



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL MISC. APPLICATION CASE NO. 5 OF 2016
(PROBATE AND ADMINISTRATION)
(CORAM: J.A. MAKAU - J.)

KAMLUS SEWE WENDA.....DECEASED

AND

**IN THE MATTER OF APPLICATION FOR REVOCATION AND/OR ANNULMENT OF
GRANT ISSUED TO ELSEBA AWUOR OYULE**

BETWEEN

PHILIP ONJOR SEWE.....APPLICANT/OBJECTOR

VS

ELSEBA AWUOR OYULE.....RESPONDENT/PETITIONER

(Being an Appeal from a Ruling dated 08.05.2013 in Succession Cause No. 79 of 2012 in Siaya Law Court before Hon. M. S. Kimani – RM)

J U D G M E N T

1. The Applicant/Objector **PHILIP ONJOR SEWE** through summons for revocation and/or annulment of grant issued to **ELISEBA AWUOR OYULE** on 8th May 2013, vide Siaya Principal Magistrate Court, in Succession Case No.79 of 2012, sought the following orders:-

*1. That the grant letters of administration intestate issued to the respondent herein **ELSEBA AWUOR OYULE** in respect of the deceased's estate **KAMLUS SEWE WENDA** on 8th May 2013 and confirmed on the 8th May 2013 by the Principal Magistrate Court Siaya in Succession Cause No. 79 of 2012 be revoked and/or annulled forthwith.*

2. That there be declaration that any sale of purported sale transfer to any party in respect to the deceased's parcel no. Siaya/Mulaha/188 and subsequent to the confirmation is illegal, null and void and initio. The same to be cancelled transferred and registered in the name of the Applicant Philip Onjor Sewe.

3. That this Honourable Court did issue for transfer/recall of the said SIAYA PMS Succession Cause original No. 79 of 2012 for revocation of the said grant. For perusal to ascertain the

legality, impropriety of the grant and give necessary directions any other order the court may deem fit and adjust to grant.

3. That cost of this application be provided for or be borne by the respondent.

2. The application for revocation of the grant is premised on the grounds on the face of the summons for the revocation of the grant:-

a. That it is the High Court which seized or empowered with the jurisdiction of revoking/annulling grants illegally obtained in the Magistrate's Court without following due process of the Law (CAP 160) Succession, Probate and Administration Rules and it is the High Court which has jurisdiction to recall issues order for cases if deemed fit and justice to grant.

b. The grant was obtained fraudulently by means of false allegation of facts and by con transfer of facts and by concealment of material facts.

c. The petition filed in the Magistrate Court which gave rise to the said grant issue on 8th May 2013 is totally incurably defective.

The application is further supported by the supportive affidavit of Philip Onjor Sewe dated 9th September 2016.

3. The Respondent/Petitioner opposed the application through replying affidavit dated 8th May 2014, 6th June 2014 and 6th March 2011 and 16th March 2017.

4. On 9th February 2017, directions were given to the effect that the summons for the revocation of the grant be determined by way of **viva voce** evidence. The Objector gave evidence and called one witness whereas the petitioner, gave evidence and called two witnesses.

Objector's Case: -

5. OW1, Philip Onjor's evidence, is that the deceased, Kamlus Sewe Wenda, was his father and the Petitioner, is the Objector's sister-in-law, being wife to Alex Francis Oyule Sewe (**deceased**). That his father had the two wives, Getrude Adala (**deceased**) and Sande who later returned back to her husband. That the children of Getrude are:- (1) Alex Francis Oyule (**deceased**), (2) Catherine Achieng, married at Homabay; (3) Philip Onjor Sewe (**Objector**):- (4) Monicah Awuor (**deceased**), who was not married but was survived by two children; namely Mary and Nyaguk; (5) Vincent Otieno (**deceased**), survived by four children:- Everlyne Achieng, Jerusa Akoth, Gertrude Adala (**deceased**) and a fourth child who OW1 could not recall: (6) Christine Oduor (**deceased**), who was not married and who had four children namely: Nicholas, Otieno, Mary and the fourth child who OW1 could not remember.

