



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. SUCCESSION CAUSE NO.41 OF 2016

FORMERLY PM'S COURT OYUGIS SUCC. CAUSE NO.70 OF 2011

IN THE MATTER OF THE ESTATE OF:

RISPA AKONGO ODONGO..... DECEASED

AND

CECILIA ISANDA..... APPLICANT

VERSUS

VINCENT OUMA ODONGO.....1ST RESPONDENT

PHILIPS ODERO ODONGO..... 2ND RESPONDENT

ROSELINE AWUOR ODONGO.....3RD RESPONDENT

ZIPRINA ATIENO ODONGO.....4TH RESPONDENT

HELLEN ACHIENG ODONGO..... 5TH RESPONDENT

MILKA AUMA ODONGO.....6TH RESPONDENT

MARY AOKO ODONGO.....7TH RESPONDENT

RULING

[1] The grant of Letters of Administration Intestate respecting the estate of **RISPER AKONGO ODONGO** dated 23rd January 2012 was issued to **VINCENT OUMA ODONGO** by the magistrate's Court at Oyugis and was confirmed on the 20th March 2013.

The certificate of confirmation of grant dated 20th March 2013, indicated that the estate property was a parcel of land described as **West Kasipul/Kasimba/15** which was to be distributed among the three beneficiaries i.e. **Vincent Ouma Odongo, Cecilia Isanda** and **Mathew Ombuya**.

Whereas **VINCENT** was allocated 1.34 Hectares of the land, **CECILIA** and **MATHEW** were jointly allocated 0.26 Hectares.

[2] However, on the 29th November 2016, an application to revoke the grant was filed by **PHILIP ODERO ODONGO** on the basis that it was obtained fraudulently and by concealment of material facts.

The court considered the application and revoked the grant on the 24th March 2017 with an order that the ownership of the estate property do revert to the deceased, **Risper Akongo Odongo**.

However, pursuant to an application filed by **Cecilia Isanda** through the firm of **H. OBACH & ASSOCIATES ADVOCATES** on 30th June 2017, the order for revocation of the grant was set aside with the result that the initial application for revocation of grant made vide the

chamber summons filed on 29th November 2016, was restored for hearing on the merits. Philip was thus described as the objector/applicant while Vincent was the first respondent. Cecilia and Mathew became the second and third respondents respectively.

[3] This court heard the application by viva voce evidence where Philip testified as the plaintiff (PW1) and Vincent as the defendant (DW1).

However, at the conclusion of the hearing on 10th July 2018, the parties notified the court that they had agreed that the grant be revoked and a fresh grant be issued in the names of the plaintiff (Philip) and defendant (Vincent).

The court noted that the agreement amounted to a compromise of the application and ordered that the grant issued to Vincent Ouma Odongo dated 23rd January 2012, and the resultant certificate of confirmation of grant dated 20th March 2013, be revoked and a fresh grant be issued to both Vincent and Philip and either party be at liberty to apply for confirmation of the new grant after the expiry of six months or a lesser period.

[4] Accordingly, a fresh grant of letters of administration intestate was issued by this court on the 10th July 2018.

Later, on the 4th January 2019, the administrator Philip, filed the necessary summons for confirmation of the grant and proposed that the estate property being West Kasipul/Kasimba/15 be shared on equal basis of 0.8 hectares between him and the administrator Vincent.

However, the first administrator (Vincent) filed an affidavit of protest dated 9th February 2019 in which he proposes that the entire estate property be wholly distributed to himself as it had been given to him by their late father, while the second administrator (Philip) was given the family land No.14 which was thus registered in his name.

The suit estate property No.15 belonged to the deceased herein who was the third wife of the two administrator's father and therefore their stepmother. She preceded her husband in death and had no children of her own.

According to the first administrator (Vincent), the suit estate property was given to him by his father upon the demise of their deceased stepmother.

[5] The protest was heard by “**viva voce**” evidence. The first administrator (Vincent) testified as the plaintiff (PW1) while the second administrator (Philip) testified as the defendant (DW1). None of them called any witness.

Further to their oral evidence and their respective affidavits both have also placed reliance on their written submissions even though those of the second administrator (DW1) are styled “**reply to affidavit of protest**”.

The first administrator's affidavit of protest refers to the estate property as being Central Kasipul/Kasimba/15, but indicated in his testimony that that description was an error.

[6] After due and careful consideration of the matter on the basis of the supporting facts and those in opposition as well as the testimonies of both parties together with their respective submissions, it was apparent to this court that the parties argued the present summons for confirmation of grant and the related affidavit of protest as though this was a land dispute where ownership of the suit estate property was the issue rather than inheritance of the property after the demise of its registered owner i.e. the late **Rispa Akongo Odongo** (deceased) and/or her husband who was the late father of both the first and second administrators with their late mother who was one of their father's three wives including late **Rispa Akongo**.

[7] Although this matter revolves around the property of the deceased known as West Kasipul/Kasimba/15 (suit estate property) a second portion of land was incorporated into the dispute, albeit erroneously. This is the land referred to as West Kasipul/Kasimba/14 said to belong to the second administrator/defendant and duly registered in his name.

