



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.38 OF 2013

IN THE MATTER OF THE ESTATE OF:

BERNARD GOR NYAGAYADECEASED

AND

ANDREW DAMBA DAMBA1ST APPLICANT

MARGARET AOKO DAMBA..... 2ND APPLICANT

VERSUS

JANE ANYANGO GOR RESPONDENT/PETITIONER

RULING

1. Bernard Gor Nyagaya (deceased), as per the death certificate dated 22nd May 2013, died on the 14th September 2011, at the very ripe age of ninety one (91) years.

He left behind a parcel of land described as No. Kanyamwa/K/Kwandiku/

1360 (plot No.1360) and on the 30th May 2013, Jane Anyango Gor (petitioner) petitioned for grant of letters of administration Intestate respecting his estate.

The letter from the chief dated 28th May 2013, indicated that the petitioner was the only wife of the deceased.

2. On the 16th May 2016, the grant was issued to the petitioners by this court and was confirmed on 7th February 2017 with the estate plot No.1360 being shared between the petitioner and an alleged buyer of part of the property called Tom Odhiambo Sipul.

Fifteen (15) acres of the land were transmitted to the petitioner while the buyer received seventeen (17) acres.

However on the 21st February 2017, Andrew Damba and Margaret Aoko Damba (applicants/objectors) filed the present summons for revocation of grant for orders that the grant issued to the petitioner on 16th May 2016 be revoked and a fresh grant be issued to the petitioner and the first objector (Andrew Damba) in their capacity as wife and nephew of the deceased respectively.

3. The grounds for the application are in the body of the summons and are supported by the averments of the first objector contained in his affidavit dated 1st December 2016.

These grounds are opposed by the petitioner on the basis of the averments in her replying affidavit dated 18th May 2017 and a further replying affidavit dated 6th August 2018.

As directed by the court, the application was canvassed by way of written submissions.

In that regard submissions dated 24th June 2019 were filed by the firm of **H. Obach & Partners advocates** on behalf of the applicants and those also dated 24th June 2019 were filed on behalf of the petitioner/respondent by the firm of **Nyauke & Co. Advocates**.

4. From the affidavit evidence and the rival submissions, it is accepted that this was an intestate succession, meaning that the deceased did

not make a will on how his estate was to be distributed upon his demise.

In the circumstances, the distribution of the estate among the dependants of the deceased was to be done in accordance with the relevant provisions of the Law of Succession Act (Cap 160 Laws of Kenya).

In that regard, **section 66** of the **Law of Succession Act**, would come into play in determining whether or not the petitioner was the rightful person to apply and obtain the grant respecting the estate of the deceased.

The provision provides that:-

“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 interest 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 to intestacy, with priority according to their respective beneficial interest as provided by Part V;

c. The public trustee and

d. Creditors.

Provided that where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove to will.”

5. It is herein admitted in evidence that at the time of his demise, the deceased was survived by the petitioner as his only wife and their two daughters who were married.

According to the petitioner, a granddaughter called **Mirab Akinyi Mafta**,

also survived the deceased and was the only one entitled to inherit the estate allocated the petitioner.

This implied that the deceased two surviving daughters could not inherit the estate on the basis of the false notion that they were married women.

In relation to the first objector, the petitioner contends that he is not an immediate member of her family and could not be consulted for the purposes of the impugned grant. Further, he had his own parcel of land and therefore devoid of any locus-standi to claim the parcel of land belonging to the deceased.

6. The respondent thus implied that the objectors are not clothed with any legal right to object to the grant issued to her as they do not have any beneficial interest in the estate of the deceased.

It was the respondent's submission that the first objector is a son of the brother of the deceased by name Adrienne Damba Nyagaya; while the second objector has no relationship of consanguinity and affinity to the deceased. As such, they cannot be deemed to be beneficiaries of the estate of the deceased.

The respondent contended and maintained that she is the rightful beneficiary of the estate of the deceased as a granddaughter of the deceased who was the other beneficiary relinquished her rights in the estate to her (respondent).

7. Under **section 66** of the **Law of Succession Act**, the respondent clearly stood first in priority of those entitled to apply for grant of letters of administration respecting the estate of the deceased.

She was the sole surviving wife of the deceased and had every right to petition for the grant upon the death of her husband. She had the liberty to do so on her own or with association of other beneficiaries. In this case, it was indicated that the respondent's two surviving daughters with the deceased were married but are now deceased. In the circumstances, it would appear that the respondent treated the deceased's surviving granddaughter as the only other beneficiary of the estate of the deceased. However, she indicated that the granddaughter relinquished her rights in the estate thereby paving way for her to apply for the confirmation of the grant and having the estate plot No.1360 to be distributed to her and a purchaser of part thereof. This was confirmed by the affidavit in support of confirmation of grant deponed by the said granddaughter and dated 7th February 2017.

8. In the respondent's petition for the grant of letters of administration dated 30th May 2013, the respondent listed one Tom Odhiambo Sipul as a beneficiary of the estate on the basis that he purchased part of the property. This was confirmed by the chief's letter dated 11th June 2013, which showed that fifteen (15) acres of the land were purchased by Tom Odhiambo Sipul.

