



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
SUCCESSION CAUSE NO. 175 OF 2014
IN THE MATTER OF THE ESTATE OF AGNES MASBAY ONGOMA (DECEASED)
AND
PRAXEDES ADHIAMBO OTIENO.....PETITIONER
AND
KENNY OTIENO OMONDI.....OBJECTOR

RULING

1. Agnes Masbay Otieno (The Deceased) died intestate on 5th July 2013 at Dekalb-Atlanta Georgia at the age of 77 years. She was survived by Eleven (11) children. A dispute has now arisen between two of those children, Praxedes Adhiambo Otieno (The Petitioner) and Kenny Otieno Omondi (The Objector).

2. The children of the Deceased are;-

- a. Praxedes Adhiambo Otieno
- b. Kenny Otieno Omondi
- c. Giannaeneriica Kwena Otieno
- d. Shillah Teresa Akechi
- e. Caroline Makokha
- f. Georgina Beatrice Njago
- g. George Muyodi Otieno
- h. Sebastian Patrick Ongoma
- i. Rosemary Awino Ochieng Kaduru
- j. Fredrick Mukasa Okhongo
- k. Charles Omondi Lwanga

While the Estate of the Deceased is said to comprise of the following Landed properties;-

- a. **MARACHI/BUMALA/1153**
- b. **MARACHI/BUMALA/1154**
- c. **MARACHI/ELUKHARI/1640**
- d. **MARACHI/BUMALA/1478**
- e. **MARACHI/BUMALA/1324**
- f. **MARACHI/BUMALA/1155**
- g. **SOUTH TESO/ANGOROMO/1852**
- h. **SOUTH TESO/ANGOROMO/1126**
- i. **SOUTH TESO/ANGOROMO/1231**
- j. **SIRIKHAYA MARKET PLOT NO. 7**
- k. **BUMALA MARKET PLOT NO. 42**

3. By a consent entered on 10th November 2015, Counsel of the parties asked this Court to hear and determine the following, together:-

- a. The Chamber Summons dated 25th May 2015.
- b. The Preliminary Objection dated 2nd November 2015.
- c. The Summons for Revocation dated 2nd November 2015

4. In the Chamber Summons dated 25th May 2015, the Petitioner seeks the following substantive prayers;-

(2) That all tenants deposit rents due /or payable to the deceased estate including those from premises on plots / parcels LR. Marachi / Bumala /1153, 1154, 1155, 1478 at Bumala Market, Ogina / Sirikhaya Market plot No. 7, Marachi / Elukhari / 1640, at Butula Market, South Teso / Angoromo /1126 be deposited into the Administrix account; Praxedes A. Otieno, A/C 0025050022824 Post Bank, Busia.

(3). THAT the Respondent Kenny Otieno Omondi do deposit into the aforesaid account and account for all rents and other incomes received on behalf of the Estate of the Deceased from July 2013 to date

(4) THAT the Respondent do release to the Administrix the Deceased's all personal documents and properties in his custody.

(5) THAT all aforesaid rents, proceeds, upon receipt by the Administrix be subjected to distribution to all the heirs of the estate.

5. That Application was met with a Preliminary Objection dated 2nd November 2015 which raised the following grounds:-

1. The applicant irregularly applied and obtained Grant of Letters of Administration without endorsement of all the beneficiaries namely Kenny Otieno Omondi and Giannaenevica Kwena Otieno and the same should be Annulled.

2. The Applicant do not have the *locus standi* in law to litigate for the Estate of the late Anges Masbay Ongoma Otieno (Deceased) using the grant issued to her on 3rd October 2014.

3. The purported signature of Giannaenevica Kwena Otieno on the Consent of distribution filed in Court on 12th May, 2015 is a forgery.

4. The Application as drawn and filed is premature and orders sought cannot be granted in law and must now await the hearing and determination of the Respondent's Application filed herein to annul the grant.

On the same day, the Objector, not unexpectedly, filed summons for, filed summons for Revocation or Annulment of the Grant of Letters of Administration made on 3rd October 2014 in favor of the Petitioner.

6. This Court has read and understood the Rival Affidavits and Submissions of Counsel and come to the conclusion that the matters involved are straightforward. Although the Court may not make direct reference to some of the arguments made in the submissions, it bears them all in mind in this short determination.

