



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE -J)**

**SUCCESSION CAUSE NO.815 OF 2010**

**IN THE MATTER OF THE ESTATE OF HESBON SHIMEI NYONG'O (DECEASED)**

**BETWEEN**

**PROF. PETER ANYANG' NYONG'O.....1ST PETITIONER/RESPONDENT**

**NYOGOY NYONG'O BLOCH.....2ND PETITIONER/RESPONDENT**

**AND**

**KENNETH ODHIAMBO OKUDHE.....1<sup>ST</sup> APPLICANT**

**GEOFFREY OMONDI NYONG'O.....2ND APPLICANT**

**JUDGEMENT**

**Introduction**

1. The deceased, **HESBON SHIMEI NYONG'O (hereinafter referred to as the deceased)** died on 10th November, 2006. The deceased's estate comprises of the following:

1. L.R NO. 1540/RATA
2. L.R NO. 1590/9/MIWANI
3. KISUMU MUNICIPALITY/ BLOCK 5/172
4. EAST SEME/RATA/1537
5. KISUMU/TAMU/223
6. EAST SEME/RATA/2774
7. NRB/R NO. 209/44401/26
8. KISUMU/MANYATTA 'A'/282
9. CENT SACCO A/C NO. 10050000124

2. The petitioners applied for letters of administration which were issued on 8th November, 2011. The grant was confirmed on 9th July, 2014 in the names of the following persons:

1. **PROF. PETER ANYANG' NYONG'O**
2. **MRS. MARY OWITI**

3. MRS. SUSAN MUDHUNE

4. MRS. ESTHER NYONG'O

5. DR. MARY NYAGOY NYONG'O

3. The certificate of confirmation of grant expresses that the 5 persons named hereinabove were to hold the estate as trustees.

**Application**

4. The Notice of Motion before the court is dated 14th November, 2017 and it is made under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, Sections 1, 1a, 3, 3A and 63 (e) of the Civil Procedure Act and Sections 45, 47, 71, 86 and 94 of the Law of Succession Act (*the Act*) and Rule 44 (1) and 59(6) of the Probate & Administration Rules (*the Rules*). The applicants seek the orders among them that

a) .....Spent

b) .....Spent

c) That respondents herein be ordered to provide an account for the Estate of the late HESBON SHIMEI NYONG'O

d) That the Certificate of Confirmation of Grant issued to PROF. PETER ANYANG' NYONG'O and NYOGOY NYONG'O BLOCH be revoked

e) That the Honourable Court be pleased to order that KENNETH ODHIAMBO OKUDHE (son of MARGARET AWUOR DICK (deceased daughter of the deceased) and GEOFFREY OMONDI NYONG'O (son of late JUDITH AKOTH NYONG'O (deceased daughter of the deceased) and their siblings be considered as beneficiaries of the Estate of the deceased HESBON SHIMEI NYONG'O.

f) That the Honourable Court be pleased to appoint the applicants as co-administrators of the deceased's estate

g) Costs be provided for

5. The application is based on the grounds among others that some of the deceased's grandchildren who are rightful heirs of the deceased's estate were not provided for; the administrators have never accounted for the deceased's estate and the applicants are apprehensive that the administrators shall sell, transfer, waste or otherwise detrimentally deal with the deceased's estate.

6. The application is supported by affidavits sworn by the applicants on 14.11.17 who reiterate the grounds on the face of the application. The 1st applicant further avers that the respondents concealed material facts that his mother MARGARET AWUOR DICK (deceased) was a daughter of the deceased and had 6 children namely:

i. Kenneth Odhiambo Okudhe (1st applicant)

ii. Millicent Nyong'o (deceased)

iii. Caroline Atieno

iv. Charles Dego

v. Samuel Otieno Deya

vi. Dorcas Adhiambo

7. He further avers that the deceased who lived with and took care of him and his siblings after their mother died and that they were therefore beneficiaries to his estate. Annexed to his affidavit is a copy of certificate of death of MARGARET AWUOR DICK (deceased) which shows that she died on 27th December, 1994.

8. The 2nd applicant similarly avers that the respondents concealed material facts that their mother JUDITH AKOTH NYONG'O (deceased) was a daughter of the deceased and had 2 children namely:

i. Geoffrey Omondi Nyong'o (2nd applicant)

ii. Fiona Atieno Nyong'o

9. He further avers that before they moved to stay with the 1st petitioner and his family, the deceased took care of him and his sister after their mother died and that they were therefore beneficiaries to his estate. Annexed to his affidavit is a copy of certificate of death of their mother JUDITH AKOTH NYONG'O (deceased) which shows that she died on 1st January, 1984.

## **Applicants' Case**

10. In their evidence, the applicants stated that the deceased was their paternal grandfather. They took issue with the petitioners for disregarding the children of their deceased sisters **MARGARET AWUOR DICK** (deceased) **JUDITH AKOTH NYONG'O** (deceased), but nonetheless including **KWAME OTIENO**, son of their deceased brother **DR. AGGREY NYONG'O** and **DR. JULIANA OTIENO NYONG'O**, wife to their deceased brother **SAMUEL OTIENO NYONGO** as beneficiaries of deceased's estate. The 1st applicant urged the court to find that the fact that he was employed and had been given land parcel **KISUMU/KITMIKAYI/3136** by the 1st petitioner did not disentitle him from benefitting from the deceased's estate.

## **Petitioners' Case**

11. The 2nd petitioner, a daughter to the deceased, in her testimony introduced herself as **RISPER NYAGROY NYONGO**. From the court record and by her own admission, the 2nd petitioner has interchangeably been referred to as **RISPER NYAGROY NYONGO; DR. MARY NYAGROY NYONG'O** and **NYAGROY NYONG'O BLOCH**. Consequently, any reference to **DR. MARY NYAGROY NYONG'O** in this judgment refers *mutatis mutadis* to **RISPER NYAGROY NYONGO** and **NYAGROY NYONG'O BLOCH**.

12. 2nd petitioner stated that she had the authority of her brother the 1st petitioner to swear the replying affidavit in response to the applicants' Notice of Motion. She conceded that the applicants **KENNETH ODHIAMBO OKUDHE** and **GEOFFREY OMONDI NYONG'O** are grandsons of the deceased by virtue of being sons of her deceased sisters **MARGARET AWUOR DICK** and **JUDITH AKOTH NYONG'O** respectively.

13. The 2nd petitioner also stated that the 1st applicant lived with the deceased from the age of 3 years to 10 years and that he had already established a family by the time the deceased died and was therefore not a dependent of the deceased immediately prior to his death. It was her evidence that the 2nd applicant lived with the deceased for only 2 years and thereafter him and his sister **FIONA ATIENO**, who was legally adopted by the 1st petitioner's wife lived with the 1st petitioner's family from the time he was 6 years and his sister was 3 years. It was her further evidence that the 2nd applicant was working and had been given land parcel **KISUMU/KITMIKAYI/3136** by the 1st petitioner and was therefore not entitled to deceased's estate.

## **Analysis and Determination**

14. After the close of the evidence by both parties, the court gave both parties an opportunity to file written submissions. At the time of writing this judgment, only the applicants had filed their submissions. The non-filing of written submission by the petitioners is however not an issue for the reason that the substance of any case is determined on the basis of evidence presented in court by the parties and not by persuasion contained in the written submissions that tend to convince the court to see the evidence in a way that favours the submitting party.

15. From the evidence on record, I have deduced the following issues for determination.

**i. Who are the deceased's dependents**

**ii. Are the grandchildren and daughters in law entitled to inherit the deceased's estate**

**iii. Should the Certificate of Confirmation of Grant be revoked**

**i. WHO ARE THE DECEASED'S DEPENDENTS**

16. Section 29 of *the Act* provides:

*"For the purposes of this Part, "dependent" means –*

*(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) Such of the deceased's parents, step-parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;*

17. The deceased was survived by the following persons:-

**i. Dorcas Nyong'o - Widow**

**ii. Peter Anyang' Nyong'o - Son**

**iii. Mercy Owiti - Daughter**

**iv. Susan Mudhune - Daughter**

**v. Nyagoy Nyong'o Bloch - Daughter**

vi. Esther Nyong'o - Daughter

vii. Helda Nyong'o - Daughter

18. Thus, the widow and children of the deceased, named hereinabove are dependents whether or not they were maintained by the deceased immediately prior to his death.

