



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.143 OF 2003

IN THE MATTER OF THE ESTATE OF SAMWEL ODILA AWAK – DECEASED

NATHAN OWINO ODILA.....PETITIONER/RESPONDENT

VERSUS

BELDINA ANYANGO ODILA.....OBJECTOR/APPLICANT

RULING

1. These proceedings relate to the Estate of one **SAMUEL ODILA AWAK** (*deceased*) who died on **17th January 2000** while domiciled in Kenya. Letters of administration in respect to his estate were on **30th July 2003** issued to his eldest son one **NATHAN OWINO ODILA** (*hereinafter in this ruling referred to as the Respondent*). The grant has not been confirmed to-date.
2. On 13th March 2015, **BELDINA ANYANGO ODILA** (*hereinafter in this ruling referred to as the OBJECTOR*) filed summons for revocation and annulment of grant under **Section 76 of the Law of Succession Act** and **Rule 44 of the Probate and Administration Rules** in her capacity as one of the widows and therefore a beneficiary of the estate of the deceased.
3. In the said application, the Objector has sought orders that:
 - a) **The grant made on 30th July 2003 to NATHAN OWINO ODILA be revoked and/or annulled.**
 - b) **The court do issue orders for restriction against any dealing on land parcel No.WEST KASIPUL/KONYONGA/802 pending the hearing and determination of this application interpartes and thereafter pending the determination of this cause.**
 - c) **The Petitioner be stopped from intermeddling with the deceased’s estate.**
4. The Objector has in the said summons alleged that the proceedings to obtain the grant and confirmation thereof were defective in substance, the grant was obtained fraudulently by making of false statements and/or concealment from the court of material facts and that the Petitioner has totally misled the court on the facts relating to the estate of the deceased.
5. In the affidavit in support of the said summons sworn on 12th March, 2015 the Objector depones that the Respondent misled the court and obtained the said grant without involving the real beneficiaries who

had the legal and beneficial interest in the estate.

The Objector further states that she was the 3rd and only surviving widow of the deceased and the Petitioner, who is the eldest son of the first wife, filed the Succession Cause secretly without her consent or knowledge. She further states that the Petitioner had no *locus standi* to file the succession cause when she was still alive.

6. The Objector further depones that the Respondent concealed material facts from the chief who prepared a letter to the court indicating the list of heirs that excluded all the legal beneficiaries of the estate. The Objector alleges that the Respondent has already secured his registration as the sole owner of the deceased's parcel of land being **WEST KASIPUL/KONYONGA/802** and she sought that a restriction order be issued against any dealings on the said suit land pending the determination of this cause due to her apprehension that the Respondent could dispose of the suit land to the detriment of the real beneficiaries of the estate.

7. The Objector therefore sought the annulment of the said grant. The Objector attached a letter from the chief dated **23rd February 2015** as '**CJB3**' showing that the deceased had 11 dependents including the Objector out of which 4 were deceased.

8. In his replying affidavit sworn on 22nd April 2015, the Respondent states that he applied for the grant of letters of administration as the eldest son of the deceased after obtaining the consent of all the sons of the deceased. The Respondent asserts that the deceased had, prior to his death, subdivided his land to his heirs in accordance with the Luo Customs and that the boundaries placed on the land still exist to date.

9. The Respondent depones that the Objector, who was initially married in Sakwa area, got married to the deceased after her first marriage collapsed but did not have any children with the deceased save for a daughter that she had from her first marriage. The Respondent asserts that the deceased had, during his lifetime, allocated Land Parcel No.KASIPUL/KONYONGA/843 to the Objector which land the Objector sold to one **MARIKO OKUMU** in **1973** after which she deserted the deceased only to make a comeback in the eighties and was given 2 acres out of the land allocated to the Respondent.

10. The Respondent contends that the Objector has been given more than her fair share of the deceased's estate despite her wayward character that disqualified her from being considered as a wife of the deceased. The Respondent asserts that he has administered the estate strictly in accordance with the wishes and directions of the deceased and that the Objector was insincere in her application as she was being incited by her daughter on **NEREAH ATIENO** for her own selfish interests.

11. When the matter came up for hearing on **8th July 2015**, the court granted both parties leave to file further affidavits and ordered that restriction be placed against the suit land pending the hearing and determination of the application inter partes.

12. On 21st July 2015, the Respondent filed a supplementary affidavit in which he averred that even though the Objector was at one time married to the deceased, she deserted the deceased's home for more than 10 years and went to stay with her daughter in Vihiga County after disposing off the land that was given to her by the deceased. The Respondent added that the Objector was never at home and was thus not suitable to administer the deceased's estate.

13. When the matter came up for hearing on 14th October 2015, parties agreed, by consent, to proceed by way of written submissions whereupon the Objector filed her submissions on 13th November 2015 while the Respondent's submissions were filed on 20th November 2015.

