



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 1349 OF 2013

IN THE MATTER OF THE ESTATE OF EDWIN OKELO AGOT OKECH

BETWEEN

STEWART JALANG'O AGOT.....PETITIONER/RESPONDENT

AND

GEORGE OKOTH ODONGO.....OBJECTOR/APPLICANT

JUDGEMENT

Introduction

1. The deceased, **EDWIN OKELO AGOT OKECH (hereinafter referred to as the deceased)** died sometimes on 9th April, 2011. The deceased's estate comprises of land parcel **NORTH SAKWA/MARANDA/1622**.
2. Letters of administration were issued to the Petitioner on 30th April, 2014.
3. A certificate of confirmation of grant was issued in favor of the Petitioner on 15th December, 2014.

Application

4. The Notice of Motion before the court is dated 1st August, 2016. The applicant seeks the following orders:

- a) **That the Honourable Court be pleased to issue an injunction restraining the Respondent from selling, disposing, subdividing and also from evicting the Applicant from land parcel No. NORTH SAKWA/MARANDA/1622**
- b) **That the Honourable Court be pleased to revoke and nullify the Grant of Letters of Administration issued to the Respondent on 30th January, 2014 and confirmed on 15th December, 2014**
- c) **That the registration of the Respondent as the registered proprietor of land parcel No. NORTH SAKWA/MARANDA/1622 be cancelled and restored in the name of the deceased**
- d) **That the Respondent to pay costs of the application**

Applicant's/Objector's Case

5. The objector testified that he was son to the deceased and one Rose Atieno Odongo who was also deceased. Objector stated that his parents solemnized their marriage in church on 12th October, 1989 and he identified a certificate of marriage in support thereof. Objector named his siblings as Dorine Atieno, Beatrice Adhiambo, Carren (deceased), Victor (deceased) and Risper Akinyi (deceased).
6. It was Objector's evidence that their parents separated in 1991 long before their deaths and that him and his siblings were brought up at the

home of their grandparents, Philister Jowi Odongo and Aloyce Odongo (deceased).

7. Objector stated that his sister Beatrice returned to their father's home in 2003 and remained with their father until he died whereas he returned in 2008 and lived in the Petitioner's servant's quarter's because he had not built a house.

8. Objector recalled that he attended his father's funeral in 2011 and in support thereof produced the funeral program which listed his mother Rose Atieno as deceased's spouse and him and his 3 sisters as deceased's children.

9. Objector also produced photographs of the funeral from which he identified among others himself, his siblings Dorine and Beatrice and his aunt Dorothy Auma (deceased's sister). Objector also identified photographs of a semi-permanent house that he had constructed on his late father's land.

10. The Objector explained that he obtained his ID card at a time that he was living with his grandparents and had thus used his grandfather's name Odongo, as his third name.

11. Objector urged court to find that the deceased's children were the rightful beneficiaries to deceased's estate and not the Respondent who is deceased's brother.

12. **PW2 BEATRICE ADHIAMBO OKELO** said she was deceased's daughter born on 12th July, 1993 and in support thereof identified her baptism card with deceased's name on it and ID card identification report filed on 16.3.17 with her parents' names Edwin Okelo and Rose Atieno.

13. **PW3 BENARD OMBOKE AGOT** stated that he was step-brother to the deceased and the Petitioner. It was his evidence that deceased was married to Rose Atieno with whom they had three children George Okoth, **PW2** Beatrice Adhiambo and Dorine before they separated. He confirmed that the 3 children attended deceased's funeral and that the Objector was living on deceased's land where he had put had put up a semi-permanent house on deceased's land.

14. **PW4 ZACCHAEUS OKOTH AKENG'O**, father in charge Sacred Heart of Jesus - Nyangoma Catholic Church stated that Catholic Church St. Peter and Paul was consecrated and its name changed to Sacred Heart of Jesus Nyangoma Catholic Church on 15th June 2008. He produced copy of the Certificate of Enthronement of Sacred Heart of Jesus - Nyangoma; extract from the marriage book for Catholic Church St. Peter and Paul for the period December 1960 to October 2005 and a copy of certificate of marriage issued to Edwin Okelo and Rose Atieno on 12th October, 1989.

