



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 77 OF 2015**

**IN THE MATTER OF THE ESTATE OF: MATINUS OKORE, RANDA OKORE and OWINO OKORE - (ALL DECEASED)**

**CDOO.....APPLICANT**

**AND**

**ELIZABETH OILE.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**FLORENCE OWINO.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**ROSE AWINO OWINO.....3<sup>RD</sup> PETITIONER/RESPONDENT**

**LEONARD OKORE RANDA.....4<sup>TH</sup> PETITIONER/RESPONDENT**

**AND**

**PHILOMENA ADHIAMBO.....INTERESTED PARTY**

**RULING NO. 1**

1. The Applicant's herein, **CDOO**, filed Summons for Revocation dated and evenly filed on 02/03/2015 (hereinafter referred to as '**the Summons**'). The Summons seeks to revoke the Grant issued on 10/09/2013 for the administration of the estates of the three deceased persons herein namely **Martinus Okore, Randa Okore and Owino Okore**. The grant was issued to the four Petitioners herein and it was confirmed on 15/04/2014.
2. The Applicant swore and filed two Affidavits in support of the Summons. They are the Affidavit in Support of the Summons sworn and filed on 02/03/2015 and a Supplementary Affidavit sworn and filed on 23/10/2015.
3. The Summons is opposed by the Petitioners together with another beneficiary one **George Otieno Oile** and a Purchaser one **Philomena Adhiambo**. The Petitioners and the said Philomena Adhiambo filed a joint Affidavit through the third Petitioner one **Rose Awino Owino**. The Replying Affidavit was sworn and filed on 17/06/2015. George Otieno Oile filed a Notice of Objection to the Summons on 21/07/2015 which was accompanied by an Affidavit sworn on 15/07/2015. He also filed his Statement on 10/10/2017.
4. Directions on the hearing of the Summons were taken *inter alia* that the Summons be heard by way of *viva voce* evidence. The parties further agreed and with the approval of the Court the Petitioners filed fresh Summons for Confirmation of the Grant. The Summons for Confirmation was supported by the Affidavit of Rose Awino Owino sworn on 09/12/2016 and evenly filed. The Applicant also swore and filed an Affidavit on the proposed distribution on 02/02/2016. Both the Summons and the Summons for Confirmation were to be heard together.
5. Having settled all the preliminaries, the matter was heard. The Petitioners who were deemed as the Plaintiffs relied on the sole testimony of Rose Awino Owino. They were represented by **Mr. Kiseru** Counsel. The gist of the evidence of Rose Awino Owino was that the Petitioners fully complied with the law in obtaining the Grant and that the subsequent confirmation was within the law. The Petitioners contended that the Applicant was in fact registered in the original parcel of land number **Kanyamkago/Kawere I/xxx** (hereinafter referred to as '**Plot No. xxx**') alongside his uncles not as a co-owner but for and on behalf of his father one **John Oile** who was, during the adjudication exercise, unwell and admitted in a Homa Bay Hospital. Further, it was pointed out that the Applicant was by then only 5 years old and in law he could not own any property on his own. It was also contended that the Applicant illegally and unlawfully hived off a portion of Plot No. xxx claiming to be his share and irregularly registered it in his sole name under **Kanyamkago/Kawere I/xxxx** (hereinafter referred to as '**Plot No. xxxx**') which portion was instead the share of the Applicant's father. The Petitioners further averred that even after the Applicant had committed the blatant breach of trust over Plot No. xxxx still the Petitioners apportioned a further share of the remainder of Plot No. xxx to the family of John Oile in their desire for peace.

6. George Otieno Oile, who was represented by **Mr. Odingo** Counsel, supported the position that the Applicant's name in Plot No. xxx was placed on behalf of their father John Oile and that Plot No. xxx belonged to their father and as a result part of it must be allocated to him since the Applicant, who is his blood brother, has disinherited him under his current sole ownership of Plot No. xxx.

7. The Applicant, represented by **Mr. Sam Onyango** Counsel, contended that he was gifted the portion of Plot No. xxx which later became Plot No. xxx by his grandfather one Martinus Okore and vehemently denied that he was registered on behalf of his then ailing father who was by then admitted in hospital. He further claimed a share of his father's inheritance from the remainder of Plot No. xxx. The Applicant did not call any witness.

8. At the close of the respective cases the parties' Counsels filed written submissions in support of their rival positions thereby paving way to this decision.

