



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 45 OF 2009

CORAM: D.S. MAJANJA J.

IN THE MATTER OF THE ESTATE OF: NATHANIEL ADERO ODONGO (DECEASED)

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

DAUDI ODHIAMBO MIGOT.....PETITIONER

AND

MILDRED AKINYI NYAWARA.....1ST APPLICANT

SOSPETER OBUNGU.....2ND APPLICANT

RULING

1. This matter concerns the estate of Nathaniel Adero Odongo (“the deceased”) who died intestate on 22nd October 1996. Daudi Odhiambo Migot (“Migot”), the petitioner, a son of the deceased, applied for and was granted letters of administration intestate on 20th February, 2009. Upon the expiration of 6 months, the certificate of confirmation of grant was issued on 16th April 2010 distributing the deceased’s property as follows;

KISUMU/KOMBEWA/3295 – William Otieno Adero, Kennedy Gogo Adero and Francis Auma Adero in equal shares.

KISUMU/KOMBEWA/3325 – Jacob Otieno Adero, William Odongo Odero, Collins Opiyo Adero, Steven Odongo Adero, Ruth Achieng Adero, Faith Atieno Odero in three equal portions

KISUMU/OTHANY/3727 – Joseph Omondi Migot

KISUMU/MANYATTA A/1820 – George OChieng Oduor, Daudi Odhiambo Migot in equal shares.

2. The family genealogy that provides a background to the matter is not disputed. During his lifetime, the deceased had three wives and several children as follows;

First House – Maritha Omolo Adero (died 1998)

1. Richard Owich Adero
2. Daudi Odhiambo Migot
3. Jacob Otieno Adero
4. William Odongo Odero

5. Ruth Achieng Otema

6. Samuel Owino Odongo alias Tom Odongo alias Tom Odhiambo Adero

7. Rose Auma Anyango Odero

8. Richard Arina Odongo

Second House – Leonida Agoro (Divorced 1956 – died 1970)

Kibira

Third House Peres Adhiambo Adero (died 1998)

1. William Otieno Adero alias William Orwa Adero

2. Emily Atieno

3. Kennedy Gogo Adero

4. Francis Auma Adero

3. On 30th July 2014, Sospeter Obungu (“Sospeter”) and Mildred Akinyi Nyawara, the wife of Tom Odhiambo Adero, filed a summons for revocation/annulment seeking, amongst others, an order that, “the *Grant of Letters of Administration to DAUDI ODHIAMBO MIGOT made on 20th day of February, 2009 be revoked or annulled.*” The grounds set out on the face of the summons were that the grant was obtained by making a false statement and failing to disclose material facts. It was alleged that Migot improperly registered himself as the proprietor of KISUMU/OTHANY/3727. In his supporting deposition sworn on 30th July 2014, Sospeter stated that he was a grandson of the deceased as his father, Richard Owich Adero (“Owich”), the eldest son of the deceased.

4. Sospeter deposed that Migot did not obtain his father’s consent when he applied for the grant of letters of administration and as consequence, him and siblings namely; Harrison Odhiambo Owich, Noah Otieno Owich, Steve Ouma Owich and Ben Odhiambo Owich did not benefit from the deceased’s estate. He also complained that Migot distributed part of the deceased’s estate to his sons who were not entitled to inherit property of the deceased.

5. Migot opposed the application through his deposition sworn on 1st September 2014. He denied the allegations against him and contended that Owich had already been provided for by the deceased in his lifetime. He further contended that Owich gave his consent for the filing of the petition and that he never raised any issue about the matter during his lifetime.

6. I heard oral testimony from Sospeter (PW 1), Mildred (PW 2) and Francis Ouma Adero (PW 3) on the applicants’ side. Migot (DW 1), Hesbon Evans Odhiambo (DW 2) and Eric Onyango Owich (DW 3) testified on the petitioner’s side. Taking the testimony together with what is pleaded in the summons, the dispute centres on the family of Owich. As Sospeter deposed at para. 8 of his affidavit, “*The applicant distributed the deceased property to himself, his son and his other brothers but left out the family of RICHARD AWICH ADERO.*” In addition, Sospeter claims that his father’s consent to commence the petition for administration of the deceased’s estate was not obtained and that no provision was made for his family.

7. In response to the allegation that no provision was made for the Owich family, Migot stated that the Owich had already been given the following properties; KISUMU/KOMBEWA/592, 3398 and 3437 which were all ancestral land and KISUMU/MANYATTA ‘A’/1821 which was bought by the deceased having been a sub-division of KISUMU/MANYATTA ‘A’/1820.

8. In his testimony, Migot explained that the was given consent by the family members to pursue the application for grant of representation for the deceased’s estate in July 1999. He produced a consent letter dated 14th January 1999 which was signed by Owich, Jacob Otieno Adero, William Odongo Adero and Samuel Owini Odongo in which they appointed Migot as the administrator of the deceased’s estate. In addition, he procured a letter form the Chief of South Central Seme dated 7th July 1999 in which he confirmed that the family of the deceased had appointed Migot as the administrator. He filed Public Trustee Cause No. 91 of 1999 for administration but was told to file the present cause in court.

