REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 186 OF 2009

IN THE MATTER OF THE ESTATE OF WILSON OMOLO OLOO (DECEASED)

JUDGMENT

1. Wilson Omolo Oloo, the deceased herein, died on 17th June 1976. According to a letter from the Chief of Kambiri Location, dated 19th March 2009, he was survived by a widow known as Yunia Oganga Omolo, and died possessed of a property known as Isukha/Kambiri/60. Representation to the intestate estate of the deceased was sought by the said widow, Yunia Oganga Omolo. She expressed the deceased to have had been survived by herself, five sons and two daughters, being Yunia Oganga Omolo, Christopher Owiti, Joshua Aboma, jane Awiti, Festus Kungu, John Onyango, Ben Guda and Rose Atieno. The deceased was expressed to have had died possessed of the property referred to in the Chief's letter. Letters of administration intestate were made to the said widow on 25th August 2009, and a grant was issued to her, dated 4th September 2009. I shall hereafter refer to her as the administratrix.

2. On 25th September 2009, a summons was lodged herein by the administratrix, of even date, seeking confirmation of the grant herein. The application listed the seven children of the deceased named in the petition as the persons who had been ascertained as having survived the deceased. It was proposed that Isukha/Kambiri/60 be devolved wholly upon the administratrix, Yunia Oganga Omolo. The application was heard on 17th February 2010, and was allowed, and the grant confirmed. A certificate of confirmation of grant in those terms was issued, dated 3rd March 2010.

3. On 14th March 2012, Christopher Owiti Omolo, who I shall hereafter refer to as the applicant, lodged an application herein, under certificate of urgency, dated 13th March 2012. The application principally sought the confirmation orders made on 17th February 2010 be set aside and the property, Isukha/Kambiri/60, be reverted to the name of the deceased and that the grant be made in his name and that of the administratrix, ostensibly to facilitate proper distribution.

4. The grounds upon which the application is premised are set out on the face of the application, as well as in the facts deposed in the affidavit sworn by the applicant on 13th March 2012. The grounds are that the succession proceedings were initiated without the consent of all the other members of the family, that although the applicant was recognized as an heir he was not provided for at distribution of the estate, and that the application be allowed to facilitate redistribution. The applicant identifies himself in the affidavit as a resident of Ndhiwa District in Homa Bay County. He avers that the deceased, prior to his death, had given him a portion measuring five (5) acres, out of Isukha/Kambiri/60. He then allegedly lived on the said five acres until 1983 when he sold the same to Joyce Isanjili Odari, who then took possession. He used the proceeds of sale to acquire another piece of land at Homa Bay County, where he relocated. He identified the administratrix as his stepmother. He averred that he was not made aware when the succession proceedings were initiated, saying that it was Joyce Isanjili Odari who brought the matter to his attention. He states that he then instructed counsel who confirmed the position to him. He complains that at confirmation, the administratrix had the entire estate conveyed to her sole name. He insists that he is entitled to a share in the estate.

5. The applicant filed several other applications, seeking conservatory orders, which were granted 27th July 2012, to the effect that a prohibitory order issued, to be registered against Isukha/Kambiri/60, pending hearing and disposal of the principal application.

6. The administratrix responded to the principal application by swearing an affidavit on 24th September 2012 and filing it here on 25th September 2012. She avers that deceased had two wives. She identified the first wife as being the mother of the applicant, who had only one child, the applicant. She identified herself as the second wife of the deceased who had eight sons, being Andrea Ang'ong'a Omollo, Joshua Aboma Omolo, Isaac Olonde Omolo, Charles Laro Omolo, Julius Oseya Omolo, Festus Kungu Omolo, John Onyango Omolo and Benjamin Guda Omolo. She further avers that the deceased had only one property, Isukha/Kambiri/60, which measured 11 acres. She states that the piece of land was too small for all the sons to fit in. She denies that the applicant was entitled to five acres out of the subject property. She asserts that the deceased never informed her that he had given five acres of the said property to the applicant. She states that the deceased died in 1977 and she did not know where the applicant got power to sell a portion of the deceased's land to Joyce Isanjili Odari. She states further that she had always believed that the said Joyce Isanjili Odari had leased the land for she planted sugarcane on it but had not settled there. She says that on her part she had no intention of selling any portion of the land and had not sold any part of it since 1977. She asserts that if there was any land purchase agreement between the applicant and someone else then the said sale was null and void. She states that as

a surviving widow she was best placed to administer the estate.