However, this letter was suspect as it indicated that the respondent was childless yet she stated herein that the deceased had two married daughters. These were also her daughters and if not biological, then they were her step-daughters as she was the only surviving and

recognized wife of the deceased.

An earlier chief's letter dated 28th May 2013, apparently from the same chief Bernard Okomo, did not indicate that the respondent was childless and that a portion of the estate property had been purchased by Tom Odhiambo.

9. From these two letters, it may be inferred that the alleged purchase of part of the estate property was a falsehood and if not, then the purchase did not occur during the lifetime of the deceased as there was no documentary evidence in the form of a written sale agreement between the deceased and the purchaser.

In her replying affidavit, the respondent disclosed that part of the estate property was sold by herself to not only Tom Odhiambo Sipul but also, Otieno Ouma. She however, did not prove the fact by any documentary evidence. In any event, she had no legal right to sell the property prior to confirmation of grant neither was it available for distribution to any buyer as at the time she applied for the grant.

Therefore, the inclusion of Tom Odhiambo Sipul as a beneficiary of the estate in his capacity as a purchaser of part thereof was absolutely erroneous and unlawful. Even describing him and implying that he was an heir of the deceased was not only incongruous but also a confirmation of the falsehood pertaining to his alleged interest in the estate property.

10. Even though it was within the respondent's legal right to petition for the grant and list herself as the beneficiary given that the deceased's granddaughter disclaimed her interest in the property, she had no legal basis to include the alleged purchaser as a beneficiary.

Nonetheless, the gravamen of the present affidavit by the objectors is the failure of the respondent to include them or anyone of them as a beneficiary of the estate. They therefore contended that the omission translated to fraud and/or concealment of material facts on the part of the respondent when applying for the grant.

11. Indeed, this would be so if the objectors had a beneficial interest and were left out of the estate of the deceased.

The respondent vehemently denied their (objectors) alleged interest in the estate and implied that they were nothing short of intruders and in particular, the first objector.

In his supporting affidavit dated 1st December 2016, the first objector indicated that his interest in the estate of the deceased who was his uncle is based on the facts that in the year 1997, the deceased had no one to take care of him and his wife (respondent).

He therefore asked the first objector to live with him on his land together with his (first objector) family. The first objector and his family then moved into the deceased's land in a ceremony attended by members of the Nyagaya family. Thereafter, the first objector erected his homestead on the land and lived thereon for a period of about twenty (20) years. He raised his six (6) children on the land which they considered their home. His occupation of the land was peaceful even after the demise of the deceased. He was however taken aback when he learnt that the respondent had applied for the impugned grant without seeking the consent of his family and himself and also omitting them as beneficiaries of the estate. Instead, an alleged buyer was included as a beneficiary.

12. The first objector implied that he had a beneficial interest in the deceased's property because he was given a portion thereof by the deceased to occupy with his family and that the deceased and the respondent treated him as their own son.

The respondent denied the foregoing and contended that the objectors do not reside on the estate property as the first objector has his own parcel of land within his own father's land and that prior to the demise of the deceased he had been asked to vacate the portion of land he was occupying with the permission of the deceased who was the owner thereof.

The respondent further contended that the first objector did comply with the request to vacate the land but returned and regained possession no sooner had the deceased died.

13. Being a nephew of the deceased who was survived by one spouse (the respondent) with or without children, the first objector was not entitled to a beneficial interest in the estate of the deceased unless he could prove that the deceased prior to his death gifted him a portion of his land or that he (deceased) took him and treated him as his own child. He did not provide credible evidence to prove these facts. Instead, he provided sufficient evidence to show that at one point in his life, the deceased allowed him to occupy part of his land. He (first objector) merely proved that he was a "licensee" of the deceased and occupied his land only with his permission and under his mercy. This did not translate to conferment by the deceased of ownership of part of the land to the first objector or any member of his family. If the first objector vacated the land prior to the death of the deceased and returned after his death, then he is currently occupying the property as a squatter and cannot even apply for a share of the property under **section 26** of the **Law of Succession Act**, which provides for provisions for dependants not adequately provided for as intestacy. He did not prove that he was a dependant of the deceased even though the deceased was his uncle.

14. For reasons forgoing, it is clear that the present application by the objectors is devoid of merit for this court to exercise discretion in their favour.

If they are of the strong view that they are entitled to part of the estate property by adverse possession, then the remedy lies with the Environment and Land Court rather than this "succession court".

Otherwise, the application is dismissed with this court exercising its inherent power in the interest of justice and to prevent further abuse of its process as per **Rule 73** of the **Probate and administration Rules**, to order that the certificate of confirmation of grant issued to the respondent be and is hereby revoked and a fresh certificate do issue to reflect the transmission of the estate property being L.P. NO. KANYAMWA/K/KWANDIKU/1360 to the respondent in exclusion of the purported buyer, Tom Odhiambo Sipul or any other purported

buyer. Parties to bear own costs of the application.

It is accordingly ordered.

J.R. KARANJAH

JUDGE

02.07.2019

[Read and signed this 2nd day of **July, 2019**]