



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 604 OF 2010

IN THE MATTER OF THE ESTATE OF PETRO OKUMU OBIERO DECEASED

AND

FREDRICK OMONDI OKUMU.....ADMINISTRATOR/RESPONDENT

AND

MARIA AKELLO OTIENO OBJECTOR/APPLICANT

JUDGMENT

By the summons dated 31st August 2010 the applicant seeks an order for revocation of the Letters of Administration issued to Fredrick Omondi Okumu in Maseno SRM's Succession Cause No. 41 of 2008. She also prays that the costs of this application be in the cause.

The grounds for the application are that the Maseno Court had no jurisdiction to entertain the cause; that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently and further that the grant was obtained fraudulently by the making of a false statement and by the concealment from the Court of facts material to the confirmation of the grant.

In the supporting affidavit the applicant deposes that the deceased died intestate on 23rd March 1992; that Land LR Ugenya/Simur/1080 valued more than 200,000/= and the only asset of the deceased is now registered in the name of the respondent by way of transmission; that she is a sister in-law of the deceased by virtue of being his blood brother's widow and that the respondent is not a son of the deceased and hence not the deceased's rightful heir.

In a replying affidavit sworn on 26th January 2015 the respondent states that he obtained the letters of administration as the only beneficiary of the estate being the only son of the deceased. He acknowledges the applicant is the widow of his uncle and contends that the applicant who has succeeded her own husband and two other brothers of the deceased who died without leaving a spouse or children, has denied him access to the only asset of his late father that the deceased moved to South Nyanza where they lived until the time of his death and that as far as he is concerned the deceased was his father. Annexed to the replying affidavit is his birth certificate, the deceased's certificate of death and a letter from the Acting Chief West Kabuoch location. He has also deposed that his father obtained the title to the land in 1981 and if he was not his rightful heir the deceased would have transferred it to whosoever before his death or would have made a will.

The summons was canvassed by way of viva voce evidence.

The applicant testified and called one witness. The sum total of their evidence is that the deceased was her late husband's blood brother; that he was not married and had no children but that he inherited the mother of the respondent when her husband Ooko Oganga died; that the respondent's mother already had seven children including the respondent when they moved to Kabuoch in South Nyanza with the deceased and the birth certificate produced by the respondent cannot be genuine. The applicant gave evidence that she had never met the respondent and that when the deceased died he was secretly buried in Kabuoch instead of being brought to his ancestral land, as dictated by Luo custom. She contended that under Luo custom the respondent cannot inherit the property of the deceased as he was already born to his mother when she married the deceased and the deceased could not in any case have inherited her as she was married to another clan altogether. While acknowledging that she has been the sole beneficiary of her late husband's estate and that of his two other brothers she contended that she is also the rightful heir of the estate and accused the respondent of stealing land from her.

On his part the respondent reiterated that he was the son of the deceased and produced a birth certificate showing that he was born on 20th August 1978 as proof. He stated that the deceased died on 23rd March 1992 while he was still in primary school. He stated that he first met the applicant in this Court as she was not one of the relatives who used to visit them. He acknowledged that his mother was first married to one Dickson Ooko Oganga but stated that it was after his death that she got married to the deceased in this case and they moved to Kabuoch where they established a home. That land however purchased by his elder brother and when their father the deceased in this case died they informed their kin in Ugenya and his relatives attended the burial in Kabuoch. He produced a letter from the chief of Kabuoch which confirms that he is the son of the deceased.

He called Mbogo Ochola (DW2) his uncle who confirmed that he was the only issue of the marriage between his mother and the deceased in this case. He could not however tell the exact date the deceased moved to Kabuoch.

Counsels for both sides consented to filing written submissions and the same were duly received.

Mr. Nyanga for the applicant submitted that the birth certificate produced by the respondent was manufactured to confuse the Court. He observed that the same was obtained on 30th September 2011 while these proceedings were underway. He submitted that the certificates ought to have been obtained through the chief of the land where the estate is situate as is the common administrative practice. He observed that the death certificate was obtained on the same day as the birth certificate and stated that this is an illustration of how far the respondent has gone in manufacturing documents to cover up for the illegality done in concealing information while obtaining the grant in the lower court. He described the respondent's claim of sole beneficiary as a white lie and wondered why the respondent did not complain about the chief's refusal to give him a letter to file the succession cause. He submitted that by the time the deceased entered into the hevirate union with the respondent's mother the respondent had been born and that he would gain from two estates if his position is upheld by this Court. He contended that as paternity is never a secret among the Luo had the respondent been a son of the deceased this would be known and there would have been no dispute. He speculated that perhaps the respondent took advantage of burying the deceased to gain his identity card in order to position himself to lay claim to the deceased's estate. He also took issue with the deceased's burial in Kabuoch rather than in his ancestral home and contended that this was contrary to the Luo traditions.

Counsel for the Respondent urged this court to dismiss this application saying that the respondent should be allowed to continue the administration of the estate as the sole beneficiary of the estate.

This application is brought under Section 76 of the Law of Succession Act which states:-

"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;"

The applicant's contention in this case is that the respondent misrepresented that he is a son of the deceased person in this case and hence ground (b) and (c) set out above have been fulfilled sufficiently to warrant this Court to revoke the grant. It was her evidence that by the time the deceased married the mother of the respondent she already had seven children including the respondent; that therefore the respondent was not the deceased's offspring as he claims. She contended that in any case the deceased could not have properly inherited the respondent's mother as her late husband belonged to a different clan.

The issue for determination is whether or not the respondent obtained the impugned grant fraudulently by the making of a false statement or by means of an untrue allegation of a fact essential to a point of law to justify the grant.

The deceased's estate is governed by the law of intestacy under the Law of Succession Act. Section 37, 38, 39 and 40 of the Act provide the manner in which the estate devolves in the different circumstances. In this case the deceased left no surviving spouse and was not polygamous. So his estate would be governed by either Section 38 or Section 39 of the Act.

The applicant would have it governed by Section 39 so that she can benefit as a relative of the deceased who is in the nearest degree of consanguinity by virtue of being married to his brother. On his part the respondent claims to have succeeded the deceased under Section 38 of the Act. He produced a birth certificate issued on 30th September 2011 which gives the names of his parents as Rosa Atieno Ooko and Petro Okumu Obiero, the deceased. The date of birth is 20th August 1978. This certificate is issued in pursuance of the Births and Deaths Registration Act. That certificate on the face of it states that "**a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Civil Registrar shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.**"

Section 83 of the Evidence Act provides:-

"83. (1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is-

(a) declared by law to be admissible as evidence of any particular fact; and

(b) substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and

(c) purporting to be duly certified by a public officer

(2) The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document."

This section enjoins this Court to presume that the certificate of birth produced by the respondent is genuine. This presumption, can as is always the case, be displaced by evidence to the contrary. It is my finding that no such evidence exists in this case. The applicant admits that the respondent's mother cohabited with the deceased for a considerable period of time upon the demise of her husband. Like in any free and democratic society a woman would be entitled to marry a person of her choice upon the

demise of her husband and the fact that she got married to the deceased who was not from her own husband's clan should not nullify her marriage to the deceased. From the certificate of death produced and in the applicant's own admission the deceased died in 1992 which would be long after the date of the respondent's birth indicated in the certificate of birth. The applicant's assertion that the respondent was already born when his mother got married to the deceased is not borne by any evidence and that mere assertion is not sufficient to displace the evidence of the dates and facts in the certificate and neither does it displace the presumption of it being genuine.

It was also alleged that the date it was obtained renders it suspect. That per se is no reason to impeach the certificate as the law does not provide for the period within which such a certificate ought to be obtained. The certificate which in the absence of any cogent evidence to impeach it is in my finding conclusive evidence that the respondent was an offspring of the deceased and as such he was entitled to succeed him under Section 38 of the Law of Succession Act. The summons for revocation has no merit therefore and is dismissed but with an order that each party shall bear their own costs this being a family matter. It is so ordered.

Signed, dated and delivered at Kisumu this ..3rd.... day of ...March... 2016

E. N. MAINA

JUDGE

In the presence of:

Mr. Nyanga for Applicant

Respondent in person

CC: Felix Magutu