7. It transpired that the administratrix expired on 29th October 2012, and there is a certificate of death in that behalf lodged herein on 27th September 2013. An order was made on 18th February 2014, by the Deputy Registrar, by consent of the parties, making Festus Kungu Omolo a party to the proceedings in the place of the administratrix. It is not clear to me what the effect of that order was. It is not clear whether Festus Kungu Omolo was intended to became administrator in place of the departed administratrix or not. If that was the intended effect then it would appear that no grant of letters of administration was ever issued to him. I doubt the propriety of the said order, and I doubt whether a Deputy Registrar can appoint administrators, even with the consent of the parties.

8. Directions on the disposal of the main application were given on 25th January 2015, for the disposal of the application orally. No directions were given on filing of witness statements, but it would appear that the parties, on their own motion and without leave of court, proceeded to lodge witness statements on record.

9. The oral hearing commenced on 6th May 2019 before me, after I had been satisfied that there had been proper service of the hearing notice. The first on the witness stand was the applicant, Christopher Owiti Omolo. He testified that their father, the deceased, had two wives, his mother and the late administratrix. He complained that he had not been involved in the process of obtaining the grant herein and that the administratrix had caused the entire estate to be devolved upon herself to the exclusion of everyone else. He testified that he had wanted the grant revoked and a fresh one issued in his name and that of Festus Kungu Omolo. He confirmed that it was the second house which was in occupation of Isukha/Kambiri/60, but not members of the first house. He said that the second house occupied the portion of the property allocated to them by the deceased. He claimed that the deceased had shared out the land in 1972 before he died in 1976. He said that his mother's house was given five acres while the second house got six acres. A boundary was subsequently fixed between the two portions. He said that he moved to South Nyanza, and the portion that was due to the first house was occupied by Joyce Isanjili Odari. He said that he sold their portion after his mother fell ill and instructed him to sell the same for her treatment. He used part of the money to buy property in South Nyanza. He stated that Joyce Isanjili Odari started to use the land in 1984. He stated that he wanted the estate distributed afresh. He said that his mother's house comprised of himself and his three sisters: Rael, Rosa Nam, Sylpha Adhoch and Rael Aoko. He stated that Sylpha and Rael were deceased, but had been survived by children. The second house had ten children: Andrea Ang'ong'a, Joshua Aboma, Isaac Olonde, Festo Kungu, Julius Laro, Julius Oloo, Ben Guda, John Owili, Rose Atieno and Jane Owiti.

10. The applicant called Rose Anam was his first witness. She was his sister. She said that she was unaware that at confirmation of grant the entire parcel of land had devolved upon the late administratrix. She confirmed that the search certificate on record had showed that the property, Isukha/Kambiri/60, had since been registered in the name of the late administratrix. She complained that the late administratrix had not involved them in the process. She claimed that the deceased had distributed the property during his lifetime, giving the first house five acres and the second house six acres. She asserted that each of the two sides of the family occupied the portions given to them by the deceased.

11. The last witness was Joyce Isanjili Odari. She stated that she knew the family of the deceased, and she named some of the children. She said that the applicant and his mother approached her with an offer to sell the land to her. They allegedly informed her that the money was intended for treatment of the applicant's mother. She produced a written agreement purportedly entered into on 1st December 1993. She said that it had been agreed that she would be involved in the succession process so that she could get her share. She complained that she was not involved when the matter was initiated in court. She was to get the three acres she had allegedly bought while the applicant was to retain the remainder of the two acres.

12. Although the application before me principally seeks the setting aside of confirmation orders, in principle the proceedings conducted before me were for revocation of the grant. I do not quite understand why the applicant refrained from taking the revocation of grant route, while in fact that is precisely what he seeks. The facts upon which he grounds his application are principally those that support a revocation application.

13. The law on revocation of grants is section 76 of the Law of Succession Act, which states as follows:

> ""*76. Revocation or annulment of grant 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;*
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> *(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;*
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> *(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 order or allow; 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. Grants of representation are liable to revocation on three general grounds. The first is that the process of obtaining the grant was fraught with problems. It could be that there were defects in the process or that the court is misled in some way. Such would include where the grant is sought by a person who is not qualified to obtain representation to the estate of the deceased, or where certain facts as are required under the law have not been disclosed or are concealed from the court or are misrepresented. The second general ground is where the grant is obtained procedurally and properly, but subsequently the grant holder encounters challenges during administration, such as where they fail to apply for confirmation of grant within the period allowed in law or fail to proceed diligently with the administration of the estate, or fail to render accounts as when required. The last general ground is where the grant has subsequently become useless or inoperative, usually in cases where the sole administrator dies.

15. In the instant case, the applicant appears to anchor his case on the first general ground, that the process of obtaining the grant herein was attended by challenges. He submits that his consent towards obtaining the grant was not obtained.

16. The persons who qualify to apply for administration in intestacy are set out in section 66, which gives an order of priority to guide the court in exercising discretion in the matter of appointment of administrators. The provision states as follows:

"66. Preference to be given to certain persons to administer where deceased died intestate

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: Provided that, where there is partial intestacy, letters of administration in respect."

