAMBO NANGA.....PETITIONER/RESPONDENT

AND

PITALIS ARINGO OBUDHO NANGA.....1ST OBJECTOR/APPLICANT

THOMAS NGWESO OBUDHO NANGA.....2ND OBJECTOR/APPLICANT

ELISHA ONYANGO KIBUYE.....3RD OBJECTOR/APPLICANT

SAMSON OULO KIBUYE.....4TH OBJECTOR/APPLICANT

JUDGMENT

Introduction

1. **NANGA OKUNGU (hereinafter referred to as deceased)** died sometimes on 20th March, 1986. Deceased's estate comprised of the following:

- 1) Land Parcel No. **Kisumu/Wang'aya 1/954**
- 2) Land Parcel No. **Kisumu/Wang'aya 1/965**
- 3) Land Parcel No. **Kisumu/Wang'aya 1/1125**

2. Letters of administration were issued to the Petitioner/Respondent on 21st November, 2016. The grant was subsequently confirmed in his favour and a certificate of confirmation of grant was issued on 8th November, 2017.

3. Subsequently, the Petitioner/Respondent was issued with title deed to Land Parcel No. **Kisumu/Wang'aya 1/965** on the strength of which he filed **ELC CASE NO. 3 OF 2018** at Tamu Magistrate's Court seeking orders to evict the 4th Objector/Applicant from the said land.

4. This prompted the Objectors/Applicants to move this court by an application dated 5th October, 2018 seeking orders for revocation of the grant on the grounds among others that it was obtained through concealment of existence of other beneficiaries.

5. The court directed that the dispute be determined by way of *viva voce* evidence.

Objectors/Applicants' Case

6. The 4th Applicant/Objector stated that the 4th Applicant/Objector was his brother and that both were son of the late Cleopa Kibuye who was brother to the deceased. He stated that the deceased had 3 daughters and one son, Obudho Nanga the father to the 1st and 2nd Applicants/Objectors, and Maricus Okumu Obudho (deceased) and an unnamed daughter (deceased).

7. The witness further told court that during his lifetime, the deceased provided for him and the 4th Applicant/Objector and allowed him to establish his home on Land Parcel No. **Kisumu/Wang'aya 1/965** in 1975 from where the Petitioner/Respondent wants to evict him.

8. The 1st, 2nd and 3rd Applicants/Objectors echoed the evidence by PW1 and stated that they had also settled on deceased's land. They equally denied that the Petitioner/Respondent was a grandson of the deceased and stated that he was related to the deceased by way of inheritance by the deceased of the his mother after her husband and father of the Petitioner/Respondent one Odhiambo Ombura died.

9. The witnesses faulted the Petitioner/Respondent for filing a false letter dated 13.3.13 from the chief indicating that he was grandson of deceased and for filing a fraudulent death certificate of the deceased. PW1 produced as PEXH. 1 a certificate of death that shows that deceased died on 24.3.80 and not on 20.4.05 as shown on the certificate of death filed by the Petitioner/Respondent.

Petitioner/Respondent's Case

10. The petitioner stated that he was son to John Odhiambo Nanga who is son of the deceased. It was his evidence that the 1st and 2nd Applicants/Objectors are sons of Obudho Okungu, brother to the deceased whereas the 3rd and 4th Applicants/Objectors are sons to Kibuye Okungu brother to the deceased. He stated that each of the Applicants/Objectors had their own parcels of land but that the 3rd Applicant/Objector had invaded Land Parcel No. **Kisumu/Wang'aya 1/965** in December, 2016 and settled his 3rd wife there. He also stated that the Applicant/Objector cultivates Land Parcel No. **Kisumu/Wang'aya 1/1125** but has not settled there.

11. DW2 Jack Omondi Bowa, assistant chief Kamswa South stated that Obudho Okungu, father to the 1st and 2nd Applicants/Objectors; Kibuye Okungu, father to the 3rd and 4th Applicants/Objectors and the deceased were brothers. He stated that the Petitioner/Respondent was son of John Odhiambo Nanga son to the deceased.

Analysis and Determination

12. At the close of the case, parties agreed to file written submission which the respondent dutifully filed. I have considered the evidence on record and submissions filed on behalf of the Petitioner/Respondent and I have deduced the following issues for determination.

i. Should the Letters of Administration be revoked

ii. Who is entitled to inherit the deceased's estate

13. Section 76 of the Succession Act Cap 160 Laws of Kenya (*hereinafter referred to as the Act*) 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.”

14. In **Musa Nyaribari Gekone & 2 Others v Peter Miyianda & Another [2015] eKLR**, the court of Appeal held that:

“The expression “any interested party” as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate.”

15. The evidence on record especially from the chief DW2 corroborates the Petitioner/Respondent's case that his grandfather, the deceased herein was brother to the Applicants/Objectors fathers. The Petitioner/Respondent whose father is son to the deceased no doubt ranks in priority to that of the Applicants/Objectors. Having said that, I find and hold that the Petitioner/Respondent did not obtain the grant fraudulently and the Applicants/Objectors application for revocation of the grant issued to the Petitioner/Respondent cannot be maintained.

(See In re Estate of John Gakunga Njoroge (Deceased) [2015] eKLR).

16. **Section 39 of the Act** provides:

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

a) father; or if dead

b) mother; or if dead

c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

17. Under the provisions of **Section 66 (b)** and **Section 39 (e)** of *the Act*, the Petitioner/Respondent who is deceased's grandson by virtue of being the son to deceased's son has the nearest degree of consanguinity to the deceased as compared to the Applicants/Objectors.

18. Consequently, I find and hold that the Land Parcel No. **Kisumu/Wang'aya 1/954**, Land Parcel No. **Kisumu/Wang'aya 1/965** and Land Parcel No. **Kisumu/Wang'aya 1/1125** ought to and rightfully devolved upon the Petitioner/Respondent who is a grandson of the deceased. In arriving at this decision, I am fortified by the holding in Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR, where Musyoka J stated as follows: -

“.....grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

Disposition

19. As a result, it is hereby ordered **THAT**:

a) The objection has no merit and it is disallowed

b) Each party shall bear its own costs

DELIVERED AND SIGNED AT KISUMU THIS 7th DAY OF March 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Felix

Petitioner/Respondent - Present

For Petitioner/Respondent - N/A

Objectors/Applicants - Present

For Objectors/Applicants - N/A