



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**SUCCESSION CAUSE NO. 114 OF 2007**

**IN THE MATTER OF THE ESTATE OF BENARD ODHIAMBO ONDUI alias BONFACE  
OBUON ONDUI (DECEASED)**

**BETWEEN**

**MICHAEL OMOLO ONDUI.....APPLICANT**

**AND**

**MONICA AUMA MBOYA.....1<sup>ST</sup> RESPONDENT**

**SELINA AWINO ODHIAMBO.....2<sup>ND</sup> RESPONDENT**

**RISPER ACHIENG ODHIAMBO.....3<sup>RD</sup> RESPONDENT**

**AND**

**CHARLES A. ONDIEK.....INTERESTED PARTY**

**RULING**

1. This matter concerns the estate of Bernard Odhiambo Ondui (“Bernard”) who died on 3<sup>rd</sup> January 1993. His daughter, Monica Auma Mboya (“Monica”) applied for the grant of letters of administration on behalf of herself and her two sisters, Selina Awino Odhiambo (“Selina”) and Risper Achieng (“Risper”). No asset was set out in the original schedule of assets (Form P & A5).

2. The grant of letters of administration was issued on 17<sup>th</sup> September 2008. Thereafter Monica filed a summons for confirmation of grant dated 20<sup>th</sup> June 2011. In her supporting affidavit, Monica stated that the deceased’s estate comprised a parcel of land being Kisumu/Border/1835 (“Plot 1835”) measuring about 2.728Ha. The land was to be divided into three portions; Part A measuring 0.9Ha in the names of Monica, Selina and Risper in equal shares, Part B measuring 0.747 Ha in the name of Monica to hold in trust for Selina, Risper and Joseph Apiyo and Part C measuring 1.001Ha which the three sisters had sold to Charles Anthony Ondiek (“Ondiek”). The grant of representation was confirmed and a certificate on those terms was issued on 30<sup>th</sup> April 2012.

3. On 24<sup>th</sup> February 2016, Ondiek moved the court for an order of rectification of grant as he was unable to execute the certificate of confirmation as the original title for Plot 1835 was registered in the name of **Bonface Obuon Ondui** and not **Benard Odhiambo Ondui**. He contended that both Bernard and Bonface were one and the same person as evidenced by the original letter filed by Chief, Awasi Location

dated 20<sup>th</sup> November 2006. The application was allowed on 2<sup>nd</sup> March 2016 but issuance of the rectified certificate of confirmation was stayed pending hearing of the applicant's summons for revocation of grant.

4. The deceased's brother, Michael Omolo Ondui ("Michael"), filed the summons for revocation of the grant dated 7<sup>th</sup> March 2016. The gravamen of the application is that that the **Benard Odhiambo Ondui** was not the same person as **Bonface Obuon Ondui**. He alleged that Bonface died intestate on or about 28<sup>th</sup> December 1970 and was a different person from Benard Odhiambo Ondui. He further contended that Plot 1835 which was registered in the name of Bonface Obuon Ondui did not form part of the estate of Benard Odhiambo Ondui and that in any case, the said plot was held in trust for himself and Benard. The applicant further contended that Ondiek had no locus standi to apply for rectification of the certificate of confirmation.

5. The respondents and interested party filed affidavits in response to the summons for revocation which they adopted in their oral testimony.

6. Michael (PW 1) testified that he is the son of Zacharia Ondui Opiyo and Catherine Saka who had four sons; Bonface Obuon Ondui, Benard Odhiambo Ondui, Michael Omolo Ondui and Joanness Ondui. He recalled that before Zacharia died he distributed land to his children. His brother Joanness was given Plot 1835 as he was married. He told the court that during adjudication, Plot 1835 was registered in the name of Bonface but when he died in 1970 without any children, Zacharia decided to divide the land between himself and Benard. Thereafter he built his house on one side of the land while Benard built his house on another part. Michael also testified that when Benard died he left behind three daughters whom Ondiek assisted in consideration for acquiring part of the land through an agreement signed between Monica and Ondiek dated 24<sup>th</sup> October 2006. The agreement was witnessed by Michael and Francis Ochieng Ajiba ("Ajiba") who Michael denied was his brother. He told the court that the respondents agreed to give him some land and that his concern was that he was claiming a portion of the land.