17. According to that provision, the court ought to be guided by Part V of the Act, which settles the order of priority in entitlement to a share in the estate of the deceased. Priority is given to the surviving spouse, followed by the children of the deceased, followed by parents of the deceased in the event that the deceased was not survived by a spouse or child, other relatives follow thereafter. The same applies with regard to entitlement to administration by dint of section 66. The surviving spouse has priority to administration, followed by the children, parents of the deceased, siblings, other relatives to the sixth degree, the Public Trustee and creditors in that order. When that is applied to the instant case, it would mean that the widow of the deceased, the late administratrix herein, had priority to appointment over her children, the applicant included.

18. I need to consider whether consents of the children were necessary in the circumstances. Rule 7 of the Probate and Administration Rules sets out the procedure for applications for representation. Sub-Rule (7) addresses situations where the petitioner has a lesser right to representation, and requires that he or she either causes citations to issue to the persons with prior right to apply, or gets them to renounce probate, or obtains their written consent allowing the petitioner to apply for representation. The provisions of section 66 of the Act, which I have set out above, should be read together with Rule 7(7) of the Probate and Administration Rules, which states as follows:

"7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "

19. The late administratrix in the instant cause had a superior right to administration over the children and the other relatives of the deceased, going by section 66 of the Act. A reading of section 66 together with Rule 7(7) would mean the widow did not need to comply with requirements of Rule 7(7), since that provision applies only to persons who seek representation while they had a lesser right to administration. She did not, therefore, have to obtain the consents of the children to apply for representation to the estate of her late husband. I note though that the deceased died a polygamist. He had two houses. Even though the law does not command that all the houses be represented in administration, it would be fair and democratic to get members of the house where the wife of the deceased had died involved in the process, and where possible to have one of them appointed alongside the surviving widow or any other member of the other house in the administration.

20. I have noted that the Chief wrote a letter where the names of the children were omitted, although they were subsequently included in the petition. I would be reluctant to blame the administratrix for that. She died in 2012 at the ripe age of ninety-nine. She must have been

illiterate, and a person who would not have expected to direct the Chief on what was to put in the letter. I would wholly blame the Chief. He ought to have known what was expected of him in writing such a letter.

21. The administratrix appointed by the grant issued on 4th September 2009 has since died. She has not been substituted as administrator. I believe it would be academic to dwell on the process that led up to her appointment as administrator when she has since died. She was a sole administratrix. Her death means that the estate is now without an administrator. The grant made to her, however, is still valid, but useless or inoperative for it cannot be confer power or authority on anyone else apart from the person it appoints. The way forward should be to appoint another administrator to take her place. The applicant has offered himself, and volunteered Festus Kungu Omolo, who has been appointed to take the place of his mother in these proceedings, whatever that means.

22. The application appears to center largely about the confirmation orders of 17th February 2010, which devolved the entire estate to the widow. The applicant complains that that process disinherited him.

23. Two issues arise from that submission. In the first place, the design under intestacy, whether under Part V of the Law of Succession Act or under customary law, is that where a person is survived by a widow and children, the surviving widow does not take the estate absolutely. She is only entitled to a life interest, which would terminate on either her death or upon her remarriage. Upon determination of the life interest, the property then passes to the children. There would be an element of disinheritance of the children where the surviving spouse takes the property absolutely, in the sense that the property would then become that of the surviving spouse absolutely, to deal with as any owner thereof would. That would mean that there would be a chance that the children would never get to access the property should it be sold by the surviving spouse during their lifetime or should they will it away as they please leaving some of the children out of benefit. The disinheritance would be complete, in such a case as the present, where the surviving widow was not the biological mother of the applicant. Where the estate is devolved wholly upon the widow, the applicant would be totally excluded, for upon her demise the applicant would not be entitled to a share in her estate as he is not one of her children. The manner of the devolution of the property was, therefore, not proper, particularly as it was not disclosed at confirmation that the deceased had died a polygamistm which would have necessitated that the estate be distributed accordaning to the houses of the deceased, in accordance with section 40 of the Law of Succession Act.

24. The other issue is that the late administratrix revealed in her reaction to the instant application that she had sons who had since died leaving behind families. I have in mind Andrea Ang'ong'a and Isaac Olonde. She did not list the survivors of these two in her petition and one would assume that they would not have been factored at confirmation. It ought to be a matter of some curiosity that their names are coming up at this stage. They are said to have been survived by eight sons between them. To the extent that their names came up after confirmation would suggest that they had been left out of the process.

