



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 88 OF 2015

IN THE MATTER OF THE ESTATE OF DORICA CHWEYA alias DORCAS CHWEYA alias DORCAS CHWEYA NYANGAO (DECEASED)

BETWEEN

GEORGE OKUMO OOKO.....1ST PETITIONER/RESPONDENT

KLIOPHA RADUOLO OCHIDO.....2ND PETITIONER/RESPONDENT

AND

GEORGE ODHIAMBO ODERO.....OBJECTOR/APPLICANT

JUDGMENT

Introduction

1. **DORICA CHWEYA** alias **DORCAS CHWEYA** alias **DORCAS CHWEYA NYANGAO (DECEASED)** (hereinafter referred to as **deceased**) died sometimes on 16th April, 2014. Deceased's estate comprised of Land Parcel No. **EAST GEM/NYAMNINIA/721**.
2. Letters of administration were issued to the Petitioners/Respondents who describe themselves as grandson and step-son of the deceased.
3. By an application dated 14th October, 2015 filed on 15th October, 2015, the Objector/Applicant applied for revocation of the Letters of Administration on the ground that he was grandson of deceased and nearest degree of consanguinity to the deceased.
4. The court directed that the dispute be determined by way of *viva voce* evidence.

Petitioners'/Respondents' Case

5. PW1 WALTER OBONYA OPISI an elder who claimed to know the parties herein stated that the deceased was first married to Tom Ogutu. The witness did not know if the union was blessed with any children. It was his evidence that after the death of the deceased's first husband, she married NYANGAO OWADE with whom they had 4 children who include MARY AUMA the mother of the first Petitioner, OWANDE NYANGAO, LOLWE and WAMUNGA. It was also his evidence after the death of the second husband NYANGAO OWADE; deceased was inherited by ODERA OBADIA with whom they bore no children. He told court that the 2nd Petitioner is the son of one OCHIDO brother to NYANGAO OWADE and is therefore a nephew of the deceased and not step-son of deceased as pleaded. The witness confirmed that the Objector was in occupation of deceased's land and that the Objector's relationship with the deceased arises from the fact that his grandfather inherited the deceased after the death of NYANGAO OWADE her 2nd husband.

6. PW2 Willis Omondi's evidence is that the only husband to the deceased that he knew was NYANGAO OWADE with whom they were blessed with children one of whom was Mary, the 1st Petitioner's mother. PW3 JOSEPH ATUK ODHIAMBO stated deceased was first married in Gongo after which she married NYANGAO OWADE with whom they were blessed with two children, Owade Nyangao and Mary Auma the 1st Petitioner's mother. He also stated that the deceased was inherited by ODERA OBADIA with whom they had two children, Nyamunga and another whose name he could not recall. PW4 GEORGE OKUMO OOKO, the 1st Petitioner stated that he was son of Mary Auma daughter of deceased and her second husband NYANGAO OWADE. It was his evidence that the deceased and NYANGAO OWADE were blessed with four children, his mother MARY AUMA, OWADE NYANGAO, WAMUNGA and LOLWE and the 2nd Petitioner was son of Ochido brother to NYANGAO OWADE. He also confirmed that the deceased was initially married in Gongo and was blessed with three children, Benjamin Okal, Joseph Odiak and Matete and that he was aware that Benjamin had children whose names he gave as Ochieng and Oduor. He confirmed that he had a brother by the name of John Otieno. He said he was unaware that that deceased was

remarried after the death of NYANGAO OWADE and stated that the Objector has been in occupation of deceased's land. The 2nd Petitioner supported the 1st Petitioner's case. He stated that deceased was inherited by ODERA OBADIA the grandfather of the Objector who has been in occupation of deceased's land.

7. PW6 JACKTON OLALE OLOO stated that his father Richard Oloo a step-brother to Owade Nyangao son to deceased and her 2nd husband NYANGAO OWADE. He confirmed that deceased bore two children with NYANGAO OWADE and two with OBADIA ODERA who had two other wives and further that the Objector was grandson of one of the other two wives of OBADIA ODERA.

Objector/Applicant's Case

8. The Applicant/Objector stated that his grandfather OBADIA ODERA had three wives who included the deceased whom he inherited and who was co-wife to his grandmother LUCIA NYAMUNGA the first wife to OBADIA ODERA. He conceded that the 1st Petitioner is deceased's grandson from her previous marriage. He stated that he was given title to deceased's land by his father Raymond Odero Odera. His evidence was supported by his brothers Wellington Otiende Odero (DW3) and Richard Odhiambo Odero (DW4).

9. DW2 JANET LOYO ODERO who described herself as step-mother of the objector gave similar evidence to that of the Objector and stated that deceased's land at Nyamninia ought not to be inherited by the Petitioners who are deceased's relatives from Gongo.

Analysis and Determination

10. I have considered the evidence on record, submissions filed on behalf of both parties and the cited authorities 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

11. **Section 66** of the **Law of Succession Act (hereinafter referred to as *the Act*)** provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate in the following terms:

“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 interests 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

12. The evidence on record did not disclose whether Benjamin Okal, Joseph Odiak and Matete the three children of the deceased and TOM OGUTU are dead or alive. The evidence disclosed that MARY AUMA and OWANDE NYANGAO two of deceased's children with NYANGAO OWADE are deceased. No evidence was tendred regarding the whereabouts of the other two children LOLWE and WAMUNGA.

13. Section 76 of ***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. In my considered view, the interest of the Objector who is a step-grandson of the deceased does not rank in priority to that of the 1st Petitioner who is a son of deceased’s daughter MARY AUMA. Having said that, I find and hold that that the Objector’s application for revocation of the Letters of Administration issued to the Petitioners and especially to the 1st petitioner who ranks in priority to him 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 1st Petitioner who is deceased’s grandson by virtue of being the son to deceased’s daughter has the nearest degree of consanguinity to the deceased as compared to the 2nd Petitioner and the Objector.

18. Consequently, I find and hold that the net intestate estate which comprises Land Parcel No. **EAST GEM/NYAMNINIA/721** registered in the deceased’s name ought to devolve upon the children of the deceased from her union with TOM OGUTU and NYANGAO OWADE and where deceased, their children who are grandchildren of the deceased notwithstanding that the Objector has been in occupation for a considerable length of time. 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) The administrators are directed to within 30 days from today’s date, proceed to apply for confirmation of the grant in accordance with the provisions of the law after ascertaining and determining all persons (the children of the deceased and where deceased, their children who are grandchildren of the deceased) and their respective beneficial entitlement to the estate

c) The Objector is condemned to pay costs to the Petitioners/Respondents.

DELIVERED AND SIGNED AT KISUMU THIS 6TH DAY OF MARCH 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant	- Felix
Petitioners/Respondents	- N/A
For Petitioner/Respondent	- N/A
Objector/Applicant	- Mr Oboso/Mr Wasons
For Objector/Applicant	- N/A