7. Richard Obondo (PW 2), a brother to Zacharia, he confirmed that Zacharia divided the land between his sons and that the land in question was to be shared between Michael and Benard since Bonface died when he was very young. He also stated that Ajiba was not a son of Zacharia but merely a neighbour.

8. Monica (DW 1) testified that Benard Odhiambo Ondui was her father and that Risper and Selina were her sisters. Her position was that Benard and Bonface were one and the same person. She told the court that although he was born as Bonface, he left the Catholic Church and joined Hera Church where he adopted the name Benard. She testified that since the deceased was disabled, Ondiek assisted him by obtaining for him employment and building for him a house in consideration of which he sold Ondiek part of his land. After the death of their father, Monica and her sisters sold another portion of the land to Ondiek to facilitate treatment of their sick sister.

9. Jane Achieng Odhiambo (DW 2), a daughter of Zacharia Ondui, testified that Michael and Benard were her brothers and that Bonface Obuon Ondui was the same person as Benard Odhiambo Ondui. She recalled that during the burial of Benard, her father and mother recognised that Ondiek had bought land from Benard. She also told the court that her father had given all her brothers land and that Michael was not being disinherited as he had his own land. Monica's case was also supported by Mary Akongo Ochieng (DW 3), the wife of Ajiba and Gordon Odhiambo Ondiek (DW 4), a son of Joannes Ondiek Ondui.

10. Ondiek (DW 5) supported Monica's case and further testified that he first purchased a part of Plot 1835 on 12<sup>th</sup> June 1988 from the Benard and he completed payment. He bought another portion from Monica and her sisters in 2006 to assist them after Selina became ill. Ondiek confirmed that in the latter agreement there was an undertaking by Monica to give Michael some land if some was left after re-survey.

11. From the evidence, I have outlined the issue for determination are whether **Benard Odhiambo Ondui**

and **Bonface Obuon Ondui** are one and the same person. If not, whether Plot 1835 was registered in the name of Bonface Obuon Ondui to hold in trust for Michael and Benard.

12. When the petitioners commenced proceedings to take out letters of administration for the deceased's estate, they filed a letter dated 20<sup>th</sup> November 2006, written by the Chief of Awasi, referring to the deceased as, "**Benard Odhiambo Ondui or (NEE) Bonface Obuon Ondui.**" Both Michael and Ajiba acted as sureties to the petitioners. This means that it was a notorious fact that the Benard and Bonface were one and the same person and at the time Michael did not raise any objection.

13. Michael's position that Benard and Bonface were different persons is undermined by plethora of evidence submitted by the petitioners. His participation in the sale of the part of Plot 1835 to Ondiek is clearly inconsistent with his position. He was a witness to the agreement between Monica, Risper and Ondiek which recognised that Benard had sold to Ondiek approximately 3 acres of Plot 1835 and that Ondiek had purchased approximately 1 acre from Monica and her sisters to enable them treat their sister Selina. In that agreement, Monica and her sisters undertook to give Michael some land whose size would be determined after the re-survey. There was a second agreement dated 24<sup>th</sup> October 2006, in which Monica sold a strip of land to Ondieki. Both Ajiba and Michael describing themselves as brothers of Benard Odhiambo Ondui consented to the sale and acknowledged receipt of Kshs. 18,000/-. They also agreed that Monica could proceed with succession of the deceased's estate. In fact, prior to that agreement, Michael and Monica had written a letter dated 19<sup>th</sup> October 2006 to the Chairman of Nyando County Council accusing Ajiba of offering Plot 1835 to the Council for sale. In that letter, Michael recognised that the land belonged to the deceased and that his daughters were his successors. At no time during these transactions did Michael raise the issue that the land belonged to another brother by the name Bonface and or that he was entitled to half share if indeed it was held in trust.

