



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 160 OF 2005**

**IN THE MATTER OF THE ESTATE OF HEREDEON OGETII OMBUNA (DECEASED)**

**BETWEEN**

**FRANCIS OMWENGA OGETII.....PETITIONER**

**AND**

**CHRISTINE NYABOKE BICHANGA .....OBJECTOR**

**RULING**

1. The grant of letters of administration intestate respecting the estate of Heredeon Ogetii Ombuna (deceased) was issued on 13<sup>th</sup> April 2006, to Francis Omwenga Ogetii (petitioner), pursuant to his petition dated 2<sup>nd</sup> August 2005, in which he was listed as the sole beneficiary and land parcel No. Bassi/Bogetaorio II/2381 was listed as the only asset belonging to the deceased.

The grant was confirmed on the 7<sup>th</sup> October 2011, and a certificate of confirmation of grant issued to that effect.

Consequently, the listed estate property was wholly transmitted to the petitioner.

2. However, an application for the revocation of the grant was filed against the petitioner on **29<sup>th</sup> January 2013**, by an interested party/objector, Christine Nyaboke Bichanga.

She alleged that the petitioner misrepresented himself as the sole beneficiary of the estate yet she was also a beneficiary of the estate by virtue of being wife of the late Abner Bichanga Omwenga, who was an elder brother to the petitioner.

She therefore contended that the deceased was her father-in-law and hence entitled to benefit from his estate. Her notice of motion dated 8<sup>th</sup> February 2013, sought temporary injunction orders to restrain the petitioner from interfering with the estate property pending hearing and determination of her objection.

3. The record shows that both the objection dated 29<sup>th</sup> January 2013 and the Notice of Motion dated 8<sup>th</sup> February 2013 were not heard to the point of conclusion. In fact, the applications were never heard by the court at all. This, was because the parties requested and were granted the opportunity to explore possibility of an out of court settlement. This was done on 19<sup>th</sup> February 2013, and from that date the matter dragged on until the 8<sup>th</sup> May 2013, when the applicant/objector filed a fresh application for revocation of grant dated 6<sup>th</sup> May 2013. The earlier application dated 29<sup>th</sup> January 2013, together with

the application dated 8<sup>th</sup> February 2013, were presumably abandoned.

4. On 14<sup>th</sup> October 2013, the parties with the approval of the court agreed to maintain the “status-quo” subsisting in respect of the estate property and on 13<sup>th</sup> March 2015, directions were eventually given by the court to the effect that the objection dated 6<sup>th</sup> May 2013, be heard by way of oral evidence.

In that regard, the objector, **Christine Nyaboke Bichanga (PW 1)**, testified in support of her objection and called three witnesses viz **Joseph Nyarindo Ogetii (PW 2)**, **John Ogega Rasugu (PW 3)** and **Gilbert William Mabeya (PW 4)**.

The petitioner, **Francis Omwenga Ogetii (DW 1)**, also testified in opposition to the objection and called one witness, **Zablon Nyongoro Ogetii (DW 2)**.

5. The evidence has been considered in its totality by this court together with the final submissions presented on behalf of the objector by the learned counsel, **Mr. Ochang**, and on behalf of the petitioner by the learned counsel, **Mr. Moracha**.

Apparently, most of the witnesses proceeded as if this was a land dispute where ownership of the aforementioned parcel of land is the main issue. This being a succession cause, the issue for determination is whether the grant of letters of administration dated 3<sup>rd</sup> May 2006, was properly and lawfully obtained by the petitioner and if not, whether the objector is entitled to an order for the revocation and/or annulment of the grant.

6. From the evidence it is clear that the deceased was married to two wives. He therefore had two houses each with its own dependants.

The petitioner indicated that he was from the first house which comprised a total of nine (9) siblings i.e five sons and four daughters. He stated that the late Abner Bichanga was his brother from the first house and that the objector was his wife. He also stated that the second house of the deceased comprised a total of four siblings i.e two sons and two daughters. His brother, Joseph Ogetii (PW 2), testified herein on behalf of the objector and his other brother, Zablon Ogetii (DW 2), testified on his (petitioner’s) behalf.

7. There is no denial that the present dispute was provoked by the intended distribution of part of the estate property being the said land parcel No. Bassi/Bogetaorio II/2381 (Plot No. 2381) which was wholly transmitted to the petitioner in exclusion of his late brother, Abner, and in effect his wife, the objector.

Evidence from both sides has established that not only did the deceased have two houses but also several immovable property. However, in his petition for the impugned grant the petitioner listed himself as the sole beneficiary/dependant and the aforementioned parcel of land as the sole property of the deceased. He therefore desired to gain absolute possession of the property by fraud and concealment of material facts.

8. Even if both houses of the deceased had agreed to distribute all immovable property of the deceased in the manner that they deemed fit and without involving the court in that regard, the simplest thing that the petitioner would have done is to be candid and disclose all material facts at the time of petitioning for the grant. The question of distribution would have followed at or before the confirmation of the grant.

The fact that the petitioner proceeded to confirm the grant in his own name and without reference to additional assets belonging to the deceased, was a clear testimony of his fraudulent intention and disregard for the law.

9. Under **S.76 of the Law of Succession Act (Cap 160 LOK)**, 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 its own motion that “inter-alia” 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.

It is clear from what has been stated hereinabove that the petitioner did not properly and lawfully obtain the impugned grant. He did so fraudulently.

Consequently, the objector is deserving of the orders sought in her application dated 6<sup>th</sup> May 2013, but only to the extent that the impugned grant made on 13<sup>th</sup> April 2006 and formally issued on 3<sup>rd</sup> May 2006 be and is hereby revoked and that any registration of the estate property made on account of the said grant and/or the certificate of confirmation dated 7<sup>th</sup> October 2011 be and is hereby cancelled forthwith.

**10.** A fresh grant of letters of administration intestate be issued in the names of the petitioner and his brother Joseph Nyarindo Ogetii (PW 2), both representing the first house of the deceased and one other person to represent the second house of the deceased. The administrators shall therefore be three (3) in number and will be at liberty to apply for confirmation of grant on or after or before the expiry of the prescribed period of six (6)

months.

Each party shall bear their own costs of the application.

Ordered accordingly.

**[Read and signed this 9<sup>th</sup> day of March 2017].**

**J.R. Karanjah**

**Judge**

**In the presence of**

Mr. Moracha for Petitioner

Mr. Nyatundo holding brief for

Mr. Ochang for Objector

CC Mohe/Dorothy