



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NO.232 OF 2012**  
**IN THE MATTER OF THE ESTATE OF THE LATE SELINA AKINYI OKETCH**  
**SIMON OKOTH MWO.....APPLICANT**  
**VERSUS**  
**MARGARET OMOLO GUMBO & JOSHUA OUMA.....ADMINISTRATORS**  
**RULING**

**CLAIM**

1. Before court is a summons for revocation or annulment of grant under **Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration rules** dated 12th April, 2016.

The orders sought are:

1. Spent
2. Spent
3. Spent
4. That an order (sic) that the grant issued on 28th September, 2015 to MARGARET OMOLO GUMBO and JOSHUA OUMA be revoked or annulled.
5. That costs of this application be provided for.

The application is grounded on the annexed affidavit of Simon Okoth Mwo (hereinafter the applicant) and on the following grounds:

1. That the grant was obtained through fraud and deceit.
2. That the applicant is the beneficiary to the estate of SELINA AKINYI OKETCH (Deceased) by virtue of being a widower.
3. That the Administrators herein cannot purport to obtain Letters of Administration while the applicant is still alive.

4. That the applicant herein had also filed Nakuru Succession Cause No.216 of 2012 and the administrators herein filed a notice of intended objection.

### **THE APPLICANT'S CASE:**

2. The gist of the affidavit and grounds in support of the summons is that the applicant got married to the deceased on 18th August, 2003 under Luo Customary Law. He annexes an affidavit. The two had two (2) issues of the marriage. Birth certificates are annexed.

3. The deceased died on 5th October, 2011. The Respondents are accused of proposing themselves as the administrators of the estate of the deceased yet he being the husband, he he was the first in line to succeed the deceased. He attached annexure "SOM6" which is a copy of a title deed showing joint ownership of land between the deceased and the applicant being LR.No.Njoro/Ngata Block 7/564.

4. The Respondents obtained a grant which was confirmed on 28th September, 2015. The said grant was obtained through fraud and deceit yet the applicant had put in a notice as an objector.

### **THE RESPONDENT'S CASE**

5. Joshua Ouma (hereinafter the 2nd administrator) swore a replying affidavit with authority of Margaret Omolo Gumbo (1st Administrator). He depones that the 1st Administrator is the mother-in-law to the deceased who was married to her son Bernard Okoth Gumbo till 15th July, 1999 when he died.

6. Bernard Okoth Gumbo was a brother to the 2nd administrator. The deceased herein died on 5th October, 2011. She was buried at her late husband's home.

7. The two (2) minors alluded to by the applicant were born during the lifetime of Bernard Okoth Gumbo (R being born within 9 months of the death of Bernard).

8. It is denied that the applicant was married to the deceased. The applicant's claim is dismissed as false and full of inconsistencies viz:

i. Death doesn't end a marriage under customary law hence the marriage of deceased to Benard still subsisted even till her demise.

ii. The Applicant herein never married the deceased herein under Luo customary law:

a. No consent was ever sought or was given.

b. No dowry in form of livestock or any monies was ever given or received.

iii. The deceased herein was buried in her late husband's rural home because she was his wife.

iv. The Applicant herein neither attended the burial nor made any claim for her body and only materialized when he allegedly lodges the succession cause No.216 of 2012.

v. At paragraph 1 of his supporting affidavit, the applicant claims he married the deceased under Luo Customary Law on 18th August, 2003.

vi. However, in his affidavit, annexure SOM 1, he stated at paragraph 3 thereof that he married the deceased herein under Luo Customary Law on 7th March, 2000. It is noted that this affidavit marked as (SOM 1) was sworn to benefit him, when he claimed to be a spouse to the deceased entitled to loan excess refund in deceased Barclays bank.

vii. The said affidavit SOM 1, lacks probative value as it was made *ex-parte* by the applicant, for his own benefit, and after the death of the deceased herein.

9. The applicant is said to have known of the proceedings. He filed a notice of appointment of Advocate. He was also called by court but never appeared. It is admitted that the applicant is a part owner of plot known as Njoro/Ngata Block 7/864(Chumo) half of which is subject of the Succession herein.

10. It is stated that the applicant filed Succession Cause No.216 of 2012 and upon a caveat being filed by the Respondents, the applicant did not prosecute the cause.

### **THE APPLICANTS' SUBMISSIONS**

11. It is submitted for the applicant that the administrators herein shrewdly petitioned for grant of letters of administration with regards to the estate of the late Selina Akinyi Oketch despite having knowledge that the deceased was married to the applicant.

The administrators are accused of concealing material facts. The spouse ranks higher where an intestate has left one surviving spouse.

12. Reference is made to the marriage affidavit (“SOMI”) save to correct what is referred to as a typographic error indicating the marriage to have taken place on 18th August, 2003 instead of 7th March, 2000. Heavy reliance is also placed on **Section 35(1)** of the **Law of Succession Act Cap 160 Laws of Kenya**.

Annexures SOM2 (a) and som2 (b) (birth certificates) are painted as prove that the applicant is the father of the two (2) children left by the deceased.

It is urged that there is no prove that the deceased was married to the late Bernard Okoth Gumbo.

It is concluded that the actions of the administrators are riddled with hatred, vendetta and unimaginable sheer greed.