In actual sense, what is at the heart of the present dispute is not the second parcel of land but the estate property West Kasipul/Kasimba/15 or plot No.15. This is the property belonging to the deceased and registered in her name and for which the first administrator (Vincent) petitioned for the initial grant dated 20th March 2013, which was eventually revoked by this court on 10th July 2018 following an agreement to that effect between the two parties and a fresh grant issued to both of them on the same day.

[8] Apparently, the two did not agree on the mode of distribution of the estate property.

In his summons for confirmation of grant, the second administrator (Philip) came up with a proposed mode of distribution which is not in agreement with the first administrator's (Vincent) mode of distribution indicated in the affidavit of protest.

Whereas, Philip proposes that the property should be distributed equally between themselves, Vincent proposes that the property should be wholly distributed to himself for reason that their late father gave it to him after the death of their stepmother Rispa while Philip was given plot No.14. He (Vincent) contended that Philip is therefore not entitled to the estate property or any part thereof.

[9] It was evidently clear that all along, the estate property No.15 was the sole asset of the deceased which was availed for distribution.

Therefore, the reference to plot No.14 by the first administrator (Vincent) was uncalled for as the property was never available for distribution from the very beginning. It was not even referred by Vincent in his initial petition for grant of letters of administration respecting the deceased. His attempt to bring it into the fore in the present matter was a misconception if not an afterthought.

Be that as it may, with regard to the suit estate property No.15, the question that must now arise is whether the two administrators (Vincent and Philip) or any one of them was entitled to petition for grant of letters of administration respecting the estate of the deceased in the first place.

[10] Both administrators agreed that the estate property belonged to their stepmother who was the third wife of their late father and who died before their late father. They also agreed that at the time of her death, their stepmother had no children with their father and that the estate property was registered in her name and this position persisted even after the death of their late father.

The foregoing circumstances clearly suggested that after the death of the deceased, her husband (late father of the administrators) or any other person did not petition the court for grant of letters of administration respecting her estate. Therefore, her property was never transmitted to

the late father of the two administrators to give him lawful authority to give it to any of them. His interest in the property after the death of the deceased was only a life interest as he was the surviving spouse.

[11] Section 36 (1) of the Law of Succession Act provides for such situations by providing that:-

“Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to –

(a) The personal and household effects of the deceased absolutely, and

(b) The first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater, and

(c) A life interest in the whole of the remainder.

Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person”.

[12] Section 36 (3) of the Act provides that:-

“Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in Section 39”.

The late father of the administrators held a life interest in the estate of the deceased and this ended upon his death.

Within that period, he could not or purport to give to any of his children including the two administrators the estate property No.15 or part thereof. Neither the first administrator nor the second administrator could be heard to claim the property on that basis.

Indeed, none of them was entitled to petition for grant of letters of administration respecting the estate of their stepmother as they did not fall within the order of priority under Section 39 (1) of the Law of Succession Act unless the deceased was never survived by any other closer relatives, in which case, they could be covered under Section 39 (1) (e) as stepchildren of the deceased from her late husband's first house (i.e. first wife).

[13] However, the facts of the case indicated that the two administrators were the only surviving relatives of their stepmother. There were other children, mainly daughters, from their late father's first and second houses. All these were also entitled to petition for the grant respecting the estate of their stepmother in terms of Section 39 (1) (e) of the Law of Succession Act now that it was indicated that the deceased was never survived by her parents and/or siblings but by her late husband and/or her co-wives and/or the children of the co-wives. The life interest held by her surviving husband reverted to her upon his death through her close relatives i.e. parents or siblings or children of the siblings and in their absence, any other relatives of a lesser degree of consanguinity.

[14] Apart from the fact that, the deceased was a relative of the administrators by being a wife to their father, i.e. a stepmother, there was no blood relation between them. It would therefore be doubtful whether the children of her late husband with her co-wives would be covered under Section 39 (1) (e) of the Succession Act and if not, then the estate property No.15 ought to devolve upon the state and be paid into the consolidated fund in accordance with Section 39 (2) of the Succession Act.

But instead of the estate going to waste and taking into consideration that although the two administrators and their female siblings are not blood relatives of the deceased but in any event, relatives by marriage, this court deems it fit to make orders which shall serve the ends of justice and prevent further abuse of the court process in terms of Section 73 of the Probate and Administration Rules.

[15] In that regard and as a fair resolution of the first administrator's protest to the second administrator's summons for confirmation of grant, it is hereby ordered that, the estate property being **West Kasipul/**

Kasimba/15 be divided and distributed in equal portions to the two administrators together with their surviving five (5) female siblings i.e. **Roseline Awuor Odongo, Ziprina or Siprina Atieno Odongo, Hellen Achieng Odongo, Milka Auma Odongo** and **Mary Aoko Odongo**, who are all entitled to the estate of their late stepmother their status as married women notwithstanding.

And, for the avoidance of doubt, the portion of land described as No. West Kasipul/Kasimba/14, said to belong to and registered in the name of the second administrator does not form part of the estate property and is therefore not and has never been available for distribution.

Each party shall bear their own costs of the application.

Ordered accordingly.

J.R. KARANJAH

JUDGE

15.05.2019

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