



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**SUCCESSION CAUSE NO.131 OF 2016**

**Formerly HC Migori Succession Cause No.43 of 2016**

**IN THE MATTER OF THE ESTATE OF:**

**ODINGA ADAK.....DECEASED**

**AND**

**TOBIAS OMONDI ODINGA.....1<sup>ST</sup> APPLICANT**

**CORNELIA ADHIAMBO ODINGA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CHARLES ALINGO ODINGA.....RESPONDENT**

**RULING**

[1] This succession cause involves the estate of the late **Odinga Odak** (deceased), for which the necessary grant of letters of administration intestate was issued to the petitioner/respondent, **Charles Alingo Odinga**, on the 11<sup>th</sup> February 1993 and confirmed on the 13<sup>th</sup> April 1993, by the Resident Magistrate's Court at Homa Bay.

The estate property comprised of a parcel of land described as **LR NO. SOUTH SAKWA/ALEGO/33**.

On 24<sup>th</sup> August 2016, after a period of about twenty three (23) years, the present application for revocation or annulment of the grant was filed at the High Court in Migori. It is dated 8<sup>th</sup> December 2014 and was made by the applicants/objectors, **Tobias Omondi Odinga** and **Cornelia Adhiambo Odinga**.

[2] The basic grounds for the application are that the proceedings to obtain the grant were defective in substance. That, the grant was obtained through fraud and misrepresentation of facts and by concealment from the court the full and active beneficiaries of the estate.

These grounds are buttressed by the averments of the first applicant in the supporting affidavit dated 8<sup>th</sup> December 2015 (sic).

Other than the prayer for revocation of the grant, the applicants also sought for an interim injunction order to restrain the petitioner from interfering with the applicants' occupation and use of the estate immovable property.

[3] On 30<sup>th</sup> November 2016, the respondent filed a replying affidavit dated 18<sup>th</sup> November 2016, opposing the application. This was followed by a supplementary affidavit dated and filed herein on 29<sup>th</sup> September 2017.

The hearing of the application proceeded by way of affidavit evidence. In that regard, written submissions were filed on behalf of the applicants on the 6<sup>th</sup> March 2019, by the firm of **Nyauke & Co. Advocates** and on behalf of the respondent on 2<sup>nd</sup> April 2019, by the firm of **G.S. Okoth & Co. Advocates**.

[4] Revocation and/or annulment of grant is provided for under **Section 76** of the **Law of Succession Act (Cap 160 Laws of Kenya)**, which provides that a grant, whether or not confirmed, may at any time be revoked if the proceedings to obtain it were defective in substance or that the grant was fraudulently obtained by the making of a false statement or by concealment from the court of something material to the case

among other factors. The factors aforementioned are the gravamen of this applicant.

It was therefore incumbent upon the applicants to establish those factors as against the respondent if this court were to exercise discretion in their favour.

[5] The facts deponed by the applicants indicated that the deceased at the time of his death on 28<sup>th</sup> August 1985 was survived by three wives and several issues.

A copy of the chief's letter dated 6<sup>th</sup> March 2014 and filed herein on 24<sup>th</sup> August 2016, confirms that the deceased was indeed survived by three wives including **Herinia Oria** (first wife), **Rosa Adoyo** (second wife) and **Cornelia Adhiambo** (third wife) and the second applicant herein).

Each of these spouses were blessed with several children. The first wife had five children (three sons and two daughters), the second wife had five children (two sons and three daughter). Her first son is the first applicant herein.

The third wife had seven children (five daughters and two sons).

[6] With regard to the actual persons who survived the deceased and presumably his dependants and beneficiaries of his estate, the allegation by the applicants to that effect as supported by the chief's letter are not substantially disputed by the respondent save that he contended with regard to the deceased's third wife (second applicant) that only one of her daughters was a biological child of the deceased with the remaining six children being the products of a levirate union between herself and one George Odhiambo Okidi.

The respondent implied that the children of the third wife with the levirator were not beneficiaries of the estate of the deceased as she had deserted the matrimonial home for eight (8) years only to return in 1994 with the levirator.

[7] This qualification by the respondent pertaining to the actual beneficiaries of the estate was apparently not disputed by the applicants and more so, the second applicant. Indeed, if the third wife bore six children for the levirator long after the death of the deceased, those children cannot be deemed to be beneficiaries of the estate of the deceased unless it was shown that they would fall under the category of dependants in terms of **section 29** of the **Law of Succession act**, in which case **Section 26** of the **Act** would come into play.

