



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 26 OF 2013

IN THE MATTER OF THE ESTATE OF DOMNIC OMORO OBOTE ALIAS DOMNICUS OMORO OBOTE(DECEASED)

BETWEEN

VICTOR OTIENO MUDHUNE.....PETITIONER/RESPONDENT

AND

JAMES OTIENO AMOLO.....OBJECTOR/APPLICANT

JUDGMENT

Introduction

1. **DOMNIC OMORO OBOTE ALIAS DOMNICUS OMORO OBOTE (hereinafter referred to as deceased)** died sometimes on 4th November, 2003. Deceased's estate comprises of Land Parcel No. **EAST GEM/ANYIKO/966**.
2. Letters of administration were issued to the **BARRACK MUDHUNE OWEGI**, the original petitioner now deceased (**hereinafter referred to as Original Petitioner**) and who described himself as nephew of the deceased on 18th June, 2013.
3. The grant was subsequently confirmed in favour of the **Original Petitioner** and a Certificate of Confirmation of Grant was issued on 19th March, 2014 and a titled deed was issued to the him on 10th April, 2014.

Application

4. By an application dated 22nd February, 2017 filed on even date is made under Sections 76 (a) and (b) of the Law of Succession Act (**the Act**) and Rule 44 (1) and 73 of the Probate & Administration Rules (**the Rules**). The Applicant seeks revocation of the certificate of confirmation of grant on the ground that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of material facts.

Objector/Applicants' Case

5. In explaining his relationship with the deceased, the Objector agreed with the family tree contained in the letter dated 22nd August, 2011 addressed to the Chairman Land Tribunal Court, Siaya, which had previously adjudicated on the disputed land between the parties herein. The family tree shows that the parties herein are descendants of one **Wangwe** who had 3 wives. It also shows that the **Original Petitioner** is a **sixth degree** descendant of **WANGWE'S** first wife **MUNGALA** whereas the Deceased is a **fifth degree** descendant of **WANGWE'S** second wife **WAUDI**. It also shows that the Deceased's great-grandfather **ORERA** is also great-grandfather to the Objector's father's. The Objector stated that **Deceased** was not married and took issue with the **Original Petitioner** who is a distant relative to the **Deceased** for disinheriting him.

6. The Objector's witnesses **PW2 Edward Oyier Angwata** and **PW3 Michael Okach Odawa** said they are distant relatives of the deceased and stated that the Objector was the closest relative of the deceased and not the **Original Petitioner**.

Petitioners' Case

7. **DW1 IGNATIUS OMOLO ONJAK** retired chief Jina Location stated that **Owegi Mudhune**, the father of the **Original Petitioner** informed him that the Deceased had given his land that is in issue to the **Original Petitioner**. It was also his evidence that sometimes in

1993, the **Deceased** and the **Original Petitioner** went to his office and the former wrote a letter in Dholuo (which the witness translated into English) in which the deceased asked the **Original Petitioner** to take care of the land in issue.

8. **DW2 CHARLES OWUOR OYOLO** assistant chief Jina Sub- Location stated that he did not know the deceased or the parties to this cause or the dispute in issue and that all he did was to issue a burial permit for the Deceased.

9. **DW3 VICTOR OTIENO MUDHUNE** son of the **Original Petitioner** (Deceased) was substituted for the **Original Petitioner** by an order dated 31st July, 2018. He adopted affidavits filed by the **Original Petitioner**. He similarly agreed with the family tree contained in the letter dated 22nd August, 2011 addressed to the Chairman Land Tribunal Court, Siaya which shows that the parties herein are descendants of one **Wangwe** who had 3 wives and that his father was from the house of the first wife **MUNGALA** whereas the Deceased and Objector are descendants of **WANGWE'S** second wife **WAUDI**.

10. The Petitioner contended that the land in issue originally belonged to his grandfather **OWEGI MUDHUNE** who donated it to the deceased during adjudication and that it was for that reason that the **Deceased** sometimes in 1993 asked the **Original Petitioner** to take care of the land with the intention of reverting it back to the descendants of **OWEGI MUDHUNE**.