### **THE RESPONDENT'S SUBMISSIONS**

13. It is the Respondent's submissions that the Applicant had knowledge of the succession proceedings. The Applicant first lodged Nakuru H.C. Succession Case No.216 of 2012 in which he petitioned for letters of administration of the estate of the deceased. He lost interest in the matter when the Respondents lodged a caveat against him in that matter. These proceedings were consolidated with the proceedings herein and he was similarly being represented by the firm of Ms. Gordon Ogolla Advocates.

14. Due process was followed in obtaining letters of administration intestate and the certificate of confirmation of grant, with the attendant notices and directions by the court and all along the applicant refused to participate.

15. It is submitted that the applicant is not a widower nor a Dependant of the deceased. The applicant predicates his claim of marriage on his affidavit sworn on 11th February, 2015 which was sworn after the deceased died on 5th October, 2011. this contradicts his assertion that he married the deceased under Luo Customary Law on 7th March, 2000 which contradicts the date given in the affidavit as 18th August, 2003. This discrepancy is not a mere error as the applicant would want this court to believe.

16. No evidence of consent of parents or dowry in support of alleged marriage is adduced and there is no challenge to the fact that the deceased was buried at her husband's home in Moro Sub-location, Pap Onditi Location of Nyakach District.

17. Annexure “SOM 2” to the applicant's affidavit is faulted. The certificate was allegedly given under seal on 18th April, 2007 but same has a CA No.19506 of 15th April, 2016 just eleven (11) days before the application for revocation was filed. The same was only made to further the applicant's ends in this application.

18. In regard to annexure “SMO 2b”, it is submitted that the dates thereon confirm that Rogers Ben Otieno was born within 8 ½ months after the death of the deceased's husband and hence the child is presumed to be the son of Deceased's husband and not the applicant.

19. Lastly, it is urged that proprietary rights in respect of parcel No.Njoro/Ngata Block 7/864 does not prove marriage between the applicant and the deceased.

### **ANALYSIS AND DETERMINATION:**

20. I have had occasion to consider the application and the opposition thereto

The Law applicable is found in **Section 76** of the **Law of Succession Act Cap 160 Laws of Kenya**.

That Section provides:

**“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 of its own motion -**

**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.**

**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 a longer period as the court has ordered or allowed: 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 provision 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.**

Based on the evidence before me, the issues for determination are:

1. Whether the applicant was the husband or dependant of the deceased.
2. If the answer to 1 is in the affirmative, whether the grant herein was obtained by fraud and deceit or by concealment of material fact.
3. Should the grant be revoked.

This case turns on issue No.1. It is incumbent on the applicant to prove his standing as a husband or dependant of the deceased for him to have a basis or a foothold for laying claim to the deceased's estate. The burden of proof lies on him. **Section 107** of the **Evidence Act** provides:

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

21. Was the applicant married to the deceased? The evidence availed is to the effect that the applicant was married to the deceased under Luo Customary Law. Over and above the averment under oath in paragraph 1 of the supporting affidavit, the applicant annexes another affidavit sworn on 11th February, 2015 (there is some notable change of date in the affidavit but I doubt whether that is really material) in which the applicant asserts that he is the legal husband of the deceased having married her under Luo Customary Law on the 7th March, 2000.

22. The assertion is denied by the Respondents. It is stated in rejoinder to the applicant's evidence that the deceased was married to one Bernard Okoth Gumbo (deceased) and indeed she (deceased) was buried at the home of her deceased husband.

23. For the applicant to prove that he was married to the deceased under Luo Customary Law, it is not enough to depone that in an affidavit. The casual approach by the applicant in attempting to prove marriage to the deceased is mind boggling. There is no evidence by way of affidavit or otherwise by the parents and or any close relative of the deceased to support the assertion of marriage between the applicant and the deceased. Certainly consent of the parents of deceased must have been obtained if at all there was such a marriage. Evidence of applicant's own relative would have been necessary.

24. Additionally, a Luo Customary marriage is an elaborate process complete with visits to the parents of the deceased and more importantly payment of dowry and other cultural activities. There is no iota of evidence that any of these took place.

25. Equally telling is the fact that the applicant does not deny that the deceased was buried at the home of Bernard Okoth Gumbo who the Respondents assert was the husband to the deceased. It is inexplicable how the applicant could have allowed the burial of his alleged wife in a stranger's home without asserting his rights.

The deafening silence on the part of the applicant in regard to the place of burial of the deceased punctures enormous holes to his case.

26. The birth certificates of the children which show the applicant as the father of the two children of the deceased are no proof of a marriage. Since it is not the paternity of the children that is in issue in this matter, I find it unnecessary to delve into the propriety or otherwise of the birth certificates as invited to do by the Respondents. The fact remains that the birth certificates do not aid the Applicant's case neither does the joint registration of ownership of parcel of land No.Njoro/Ngata Block 7/564 (Chumo)

27. On the material before me, the applicant has failed miserably to prove marriage to the deceased.

28. There is again no evidence at all that the applicant was a dependant of the deceased. I must thus find and hold that the applicant was not married to the deceased neither was he a dependant.

29. Having so found, the applicant lacks any capacity to participate in the succession process herein. It is consequently futile to try and answer issues numbers 2 and 3 herein.

30. With the result that the summons for revocation dated 12th April, 2016 is completely without merit and is dismissed with costs to the Respondent.

**Dated, Signed and Delivered at Nakuru this 18th day of January, 2017.**

**A. K. NDUNG'U**

**JUDGE**