25. Taking everything into account, I am persuaded that there is a case for the setting aside of the confirmation orders made on 17th February 2010 to allow for a redistribution where the matters that I have discussed above can be taken into account, specifically the fact that the deceased died a polygamist and that some of his children have since died leaving behind grandchildren of the deceased who should also be taken into account at distribution.

26. The matter of Joyce Isanjili Odari was also brought to the fore. She was said to have had acquired a portion of the estate from the first house of the deceased after the deceased had died. Since she did not transact with the deceased, she cannot possibly be a creditor of the estate. Her transaction was with survivors of the deceased, and, therefore, she should not look up to the estate to recover the land she purportedly bought from the survivors, she should instead look up to the survivors She transacted with to convey the land she allegedly bought from them, but that conveyance can only happen after the survivors have had the property transferred to them.

27. The other consideration is that the survivors that Joyce Isanjili Odari transacted with were not administrators of the estate at the material time. The estate of the deceased did not, therefore, vest in them. They did not have title to the estate property and therefore they had nothing to transfer to the buyer. The law on this is section 79 of the Law of Succession Act, which states as follows:

> *"79. Property of deceased to vest in personal representative*
>
> *The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."*

28. Put in simple language, the effect of section 79 is that upon a grant being made, it vests the estate of the deceased in the grant holder, so that they wear the shoes of the deceased property owner, with the powers to deal with the property in the manner stated in section 82 of the Law of Succession Act, and they are under the duties specified in section 83 of the Law of Succession Act. As a personal representative is also defined as a trustee by the Trustee Act, Cap 167, Laws of Kenya, they have the same powers and are subject to the same duties as specified in the provisions of the Trustee Act. Since the assets vest in them, they have the power to sue and be sued over the assets, to enter into contracts with respect to them whether by way of sale or of lease, among others. Any other person apart from the administrator, has no such powers. Section 82 is categorical, that immovable property should not be sold before confirmation of grant.

29. For avoidance of doubt, sections 82 and 83 state as follows:

> *"82. Powers of personal representatives*
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> *Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*
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> *(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy;

(ii) (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in w"hich case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required."

and

"*83. Duties of personal representatives*

Personal representatives shall have the following duties—

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts; (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration."

30. Sections 79, 82 and 83 should be read together with section 45 of the Law of Succession Act, which provides against intermeddling with the estate of a dead person. The provision is clear that the property of a dead person should only be dealt with by a person who is authorized in law to deal with such property, which authority derives from a grant of letters of administration. Section 45 makes it a criminal offence to deal with such property without authority, known as intermeddling, and the provision imposes sanctions for such intermeddling. The said provision states as follows:

"45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

31. The deceased herein died in 1976 and the sale transaction occurred after his death, in 1993. The sellers/vendors were the applicant and his mother. at the time none of them were administrators of the estate of the deceased. The assets of the estate did not vest in them by virtue of section 79 of the Act, and they did not have the powers vested by section 82 of the Act. The transaction, therefore, fell afoul of section 45 of the Act. The applicant had no authority to sell the land, and, therefore, both he and Joyce Isanjili Odari intermeddled with the estate, and exposed themselves to the sanctions created under section 45(2)(a) of the Act. The transaction was, therefore, null and void. The buyers had nothing to sell. They could not confer any interests over the estate assets to Joyce Isanjili Odari, and the latter acquired no interest in the asset. She has no claim over the estate, and, as stated elsewhere, she can only look up to the applicant personally to settle her out of the share of the estate that shall ultimately, if at all, be transmitted to him after confirmation of the grant.

32. I believe I have addressed all the issues raised in the application. What remains is for me to make final orders. In the end the orders that I shall make in this matter are as follows:

(a) That I hereby revoke the grant made on 25th August 2009 to Yunia Oganga Omolo;

(b) That I hereby appoint Christopher Owiti Omolo and Festus Kungu Omolo administrators of the estate of the deceased, and direct that a grant of letters of administration intestate shall issue to them accordingly;

(c) That I hereby set aside and vacate the orders made on 17th February 2010, confirming the grant of 25th August 2009, and I hereby order cancellation of the certificate of confirmation of grant dated 3rd March 2010;

(d) That the Land Registrar responsible for Kakamega County is hereby directed to cancel any transfers, or other transactions, carried on Isukha/Kambiri/60 on the strength of the certificate the subject of (c) above and revert the property to the name of the original proprietor, the deceased herein, Wilson Omolo Oloo;

(e) That the fresh administrators shall, in the next thirty (30) days, apply for confirmation of their grant taking into account all the issues that I have raised above in this my judgment;

(f) That the matter shall be mentioned in open court on a date to be appointed at the delivery of this judgment for compliance and further directions;

(g) That any party aggrieved by the orders made in this judgement has twenty-eight (28) days to move the Court of Appeal appropriately; and

(h) That each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2019

W. MUSYOKA

JUDGE