11. **DW4 GEORGE OWITI NYAMWANGA** stated that the Objector had established one home on the suit land which is situated in Nyamninia B village and another home in Nyamninia A village whereas **DW5 BOAZ OKOTH OTIENO** stated that **OWEGI MUDHUNE** gave the suit land absolutely to the deceased during adjudication.

Analysis and Determination

12. I have considered the evidence on record and submissions filed on behalf of both parties and I have deduced the following issues for determination.

i. Whether the Letters of Administration and Grant should be revoked

ii. Who is entitled to inherit the deceased's estate?

13. Section 76 of the **Law of Succession Act** (hereinafter referred to as *the 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-

(a) that the proceedings to obtain the grant were defective in substance;

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

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

14. In **Musa Nyaribari Gekone & 2 Others v Peter Miyienda & another [2015] eKLR**, the court of Appeal held that:

“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.”

15. As stated hereinabove, the family tree of the parties herein shows that the Deceased's great-grandfather **ORERA** is also great-grandfather to the Objector's father's. Having said that, I find that the Objector has a right or expectancy in the estate and is thus entitled to apply for revocation of the grant.

16. **Section 66** of *the Act* provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate in the following terms:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors

17. From the evidence on record, it is not disputed that the deceased was not married and did not have children and **Part V of the Act** becomes applicable.

18. Section 39 of *the Act* provides that:

(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.

19. As stated hereinabove, there is evidence that **Deceased** was not married and did not have children. There is no evidence that he was survived by any of the relatives at Section 1 (a), (b), (c) and (d) above. The case for inheritance in this case therefore turns around the relatives who are in the nearest degree of consanguinity up to and including the sixth degree under Section 1 (e) above.

20. I have considered Petitioner’s contention that the land in issue originally belonged to his grandfather **OWEGI MUDHUNE** who gave it to the Deceased and I find that the contention not supported by material evidence. And even supposing that that was factual, there is no evidence that the alleged gift was not absolute. Under the provisions of **Section 66 (b)** and **Section 39 (e)** of *the Act* and in view of the family tree in this case, I find that the Objector who together with the deceased are descendants of **WANGWE’S** second wife **WAUDI** has the nearest degree of consanguinity to the deceased as compared to the **Original Petitioner** who is a descendant of **WANGWE’S** first wife **MUNGALA**.

21. Consequently, I find and hold that Petitioner’s interest in the Deceased’s estate does not rank in priority to that of the Objector and his claim cannot therefore be maintained. (See **In re Estate of John Gakunga Njoroge (Deceased) [2015] eKLR**).

22. Having said that, I find that the Objector has made a case for revocation of the Letters of Administration and Grant issued to the **Original Petitioner**.

Disposition

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

a) Letters of administration issued on 18th June, 2013 to the BARRACK MUDHUNE OWEGI, (hereinafter referred to as Original Petitioner) and the Certificate of Confirmation of Grant was issued in his favour on 19th March, 2014 are hereby revoked

b) Letters of administration shall issue to JAMES OTIENO AMOLO, the Objector/Applicant

c) The registration dated 10th April, 2014 of BARRACK MUDHUNE OWEGI, (hereinafter referred to as Original Petitioner) as the registered proprietor of Land Parcel No. EAST GEM/ANYIKO/966 is hereby cancelled and restored to the name of the Deceased DOMNIC OMORO OBOTE alias DOMNICUS OMORO OBOTE

d) Once ownership of Land Parcel No. EAST GEM/ANYIKO/966 has reverted to DOMNIC OMORO OBOTE alias DOMNICUS OMORO OBOTE, the administrator 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

DELIVERED AND SIGNED AT KISUMU THIS 2nd DAY OF *May* 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Felix

Petitioner/Respondent - Present

For Petitioner/Respondent - Mr Ogonde

Objector/Applicant - Present

For Objector/Applicant - N/A