There was no evidence from the applicants to prove such dependency. It would therefore be safe for this court to agree with the respondent and find that save the biological daughter of the deceased with his third wife, the remaining six children begotten from her levirate union with one George Odhiambo Okidi are not beneficiaries of the estate of the deceased and what their mother will get from the estate may be distributed to them by herself from her own share of the estate property.

[8] It would therefore follow that the applicants' allegation of concealment by the respondent of material facts relating to the beneficiaries of the estate is unfounded and unsupported by the evidence.

The other allegation against the respondent related to fraud and misrepresentation of facts. This related more or less to the distribution of the estate (i.e. plot No.33) and therefore, the validity of the certificate of confirmation of grant dated **13<sup>th</sup> April 1993**.

The applicants averred that after obtaining the grant, the respondent proceeded to have it confirmed and in the process transferred the specified assets to himself.

[9] Indeed, the said certificate of confirmation of grant indicated that the deceased's movable assets which included money held at the Kenya Commercial Bank, Migori Branch and unspecified number of shares held by the deceased with Kenya Breweries Limited and B.A.T. (K) Limited.

Most significantly, the only immovable asset (i.e. plot No.33) appears not to have been included in that certificate of confirmation thereby implying that it was never availed by the respondent for distribution at that particular time. However, the applicants alluded to a second certificate of confirmation of grant dated **28<sup>th</sup> August 2013**, which perhaps dealt with the distribution of the said parcel of land and which the respondent used to have the property transferred to himself.

[10] A copy of the title deed dated 19<sup>th</sup> June 1993, availed herein by the applicants shows that the entire parcel of land measuring 7.8 hectares was registered in the name of the respondent as the absolute proprietor.

If this title was obtained in 1993, it would follow that it was so obtained on the strength of the certificate of confirmation of grant issued in the same year. This would mean the certificate dated 13<sup>th</sup> April 1993 rather than that dated 28<sup>th</sup> August 2013, which is not among the documents availed herein by either side. Its existence is therefore doubtful or it was confused with the earlier certificate which according to the respondent also catered for the estates immovable property in addition to the shares with B.A.T. (K) Limited, Kenya breweries Limited and also E.A. Breweries Limited.

[11] The title deed availed by the applicants showing that plot No.33 was wholly registered in the name of the respondent in 1993, strongly implies that the property was indeed catered for and availed for distribution vide the certificate of confirmation of grant dated 13<sup>th</sup> April 1993. It would appear that the copy thereof availed herein by the respondent was incomplete or the page identifying the property was missing.

Be that as it may, the respondent confirmed without dispute from the applicants that the monetary proceeds from the shares and the bank

account were utilized for the benefit of the entire family of the deceased and in particular, for the payment of education expenses for sons of the beneficiaries.

[12] As for the estate property (plot No.33), the respondent indicated that, it is held in trust by himself for his benefit and that of the other beneficiaries and that his efforts to sub-divide it for distribution to all the beneficiaries have always been frustrated by the applicants. However, a copy of the title deed produced by himself and the applicants does not show that the property is held in trust by him for the benefit of all the beneficiaries. Instead, the title deed shows and confirms that the property was wholly and absolutely transferred to himself (respondent) to the exclusion of the other beneficiaries.

This meant, that the respondent was dishonest by his act of transferring the entire parcel of land to himself without any reference to the rest of the beneficiaries and out of sync with the distribution of the entire estate as stipulated in the appropriate certificate of confirmation of grant.

[13] For all the foregoing reasons, this court finds that indeed the respondent acted fraudulently and dishonestly when he transferred the entire plot No.33 to himself in total disregard to the mode of distribution stipulated in the certificate of confirmation of grant and the beneficial interest of all the beneficiaries in the estate of the deceased.

Consequently, this application is allowed only to the extent that the certificate of confirmation of grant dated 13<sup>th</sup> April 1993 or any other certificate for that matter be and is hereby revoked with the result that a fresh certificate of confirmation of grant shall issue distributing the immovable asset (i.e. L.R. No. South Sakwa/Alego/33 or Plot No.33) in accordance with section 40 of the Law of Succession Act as the deceased was polygamous.

[14] The provision states that:-

**“(1) where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net estate shall, in the first instance be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.**

**(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”**

[15] With regard to the shares, these may be offered for sale and the proceeds be shared accordingly among the beneficiaries in the three houses of the deceased.

Each party shall bear their own costs of the application.

It is accordingly ordered.

**J.R. KARANJAH**

**JUDGE**

**04.07.2019**

[Read and signed this 4<sup>th</sup> day of July, 2019]