



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**SUCCESSION CAUSE NO.103 OF 2015**

**IN THE MATTER OF THE ESTATE OF:**

**PAUL OBINGO OLWAGA .....DECEASED**

**AND**

**NYOLOO WASHINGTON OMONDI.....APPLICANT/OBJECTOR**

**VERSUS**

**ELIUD OMOLLO NYOLOO.....PETITIONER/RESPONDENT**

**RULING**

[1] The late **PAUL OBINGO OLWAGA** (deceased), hailed from east Kagan Location – Rangwe - Homa Bay County. He passed away on the 8<sup>th</sup> August 2004 at the age of ninety (90) years and according to the chief's letter dated 3<sup>rd</sup> June 2014, was survived by four sons and four daughters but one son and one daughter are now deceased. The three surviving sons are **Eliud Omollo Nyoloo**, **John Owili Nyoloo** and **Enock Muombo Nyoloo**, while the surviving daughters are **MARGARET AOKO OCHOGO**, **EUNICE OBONYO OWADE** and **MARY ADOYO OMOLLO**. The deceased children are **THOMAS OLWAL NYOLOO** and **DORINE AUMA**.

[2] The eldest son, **ELIUD OMOLLO** (petitioner), filed the necessary petition for Letters of Administration Intestate on 25<sup>th</sup> March 2015, and this was issued to him on 29<sup>th</sup> January 2016. He thereafter took out summons for confirmation of grant on the 19<sup>th</sup> August 2016, but it remains pending.

In the meantime, on 5<sup>th</sup> October 2016, **NYOLOO WASHINGTON OMONDI**, filed summons for revocation of the grant issued to the petitioner on the basis that he was a grandson of the deceased and therefore a beneficiary of the estate of the deceased but was not consulted or included as a family member. He contended that the petitioner concealed material facts with regard to the identity of all the rightful beneficiaries to the estate.

[3] The grounds in support of the application are detailed in the applicant's supporting affidavits dated 14<sup>th</sup> December 2016 and in 5<sup>th</sup> October 2016.

It is this application which is the subject of this ruling in terms of the directions taken on 18<sup>th</sup> September 2018 to the extent that the application be heard by way of affidavit evidence. In that regard, written submissions dated 29<sup>th</sup> January 2019 were filed by the applicant through the firm of **P.R. Ojala & Co. Advocates**, while the firm of **G.S. Okoth & Co. Advocates**, filed written submissions dated 22<sup>nd</sup> October 2018, on behalf of the respondent.

[4] However, in a strange twist of the process, the submissions by both parties refer and are addressed to the applicant's/objector's affidavit of protest dated 23<sup>rd</sup> February 2017 instead of the application at hand dated 5<sup>th</sup> October 2016. This confusion can be traced to the petitioner's summons for confirmation of grant dated 10<sup>th</sup> August 2016 and the proceedings which followed in respect thereof commencing on 6<sup>th</sup> September 2016 when the summons was listed for hearing for the first time and the proposed mode of distribution of the estate was read to all those present. Despite their agreement on the proposal, the court declined to confirm the grant in the absence of medical evidence that one of the beneficiaries, **Mary Adoyo Omollo** was indisposed.

[5] On the 13<sup>th</sup> September 2016, when the matter was again listed for hearing, confirmation of the grant did not materialize as the court wondered why the widow and children of the deceased's late eldest son, **Thomas Nyoloo**, were excluded from the proposed distribution of the estate. The court then went ahead to order that the widow and/or child be included as beneficiary and attend court on 6<sup>th</sup> October 2016, on which date her son, (Nyoloo Washington Omondi), appeared and indicated that he was opposed to the proposed mode of distribution as it had omitted his late father's house.

The court then advised the parties to engage in negotiations with a

view to resolving the matter but directed that an affidavit of protest be filed as what had previously been filed by the applicant (Washington) was a summons for revocation of grant.

[6] Nothing was said about the fate of the summons for revocation. It remained intact as it was neither withdrawn by the applicant nor struck out by the court on its own motion.

Since then, the parties proceeded as if they were negotiating on the affidavit of protest with a view to agree or disagree and leave the matter to the court for its determination. Ultimately, the matter was listed for hearing on 5<sup>th</sup> June 2018, on which date MR. OKOTH appeared for the petitioner and MR. RATEMO holding brief for MR. OJALA appeared for the applicant/protestor/objector. It was then that MR. OKOTH, informed the court that what was due for further hearing was the summons for revocation of grant dated 5<sup>th</sup> October 2016. From then onwards, the matter proceeded as if it related to the summons for revocation rather than summons for confirmation on which the affidavit of protest was based.

[7] Nonetheless, parties were given more opportunity to engage and settle the matter. They failed and on the 18<sup>th</sup> September 2018, directions were given that the application vide the summons for revocation of grant dated 5<sup>th</sup> October 2016, be heard by way of affidavit evidence and on the 25<sup>th</sup> September 2016, the parties indicated that they would proceed with the matter by way of written submissions. These were later filed and a date for oral highlighting was set i.e. 26<sup>th</sup> February 2019.

On that 26<sup>th</sup> February 2019, the parties indicated through their respective counsel (Mr. Ojala and Mr. Okoth) that they were fully relying on their respective submissions.

The ruling was thus set for the 5<sup>th</sup> March 2019, but having gone through this matter's memory lane it may safely be stated that there is no ruling to be made with regard to the summons for revocation of grant dated 5<sup>th</sup> October 2016 as no arguments were led by the

parties in respect thereof yet it was to lay and provide the foundation for the ruling. Instead, the parties arguments or submissions were in relation to the affidavit of protest dated 23<sup>rd</sup> February 2017, **albeit** wrongfully.

[8] While it is unfortunate that the matter had to take such a twist resulting in the wastage of judicial time and causing extreme inconveniences to the parties as well as taking a toll on their expenses incurred so far and not to forget the immense psychological torture weighing on them, this is a court of justice and justice demands that there be a conclusion of the dispute at this end without further delay.

Consequently, in the exercise of the powers conferred to this court under **Rule 73** of the **Probate and Administration Rules**, it is hereby ordered that the impugned grant dated 29<sup>th</sup> January 2016 and issued to the petitioner, **Eliud Omolo Nyoloo**, be and is hereby affirmed and upheld but shall be confirmed after the expiry of six

(6) months from this date hereof or a shorter period as may be necessary only after all beneficiaries have been included in the distribution of the estate property among the surviving children of the deceased and the spouses and/or eldest children of the deceased's departed children **THOMAS OLWAL NYOLOO** and **DORINE AUMA**.

[9] In the event that the grant remains unconfirmed within the next six (6) months from this date hereof due to the failure of the beneficiaries to agree on distribution, it shall forthwith stand revoked and the matter be referred to the Public Trustee for necessary administration and/or distribution of the estate property.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**05.03.2019**

[Read and signed this 5<sup>th</sup> day of **March, 2019**].