6. OW1, testified further that Sande had two children with OW1's father who are also entitled to the deceased's estate. He named the two as Consolata Ojuanga and could not remember the other. That both the Petitioner and the Objector/Applicant live on the estate of the deceased herein. He agreed that the deceased's assets are as listed by the Petitioner in the Petition namely:- **Land Parcel No. Siaya/Mulaha/188**. The Objector urged the grant to be revoked because the Petitioner did not seek his consent not informed him before petitioning for the grant nor did she list all the beneficiaries and failed to disclose all the deceased's beneficiaries. That the Petitioner sold the Objector's and other beneficiaries shares. He prayed the grant be revoked, title deed do revert back into the deceased's name and the illegal sale be declared null and void. He prayed to be appointed the Administrator of his father's estate, with another beneficiary other than the Petitioner, thus one Isa Onden, OW1's nephew.

7. OW2, Brigida Anyango Ohanya, testified that he knows both the Petitioner and Applicant and that she is related to both parties. That the deceased was his brother in-law and was the owner of Land Parcel **SIAYA/MULAHA/188**. That both the petitioner and the applicant are entitled to the deceased estate.

That the land should be shared to all children of the deceased.

Petitioner's Case: -

8. PW1, Elseba Awuor Oyule, testified that the Objector/Applicant is her brother-in-law and that he is son to the deceased, whose estate is subject of this cause. That she is daughter-in-law to the deceased. She agreed the deceased had 6 (six) children and was the sole proprietor of land a parcel No. **Siaya/Mulaha/188** which was in the name of the deceased. That she petitioned for grant of letters of Administration intestate without informing the Applicant/Objector. She averred the applicant obtained the title deed without grant of letters of administration. That the Petitioner filed PMSC No. 79 of 2012 seeking grant of letters of administration. That the applicant raised a complaint before the Area Chief, but the Petitioner proceeded with the succession cause and obtained the title deed in respect of **SIAYA/MULAHA/188**.

9. PW2, Tropoza Akoth Onyango, Village Elder, from Mulaha Sub-location, Township location, testified that the Applicant raised a complaint before her against the Petitioner, who had cut his trees. The case was heard and decided in favour of the Petitioner. The Applicant was dissatisfied and referred the matter to the Area Chief and lost as the land belonged to Francis Oyule Sewe. The Applicant was ordered to surrender the title deed which belonged to the deceased, which he did, and later the title deed was transferred into the name of the Petitioner, after she had filed a succession cause, to which she got the grant of the Letters of Administration.

10. PW3, Fredrick Ojwang Ogongo, a retired Chief, of Siaya Township location, testified that the applicant is brother-in-law to the Petitioner. That the succession in this case is over the estate of Sewe. That he had handled a case, over land registered in the name of the Objector, that he directed the parties to the D.O's Office, who referred them to the Land Registrar, who cancelled the title deed issued to the Applicant as it was not obtained in accordance with the law. That the title deed reverted back into the name of Sewe (**deceased**), that both the Applicant/Objector and the Petitioner were advised to initiate succession process; but only the Petitioner, petitioned for the grant. He stated he does not know how the succession process; for the grant of letters of Administration progressed, but later came to know that the property was registered in the name of the Petitioner. He admitted he wrote a letter for succession cause to be commenced listing the beneficiaries of the estate of Kamlus Sewe Wenda, father to the Objector and father-in-law to the Petitioner but did not state all the names of the children of the deceased as he excluded the Applicant.

11. That upon the close of the Petitioner's case, both the Applicant/Objector and the Petitioner did not submit but requested the court to proceed and do its judgment. I have summarized the Applicant/Objector's case and the Petitioner's case, that from the pleadings and the evidence in this case the issues for consideration can be summed up as follows: -

a. Whether the Applicant/Objector has established grounds for grant issued to the petitioner to be revoked?

b. That if grant is revoked, who should be appointed the Administrator(s) of the deceased's estate?

12. **Section 29(a),(b) and (c) of the Law of Succession Act** states who the beneficiaries of the deceased estate are and provides as follows: -

“29. For the purposes of this Part, “dependant” means-

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and

sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

13. Section 76 of the Law of Succession Act sets out the conditions under which a grant can be revoked. It provides as follows: -

“76. 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 of its own motion-

a. that the proceedings to obtain the grant were defective in substance;

b. that 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;

c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

((iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or

e. that the grant has become useless and inoperative through subsequent circumstances.”