19. The applicants who are grandchildren of the deceased have not demonstrated that they and their siblings were maintained by the deceased immediately prior to his death. Under the provisions of Section 29 of *the Act*, they are therefore not dependents.

ii. Are the grandchildren and daughters in law entitled to inherit the deceased's estate

20. It is not disputed that the deceased's children MARGARET AWUOR DICK (daughter); JUDITH AKOTH NYONG'O (daughter); DR. AGGREY NYONG'O (son) and SAMUEL OTIENO NYONGO (son) are deceased.

21. I have carefully considered the oral and documentary evidence tendered in this cause. One thing that stands out prominently is that the petitioners did not make any mention of their late sisters' children who are grandchildren of the deceased. The fact that the petitioner listed KWAME OTIENO, son to their deceased brother DR. AGGREY NYONG'O and DR. JULIANA OTIENO NYONG'O, wife to their deceased's brother SAMUEL OTIENO NYONGO leaves no doubt in the mind of the court that they acted under the fallacious patriarchal family tree which excluded daughters and any one claiming under them from inheriting from their fathers.

22. Today, it will be pretentious for any person to say or act ignorantly of the fact that discrimination of any person on the basis of gender or status is prohibited under the Constitution of Kenya, 2010, because; other than the existence of abundantly clear provisions of the Constitution, the chain of judicial decisions on discrimination on the basis of gender or status are equally clear. (See *Rono v Rono & Another, 2008 1 KLR (G & F) page 803; Douglas Njuguna Muigai v John Bosco Maina Kariuki & another [2014] eKLR; Mwongera Mugambi Rinturi & another v Josphine Kaarika & 2 others [2015] eKLR; Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR and Joyce Kabiti M' Turuchu v David M' Niritu Kiambi [2016] eKLR*).

23. In this present cause, the two applicants who are grandchildren of the deceased are not claiming interests as dependents but are claiming the interests of their respective parents who are now deceased.

24. In the persuasive decision in the case of Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR, Musyoka J stated as follows: -

*".....grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."*

25. The fact that the applicants are working and the fact that the 1st petitioner had given to the 2nd applicant land parcel KISUMU/KITMIKAYI/3136, which did not form part of the deceased's estate, does not disentitle the applicants from inheriting the deceased's estate.

26. From the foregoing, I hold that the applicants who are grandchildren of the deceased are on an equal footing with KWAME OTIENO, son of the deceased's son DR. AGGREY NYONG'O and DR. JULIANA OTIENO NYONG'O, wife to the deceased's son SAMUEL OTIENO NYONGO.

27. Consequently, I find and hold that the children of the late MARGARET AWUOR DICK and the late JUDITH AKOTH NYONG'O are entitled to inherit their grandfather's estate by virtue of their deceased mothers being daughters of the deceased.

28. Similarly, the spouse/s (if any) and children of the late DR. AGGREY NYONG'O are entitled to inherit the deceased's estate, by virtue of her/his/their husband and father (as the case may be), the late DR. AGGREY NYONG'O, being a son of the deceased.

29. Likewise, DR. JULIANA OTIENO NYONG'O and her children (if any) are entitled to inherit the deceased's estate by virtue of her/his/their husband and father (as the case may be), the late SAMUEL OTIENO NYONGO, being a son of the deceased.

iii. Have the applicants made out a case for revocation of the Certificate of Confirmation of Grant

30. Section 76 of *the Act* provides as follows:

*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*

*(b) That the grant was obtained by the making of a false statement or by concealment of from the court of something material to the case*

31. The expression "any interested party" as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate such as the applicants herein. I therefore find that applicants have the *locus standi* to present the application for revocation of the grant.

