



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.20 OF 2018

FORMERLY PM'S COURT MBITA SUCC. CAUSE NO.4 OF 2017

IN THE MATTER OF THE ESTATE OF:

OSAWA s/o ARINGO alias OSAWA ARINGO DECEASED

AND

JACOB ODHIAMBO KIMORI APPLICANT/OBJECTOR

VERSUS

GEORGE OTIENO PAMBO RESPONDENT/PETITIONER

RULING

1. The summons for revocation of grant dated 12th October 2018, seeks the revocation of the grant of letters of administration intestate issued on the 27th September 2017, and confirmed on the 19th April 2018, in favour of the petitioner, **GEORGE OTIENO PAMBO**.

The applicant/objector, **JACOB ODHIAMBO KIMORI**, alleges that the said grant was obtained fraudulently by making of false statements and concealment from the court of facts material to the case or that it was obtained by means of untrue allegations of facts essential in point of law to justify the grant.

These allegations, are fortified by the averments of the applicant in his supporting affidavit dated 12th October 2018, in which he contends that the deceased, **OSAWA s/o ARINGO** alias **OSAWA ARINGO**, was survived by his wife, **FILGONA AYO OSAWA**, who died on 28th November 2008 and that he had three brothers including himself (applicant) and two others who are now deceased thereby ranking him in priority to the petitioner in applying for the grant.

He contends that the petitioner is a nephew of the deceased and that the second wife of his late brother, **ALEXANDER**, by name **LORNA OLIMA** and the first wife of his late brother, **BENJAMIN**, by name **JANE AKUMU**, are alive and have children.

2. The applicant therefore implies that the petitioner, did not disclose all material information at the time of applying for the grant and ended up omitting the names of other beneficiaries of the deceased's estate with the result that the sole estate property being land parcel **NO.GEMBE/ WAONDO/WASAKI/1471**, was wholly transmitted to him.

In opposing the application, the petitioner/respondent deponed in his replying affidavit undated but filed herein on 25th February 2019, that he is an orphan and was taken in by the deceased and his wife to live with them as their son as they only had one daughter called **PRISCA ADHIAMBO** who was already married. Therefore, he ranked first in priority among family members of the deceased in applying for the grant and inheriting the estate of the deceased.

3. The respondent further deponed that he built his house on the material parcel of land where he lives with his family without any objection from the applicant who actually assisted in building the house although he is not an immediate member of the deceased's family but a member of the Komanga family and not the deceased's Kawadiku family. That, he (applicant) was given a share of his father's land being parcel **NO. GEMBE/WAONDO/WASAKI/1296**, which he later transferred to one **SHADRACK OGOLA NYAKWAMBA**.

That, in two meetings of the deceased's family convened by the area Chief of Gembe East location, Justus Ochwedo, it was agreed that he (Petitioner) was taken as a child of the deceased and given the material suit land. He, therefore petitioned for necessary grant of letters of administration with the knowledge of all the members of the deceased's family and as a matter of fact, the applicant/objector's brother by name **SIMEON OLOO KIMORI** was one of his sureties. He contends that the grant was properly obtained and confirmed.

4. The court gave directions that the application be canvassed by way of written submissions and in that regard, the applicant filed his witnesses' statements but not written submissions. The respondent/ petitioner filed his submissions on 29th April 2019.

Learned counsel for the applicant, **M/S NYARIGE**, intimated to the court that they filed written submissions which they were relying on but no such submissions are in the court file, instead we have witness statements which were not made on oath nor tested on credibility by cross examination thereby depriving them of probative value.

Nonetheless, further to his written statement, the objector placed reliance on his supporting affidavit dated 12th October 2018. The petitioner placed reliance on his replying affidavits filed on 25th February 2019 and the supporting replying affidavit, also undated but filed on 7th October 2019. He also filed statements of his witnesses but these do not have probative value as they were not made on oath, neither were they tested on credibility by cross-examination.

5. Basing the dispute on the facts contained in both the supporting and replying affidavit, it is apparent that it is not disputed that the petitioner was a dependent of the deceased who though not a biological son of the deceased was nonetheless taken to be a son of the deceased. He was therefore a beneficiary of the estate of the deceased. However, it is clear from the facts that he was not the only beneficiary. Other beneficiaries included the only daughter of the deceased called **Prisca Adhiambo** and perhaps the widow of the deceased who survived him at the time (i.e **FILGONA AYOO**) but who is now said to be deceased.

Although said to be married at the time, **PRISCA ADHIAMBO** was entitled to inherit her father's property unless she decided to forego the right. She is also said to be now deceased and in fact succeeded her father in that regard.

The objector, being a brother to the deceased could not therefore rank in priority to the deceased's widow and children in applying for the grant respecting the deceased's estate and/or inheriting the estate. In any event, his alleged lineage to the deceased is disputed by the petitioner.

6. And, even if the lineage is established, he would be regarded as a brother or step brother to the deceased who could not rank in priority to the petitioner in applying for the grant and/or inheriting the estate of the deceased as the sole survivor of the deceased who was only survived by his wife and the petitioner as his "**son**" before the demise of the wife.

The demise of the deceased's wife rendered the petitioner the sole beneficiary of his estate for the purposes of inheritance as there is no dispute that the deceased recognized and in fact accepted the petitioner as his own child for whom he voluntarily assumed permanent responsibility. Such a child is treatable as a child of a deceased person for the purposes of the Law of Succession Act (see **Section 2** of the **Act**).

7. It would therefore follow that the present application is without merit and is therefore dismissed with costs to the petitioner.

The grant of letters of administration dated 27th September 2017 and the certificate of confirmation of the grant dated 19th September 2018, both issued to the petitioner/respondent are hereby upheld.

Ordered accordingly.

J.R. KARANJAH

JUDGE

09.05.2019

[Read and signed this 9th day of May, 2019]