14. The Objector who was represented by the firm of Ochoki & Company Advocates, submitted that she had demonstrated sufficient grounds to warrant the revocation of grant citing the Respondent's non-disclosure of all the beneficiaries of the estate of the deceased including her in his application for the grant of letters of administration. The objector added that the respondent acted secretly while applying

for the grant in a bid to disinherit her and her daughter yet they were lawful heirs of the deceased.

15. The Objector reiterated that the Respondent concealed material facts regarding the true beneficiaries of the deceased's estate. The Objector further submitted that the chief's letter that she had annexed to the application as annexure 'CJB3', which letter was not controverted by the Respondent, showed that she was the widow of the deceased. She argued that the Respondent admitted the fact that she was the deceased's widow in his supplementary affidavit sworn on 21st July 2015.

16. In his submissions the Respondent reiterated the contents of his replying affidavit and supplementary affidavit by stating that the Objector had already received her share of the deceased's estate before he died, which share she sold off to a third party and deserted the deceased with her daughter and has never returned to-date.

17. The Respondent through his counsel Mr. Masese Advocate, submitted that all the sons of the deceased consented to his being the administrator of the deceased's estate and had not complained of any fraud as each beneficiary is satisfied with the portions of land that they were occupying. The Respondent further submitted that by deserting the deceased and not even showing up for his burial the Objector was perceived to have constructively divorced the deceased and returned to her first husband and should not therefore be seen to come back and lay claim to the deceased's estate.

18. The Respondent added that despite her unbecoming conduct, he had allowed the Objector to utilize 2 acres out of his land during her lifetime and that it would be unjust to clothe a divorcee with widowhood status.

19. The Respondent concluded that the Objector's application for revocation of grant was unmerited, fraudulent and ought to be dismissed with costs.

20. I have duly considered the pleadings, the submissions of both parties and the authorities cited. I note that the main issue for determination is whether or not the proceedings to obtain grant were defective in substance and the grant issued obtained fraudulently by the making of false statements or concealment of material facts from the Court.

21. **Section 76** of the **Law of Succession Act**, under which the instant application was brought provides for instances under which the revocation of grant can be made (see **Matheka & Anor. -vs- Matheka [2005] KLR 456**). The said **Section 76** state as follows:

“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 order or allow; 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.”

22. In the instant case, it is clearly evident from the court record that the Respondent relied on a chief's letter that tended to show that he was the only heir of the deceased yet a subsequent letter from the area chief that was produced by the Objector in her application as 'CJB3' indicated that the deceased had 7 living heirs including the Objector and her daughter. The Respondent only mentioned 4 heirs in his application for grant.

23. Clearly, the Respondent concealed from the court material facts regarding the actual number of beneficiaries entitled to benefit from the estate of the deceased.

24. Furthermore, I note that the Respondent has, since the grant was issued to him on 30th July 2003, failed to apply for the confirmation of the said grant despite the fact that the 6 months period after the issuance of the said grant has obviously long lapsed.

25. I note that even though the Respondent is duly represented by a counsel in this matter, he seems to be unaware of his duties as an administrator, which duties include the applying for the confirmation of the grant so that the court can distribute the estate to all the deserving beneficiaries.

26. The Respondent seems to be operating under the illusion and misconception that since all the sons of the deceased are happy with the shares of land that they were allegedly given by the deceased, there is no need of actualizing each beneficiaries respective land portions through a confirmation of grant and subsequent registration of the new titles.

27. I find that the Respondent's contention that the Objector had constructively divorced the deceased or was not entitled to a share of the estate having been granted her own parcel of land which she sold are issues which can only be determined at the hearing of the confirmation of grant when all the beneficiaries will be at liberty to give their views on the mode of distribution.

28. In a nutshell, I find that the Objectors summons for revocation and/or annulment of grant has merit.

29. Consequently, I hereby revoke the grant issued to the Respondent on 30th July 2003 on the basis that the Respondent only concealed the true number and identity of some of the beneficiaries of the estate but has also failed to apply for the confirmation of the grant for more than 10 years after it was issued.

30. The objector did not furnish the court with a certificate of official search to show that the suit land had changed hands or had been registered in the names of the Respondent. However, for any avoidance of doubt, I order that the estate of the deceased, to wit, land parcel No. **WEST KASIPUL/KONYONGA/802** is returned to the status quo ante.

31. The parties hereto, including the Respondent, are at liberty to apply afresh for grant of representation to the estate of SAMUEL ODILA AWAK. Each party shall bear their own costs bearing in mind the nature of this case as it involves relatives.

Dated, signed and delivered in open court this 3rd day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

Mr. Masese for the Petitioner

Miss. Sagwa holding brief for Ochoki for the Objector

Omwoyo: court clerk