



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 307 OF 2015

IN THE MATTER OF THE ESTATE OF SHADRACK OPALA OJWANDO (DECEASED)

-between-

SYPRIN AKOTH OTIENO.....APPLICANT/PLAINTIFF

-VERSUS-

1. MESHACK ONYANGO OLONDO

2. JOSEPH OKOTH ONYANGO.....RESPONDENTS/DEFENDANTS

RULING

1. By the Summons for revocation dated and evenly filed in Court on 02/09/2015, the Applicant herein applied for the revocation of the grant of the representation in respect of the estate of **SHADRACK OPALA OJWANDO** which was issued to **MESHACK ONYANGO OLONDO**, the first Respondent herein who was the Petitioner before the then Senior Principal Magistrate's Court's at Migori in Succession Cause No. 59 of 2008. That grant was eventually confirmed.
2. The application is opposed by the Respondents through the filing of a Notice of Objection and a Replying Affidavit of **MESHACK ONYANGO OLONDO**, the first Respondent herein.
3. Directions on the hearing of the application were taken to the effect that the application be heard by way of oral evidence. The Applicant was deemed as the Plaintiff whereas the Respondents were deemed as Defendants. As both parties were duly represented by Counsels, parties filed their respective documents and the hearing took place. I shall in this judgment refer to the parties as the Plaintiff and the Defendants respectively.
4. The Plaintiff testified and only called one witness, **SAMWEL OMOLO NYAGAYA (PW2)**, a retired Assistant Chief of South Kanyajuok. Both Defendants testified without calling any witnesses. It is the Plaintiff's contention that the Defendants fraudulently disinherited her from the estate of **Shadrack Opala Ojwando**, the deceased in this cause. The estate of the deceased comprised of the parcel of land known as **KAMAGAMBO/KANYAJUOK/769** (hereinafter referred to as '**the land**') which land was registered in the names of the Defendants on the basis of the Certificate of Confirmation of the grant issued to the first Defendant. The first Defendant is the father of the second Defendant. To the Plaintiff, the Defendants are not in any way related to the deceased as they hail from a completely different clan from that of the deceased and were not related to the deceased in any manner whatsoever. It was further contended that the Defendants fraudulently obtained an introductory letter allegedly issued by PW2 introducing the first Defendant as a close cousin of the deceased. That letter which is dated 10/12/2007 and its contents were denied by PW2 and this Court learnt that indeed criminal proceedings based on the

said letter had been instituted against the first Defendant. PW2 testified that he had long retired from service in June 2007 and as such the letter was a fraud.

5. On their part, the Defendants while denying any wrong doing on their part testified that the land historically belong to them and that the deceased had only been temporarily allowed to use part of their land in 1969 for only 4 years. They contend that instead the deceased fraudulently registered the land in his name during the adjudication process and in the absence of the relatives of the Defendants. That irregular registration only came to the knowledge of the Defendants long after the death of the deceased and that is why the Defendants instituted the succession proceedings so as to take back what lawfully belonged to them. The Defendants admitted having not named the Plaintiff as a beneficiary of the estate of the deceased.

6. At the close of the respective cases, Counsels filed written submissions hence this ruling.

7. This Court carefully observed the witnesses as they testified. From the totality of the evidence, there is no dispute that the Plaintiff was the wife of one the children of the deceased. Her husband was one **DANIEL OTIENO OPALA** who also passed away but survived the deceased. It is also not in dispute that all the three children of the deceased passed on leaving no survivors and that in the lineage of the deceased there is only one closet surviving person who is the Plaintiff; a daughter-in-law to the deceased.

8. Whereas this Court cannot outrightly disregard and/or ignore the position taken by the Defendants on their alleged entitlement to the land, it is clear that the Defendants are not in the line of consanguinity in respect to the deceased and as such they cannot purport to inherit from the estate of the deceased unless under the clear and settled exceptions in law. Their claim on the ownership of the land may however be sustained before an appropriate forum but not before a Probate Court.

9. It is on the foregone basis that this Court finds that the Defendants' involvement in the affairs of the estate of the deceased, in the manner they did, is wanting in law. On realizing that 'their' land had been irregularly allocated to the deceased who had long died, the Defendants ought to have taken out citation proceedings against any of the family members or relatives of the deceased and thereafter appropriately pursue their claim. Engaging in acts leading to fabricating evidence can only be deemed as highly contrary to law and as such any resultant proceeds of such a process have no legal leg to stand on and must fall.

10. The Plaintiff has therefore satisfied this Court that the Grant, as issued, was a result of a flawed process. The proceedings did not disclose that the Plaintiff was a beneficiary, the first Defendant intentionally made a false statement that he was a close cousin of the deceased, the Defendants fraudulently obtained the letter dated 10/12/2007 which accordingly misled the court, the first Defendant concealed the fact that their 'claim' to the land was based on fraud and not inheritance and also failed to show that the person(s) to whom a grant was to be made failed to take out such a grant after any due notice and without any reasonable cause.

11. It is the finding of this Court that the Plaintiff has appropriately brought her application within the confines of **Section 76** of the **Law of Succession Act**, Chapter 160 of the Laws of Kenya and as such it is merited.

12. Consequently, this Court now makes the following orders: -

(a) The Grant of Letters of Administration made to MESHACK ONYANGO OLONDO and the resultant Certificate of Confirmation be and are hereby revoked forthwith.

(b) A new grant shall be issued in the name of SYPRIN AKOTH OTIENO.

(c) The registration of the parcel of land known as KAMAGAMBO/KANYAJUOK/769 in the names of MESHACK ONYANGO OLONDO and JOSEPH OKOTH ONYANGO be and is hereby cancelled and the parcel of land shall revert to the name of SHADRACK OPALA

OJWANDO.

(d) The Respondents shall bear the costs of the application.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of May 2017.

A. C. MRIMA

JUDGE