



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 27 OF 2011

IN THE MATTER OF THE ESTATE OF NICHOLAS OGADA WAMURE (DECEASED)

BETWEEN

GAUDENCIA OKAKA OCHOLA.....PETITIONER/RESPONDENT

VERSUS

JOSEPH OTIPO AMURE.....OBJECTOR/APPLICANT

JUDGMENT

1. The objector herein, Joseph Otipi Amure, has filed an application dated 31st August, 2010 seeking for revocation of grant issued to the petitioner herein, Gaudencia Okaka Ochola, on the grounds that:

1. The grant of letters of Administration intestate was obtained fraudulently by concealment of material facts to this cause.
2. The petitioner/respondent did not seek the objector's consent before filing the succession cause as she filed the same secretly.
3. The objector is a brother to the deceased and is entitled to a share of his estate.

4. The petitioner wilfully and or knowingly omitted the objector's name as beneficiary to the estate.

2. The application was supported by the affidavit of the applicant/objector in which he states that the deceased in this succession cause, Nicholas Ogada, was his step brother. That their late father had about 5 wives. That his mother Flora was the second wife. That the third wife was Damara Awino who was the mother to the petitioner/respondent and also mother to the deceased herein Nicholas Ogada Wamure and one Eshima Wamure. That after the petitioner and his brother Nicholas Ogada (the deceased) were born their parents separated. Nicholas and his siblings including the petitioner were brought up by the objector's mother. Nicholas was given land by the objector's mother. That the land borders that of the objector and that the objector was using it prior to the death of the deceased, Nicholas Ogada. That the petitioner has never used the land as she got married in 1963 and is happily staying at her matrimonial home at Sichilayi. That Nicholas Ogada was an adopted brother to the objector. Therefore that the objector has a right to inherit the land of his step-brother.

3. The application was opposed by the petitioner through her replying affidavit in which she states that she is a biological sister to the deceased, Nicholas Ogada. That their mother Damara Awino was the third wife of the late Jacob Amule (Wamure). That the objector was an issue of the second wife. That each of the three wives and the children of each of the wives were given a portion of land which was registered in the name of their elder sons. That the objector being the elder son in the house of his mother Flora Machio was registered as proprietor of their parcel of land to hold in trust for the offspring of his mother. That her deceased brother Nicholas Wamure being the only son was registered proprietor of their parcel of land to hold in trust of the petitioner as his only sister. That his deceased brother, Nicholas Ogada, died on 16/7/1992 leaving her as the sole beneficiary of his estate since their mother had already preceded him. That the objector is her step-brother and that he has his portion of land handed to him through his late mother. That he should inherit what their father bequeathed his mother and has no right over the estate of her brother.

4. Directions were given in the matter that it proceeds by way of *viva voce* evidence. The objector testified in the case and called one witness, the former Assistant chief of Shihoti sub – location, Reuben Ongutia, PW2. The petitioner/respondent did not adduce any evidence in the case.

Submissions -

5. The advocates for the objector, **Momanyi, Manyoni & Co. Advocates**, submitted that the mother to the petitioner left the petitioner and the late Nicholas when she went to be married elsewhere. That Flora Machio adopted Nicholas Ogada and brought him up as her own son.

That Flora gave Nicholas Ogada land as one of her sons as he had adopted him. That the former assistant chief PW2 supports the evidence that Nicholas Ogada was adopted by Flora Machio. That the objector therefore has a share in the estate of the late Nicholas Ogada.

7. The advocates for the petitioner/respondent, **A.G. Aburili & Co. Advocates**, submitted that the objector's father had sub-divided his land among his three wives. That the objector is a step – brother to the petitioner and he is therefore not entitled to the land registered in the name of Nicholas Ogada. That the person entitled to the estate of Nicholas Ogada is his closest surviving relative, that is, his sister, the petitioner. That this is supported by section 39 of the law of succession Act (Cap. 160) that states that:

“Where an intestate has left no surviving spouse or children, the net estate shall devolve upon the kindred of the intestate in the following order of priority -

a) Father , or if dead

b) mother; or if dead

c) brothers and sisters ,

d) half–brothers and a half-sisters..”

Analysis and Determination -

7. The question for determination before the court is whether the objector is entitled to a share of the deceased's estate. The petitioner says that she is the one who is legally entitled to the estate as she is a biological sister to the deceased. The objector on the other hand says that the deceased was adopted by his mother as her own son. That both he and the petitioner are entitled to inherit the land.

