



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 537 OF 2015

IN THE MATTER OF THE ESTATE OF SAMWEL

OBITE GETABU ALIAS OBITE GETABU (DECEASED)

ZACHARIA NYAKUNDI.....ADMINISTRATOR / RESPONDENT

VERSUS

HAGGAI OGOTI

KENNEDY OSORO.....APPLICANTS/ OBJECTORS

RULING

1. The late **Samwel Obite Getabu alias Obite Getabu** died intestate on 7th December 2001. His son **Zacharia Nyakundi** petitioned the court for letters of administration in his estate and was issued with the grant on 14th November, 2016. In the affidavit in support of the petition, he listed the deceased's assets as **Nyaribari Masaba Bonyamasicho/299** (hereinafter referred to as "Parcel 299") and **Ker/Kipchorian/ Lelu Block 2 (Kasheen) 83** and listed the following children of the deceased as his beneficiaries; **Levis Mageto Obite, Gladys Moraa Onyando, Cicilia Bosibori Obite, Gesare Linet Obite, Esther Kwamboka Obite and Josephine Nyaboke Obite.**

2. Before the grant could be confirmed, **Haggai Ogoti** and **Kennedy Osoro** (hereinafter referred to as "the objectors") filed summons for revocation and review of the grant dated the 15th December 2016 to include them as administrators. The application is brought under sections 45,47 & 76 (a, b, c) of the Law of Succession Act Cap 160 and Rules 44,49,73 of the Probate and Administration Rules. The objectors claim that they are both beneficiaries of the estate of the deceased for the reason that the deceased held Parcel 299 in trust for himself and on behalf of their mentally handicapped father Osoro Mokuia (hereinafter referred to as "Osoro").

3. Directions were taken to have the matter canvassed by way of *viva voce* evidence. I took over the matter from Justice J.R. Karanja, who had partially heard the 1st objector's evidence on the 20/9/2017. The matter was adjourned in an attempt at an out of court settlement and proceeded before me when negotiations failed.

4. **Haggai Ogoti** (PW1) adopted his statement filed in court on the 4/5/2017 and testified that the deceased, Samuel Obite and his father Osoro were brothers. The deceased was required to hold land in trust for his mentally handicapped father and therefore he was a beneficiary of the deceased's estate. He testified that the land had been divided but they had had boundary disputes and his cousin the petitioner, had refused to negotiate.

5. The 2nd objector **Kennedy Osoro** (PW 2) too adopted his statement filed in court on the 4/5/2017 and testified that their deceased uncle, Samuel Obite was to hold the land in trust for their father. The deceased's children had however denied their father's claim to the land and had failed to include him in the succession proceedings. He testified that when he was alive, the deceased had lived peacefully with their father and the dispute only began after the deceased died. He is cultivating about 1 ½ acres of Parcel 299. He denied living in Parcel no. 298

6. **Kemunto Mokuia** (PW3) adopted her statement dated the 22nd of January 2019 and testified that she was the 3rd wife of Mokuia Getabu who married 4 wives including the deceased's mother Moraa. She testified that the deceased and Osoro were sons of the 1st house. The 1st house a parcel of land where Osoro and his family had been living but the deceased's sons were chasing him away from the land and had declined to attend meetings to resolve the matter.

7. **Francis Omari Mokuia** (PW4) adopted his statement filed in court on the 22/1/2019 and testified two of his brothers Francis Mageto and the deceased, Samuel Obite had died and Osoro Mokuia could not speak since his childhood. He recalled that his father had subdivided his land amongst all his sons. He refuted the claim by the deceased's sons that the entire land belonged to their father and testified that the land was to be shared between the deceased and Osoro. There had been a boundary between Osoro's portion and the deceased's and each had lived and cultivated his part peacefully when the deceased was alive. Osoro had been living on Parcel 299 with his sons, PW 1 and PW2 but

the deceased's sons became problematic and refused to attend meetings convened to resolve the matter.

8. **Jackson Anyoma Mokuu** (PW 5) a step brother of the deceased adopted his statement dated the 22/1/2019 and testified that Parcel 299 was registered in the deceased's name but the land had been divided equally for the deceased and Osoro by their father and therefore Osoro was entitled to inherit it. When the deceased died, his sons claimed that Osoro's portion of the land belonged to them. They attempted to resolve the matter but the deceased's sons failed to attend meetings. He admitted during cross examination that Kennedy Osoro had built 2 houses in Parcel no. 298.

9. For his part, **Zacharia Nyakundi** (DW1) adopted his statement dated the 20th August 2017 and testified that his father the deceased had left Osoro living on his parcel of land. He denied the claim that the land had been registered in the name of the deceased because Osoro was mentally handicapped and testified that he had taken out letters of administration after being cited by the objectors and wanted to divide his father's land with his brother. He admitted that Osoro still stays in the said land. That in parcel no. 298 is occupied by all the other sons of Osoro Mokuu.

10. **Levis Mageto Obite** (DW 2) adopted his statement dated the 20th August 2017 and urged the court to maintain his brother as the administrator of their father's estate to enable them inherit his property. During cross-examination he stated that his grandfather had 4 wives as opposed to three. He named the sons of his grandfather by his 1st wife as Francis Mageto, Francis Omari Mokuu, Osoro Mokuu and the deceased. Francis Mageto and Francis Omari lived on Parcel 300 while the deceased and Osoro lived on Parcel 299. He admitted that when his father was alive, he had not evicted Osoro from his land. That the sons of Osoro Mokuu have not done succession over their father's estate. Kennedy Osoro has built in their grandfather's 'emonga' which is in Parcel 298. He has also planted trees in a portion of the 'emonga'.

11. Parties filed written submission. They basically reiterate the evidence adduced by the parties. The objectors' seek to have 3 issues determined; whether or not the family of Osoro Mokuu was/ is entitled to inherit the estate of the late Samuel Obite Getabu; whether or not Osoro Mokuu together with his family lives, stays, occupies, possesses and uses half of L.R. Nyaribari Masaba Nyamasicho/299 which forms part of the estate of the deceased Samuel Obite Getabu and whether or not the estate of the deceased should be distributed/ shared equally between the family of the late Samuel Obite Getabu and the family of Osoro Mokuu.

DETERMINATION

12. The objectors' application is premised on **section 76** of the **Law of Succession Act ("the Act")** which provides for the revocation of grant. The provision stipulates that a grant may be revoked at any time if the court decides that;

(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

13. The objectors seek revocation of the grant on the grounds that the petitioner failed to include them as beneficiaries of the deceased. They also urge the court to review the grant and include them as administrators of the deceased's estate.

14. The deceased herein died intestate. There is no contention that he was survived by his children as listed in form P & A 5. The petitioner, being a son of the deceased, was entitled to apply for letters of administration by virtue of **section 66** of the Succession Act which provides the order of preference for persons to whom a grant of letters of administration can be made.

15. Under **Section 51(2) (g) (h)** of the Act an application for grant is required to include;

(g) in cases of total or partial intestacy, the names and addresses of all previous spouses, children, parents, brothers and sisters of the deceased and of the children of any child of his or hers then deceased; and

(h) a full inventory of all the assets and liabilities of the deceased;

16. The objectors' contention is that Parcel 299, though registered in the deceased name, was held in trust for his mentally handicapped brother, and their father Osoro. Their case is that Parcel 299 was passed down to the deceased by his father Mokuu Osoro and was to be shared equally between the deceased and Osoro. It is averred that when he was alive, the deceased had lived peacefully with Osoro but the petitioner has defiantly dismissed Osoro's claim to the land. They urge the court to exercise its discretionary powers and distribute the asset equally between the deceased's family and Osoro.

17. The objectors' further argument is that Parcel 299 did not form part of the deceased's estate and could not be listed as his asset without including Osoro's claim to the land. Customary trusts to land have largely been accepted in our legal regime. Recently the Supreme Court in **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another Petition No. 10 of 2015 [2018]eKLR**, pronounced itself on the matter as follows;

"[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land

Act.”

18. The Court proceeded to list some of the elements that would qualify a claimant as a trustee as follows;

1. *The land in question was before registration, family, clan or group land.*
2. *The claimant belongs to such family, clan, or group*
3. *The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*
4. *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
5. *The claim is directed against the registered proprietor who is a member of the family, clan or group.*

19. It is not in dispute that Parcel no. 299 is registered in the name of the deceased. From the above decision, it is clear that registered land is subject to overriding interests even when they are not indicated in the register. In my view the objectors through the evidence adduced have shown that the land was before registration family land. Parcel no. 299 was land which belonged to the deceased's father which he distributed to his sons the deceased included. This fact is not in dispute that the deceased's father distributed his land to his sons. The objectors are family of the petitioner their fathers were brothers. It is not in dispute that the objectors' father (Osoro) had a mental issue and still has and could not be registered as an owner of the said land. There is sufficient evidence adduced by the objectors that the deceased held Parcel no. 299 in trust for his brother Osoro. The objectors in my view have established that they beneficiaries of Parcel no.299, but for some intervening circumstances their father Osoro who is mentally incapacitated could not be registered as an owner of the portion they occupy. The objectors have also established the existence of a trust in their favour on the basis of their being in actual occupation and also as bona-fide members of the household.

20. There is no doubt in my mind that the petitioners were aware of the fact that their father held Parcel No. 299 in trust for his brother Osoro. The petitioner therefore should have included Osoro's family as beneficiaries of the deceased's estate in regard to parcel no 299. The deceased's father's wish was to have the said parcel of land divided into equal portions between the sons.

21. I therefore find that the petitioner concealed from the court something material to the case, that the Parcel No. 299 was to be shared between the deceased and his brother Osoro and that the family of Osoro are beneficiaries of Parcel no.299. The grant issued on the **14th of November 2016** is hereby revoked. A fresh grant shall issue to **Haggai Ogoti** and **Zachary Nyakundi** as administrators of the estate of **Samwel Obite Getabu alias Obite Getabu** forthwith. The 2 administrators shall file an application to confirm the grant within 45 days from the day of this ruling. The case will be mentioned after 45 days on a date to be taken in court to confirm compliance and for directions. Since this is a family matter each party to bear its own cost.

Dated, signed and delivered at Kisii this 2nd day of July 2019.

R.E.OUGO

JUDGE

In the presence of;

Zachariah Nyakundi in Person

Mr. Momanyi for the Objectors

Rael Court clerk