



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**SUCCESSION CAUSE NO.378 OF 2000**  
**IN THE MATTER OF THE ESTATE OF PHILIP NYENDE.....DECEASED**  
**AND**  
**REBECCA ANDAWA MAKOKHA.....1<sup>ST</sup> OBJECTOR**  
**AND**  
**JARED SALASYA NYENDE.....1<sup>ST</sup> PETITIONER**  
**HARRION AMOYI MALALA.....2<sup>ND</sup> OBJECTOR**  
**RULING**

**Introduction**

1. There are two applications in this matter filed at different times and both seeking the same relief. The first application was filed by the 1<sup>st</sup> objector REBECCA ANDAWA MAKOKHA and is dated 5<sup>th</sup> September 2011. It is brought pursuant to Section 76 of the Law of Succession Act and Rule 44 of the Probate Administration Rules. She seeks for orders that the Grant of Letters of Administration in respect of the estate of the deceased herein PHILIP NYENDE issued to the Petitioner/Administrator on 8<sup>th</sup> December 2000 and confirmed on the 5<sup>th</sup> June 2011 be revoked and/or annulled and be of no effect and a fresh grant be issued in the joint names of the petitioners and herself. The application is based on the grounds that the petitioner/administrator confirmed the grant by the making of a false statement and by omitting her name from the list of beneficiaries of the said estate and further by concealing from the Court matters material to the cause by means of untrue allegations of fact essential in point of law to justify the grant. The application is supported by the applicants own affidavit sworn on the same date wherein she depones that she is the daughter of JOEL MAKOKHA NYENDE a beneficiary to the above estate who passed on prior to the completion of the succession proceedings herein. She has annexed a copy of the death certificate which is marked as "RAM – 1". She claims to have become entitled to stand in the place of the said JOEL MAKOKHA NYENDE who had been included as a beneficiary in the Chief's letter dated 5/09/2000 see annexure "RAM 1"

2. The applicant also claims that the petitioner RASHID OCHANDA NYENDE through the firm of M/s E.K. OWINYI & CO. ADVOCATES prepared another fresh summons for confirmation of grant dated 25/01/2010 and has deliberately omitted her names see annexure "RAM – 3" which is a copy of the said summons. The summons for confirmation of grant were subsequently confirmed on the 15<sup>th</sup> June 2011 in her absence see annexure "RAM 4" a copy of the certificate of confirmation. She adds that after the

death of her father the family members of the deceased's estate herein held a meeting on the 26<sup>th</sup> January 2007 and made resolutions which she confirms see annexure "RAM 5".

3. The second application is dated 30<sup>th</sup> May 2014 filed by the 2<sup>nd</sup> objector/applicant HARRION AMOYI MALALA pursuant to Section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 44 (1) of the Probate and Administration Rules. The applicant seeks for orders that the grant of Letters of Administration intestate issued to the petitioner and subsequently confirmed be revoked and/or annulled on the ground that the grant was obtained fraudulently by the making of a false statement and by concealment from the Court of material particulars and of heirs and/or liabilities to the estate of the deceased. Further that the proceedings to obtain the grant were improper, irregular and defective and lastly that the petitioners filed and proceeded with this succession cause secretly and omitted the 2<sup>nd</sup> objector yet he purchased and has constructed his home on three quarters ( $\frac{3}{4}$ ) of an acre out of land parcel No.E/Wanga/Lubinu/474. He claims that the petitioners aim to defraud and disinherit him and to enrich themselves unjustifiably. He also seeks for costs of the application.

4. The application is supported by the annexed affidavit of HARRION AMOYI MALALA sworn on the same date. He claims that vide agreement made on 21<sup>st</sup> February 2001 and 20<sup>th</sup> October 2009 he purchased from RASHID OCHANDA NYENDE the 2<sup>nd</sup> Petitioner a total of three quarters ( $\frac{3}{4}$ ) of an acre of land out of his share from land parcel No.E/WANGA/LUBINU 474 at a consideration which he paid in full and the agreements witnessed by 2<sup>nd</sup> petitioners wife MILDRED MALOBA OCHANDA and the area Assistant Chief see annexure marked "HAM 1 a, b & c" That he took possession of the said portion of land parcel No.E/WANGA/LUBINU/474 constructed his home thereon and has since occupied and utilized the said portion exclusively and without interruption.