14. To buttress his case and discredit the petitioners', Michael's and PW 2 contended that Ajiba was not his brother but a neighbour. This position was in direct contradiction to the affidavit sworn by Ajiba an affidavit on 29<sup>th</sup> March 2016, in which he deponed that he was Zacharia's eldest son and that Benard was one and the same person as Bonface. The agreement dated 24<sup>th</sup> October 2006 confirmed that both Ajiba and Michael assented to the sale of the part of the property to Ondiek. Ajiba's funeral program annexed to the further affidavit of Ondiek sworn on 9<sup>th</sup> December 2016, recognised Ajiba as the first-born son of Zacharia Ondui and Cathorina Saka. The program named the other siblings but did not mention that there was another son by the name Bonface apart from Benard. Achieng (DW 2), Ajiba's wife (DW 3) and Joannes son (DW 4) all supported the petitioners and rejected Michael's claims.

15. To prove that Bonface was a person different from Benard, Michael case was that when he wanted to commence succession proceedings for the estate of Bonface after he had been away for a long time, he obtained a certificate of death no. 0272736 in the name of Bonface Obuon Ondui who died on 28<sup>th</sup> December 1970. It was issued on 12<sup>th</sup> December 2016. Michael could not produce a letter from the Chief permitting him to commence succession proceedings. It is strange that Michael obtained the death certificate after 46 years despite the fact he knew that deceased property was the subject of succession proceedings. I cannot resist making the inference that the death certificate was manufactured purely for this case to support Michael's baseless claims against his brother's daughters.

16. Having reviewed the testimony and affidavits, I find and hold that Zacharia Ondui and Catherine Saka had only four sons; Francis Ochieng Ajiba alias Ajiba Ondui, Johannes Ondiek Ondui alias Johanes Obewa Ondui, Benard Odhiambo Ondui alias Bonface Obuon Ondui and Michael Samo Ondui alias Michael Omolo Ondui. I also find and hold that Benard Odhiambo Ondui is one and the same Bonface Obuon Ondui. It follows that Michael's claim that he is entitled to Plot 1835 or any part thereof based on a trust cannot survive as it based on the fiction that Benard and Bonface are different persons.

17. Under **section 76(b)** of the **Law of Succession Act** the court may on application or on its own motion revoke a grant of representation on the ground that, "*the grant was obtained fraudulently by making a false statement or by the concealment from the court of something material to the case.*" The deceased's three daughters were the direct and lawful heirs and were entitled to apply for the grant of representation.

They fully disclosed that the deceased was also known as Benard alias Bonface as is clearly stated in the Chief's letter submitted to court. Since Michael was not a beneficiary, he cannot complain if the all the beneficiaries consented to selling part of their inheritance to Ondiek. Furthermore, the evidence is clear that the deceased had already sold part of his land to Ondiek and at all times the larger family including Michael had given their blessings to the deceased's daughters to proceed with succession on that basis.

18. I would also be remiss if I did not mention the position of Ondiek. It is clear from the evidence that Ondiek was not a mere stranger. He assisted Benard during his lifetime. He enabled him get employment even though he was disabled. He constructed for him a semi-permanent house and when Monica and her sisters were in distress, it is to him they turned for assistance. This fact was recognised by the entire family.

19. Following the findings I have made, I direct the Nyando District Criminal Investigation Officer to investigate how the death certificate for No. 0272736 for Bonface Obuon Ondui was issued to the applicant. The report should be filed before this court within the **next 30 days**.

20. The Summons for revocation dated 7<sup>th</sup> March 2016 is dismissed. I make no order as to costs as this is a family matter. The rectified certificate of confirmation may now be issued forthwith.

**DATED and DELIVERED at KISUMU this 10<sup>th</sup> day of April 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Okoyo instructed by Abande and Associates for the applicant.

Mr Oluoch instructed by A. T. Oluoch and Company Advocates for the petitioners/respondent.

Charles Ondiek in person.