



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SUCCESSION CAUSE NO. 836 OF 2015

IN THE MATTER OF THE ESTATE OF:

ONANGO ANYANGO.....DECEASED

AND

BENARD OCHIENG AJIGO.....PETITIONER/RESPONDENT

VERSUS

ANYANGO OUYA AWINO.....OBJECTOR/APPLICANT

RULING

[1] The summons for revocation of grant dated 17th August 2012, was re-instated for hearing by an order of the court made on 26th October 2018.

In that regard, the hearing proceeded by way of affidavit evidence and written submissions pursuant to an order of this court made on 19th December 2018.

In that regard, the petitioner/respondent, **BERNARD OCHIENG AJIGO**, filed his written submissions through the firm of **OGUTTU, OCHWANGI & OCHWAL ADVOCATES**.

The applicant/objector, **ANYANGO OUYA AWINO**, represented by the firm of **NYAUKE & CO. ADVOCATES**, did not file his submissions.

Nonetheless, the application was supported by the applicant's averments in his supporting affidavit dated 17th August 2012, which was opposed and/or countered by the respondent's replying affidavit dated 2nd October, 2012.

Further to both affidavits, both the objector and the respondent filed respective witnesses' statements.

[2] All the aforementioned documents i.e. the affidavits, written submissions and witnesses' statements, indicate that the basic issue for determination was whether the impugned grant was obtained without confirmation of the death of the deceased, **ONANGO ANYANGO**, or a court order presuming his death.

It cannot be gainsaid that in the absence of any evidence confirming the death of the deceased, a succession cause in respect thereof would be a fraud and thus, unlawful "**ab-initio**". Any accruing proceedings would be totally defective such as to attract the operation of **Section 76 (a)** of the **Law of Succession Act** even on a court's own motion.

A grant may be revoked if the proceedings to obtain it were defective in substance.

[3] Indeed, the Law of Succession Act is all about the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for any purpose connected and incidental thereto.

The present dispute relates to intestate succession involving the estate of the late **ONANGO ANYANGO**, comprising a portion of land known as **GEM/KANYANJWA/347**, which was equally shared between the respondent and his brother, **TOM ABONYO AJIGO**. It is this state of affairs that the present application aims to dismantle.

In the supporting affidavit, the objector averred that the deceased was his first cousin who went to Mombasa in the year 1955 to seek employment but is yet to return home. He implied that the deceased is alive and in that regard, he was not aware of any court proceedings seeking for a presumption of the deceased's death. He further implied that the death certificate used in this case by the petitioner was a false document and indicated that the alleged estate properly was registered in the name of the deceased but was occupied and held in trust by himself from the year 1962. That, it was in 1986, that he leased a portion of the estate to the petitioner for a period of three years, but after the expiry of the term the respondent refused to vacate and, continued to forcefully occupy the land only to later petition for the impugned grant.

[4] However, in the replying affidavit, the respondent indicated that the family tree respecting the deceased family showed that he was amongst the closest and immediate surviving members of the deceased's family, others being **William Okeyo Ajigo, Elly Okewa Ajigo and Tom Abonyo Ajigo**. That, the objector belonged to the Aduwe clan which had no connection or affinity and/or relationship to the deceased who belonged to Kanyumba clan.

That, the death of the deceased was reported to the Registrar of births and deaths in South Nyanza and a death certificate was issued. Therefore, it was unnecessary to apply for a court order on presumption of the death of the deceased.

The respondent contended that the objector was in any event, not related to the deceased but proceeded to occupy the estate property in the year 2000, long after the death of the deceased and continues to intermeddle with it.

[5] The respondent also contended that the objector never leased to him a portion of the estate property as alleged by himself and could not do so as he was not the lawful owner of the property but a co-owner of another parcel of land known as **No. Gem/Kanyanjwa/344**.

Whereas, the respondent urged this court to dismiss the summons for revocation of grant, the objector beseeched the court to allow the application and revoke the impugned grant. Both parties were supported by their respective witnesses who recorded statements which were never tested on credibility by way of cross examination.

[6] Basically, the determination of this matter is keyed to the evidential facts availed by both the objector and the respondent as well as the record of the court which clearly shows that the petitioner/ respondent applied for the grant on the 9th April 2009, in his capacity as a stepson of the deceased. In doing so, he presented the necessary death certificate dated 28th April 1993, confirming that the deceased died on 25th October 1975. He also produced the chief's letter dated 8th April 2009, showing that it was himself and his brother **Tom Obonyo Ajigo**, who were the only beneficiaries of the estate of the deceased.

These two vital documents were accepted by the court which then proceeded to issue the grant on the 7th July 2009, and confirmed it on the 16th February 2010.

[7] The objector did not feature in the chief's letter as a beneficiary of the estate nor even as a relative of the deceased or a person with interest in the estate property. His evidence did not succeed in invalidating the death certificate presented by the respondent. He provided no evidence to disprove the same and show that it was necessary for the respondent to obtain a presumption of death order from the court prior to applying for the impugned grant.

In sum, the objector failed to prove against the respondent any of the factors contained in **Section 76** of the **Law of Succession Act** for this court to exercise discretion in his favour and revoke the grant together with its certificate of confirmation of grant. This application is therefore wanting in merit and is hereby dismissed with each party bearing their own costs.

J.R. KARANJAH

JUDGE

15.05.2019

[Read and signed this 15th day of **May, 2019**].