



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY.**

**SUCCESSION CAUSE NO. 148 OF 2016**

**IN THE MATTER OF THE ESTATE OF THE LATE:**

**MISHAEL OYAA DIANG'A ..... (DECEASED)**

**AND**

**MARTIN ODIPO OYAA ..... PETITIONER/RESPONDENT**

**VERSUS**

**SIPRINA OSORE OYAA ..... OBJECTOR/APPLICANT**

**JUDGMENT**

1. Upon the death of **MISHAEL OYAA DIANGA** (deceased) on 27<sup>th</sup> November 1995, **MARTIN ODIPO OYAA** filed succession cause No.172 of 2003 Homa Bay for and obtained grant for Administration of the deceased in his capacity as a son of the deceased.

2. The deceased was polygamous – having two wives and he was shown as being survived by:-

**First House**

- Teodera Ayoo Oyaa first wife and her children
- Martin Odipo
- Edward Ouma
- Penina Anyango
- Teresa Mboya
- Linet Adhiambo
- Elida Atieno
- John Mwai Khoya
- Pamela Akinyi
- Daniel Odula

**Second House**

- Siprina Osore Oyaa – 2<sup>nd</sup> wife and her children
- Judith Achieng
- Chrispine Okoth
- John Adede
- Fredrick Odhiambo

- Pauline Awuor
- Harrison Ochieng

3. The Chief's letter dated 15<sup>th</sup> November 2015 indicated the deceased had two wives, namely Siprina Osore Ayoo (the objector) 2<sup>nd</sup> wife and Teodora Ayoo (now deceased) first wife.

4. Among the assets for distribution was parcel NO. KANYADA/ KANYABALA/1242 which was distributed in favour of the petitioner/respondent whole share in recognition of all the material assistance the applicant had given him Parcel NO. KANYADA/ KANYABALA/781 was subdivided and distributed between -

- Siprina Osore – 2.0 Ha.
- Martin Odipo – 0.47 Ha.
- Edward Odipo – 0.80 Ha.
- Daniel Odula – 0.49 Ha.
- John Mwai – 0.40 Ha.

5. The objector/Applicant contends that there was material non-disclosure by the respondent of all the beneficiaries of the estate as she and her family were not aware of the succession proceedings which culminated in the issuance of grant of letters of administration intestate. She further states that no consent was obtained from all the beneficiaries of the estate and her sons have been disinherited because they have not been included as beneficiaries of the deceased.

6. In response the petitioner/respondent deposes that the summons for revocation of grant is fatally defective and ought to be struck out in limine as the objector lacks locus to raise claims on behalf of the children who are adults. He also insists that this objection was filed without leave of court yet the 30 days within which the same was required to be filed had lapsed.

7. The respondent explains that at the time when the administration proceedings began in 2003, all the applicant's children except one were minors, and the one who was an adult named **CHRISPINE OKOTH OYAA** had given his signed and dated consent. He accuses the applicant of material non-disclosure, saying she is guilty of mis-representation and non-disclosure of facts and is attempting to fraudulently include persons who are not children nor dependants of the late **MISHAEL OYAA DIANGA** with the sole purpose of disinheriting the three and rightful children and dependants of the deceased – which would be unfair and unjust.

8. The respondent deposes that the applicant has failed to disclose that she got remarried to one LA NGO OPIYO in 1998 and cannot therefore claim a life interest under **Section 37** of the **Law of Succession Laws**.

9. Further that the applicant and her 6 children have in the proposed division, received half the estate of the deceased on behalf of the house, so she cannot claim the other half which belongs to another house which has 9 children/dependants.

10. The application is described as a back-door attempt to forcibly grab land which is not her share and derail the confirmation of the grant.

He confirms that the deceased's assets comprised the two parcels of land aforementioned –

- 10 heads of cattle
- 10 heads of sheep
- Household items

11. The applicant is said to have disposed off the animals thereby intermeddling with the estate. The respondent further deposed that one Michael Onyango Oyaa was the product of the applicant's remarriage.

