



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D. S. MAJANJA J.**

**SUCCESSION CAUSE NO. 47 OF 2000**

**IN THE MATTER OF THE ESTATE OF**

**GWONDA KEBATE, ONDANDE KEBATE, ONCHERE KEBATE AND KEBATE KEBATE (ALL DECEASED)**

**BETWEEN**

**PATRICK ONGECHI NYABUTO.....1<sup>ST</sup> APPLICANT**

**ERICK ONGECHI AKUNGA.....2<sup>ND</sup> APPLICANT**

**JUSTIN OМУYA.....3<sup>RD</sup> APPLICANT**

**AND**

**ROSE BWARI ONDIEKI.....RESPONDENT**

**RULING**

1. The deceased persons, **GWONDA KEBATE, ONDANDE KEBATE, ONCHERE KEBATE** and **KEBATE KEBATE** are brothers who were registered as proprietors in common of the property; **NYARIBARI CHACHE/B/B/BOBURIA/2460** ("Plot 2460"). It is common ground that they neither married nor had children. The respondent, Rose Bwari Ondieki ("Rose"), who was their daughter in law, applied for and obtained letters of administration and in due course the grant was confirmed on 19<sup>th</sup> March 2000 resulting in her taking Plot 2460 absolutely.

2. The matter for consideration is the Summons for Revocation dated 19<sup>th</sup> September 2018 seeking to revoke the grant issued to Rose. The application is supported by the deposition sworn on the same date by Patrick Ongechi Nyabuto ("Patrick") who states that the applicants are the beneficiaries of the deceased estate. They contend that the application for and confirmation of the grant of letters of administration was irregular as Rose concealed material facts by failing to name the beneficiaries of the deceased and proceeding to register Plot 2460 for herself and her children.

3. I directed that the matter be heard by oral testimony and in that regard I heard the testimony of Wilfred Monyene Yoge (PW 1), Isaac Aburi Ongenchi (DW 1) and Rose (DW 2). I also referred the parties to mediation but the parties could not agree on a resolution of the matter. I am now called upon to determine the matter.

4. As I stated earlier, it is common ground that the deceased were brothers and were registered as the owners of Plot 2460. According to DW 1, the land was registered in their names while they were away working in the tea farms. They never lived on the land and did not have any children. It is also common ground that ONCHERE, ODANDE and KEBATE died in the 1960's while GWONDA died on 17<sup>th</sup> August 1999 according to the death certificate.

5. The applicants' case is that since the deceased died without any spouses and children, their first cousins; ONGECHI MOTUMBI, KEROSI MOTUMBI and YOGI MOTUMBI and in their absence members of their respective families are the lawful beneficiaries of the estate. PW 1 testified that he was the son of Yoge while Rose was the wife of Charles Oyaro Ongenchi, the son of Ongechi and as such they both had equal priority in administration of the estate. PW 1 contended that since the four deceased persons were not married, Rose, as a daughter in law could not rank in priority to the other cousins. He alleged that Rose intended to disinherit the families of Yoge Motumbi, Kerosi Motumbo and Ongechi Motumbo who also had children and grandchildren who ought to benefit from the estate of the deceased.

6. The respondent's case Gwonda, who was the last to die of the brothers, gave the land to her husband, Charles, as a gift. DW 1, the eldest

son from the Ongechi family and the brother to the Charles testified that Gwonda gave Charles the land as Charles was taking care of him in his old age. When Charles died, Rose is the one who continued taking care of him until he died. He told the court that members of the family never complained about Charles and Rose keeping the land and the issue only arose recently. Rose testified that when she married, she found Gwonda residing on Plot 2460. He did not have a proper house so they built one for him and took care of him until his death. She further stated that she had been living on Plot 2460 for 24 years without any claim and that it is the applicants who incited other family members to claim the land.

7. Three of the deceased persons died in the 1960's when the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* ("the Act") was not in force. By virtue of **section 2(1)** of thereof, distribution of their respective shares was governed by customary law. Since the three brothers died and left Gwonda, he effectively inherited their shares in Plot 2460. As Gwonda died in 1999, the *LSA* applies to the administration and distribution of his estate which includes the shares left behind by his brothers. The applicant's case is grounded on the provisions of **section 39** of the *LSA* states as follows:

39. *Where intestate has left no surviving spouse or children*

*(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.*

8. The application of **section 39** of the *LSA* would mean that the deceased's cousins and their heirs would be entitled to the property in equal shares. However, **section 39** aforesaid is not absolute. It is also subject to **section 42** of the *LSA* which specifically states that:

42. *Where—*

*(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

*(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.*

43. I am satisfied that Charles was given Plot 2460 by Gwonda as a gift. Rose, as wife to Charles, was thus entitled to apply for letters of administration. Whereas, she was required to disclose that all the other beneficiaries being the deceased persons' nephews once removed, I do not find that any purpose will be served by revoking the grant in this matter. I also note while the applicants accuse Rose of failing to disclose all the beneficiaries, they did not do so in their deposition. There is ample evidence that the property was a gift to Charles and his wife, Rose who took care of Gwonda in his old age. He invited them to his land and they took care of him by building his house. When Charles and Rose built their house on the property none of the family members protested and indeed for a period of 18 years they were silent and had accepted the fact that Charles and his wife were entitled to inherit and enjoy the property.

44. The applicants complained that Rose wanted to disinherit them but Rose demonstrated in her affidavit that each of them had parcels of land either owned by them or their families hence they could not claim that they were fully dependent on the land left by the Gwonda. At the end of the day, I do not find that the applicants have discharged their burden to show that the grant issued to the respondent and duly confirmed should be revoked under **section 76** of the *LSA*. I also find that the application has been brought in bad faith with the intention of disinheriting Rose, a widow, of her inheritance.

45. I dismiss the summons for revocation dated 19<sup>th</sup> September 2018. As this is a family matter, there shall be no order as to costs.

**DATED and DELIVERED at KISII this 20<sup>th</sup> day of MAY 2019.**

**D. S. MAJANJA**

**JUDGE**

Mr Nyambati instructed by G. M. Nyambati and Company Advocates for the applicants.

Mr Onchwangi instructed by Ochoki and Company Advocates for the respondent.