15. **PW5 PHILISTA JOWI ODONGO** said she was married to Aloyce Odongo (deceased) and that they were blessed with 5 children who included Rose Atieno the mother of the Objector. It was her evidence that deceased married her daughter Rose in a catholic church at Nyangoma and they were blessed with 5 children, two of whom are deceased. She recalled that after her daughter Rose disagreed with the deceased, she went back home and lived there with her children until she died. She further told court that when deceased's children became of age, the two daughters married and the Objector went back to deceased's home.

Petitioner's/Respondent's Case

16. The Petitioner conceded that he was deceased's brother who he said was not married. He confirmed that the deceased's photo on the funeral program produced by him and the other by the Objector were similar but denied knowledge of deceased's widow and children named in latter. He stated that Google search and Kenya Catholic Directory for 2006 disclosed that Catholic Church St. Peter and Paul Nyangoma where deceased and Rose Atieno were allegedly married did not exist and on that ground stated that the marriage certificate between them was not authentic. He denied that Objector and **PW2** Beatrice Adhiambo Owino and others were deceased's children and in support thereof relied on objector's ID card that bears his father's name as Odongo. Petitioner claimed that deceased was Edwin Okelo Agot Okech and not Edwin Okelo named on identification report for **PW2** Beatrice. He denied PW5's evidence that he had accompanied deceased to her home pay dowry for Rose Atieno. He denied that Objector and his siblings attended deceased's funeral and stated that he could only identify his sister Dorothy Auma; his eldest son James Jalang'o and the Objector on one of the funeral photographs produced by the Objector but that he did not know where the photographs were taken.

17. **DW2 DOROTHY AUMA AGOT**, sister to deceased and the Petitioner stated that deceased was not married and had no children. She denied that Objector and his siblings attended deceased's funeral and stated that she could only identify herself and Petitioner's eldest son James Jalang'o and the Objector on one of the funeral photographs produced by the Objector but that she did not know where the photographs were taken.

Analysis and Determination

18. As the case progressed, the Objector appears to have abandoned his application for injunction restraining the Respondent from selling, disposing, sub-dividing and also from evicting the Applicant from land parcel No. NORTH SAKWA/MARANDA/1622. 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. Was deceased married to Rose Atieno

ii. If the answer to (i) above is in the positive, were deceased and Rose Atieno blessed with children

iii. Has a case been made out for revocation of the Letters of Administration and Certificate of Confirmation of Grant issued

to the Petitioner

I will endeavour to address the issues as hereunder.

i. Was deceased was married to Rose Atieno

19. The objector, his sister **PW2 BEATRICE ADHIAMBO OKELO**; his uncle **PW3 BENARD OMBOKE AGOT** and grandmother **PW5 PHILISTA JOWI ODONGO** maintained that deceased was married to Rose Atieno. **PW4 ZACCHAEUS OKOTH AKENG'O**, father in charge Sacred Heart of Jesus Nyangoma tendered a copy of certificate of marriage issued to Edwin Okelo and Rose Atieno on 12th October, 1989 at Catholic Church St. Peter and Paul which he said was consecrated and its name changed to Sacred Heart of Jesus Nyangoma Catholic as shown on a certificate dated 15th June 2008.

20. The Kenya Catholic Directory for 2006 produced by the Petitioner disclosed that Catholic Church St. Peter and Paul Nyangoma did not exist. In view of the evidence by PW5, it would have been expected of the Petitioner to tender evidence that Catholic Church St. Peter and Paul Nyangoma did not exist as at 12th October, 1989 when the deceased and Rose Atieno were issued with a certificate of marriage by that church but that was not done.

21. In an attempt to prove that Catholic Church St. Peter and Paul Nyangoma did not exist, the Petitioner produced a letter dated 6th March, 2017 by the firm of Macharia Ng'aru and Wetangula Advocates to the Registrar of Societies to confirm whether Nyangoma Catholic Church was registered. In a response dated 17th March, 2017, the Registrar of Societies confirmed that the said church was not registered.