12. The respondent states that all the sons of the 1<sup>st</sup> wife consented to him being appointed as an administrator of their late father's estate and the grant was issued to him with the full knowledge of the applicant. He did not include his sisters in the distribution as they had all married and moved out of their father's home exception of daughter **PAULINE OYAA**.

13. He laments that the applicant and her sons have declined to accept the proposed equitable mode of distribution. The respondent explained the rationale for the proposed mode of distribution. He contends that the applicant has simply set her sights on the homestead of the first wife of the deceased which homestead according to Luo custom should be inherited by **DANIEL ODULA KHOYA**, (the last born) in the house of **TEODORA AYO OYAA**. The respondent maintains that he has had several meetings with the village elders and the applicant's relatives for purposes of securing an amicable settlement but the applicant has refused to vacate the portion of land which hosts the homestead of **TEODORA AYO OYAA** and where her grave stands. The respondent insists that the distribution was guided by the provisions of **Section 40 of the Law of Succession**.

14. The respondent also justifies the mode of distribution saying upon graduation from the UoN, his father married the applicant i.e. 1979 and since then he used his salary to educate the applicant's children. His father before he died disclosed how distribution of the land in an equitable manner was to be conducted between the two houses. He urges the court to dismiss the application for revocation saying at a family gathering in March/April 1994 when they visited the deceased at his home in Homa Bay, the deceased informed all those gathered then and who included his brothers **EDWARD OYAA, JOHN MWAI KHOYA, DANIEL ODULA KITOYA, ROSE WAYUA** (the sister in-law) and the applicant that parcel No.1242 would be left to the respondent as a sign of gratitude for shouldering many family responsibilities. He insists that this is why his brothers have not protested the mode of distribution, and have in fact sworn affidavits supporting his assertion.

15. The matter was canvassed by way of written submissions where the applicant's counsel argued that **Siprina Oyaa** has satisfactorily demonstrated that the respondent was not genuine and forthright in the whole process which led to the issuance of the grant as the application for grant of letters of administration was shrouded in secrecy and no disclosure was made about the relationship between the applicant and the deceased.

16. The respondent's argument that he received consent from 3 sons of the deceased regarding filing of the letters of administration is criticized on grounds that the three sons namely **EDWARD OUMA, JOHN MWAI KHOYA** and **DANIEL ODULA KHOYA** were all sons of the first wife who also happens to be the respondent's mother.

17. Although the respondent claimed that he had consulted **CHRISPINE OKOTH KIHoya** (a child from the 2<sup>nd</sup> house), counsel submits that this could not have happened as the latter was a minor and had not been issued with an identity card at the time.

18. The claims that parcel **NO. KANYADA/KANYABALA/1242** was given to the respondent as a sign of gratitude are questioned and termed as pure lies and simply tailored to satisfy the respondent's own interest.

19. It is also argued that the respondent has made up tales about the applicant having remarried, saying she still lives in the home she had lived in with the deceased and has never remarried.

20. Counsel further submits that the concealment of material facts is demonstrated in the application filed by the respondent which did not include the applicant among the surviving heirs and even the chief's letter dated 26<sup>th</sup> September 2003 which was used in filing the petition for grant of letters did not list all the beneficiaries of the deceased's estate. This court was urged to compare this with the chief's letter presented to court dated 26<sup>th</sup> September 2003 by the respondent against the chief's letter dated 15<sup>th</sup> November 2015 which listed all the beneficiaries and confirmed the applicant as the deceased's second wife and urged the court to grant the prayers sought.

21. The applicant's counsel submitted that the *mala fides* of the respondent is demonstrated by the speed at which he went ahead to sub-divide the land without confirmation of the grant issued on 30<sup>th</sup> March 2004.
22. The respondent's counsel submits that there was failure to seek leave to file an objection after the lapse of 30 days in collation of **Section 68** of the **Law of Succession Act**.
23. It is his contention that the sons from the 2<sup>nd</sup> house could not have been consulted at the time the applicant petitioned for the grant as they were all minors, with the exception of **CHRISPINE OKOTH OYAA** who he insists gave his consent and signed the consent.
24. The applicant is accused of trying to settle the succession process and to disinherit the heirs of the deceased by introducing persons who are not the deceased's children. It is submitted that the petitioner has been proposed to receive 0.47 hectares from **LR NO. KANYADA/ KANYABALA/781** which belonged to the deceased where the applicant will be receiving 2.0 hectares out of the 4.0 hectares from the same parcel.
25. Counsel points out that the applicant has not denied getting re-married to one **LANGO OPIYO** a year after her husband's death, and that together they had a son named **MICHAEL ONYANGO OYAA** born in 1999.
26. Counsel invokes the provisions of **Section 42** of the **Laws of Succession** to support the respondent's decision to distribute parcel No.1242 entirely to himself saying the deceased gifted part of his estate to certain dependants prior to his death.