5. He claims that the 2<sup>nd</sup> petitioner undertook to list him as a beneficiary and/or liability to the estate of the deceased at the stage of confirmation of grant herein so that he could get the title for the portion of land but the petitioner/respondent did not consult or inform him about the confirmation and also omitted his name from the list of beneficiaries. See "HAM 2".

6. The 2<sup>nd</sup> Objector/applicant says that the intention of the petitioners is to defraud or deny him his right to the portion of land he purchased and thereby disinherit him and enrich themselves by retaining both his money and the land. He contends that having purchased and occupied three-quarters ( $\frac{3}{4}$ ) of an acre out of L.R. No.E/Wanga/Lubinu/474 he is lawfully entitled to the same and it is just and proper that his rights and/or interest in the said title are protected by this Honourable Court.

### **Determination**

7. Both applications are unopposed though the Petitioner/Respondent has filed his witness statement. On the 3<sup>rd</sup> June 2015, this Court gave directions that the two applications dated 5<sup>th</sup> September 2011 and 30<sup>th</sup> May 2014 proceed by way of oral evidence with the two objectors as plaintiffs and the petitioner as defendant. Parties were given liberty to call witnesses and to file and exchange witness statements.

8. On the 3<sup>rd</sup> June 2015 when the matter came up for hearing the petitioner was represented by Miss Wilunda while Mr. Ombaye was present for the 1<sup>st</sup> objector. Mr. Akwala was present for 2<sup>nd</sup> objector. The Court has noted from the submissions by Miss Wilunda Counsel for the petitioner that the 1<sup>st</sup> objector has never come to Court since she filed her objection on 5<sup>th</sup> November 2011. This is true from the record. It is also on record that the 1<sup>st</sup> objector has been uncooperative in settling the matter out of Court and that she is not keen on proceeding with her objection. Her advocate on record Mr. Ombaye has told the Court that he lost contact with his client and had intentions to file an application to cease acting for her.

9. This Court therefore finds that the 1<sup>st</sup> objector has no interest in her application dated 5<sup>th</sup> November 2011 and the same is dismissed for want of Prosecution with costs to the petitioner. Mr. Akwala for the 2<sup>nd</sup> objector told this Court that the 2<sup>nd</sup> objector's claim has been admitted by the petitioner which means

that the 2<sup>nd</sup> objector has no interest in their application dated 30<sup>th</sup> May 2014. Mr. Akwala has not withdrawn the said application but this Court notes that the 2<sup>nd</sup> objector has no interest on the said application. In order for this matter to proceed to its logical conclusion, the 2<sup>nd</sup> objectors application dated 30<sup>th</sup> May 2014 be and is hereby deemed as abandoned with no orders as to costs.

### **Conclusion**

10. When this matter came up before me on 3<sup>rd</sup> November 2015, it was intimated to the Court that the 2<sup>nd</sup> objector's claim has been admitted by the petitioner. In his affidavit dated 30<sup>th</sup> June 2015, which affidavit was filed on 7<sup>th</sup> July 2015, Rashid Ochanda Nyende states that out of his share of the deceased's estate, he sold 0.75 acres to the 2<sup>nd</sup> objector herein, Harrion Amoyi Malala. After setting out the details of those who are entitled to the deceased's estate, namely:-

- i) Rashid Amoyi Malala - 1.00 acres
- ii) Harrion Amoyi Malala - 0.75 acres
- iii) Beneah Nyapola - 4.5 acres
- iv) Filipino Wanyonyi - 3.00 acres
- v) Rebecca Andawa Makokha - 2.5 acres
- vi) Patrick Otundo Salasya -
- vii) Charles Omutekete Salasya - 2.75 acres
- viii) David Omonyira Walutsachi -
- ix) Risper Mukolwe Malala -

11. As the only person who still had an objection to the distribution is Harrion Amoyi Malala who has now been provided for, the proposal by the Petitioners/Respondents as outlined above is approved. A fresh Certificate of Confirmation shall issue in terms of the above distribution.

12. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 11<sup>th</sup> day of February 2016.

**RUTH N. SITATI**

**JUDGE**

In the presence of:

Miss Wilunda (present) for Petitioners/Respondents

Mr. Ombaye (present) for 1<sup>st</sup> Objector

Mr. G.P Omondi for Akwala for 2<sup>nd</sup> Objector

Mr. Lagat - Court Assistant