9. In his submissions, **Mr. Sam Onyango** Counsel, vehemently submitted on the jurisdiction of this Court over the alleged issue of trust. Counsel submitted that this Court lacks the jurisdiction to otherwise determine whether the Applicant was registered in Plot No. xxx in trust of his father, one John Oile, since that is the exclusive preserve of the Environment and Land Court and that the issue was not for determination before this Court. **Mr. Kiseru** Counsel submitted at length on the issue that the Applicant was instead registered in Plot No. 636 on behalf of his father and Counsel was categorical that the issue is so central that once resolved then over one half of all the issues in this matter will stand resolved.

10. Having considered the matter, I agree with the two Counsels; that is **Mr. Kiseru** and **Mr. Sam Onyango**. On one hand I am in agreement that the issue of whether the Applicant was registered in Plot No. xxx on behalf of and in trust of his father remain very central in this dispute and its resolution will go a long way in settling various other pertinent issues. That will also accord this Court the best way in dealing with the subject land in light of the positions taken by the Petitioners, the Applicant, George Otieno Oile and Philomena Adhiambo.

11. On the other hand, the duty of a Succession Court is principally to protect estates of deceased persons which it has jurisdiction over and to oversee the transmission of those estates to the lawful beneficiaries. The High Court as a Succession Court is vested with requisite jurisdiction to discharge that mandate. However, if a dispute arises on the ownership of the land subject of the succession proceedings and/or the declaration of trusts over the land in issue, then such a dispute transcends the jurisdiction of a Succession Court courtesy of **Article 165(5) of the Constitution, Section 13 of the Environment and Land Court Act, No. 19 of 2011** among other relevant legal provisions. It is a dispute which calls for evidence to establish ownership or the existence of such a trust upon which finding a party may be a beneficiary for purposes of the distribution of the estate property before a Succession Court or not. (See the Court of Appeal in **Peter Moturi Ogotu vs. Elmelda Basweti Matonda & 3 others (2013) eKLR, Muthuita vs. Muthuita (1982-88) 1 KAR 42** and **Chogera vs. Maria Wanjira Kimani & Others (2005) eKLR**).

12. In reaching that position I am alive to the provisions of **Section 2(1) of the Law of Succession Act, Cap. 160** of the Laws of Kenya, which provides as follows: -

*'Except as otherwise expressly provided in this Act or any other written law, the provisions of this act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of the deceased persons dying after the commencement of this Act and to the administration of estate of those persons'*

13. My response thereto is that the **Law of Succession Act** is a pre-2010 legislation and pursuant to **Article 262** and the **Sixth Schedule** of the **Constitution** the **Law of Succession Act** must be brought into conformity with the **Constitution** and shall only remain in force and be construed with the necessary adaptations, alterations, qualifications and exceptions. It is the very **Constitution** that clearly demarcated the boundaries of the superior Courts with their respective jurisdictions. (See the Supreme Court decision in **Petition No. 5 of 2015, Republic - vs- Karisa Chengo & 2 Others [2017] eKLR**). I am further aware of the immense inconveniences, increased costs and unpredicted delay caused to parties who are forced to move from one Court to the other in dealing with disputes which could be easily dealt with by one Court but since jurisdiction is everything and a Court cannot legally act without it, the law must always prevail given that this country is firmly and constitutionally governed by the Rule of Law.

14. I must therefore find, which I hereby do, that this Court lacks the jurisdiction to determine the issue as to whether the Applicant was registered in **Kanyamkago/Kawere I/xxx** on behalf of and in trust of his father John Oile. That core issue must be first determined by the Environment and Land Court before this Court can proceed on with the Summonses.

15. Consequently, the following orders do hereby issue: -

(a) **This Court has no jurisdiction to deal with the declaration of trust over Kanyamkago/Kawere I/xxx and/or any resultant parcels thereto.**

(b) **There shall be a stay of any further proceedings in respect to the Summonses for Revocation and Confirmation herein pending the determination on the issue of the alleged trust over Kanyamkago/Kawere I/xxx and/or any resultant parcels thereto by the Environment and Land Court.**

(c) **The Petitioners and/or George Otieno Oile shall file and serve the proceedings before the Environment and Land Court within 60 days' failure to which the stay of proceedings shall be automatically discharged and the Summonses for Revocation and Confirmation shall be fixed for judgment.**

(d) **The prevailing status quo shall be maintained pending further orders of this Court.**

(e) **Parties be at liberty to apply.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 11<sup>th</sup> day of July 2019.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Mr. Kisera**, Counsel instructed by the firm of Messrs. Omonde Kisera & Company Advocates for the Petitioners and the Purchaser.

**Mr. Sam Onyango**, Counsel instructed by the firm of Messrs. Sam Onyango & Company Advocates for the Applicant.

**Mr. Odingo**, Counsel instructed by the firm of Messrs. Odingo & Company Advocates George Otieno Oile.

**Evelyne Nyauke** - Court Assistant