22. The letter by the Registrar of Societies confirming that Nyangoma Catholic Church was not registered is in my considered view of no probative view to the Petitioner's case since the church in issue is Catholic Church St. Peter and Paul Nyangoma and not Nyangoma Catholic Church.

23. The second set of letters dated 2nd February, 2017 requesting the Registrar of Societies to confirm if Catholic Church Peter and Paul Nyangoma was registered and the response dated 6th February, 2017 that the church was not registered did similarly not add value to the Petitioner's case since evidence by **PW5** was that the church was from 2008 known as Sacred Heart of Jesus Nyangoma Catholic as demonstrated by a certificate of consecration dated 15th June 2008.

24. The provisions of **Section 68** of the Evidence Act concerning production of secondary evidence were restated in **re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR** cited by the Petitioner.

25. The deceased and Rose Atieno who are the parties to the certificate of marriage dated 12th October, 1989 are long dead. It is trite that an original certificate of marriage is issued to the parties contracting the marriage. To demand that the Objector or **PW5** tender the original certificate of marriage between deceased and Rose Atieno would be irrational. The certificate of marriage is in English language and did not require translation and hence the case of **Paul Tono Pymto & Another v Giles Tarpin Lyonnet [2014] eKLR** cited by the Petitioner is irrelevant to this cause. Consequently, I find that the copy of the certificate of marriage dated 12th October, 1989 between deceased and Rose Atieno is admissible under the provisions of **Section 68 (1)(a) (ii)** of the Evidence Act which provides that

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases–

(a) when the original is shown or appears to be in the possession or power of–

(ii) a person out of reach of, or not subject to, the process of the court (*Emphasis Added*)

26. Further to the foregoing, **PW4 ZACCHAEUS OKOTH AKENG'O** tendered an extract from the marriage book for Catholic Church St. Peter and Paul Nyangoma for the period December 1960 to October 2005 confirming that the copy of certificate of marriage in issue issued to Edwin Okelo and Rose Atieno on 12th October, 1989 was extracted from therefrom. I am not convinced as alleged by the Petitioner that the Catholic church would go into a treacherous expedition of manufacturing records dating back to the 1960 just to support this case if indeed the deceased and Rose Atieno were not married in that church. Would the church stand to benefit for giving such evidence? My answer is in the negative.

27. From the foregoing, I am satisfied that evidence as tendered by objector; his sister **PW2 BEATRICE ADHIAMBO OKELO**; their uncle **PW3 BENARD OMBOKE AGOT** and grandmother **PW5 PHILISTA JOWI ODONGO** that the deceased married Rose Atieno is corroborated by the copy of certificate of marriage. Evidence to the contrary as tendered by the Petitioner and his sister **DW2 Dorothy Auma** is hence rejected.

ii. Were deceased and Rose Atieno blessed with children

28. Objector stated that his parents, deceased and Rose Atieno were blessed with 5 children. He named his siblings as Dorine Atieno, **PW2 Beatrice Adhiambo**, Carren (deceased), Victor (deceased) and Risper Akinyi (deceased). His evidence was corroborated by his sister **PW2 BEATRICE ADHIAMBO OKELO**; his uncle **PW3 BENARD OMBOKE AGOT** and grandmother **PW5 PHILISTA JOWI ODONGO**.

29. Objector told court that he attended his father's funeral together with his siblings **PW2 Beatrice** and Dorine. Objector in addition told court that the funeral was also attended by the larger Okelo family including the Petitioner, his sister **DW2 Dorothy Auma** and Petitioner's eldest son James Jalang'o. Objector produced a funeral program and photographs taken at the funeral and identified himself, his sister **PW2 Beatrice**, the Petitioner, his aunt **DW2 Dorothy Auma** and cousin James Jalang'o.