**Section 42** provides as follows that:-where

**“An intestate has during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**Property has been appointed or awarded to any child or grandchild under the provision of Section 26 or Section 35, that property shall be taken into account in determining the share of the net estate finally accruing to the child, grandchild or house.”**

27. Counsel submits that the applicant and her children have been nominated to get the larger share from parcel **NO. KANYADA/KANYABALA/781** despite having a smaller unit than the first wife's family which has 9 children but are sharing the remaining 2.0 hectares of the land. It is further submitted that the petitioner has incurred lots of funds and time in pursuing the succession cause and revoking the grant will not solve the real issue in question which is that the applicant wants non-dependants to be allocated portions of the deceased's estate. It is however not indicated who those non-dependants are – although I suspect it is Michael Onyango Oyaa who is said to have been born 4 years after the deceased's death.
28. Counsel urges this court to make a finding that the respondent is a suitable administrator, and the issue of distribution should be addressed when the matter comes up for confirmation. But has the respondent already caused sub-division and registered the shared parcels before confirmation?
29. The main issues raised by the applicant are:-
- a) *Material non-disclosure of all the beneficiaries of the estate of MISHAEL OYAA DIANGA.*
  - b) *There was lack of consent from all the beneficiaries.*
  - c) *The applicant's children were disinherited as they were not included in the list of beneficiaries.*
  - d) *The respondent is not fit to administer the estate of the deceased as he has even caused parcel NO. KANYADA/KANYABALA/1242 to be registered in his name.*

*e) Objections filed out of time – I will deal with this point first as its outcome determines whether to address the other issues.*

30. The respondent faulted these proceedings saying they were filed without leave of the court thereby violating the provisions of **Section 68** of the Law of Succession Act. **Section 68 (1)** provides –

**“Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice.”**

31. It is argued that the gazette notice gave the objector 30 days to file her objection to the applicant being appointed administrator of the estate – yet she moved to court 13 years later. I take note that the applicant has offered no response to this limb. From the court record, notice of the respondent’s application for grant appeared in the **Kenya Gazette Notice No.8113 of 24/12/2003**, and also in the court notice board as from 28<sup>th</sup> October 2003 to 28<sup>th</sup> November 2003. Subsequently the grant of letters of administration intestate was issued on 30<sup>th</sup> March 2004.

32. I have no doubt that the objection was filed outside the 30 days window provided for under **Section 68** of the Act. I am also alive to the various decisions cited by counsel resting with **High Court Nairobi Succession Cause No.838 of 2012, In Re: Estate of grace Waithera Rogeni – deceased [2014] e KLR** which held that objections filed outside the 30 days period, and without leave of the court were invalid. I cannot begin to re-invent the wheel, that is the correct legal position and I make a finding at this stage that the objection filed herein was filed out of time and without leave from the court and is incompetent.

33. Having found that – it then follows that every other argument flowing from those proceedings cannot be merited. I’ll admit the applicant had some very valid concerns, but I think these can still be addressed when the matter comes up for confirmation of the grant. I need therefore, not delve any further on the grounds of issues raised by the applicant – the application is dismissed with costs to the Respondent.

34. Since the applicant challenges the mode of distribution, her arguments would well secure her when the matter comes up for confirmation of the grant. I direct that parties attend court on 15/03/2017 for hearing of application for confirmation of grant. **ALL** the deceased’s dependants to attend and must bring along their identification documents.

**Delivered and dated this 15<sup>th</sup> day of February, 2017 at Homa Bay.**

**H. A. OMONDI**

**JUDGE**