7. It is conceded by the Petitioner that the Objector and Giannaenevica Kwena Otieno did not sign the consent to making of the Grant to herself. In paragraph 7 of the Petitioners Replying Affidavit of 13th January 2016, she avers;

(5) That I personally contacted all the aforesaid heirs including the objector and sought for their consent prior to the filing of this cause.

(6) That all the aforesaid heirs save the objector and Giannaeevica Kwena Otieno did sign the consent to the making of this grant.

8. Let me for a moment, accept that what the Petitioner is stating is true, what was she to do when Giannaeevica and Kenny refused to sign the consent? Rules 26 (1) and 26 (2) of the Probate and Administration Rules provide:-

“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.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”.

9. In salutation of the above provisions the Petitioner should have at the time of presentation of the Petition, provided evidence to Court that she had given notice of her intention to apply for Grant to all persons entitled to the Grant as she was. I have looked at the documents filed alongside the Petition and I do not see any such evidence by the Petitioner. There is however a consent which bears the name of all the children but which has been signed by all the children apart from Giannaenevica and the Objector. In fairness the Petitioner should have placed evidence that she had notified the two and sought their consent but that they were uncooperative. For this reason I do find that the Proceedings were defective in substance right from the onset and would be good reason for this Court to Revoke the Grant made to the Petitioner. This Court does hereby Revoke that Grant notwithstanding the provisions of Rule 27 which provides:-

“ (27) Nothing in rule 26 shall operate to prevent a grant being made to any person to whom

a grant may be made, or may be required to be made, under the Act”.

I do so because there is an obvious disagreement between the Petitioner and at least one other person who is entitled to the Grant in the same degree.

10. What is the appropriate order to follow? In paragraph 14 of her affidavit of 17th January 2016, the Petitioner states;-

“That I have no objection to being a Co- Administrator with the objector”.

Although I have found that the Petition was defective, the Petitioner was honest enough to include Giannaenevica and the Objector among the survivors of the Deceased. Secondly, the Petitioner has the support of eight (8) of the Ten (10) other children of the Deceased. For these reasons this Court shall not lock her out from the Administration of Deceased’s Estate notwithstanding that she may have made a false start. The Order that endears itself to me is to appoint both the Objector and the Petitioner as joint Administrators to the Estate of Agnes Masbay Ongoma Otieno with effect from the date of this Ruling

11. Let me now consider the Chamber Summons of 25th May 2015. The Objector in paragraph 5 of his Affidavit of 2nd November 2015 states this;-

“ That the responsibility to collect rents of the Estate property were solely vested on me by my late mother seven years before she died with specified instructions on how they were to be managed and maintained to the exclusion of the Applicant who was not in the country then”.

That may be so, but upon the death of the Deceased, the authority to collect rent would have to fall to the Administrator of the Estate. As the Objector concedes that he has been collecting rents of the Estate property, he shall be required to give an account of all rent and income received by him on behalf of the Estate from the date of Death of the Deceased to date. Going forward all the rent and income shall be paid into an account to be operated jointly by the two just appointed Administrators.

12. For the sake of clarity, all the issues placed before me are settled as follows:-

- a. **The Grant issued herein to Praxides Adhiambo Otieno on 3rd October 2014 is hereby revoked.**
- b. **Praxides Adhiambo Otieno and Kenny Otieno Omondi are hereby appointed as joint Administrators to the Estate of Agnes Masbay Ongoma Otieno (Deceased) with effect from the date of this Ruling.**
- c. **Kenny Otieno Omondi shall within 60 (Sixty) days of this order furnish an account of all rent and income received from the properties of the Deceased Estate from 5th July 2013 to date.**
- d. **Upon receipt of the account, the Court shall make further orders in respect thereof.**
- e. **Effective from the date of this Ruling all rent and income from the property of the Deceased Estate shall be paid into an account jointly operated by the two Administrators.**
- f. **As both sides have partly succeeded and partly failed, each party shall bear its own costs.**

Dated, signed and delivered this 2nd day of February 2016.

F. TUIYOTT

J U D G E

In the presence of :-

Oile- C/Assistant

Maloba h/b Opiyo for Objectors

Onsongo h/b Fwaya for the Petitioner