9. Migot went further to explain that prior to his death, the deceased had distributed his property and in making the final distribution, he took the shares into account made a fair distribution as follows:

- Since Owich was the first born, he was given KISUMU/KOMBEWA/592 measuring 0.13Ha, KISUMU/KOMBEWA/3398 measuring 0.16Ha, KISUMU/MANYATTA ‘A’/1821 measuring 0.06Ha. The total land given to Owich was 1.55Ha (approx. 3.9acres).
- Migot received KISUMU/MANYATTA ‘A’/1820 measuring 0.04Ha, KISUMU/OTHANY/3727 measuring 0.25Ha and part of KISUMU/KOMBEWA/3325 measuring 0.25Ha. The total being 0.54Ha (approx. 1.33acres).
- William Odongo Odero had been given KISUMU/KOMBEWA/ measuring 0.21Ha and upon confirmation of the grant he received ¼ portion of KISUMU/KOMBEWA/3325 measuring 0.25Ha. The total land he received was 0.46Ha (approx. 1.4 acres).

- Jacob Otieno Adero had been given KISUMU/KOMBEWA/3660 measuring 0.22Ha. Under the distribution he received part of KISUMU/KOMBEWA/3325 measuring 0.25Ha all totalling 0.47Ha (approx. 1.162acres)
- Tom Odongo alias Tom Odhiambo and his children were allocated KISUMU/KOMBEWA/3325 measuring 0.25Ha. He had been bequeathed KISUMU/KOMBEWA/3661 measuring 0.06Ha making a total of 0.85Ha (approx. 2.2acres).
- The third house already had KISUMU/KOMBEWA/295 measuring 0.12Ha. The deceased had also purchased for them KISUMU/KOMBEWA/3490 and 3794 measuring 0.9Ha and 0.17 Ha. The total area given to them was 0.38Ha (0.94acres).

10. Sospeter told the court that Owich died in 2007. He complained that the consent dated 14th January 1999 was filed in 2009 by which time his father had died and that the signature on the document was not that of his father. He also complained that the Dudi Andanje cited not a relative and could not have been a beneficiary. In his testimony he alleged that his father signature was forged.

11. The burden of proof lay on the applicant to show that the consent was a forgery or that it was not signed by the deceased. The only evidence adduced by the Sospeter was that the deceased was dead by the time the consent was filed and that the signature was not that of his father. In my view this was insufficient evidence to prove that the consent was fraudulent as alleged. The consent was signed in 1999 when Owich was still alive and that consent was the basis of Public Trustee Cause No. 91 of 1999. Hesbon Evans Odhiambo (DW 2) also produced death certificates of Maritha Omolo Adero and Presi Adhiambo Adero signed by the Owich while he was a chief. The signature on the consent and the signatures on the certificates bore a striking similarity. The totality of this evidence is that Sospeter failed to surmount the burden of proving that his father did not give consent to Migot to commence administration proceedings on behalf of the family.

12. It was also the burden of the applicant to show that the Owich was not the beneficiary of inter vivos gifts of land from the deceased and that his family was effectively disinherited. On this issue Migot produced clear evidence on how the deceased gave each son land in Kombewa prior to his death. Although, Sospeter contended that the deceased purchased land on his own as he was an administrator for many years, he did not furnish any evidence to that effect. I am inclined to accept the petitioner's version of events as the evidence was clearly supported by documents.

13. PW 2, who was the wife of Tom Odongo alias Tom Odhiambo, who died in 2007 supported the applicant's claim. It was her understanding that the Plot 3727 belonged to her husband as he was the last born and that she was entitled to it. The complaint by PW 3, the deceased's son from the last house, was that he was not consulted and that he too was entitled to the homestead.

14. Finally, there is the issue of Plot 3727 which was said to have been purchased by one Jemima Akinyi Oyare. The matter is the subject of Maseno PMCC No. 4 of 2010. Given the conclusions I have reached in this matter; I decline to make any further orders regarding the suit or the subject property.

15. The question then is whether the distribution is fair distribution to all the beneficiaries. The distribution is as set out by in paragraph 9 above was distributed to all the beneficiaries and took into account the fact that Owich had been given land prior to his death. PW 2 and her children had already been provided for under the provision made for Tom Odongo. Sospeter also complained that that Migot registered part of the deceased's estate in the name of his son, George Ochieng Oduor. Although it was improper for Migot to register his sons as the beneficiaries of the estate, the distribution shows that the share that was registered in his name belonged to Migot hence none of the other beneficiaries were prejudiced. The totality of the evidence is that all the deceased's beneficiaries have been provided for.

16. I dismiss the summons of revocation dated 30th July 2014. As this matter concerns the family, I make no order as to costs. In addition, all interim orders issued in this matter are discharged.

SIGNED at KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 17th day of September 2018

F. A. OCHIENG'

JUDGE