32. From the foregoing analysis; I am satisfied from the facts in this case that applicants are persons beneficially entitled to the estate of the deceased. I am also satisfied that the grant was obtained by concealment of material facts and non-disclosure of the applicants' interest and on the basis of an untrue allegation that all persons beneficially entitled to the estate had been ascertained and determined.

33. Further to the foregoing, the 2nd petitioner was unable to explain to court how the deceased's estate has been managed from the time the grant was confirmed on 9th July, 2014. That the 2nd petitioner appears not to have been actively involved in the administration of the deceased's estate was confirmed by her admission that until the applicants moved the court to revoke the confirmed grant, she had not realized that her name in the Certificate of Confirmation of Grant was stated as **Mary** yet her name is **Risper**.

34. 2nd respondent revealed that except for land parcel **EAST SEME/RATA/1537** where their ancestral home stands, all other assets that form the estate of the deceased are commercial properties where rent is collected yet no trust account for the funds had been opened, more than four years from the time the grant was confirmed.

35. As a result, the applicants' apprehension that the estate of the deceased might be wasted or otherwise detrimentally dealt with, to the disadvantage of the beneficiaries, is therefore not farfetched.

36. Besides, the petitioners have not explained the reason for which they wished to delay the distribution of the deceased's estate by holding it in trust yet there's no evidence that any of the beneficiaries is a minor for whose benefit a trust was suited.

37. Having said that, I conclude that there is overwhelming evidence in support of the applicants' case for revocation of the Certificate of Confirmation of Grant issued on 9th July, 2014 to **PROF. PETER ANYANG' NYONG'O; MRS. MARY OWITI; MRS. SUSAN MUDHUNE; MRS. ESTHER NYONG'O** and **DR. MARY NYAGYO NYONG'O**.

### **Disposition**

38. As a result, it is hereby ordered **THAT**:

**1. The letters of administration issued to PROF. PETER ANYANG' NYONG'O and NYAGYO NYONG'O BLOCH on 8th November, 2011 and the Certificate of Confirmation of Grant issued on 9th July, 2014 to PROF. PETER ANYANG' NYONG'O; MRS. MARY OWITI; MRS. SUSAN MUDHUNE; MRS. ESTHER NYONG'O and DR. MARY NYAGYO NYONG'O be and are hereby revoked**

**2. KENNETH ODHIAMBO OKUDHE is hereby appointed as a co-administrator of the Estate of the deceased HESBON SHIMEI NYONG'O jointly with PROF. PETER ANYANG' NYONG'O and DR. MARY NYAGYO NYONG'O. The Deputy Registrar of this court is directed to ensure issuance of letters of administration in their joint names forthwith**

**3. PROF. PETER ANYANG' NYONG'O; MRS. MARY OWITI; MRS. SUSAN MUDHUNE; MRS. ESTHER NYONG'O and DR. MARY NYAGYO NYONG'O are hereby directed to, within 45 days from today's date, render and file in court an account of the deceased's estate from 9th July, 2014 when the Certificate of Confirmation of Grant was issued to them**

**4. The appointed co-administrators PROF. PETER ANYANG' NYONG'O; DR. MARY NYAGYO NYONG'O and KENNETH ODHIAMBO OKUDHE are directed to within 60 days from today's date, proceed to apply for confirmation of the grant in accordance with the provisions of the law after ascertaining and determining all persons and their respective beneficial entitlement to the estate**

**5. The court record shows that this court's effort to have this matter settled amicably was not given due consideration by the petitioners. This would have entitled the applicants to costs of this application but this being a succession matter, there will be no order as to costs.**

**DATED AND DELIVERED IN KISUMU THIS..11th...DAY OF...October...2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix**

**Petitioners - N/A**

**For Petitioners - Mr Obondi/Ms Gusenwa**

**Applicants - Present**

**For Applicants - Mr Mugumia & Mr Korir**