



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE AND ADMINISTRATION NO.136 OF 2014

IN THE MATTER OF THE ESTATE OF PETER NAMENGE OUMA....DECEASED

AND

FELISTER AKOTH OUMA.....APPLICANT/OBJECTOR

VERSUS

BERNARD ODUOR NAMENGE.....RESPONDENT/PETITIONER

RULING

(Summons for revocation or annulment of grant dated 1st December, 2015)

1. Peter Namenge Ouma (hereinafter simply referred to as the deceased) died intestate on 18th December, 2013. Subsequently Bernard Oduor Namenge, the Respondent/Petitioner commenced these proceedings seeking to be appointed an administrator of the estate of the deceased. A grant of letters of administration was made and the same confirmed on 12th March, 2015.
2. Acting on the certificate of confirmation, the Respondent transferred the only property of the estate of the deceased being Marachi/Bukhalalire/1434 to himself.
3. On 4th December, 2015 Felista Akoth Ouma, the Applicant/Objector filed the instant application seeking an annulment of the grant, cancellation of the registration of the Respondent as the proprietor of L.R. No. Marachi/Bukhalalire/1434 and restoration of the proprietorship to the deceased. She also prays for an order restraining the Respondent from interfering with the estate of the deceased and her appointment as the administrator of the estate of the deceased.
4. In summary, the Applicant through her affidavit sworn in support of her application discloses that she is the mother of the deceased. She avers that the deceased's father one Gabriel Ouma Namenge is dead. Further, that the deceased had no wife or child. It is her averment that the deceased had six sisters.
5. The Applicant avers that the Respondent is neither her child nor the brother of the deceased. The Applicant reveals that the Respondent is the son of the late Thomas Oduor Namenge who was the brother of her late husband Gabriel Ouma Namenge.
6. The Applicant contends that the Respondent applied to administer the estate of the deceased by falsely swearing that he was a brother to the deceased. Further, that the letter of the Chief dated 22nd April, 2014 had simply described the Respondent as a family member without disclosing his exact relationship with the deceased.
7. It is the Applicant's disposition that the Respondent never sought nor obtained her consent before filing these proceedings. She avers that she was aware that the deceased had sold part of L.R. No. Marachi/Bukhalalire/1434 to Bernard Magero and Francis Otieno Adinda and they took possession of their portions of the said land.
8. The Applicant therefore urges the Court to allow her application since according to her the Respondent obtained the grant by making false statements and failing to disclose material facts.
9. The Respondent opposed the application through a replying affidavit sworn on 20th September, 2016. Through his affidavit he concedes that the Objector is indeed the mother of the deceased who had no wife or child. He also concedes that the deceased had six sisters who are all married. He further agrees with the Applicant that the deceased and his six sisters were born of the late Gabriel Ouma Namenge and the Objector. The Respondent accepts that the Objector is indeed not his biological mother.

10. It is the Respondent's averment that he did not commence this succession cause secretly. He also denies that Bernard Magero and Francis Otieno Adinda had bought part of the deceased's estate when the deceased was alive.

11. The Respondent's case is that the late Gabriel Ouma Namenge had acknowledged him as his son and he grew up with the deceased who acknowledged him as his true brother though he is only related to him as a cousin. It is his position that the Objector took him in as her son and the deceased and his sisters accepted him as a brother in accordance with Marachi customs in which a man who during his lifetime was not blessed with many sons is allowed to adopt his brother's son(s) whom he recognises as his own biological son(s).

12. The Respondent deposes that the deceased who was unemployed was ill for a long time and he is the one who paid his medical fees and covered his funeral expenses.

13. On the alleged disposal of part of the deceased's land, he avers that the deceased confided in him that the two purported buyers who had interest in his land had tried to defraud him through the Objector. Further, that the deceased had opposed the Objector's attempt to sell part of his land to the two buyers. It is his case that any sale of land between the deceased and the purported purchasers was not valid as there was no consent from the relevant Land Control Board.

14. The Objector avers that after the burial of the deceased a family meeting was held in which it was decided that he should seek authority to administer the estate of the deceased on behalf of the other beneficiaries including the Objector herein. The Respondent admits that there was no written consent from the Objector allowing him to apply for letters of administration but avers that she was present when the Chief wrote the letter authorising him to file this cause.

15. The Respondent's case was supported by a sister of the deceased who swore an affidavit on 4th October, 2016. In her affidavit Beatrice Atieno Ouma discloses that she is swearing the same on her own behalf and on behalf of her other five sisters: Praxides Akinyi, Jane Achieng, Selina Anyango, Alice Apondi and Elizabeth Night. The affidavit entirely supports the Respondent's case. The sisters of the deceased state that they together with the Objector consented to the filing of these proceedings by the Respondent.

16. Looking at the evidence adduced in this matter, it is clear that the deceased was the son of the Applicant. The deceased had six sisters who are all married. The evidence also shows that the Respondent was a cousin to the deceased.

17. The only issue that needs to be determined is whether the Objector gave her consent to the Applicant before filing these proceedings. The Respondent and the Applicant's daughters claim that the Applicant gave verbal consent to the Respondent.

18. Section 39 of the Law of Succession Act, Cap 160 provides for the order of priority where a deceased has left no surviving spouse or child as follows:

“39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

19. Since the father of the deceased had passed away the next on line to inherit the estate of the deceased was the Objector who is the mother of the deceased. The deceased ranked way below the Objector in the priority list provided by Section 39. Without the written consent of the Objector, the Applicant and even the sisters of the deceased had no legal authority to apply for a grant of letters of administration in respect to the estate of the deceased.

20. The Respondent claims that he received verbal consent from the Objector. A perusal of documents filed in Court does not support this assertion. The first letter from the Assistant Chief of Namusala Sub-Location is addressed to “whom it may concern” and only states that the Respondent is a family member of the deceased. The second letter dated 25th November, 2015 which was written to the Deputy Registrar of this Court long after this matter had been filed introduced the Respondent as the son of the late Gabriel Ouma Namenge and the Objector.

21. In his affidavit sworn on 23rd April, 2014 in support of the petition for letters of administration intestate, the Respondent averred at paragraph 4 that he was the only one surviving the deceased.

22. The documents filed in Court by the Respondent concealed the fact that the deceased had other persons surviving him. When it came to the distribution of the estate, the Respondent did not give any share to the Objector or the sisters of the deceased.

23. It is clear that the grant was obtained through the making of a false statement or by concealment from the Court of material fact and that is a ground for revoking a grant - see Section 76(b) Law of Succession Act, Cap. 160.

24. In short, the application succeeds and the same is allowed as prayed. In view of the relationship between the Applicant and the Respondent, I will make no order as to costs.

Dated, signed and delivered at Busia this 9th day of March, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT