



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

SUCCESSION CAUSE NO. 713 OF 2014

(Formerly Homa Bay SRM Succession Cause No. 231 of 2014)

IN THE MATTER OF THE ESTATE OF

OSAMBO RAYOLA (DECEASED) &

MAGDALEN OKENDO ONYUKA (DECEASED)

BETWEEN

STANSLAUS MBAI NYAMIEL
APPLICANT

AND

RICHARD OPIYO ODONGO
RESPONDENT

RULING

1. The application before the court is a summons for confirmation of grant dated 16th December 2014 seeking to confirm the grant issued by the court on 7th November 2014. The application is supported by the affidavit of Stanlaus Mbai Nyamiel (“Nyamiel) sworn on 16th December 2014. He deponed that he is entitled to the land parcel KANYADA/KOTIENO-KATUMA ‘A’/799 (Plot No. 799) as sole proprietor as the other joint proprietors have all died.
2. Richard Opiyo Odongo (“Odongo”) has filed an affidavit of protest sworn on 19th August 2015. The thrust of his case was that the applicant was a proprietor in common with the deceased and not a joint proprietor hence he was not entitled to inherit the entire portion. He also stated that the deceased was a survived by other beneficiaries who were entitled to inherit the property.
3. At the hearing of the application, the parties agreed that the court should adopt evidence given in support of and in opposition to the summons for revocation of the grant issued to Nyamiel on 31st January 2012 and confirmed on 4th October 2012 in ***Homa Bay Principal Magistrates Succession Cause No. 231 of 2014***. The summons was compromised on 7th November 2014, when the parties recorded a consent order revoking the grant so issued and agreed that a fresh grant be issued to both of them and the same be confirmed on application by either party.
4. Several issues are not contested. Osambo Rayola and Magdalina Okendo died on 6th May 1976

and 8th January 1995 respectively. They left behind Plot No. 799 which was in their names and that of Nyamiel. They were all registered as proprietors in common of equal undivided shares of Plot No. 799. Odongo and one Tom Mboya Olum initially applied for grant of letters of administration in respect of the estates and the same were issued in ***Homa Bay Senior Resident Magistrates Court Succession Cause No. 42 of 2008*** and ***Homa Bay Senior Resident Magistrates Court Succession Cause No. 69 of 2002***. The respective grants were subsequently revoked in ***High Court Kisii Misc. Succession Cause No. 552 of 2009*** on application of Nyamiel. Nyamiel thereafter applied for the grant of letters of administration in ***Homa Bay Principal Magistrates Succession Cause No. 231 of 2014*** which is the subject of these proceedings.

5. From the affidavit in support of the application and the protest, there are two issues for consideration. First, whether Stanslaus is entitled to the entire parcel of land as sole proprietor upon the demise of the joint proprietors. Second, whether the deceased had survivors who were entitled to inherit the property.
6. As concerns the first issue, I have looked at the certificate of search issued by the District Land Registrar dated 17th June 1994 and it shows that Osambo Rayola, Stanslaus Mbayi and Magdalene Okendo each owned 1/3 share of the property. In his replying affidavit sworn on 30th September 2013, Nyamiel deponed that he was, “*jointly registered with the ... deceased persons as proprietors in common of equal undivided shares of the land ...*” I therefore hold that the land was held in common and not jointly and hence the doctrine of survivorship does not apply at all. I further find and hold that Stanislaus is not entitled to the 2/3 portion in the names of the deceased. It follows therefore that the shares of the deceased have to be distributed in accordance with the rules of intestacy under the ***Law of Succession Act (Chapter 160 of the Laws of Kenya)***.
7. It is not disputed that the applicant and respondent are descendants of Odundo who had four wives; Achieng, Onyuka, Awuor and Olang. Both of them are descended from the house of Achieng. The deceased are descended from the house of Onyuka. Rayola died without any heirs. Magdaleen was the wife of Atondi but left no heirs. Since both the deceased left no heirs, the issue is who should inherit the property.
8. In dealing with this issue, I bear in mind that since Rayola died in 1976, his estate is to be administered in accordance with customary law since he died before 1st July 1982, by virtue of **section 2(2)** of the ***Law of Succession Act***. Customary law is a question of fact and upon perusal of the proceedings, I find that the parties did not lead evidence on the same. As regards the estate of Magdaleen, the same is to be governed by **section 39** of the ***Law of Succession Act*** which provides that in such circumstances the net estate shall devolve upon kindred of the intestate first to the father and if he is dead to the mother and if she dead to the brother and sisters of the intestate in equal shares.
9. In confirming the grant, the court is required to identify every beneficiary and the share the person is entitled to. The proviso to **section 71** of the ***Law of Succession Act*** states that;

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

10. As the deceased left no heirs and in light of the application of customary, it is clear that several people are beneficially interested in the property who are neither named nor identified. In my view, this is a case that would benefit from the application of **Article 159(2)(d)** of the Constitution which obliges this court to promote alternative dispute settlement.
11. The final orders are therefore as follows;
 - a. The Chief, West Kanyada Location shall convene a panel of elders with a view to resolving and distributing the estate **OSAMBO RAYOLA** (deceased) and **MAGDALINA OKENDO**

- ONYUKA** (deceased) comprising the 2/3 share of **KANYADA/KOTIENO-KATUMA 'A'/799**.
- b. The panel shall determine the matter within a period of 45 days from the date hereof and file its report in court.
 - c. The court shall thereafter issue further orders and directions.

DATED and DELIVERED at HOMA BAY this 12th day of February 2016.

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth Advocates for the applicant.

Mr Rakoro instructed by Rakoro & Company Advocates for the respondent.