30. Even though the Petitioner disputed the funeral program produced by the Objector, he conceded that his sister **DW2 Dorothy Auma** and eldest son James Jalang'o appeared on the funeral photographs produced by the Objector. The photographs and images thereon are unblemished and it was dishonest and misleading for **DW2 Dorothy Auma** to even attempt to deny that she could identify her own image.

31. The Petitioner and his sister **DW2 Dorothy Auma** denied that the Objector was known to them but they failed to explain in what capacity the Objector had attended a funeral attended by the larger Okelo family. The fact that the Petitioner and his sister **DW2 Dorothy Auma** stated that they could not recall in whose funeral the photographs were taken leaves the Objector's evidence that they were taken during his father's funeral unchallenged.

32. With reference to failure the Objector to include deceased's name on his ID card, he explained that he obtained it at a time when he was living with his grandparents after his parent's separated and had thus used his grandfather's name Odongo, as his third name. This was confirmed by his grandmother **PW5 PHILISTA JOWI ODONGO**.

33. As regards PW2, her KCPE certificate bears the name **BEATRICE ADHIAMBO OKELO**. PW2's evidence that she was living with the deceased when she sat for her KCPE examination in 2004 is corroborated by the Objector. The evidence by Petitioner that Milenga Primary School that PW2 **BEATRICE ADHIAMBO OKELO** attended is within the same village that the deceased lived corroborates evidence by Objector and PW2 that the latter lived with deceased before he died.

34. PW2's ID card identification report filed on 16.3.17 has her parents' names Edwin Okelo and Rose Atieno on it. Petitioner stated that deceased was **EDWIN OKELO AGOT OKECH** and not Edwin Okelo but from the evidence on record and what is stated in the foregoing analysis, I have no doubt that **EDWIN OKELO AGOT OKECH** and Edwin Okelo refers to one and the same person.

iii. Has a case been made out for revocation of the Letters of Administration and Certificate of Confirmation of Grant issued to the Petitioner

35. **Section 38 of the Law of Succession Act** stipulates in what manner the net intestate shall devolve where intestate has left a surviving child or children but no spouse as is the case in this cause in the following terms:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

36. Section 76 of the Law of Succession 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

(b) That the grant was obtained by the making of a false statement or by concealment of from the court of something material to the case

37. 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 such as the applicants herein. The Objector/Applicant who I have found is a son of deceased is a person beneficially entitled to a share of the estate of deceased with *locus standi* to present the application for revocation of the grant.

38. Having said that, I find that the petitioner obtained Letters of Administration and Certificate of Grant in his favour by concealment of material facts and non-disclosure of the interest of the deceased's children and on the basis of an untrue allegation that all persons beneficially entitled to the estate had been ascertained and determined.

39. The Petitioner who is deceased's brother is not entitled to either a share or the whole of deceased's estate. Accordingly, I am satisfied that there is overwhelming evidence to support the objector's case for revocation of Letters of Administration and Certificate of Grant obtained by the petitioner.

Disposition

40. In the result, it is hereby ordered **THAT**:

a) Letters of administration issued on 30th April, 2014 and certificate of confirmation of grant issued on 15th December, 2014 in favor of the Petitioner be and are hereby revoked

b) Letters of administration be issued jointly to GEORGE OKOTH ODONGO and PW2 BEATRICE ADHIAMBO OKELO

c) The registration of the Respondent as the registered proprietor of land parcel No. NORTH SAKWA/MARANDA/1622 be and is cancelled and restored in the name of the deceased EDWIN OKELO AGOT OKECH

d) Once ownership of NORTH SAKWA/MARANDA/1622 has reverted to EDWIN OKELO AGOT OKECH, the appointed administrators shall be at liberty to apply for confirmation of the grant after ascertaining and determining all persons and their respective beneficial entitlement to the estate

e) The Petitioner/ Respondent is condemned to pay costs to the Objector/Applicant

DATED AND DELIVERED IN KISUMU THIS 4th DAY OF April 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner/Respondent - Present

For Petitioner/Respondent - Mr. Mwesigwa hb for Mr. Odongo

Applicant/Objector - Absent

For Applicant/Objector -Mr. Anyul