8. The objector deposed in his supporting affidavit sworn on 10/10/2011 that after his mother was married by his father, his mother Flora Machio was given a parcel of land by her father. That his father married the mother to the petitioner but she later left and got married in Wanga in Mumias. That she left behind her children, the petitioner and her brother Nicholas Ogada. The two were brought up by the objector's mother. That when the family was sharing land, Nicholas was given land by the objector's mother which land emanated from the land given to the mother of the objector by her father. That the said parcel of land given to Nicholas Ogada by the mother to the objector is the subject matter of this succession cause. That the objector is entitled to the land as the same belongs to an adopted brother.

9. In his evidence in court, the objector stated that the deceased herein, Nicholas Ogada, was his step – brother. That Ogada's mother left his father and got married elsewhere. That Ogada was brought back to his father when he was 5 years old. That the objector's mother brought him up. That the objector's mother had inherited land from her father. She shared the land between him and Ogada. Ogada was given one acre. That before Ogada died in 1992 he and Ogada were using the land owned by Ogada. That the land given to Ogada had come directly from his mother and therefore that the petitioner cannot inherit it.

10. The objector further said that his father had 2 wives – Sarah and Flora. That the sons of Flora were given land parcel No. 139. That the petitioner was not born of his father and that the petitioner and Nicholas Ogada were not related.

11. The petitioner's witness, Reuben Ongutia (PW2) testified that he is a former Assistant Chief of Shikoti Sub-location. That he knew the late Nicholas Ogada who was from his Sub-location. That he knew him as a son of Flora Machio. That he also knew the father to Nicholas who was called Amure. That the said person hailed from Luo land and he married Flora Machio but he had no land in Butso. That the subject land herein initially belonged to the family of Flora Machio who gave it to her. That during land registration it was registered in the names of Nicholas Ogada, the objector herein and Bushuru. The witness said that he does not know the petitioner herein. That he does not know any other mother of Nicholas Ogada other than Flora Machio. He said in cross-examination that he does not know who should inherit the land of the late Nicholas Ogada.

12. It has to be noted in the first place that the objector did not place any evidence before the court to prove that the suit land initially belonged to the father of the objector's mother and that the objector's mother was given the land by her father. It is not disputed that at the time that the deceased died the land was registered in his name. The land was therefore his free property as defined in Section 3 of the Law of Succession Act Cap. 160 Laws of Kenya that:-

“free property, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”

The property therefore belonged to the deceased and ought to be distributed as his intestate property. The evidence that the property was given to the deceased by the objector's mother is neither here nor there.

13. The objector in his evidence in court stated that the mother to the petitioner was not a wife to his father but only a girlfriend. He denied that the petitioner was his father's child to Damara Awino. However in his affidavit deposed on 10th October, 2011 the objector stated that Damara Awino was the third wife of his father and that she was the mother to the petitioner and Nicholas Ogada. He further stated therein that after Damara was married elsewhere the children of Damara who were born of his father were brought to his mother's house who took care of them as members of the family. The foregoing clearly shows that Nicholas Ogada and the petitioner were brought up by the objector's mother after the petitioner's mother got married elsewhere. The objector cannot then turn around and disown the petitioner.

14. Though the deceased herein, Nicholas Ogada, may have been brought up by the objector's mother after the mother to the deceased got

married elsewhere, that does not mean that the objector's mother had adopted the deceased as her son. The objector's mother could only have brought up the deceased as a member of the family and as a step-son. The contention by the objector that Nicholas Ogada was his adopted brother is mischievous.

15. It is my finding that the deceased was given a share of the family land as a son of Jacob Amule (Wamure). The objector admits that he was also given his own land during land registration just as was Nicholas Ogada. Is he then justified in making a claim on the land of Nicholas Ogada?

16. The petitioner is a uterine brother to the deceased while the objector is a step-brother to the deceased. The deceased's father was a polygamous man. He distributed his land in accordance with the houses in the family. The objector cannot thereby inherit from the house of the petitioner's mother when there is somebody in that house to inherit the property of the deceased. The objector can only inherit from his house members. As a sister to the deceased, the petitioner ranks higher than the objector in consanguinity to the estate of the deceased as provided by Section 39 of the Law of Succession Act.

17. The upshot is that the objector has not shown that the grant issued to the petitioner was obtained fraudulently. It is evident that the objector has no entitlement to the estate of the late Nicholas Ogada, the deceased herein, relative to the interest of the petitioner. The objection has no merit and is accordingly dismissed.

18. The dispute herein involves family members. I order that each party bears its own costs to the objection proceedings.

Delivered, dated and signed in open court at Kakamega this 19th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for petitioner/respondent

Mr. Athunga holding brief for Momanyi for objector/applicant

Petitioner/Respondent - absent

Objector/Applicant - absent

Court Assistant - George

30 days right of appeal.