14. The petitioner is seeking grant of letters of administration before Court in completing Form P and A 5 she stated the deceased was survived by herself and one Florence Akinyi Oyule a granddaughter to the deceased. The Petitioner further filed a Chief's letter dated 20th July 2012 in which the surviving heir was named as the Petitioner notwithstanding the Applicant/Objector Philip Onjor and others were still known to the Petitioner and are still alive. The Petitioner in seeking the grant herein deliberately filed proceedings to obtain grant which she knew were defective in substance; that she obtained the grant fraudulently by making of a false statement and by concealment from Court of some material to the case; obtained the grant by means of an untrue allegation of a fact essential in point of law to justifying the grant.

15. Rule 26(1) of the Probate and Administration Rules provide as follows: -

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

16. I find the Petitioner herein did not seek consent of the Applicant/Objector nor did she cite him but secretly proceeded to Court to Petition for the Grant of Letters of Administration of the Deceased's Estate Intestate. She sought grant of letters of administration of the Deceased's estate without Notice to the Applicant and all other beneficiaries to the Deceased's estate. The Petitioner is entitled in the same degree with other beneficiaries including the Applicant/Objector. She was not entitled in priority to the

Applicant /Objector.

17. In view of the provision of **Section 29(a), (b), Section 76 of the Law of Succession Act and Rule 26(1) of the Probate and Administration Rules**, I am satisfied that the Objector has established sufficient grounds to warrant the grant of letters of administration issued to the Petitioner revoked.

18. The next issue for my consideration, is having revoked the grant who should be appointed the administrator of the Deceased's estate? **Section 66 of the Law of Succession Act** provides that the Court has the final discretion as to the person or persons to whom a grant of letters of administration in the best interest of all concerned, can be made.

Section 66 of the law of Succession Act provides: -

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

a. surviving spouse or spouses, with or without association of other beneficiaries;

b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

c. the Public Trustee; and

d. creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

19. I have considered the relationship between the Applicant/Objector and the Petitioner and I am not satisfied the two can work closely together to faithfully administer the estate of the deceased taking into account, that the Petitioner secretly moved to petition for the grant without informing the Applicant/Objector and other beneficiaries. The Applicant/Objector is of the view that he and one Isa Onden, would administer the estate very well. The Petitioner did not object to the suggestion put forward by the Applicant/Objector, however to safeguard the interest of the Petitioner, that in the best interest of all concerned, the Applicant / Objector, the Petitioner and Isa Onden should administer the deceased's estate jointly.

20. The upshot is that the summons for revocation of the grant issued to the Petitioner on 8th October 2012 and confirmed on 8th May 2013 in **Siaya PMSC 79 of 2012** is meritorious and the same is allowed. I proceed to make the following orders: -

a. The grant of letters of administration intestate issued to the Respondent Elseba Awuor Oyule in respect of the estate of the deceased's estate Kamlus Sewe Wenda on 8th October 2012 and confirmed on 8th May 2013 in Siaya PMSC 79 of 2012 be and is hereby revoked forthwith.

b. That any sale or transfer of parcel No. Siaya/Mulaha/188 following the issuance of the grant or thereafter is null and void. The title Siaya/Mulaha/188 issued to any of the party be and is hereby cancelled and ordered to revert back into the name of Kamlus Sewe Wenda (deceased).

c. The Applicant/Objector, Philip Onjor; the Petitioner, Elseba Awuor Oyule and Isa Onden are jointly appointed as joint administrators of the deceased's estate in PMSC 79 of 2012. Fresh P&A 41 to issue to the three forthwith and the three to be at liberty to forthwith seek confirmation of the grant including all the beneficiaries to the deceased's estate who had earlier

on been omitted in the application for confirmation of the grant.

d. The Applicant/Respondent is awarded costs of the application to be agreed or taxed.

e. In view of the value of the estate this matter is transferred to Siaya P.M's Court for further hearing and determination on the issue of distribution amongst all Deceased beneficiaries.

DATED AND SIGNED AT SIAYA THIS 20TH DAY OF JULY 2017.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Applicant/Objector in person - present.

Petitioner/Respondent in person – present.

Court Assistants:

1. Laban Odhiambo
2. Atika Leonidah
3. Brenda A. Ochieng

J. A. MAKAU

JUDGE