



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 154 OF 2010**

**IN THE MATTER OF THE ESTATE OF LUCAS NYANJOM OCHOLA – DECEASED**

**AND**

**IN THE MATTER OF AN APPLICATION BY RICHARD OLOO NYADUONG**

**RICHARD OLOO NYADUONG ..... APPLICANT**

**VERSUS**

**CAREN AKINYI ORWA.....)**

**DAN JACOB NYANJOM .....)RESPONDENTS**

**RULING**

What is before me for determination is the Chamber Summons dated 6th August 2014 brought under Section 26 of the Law of Succession Act seeking orders:-

***“1. THAT this Honourable Court be pleased to make a provision in favour of the applicant with regard to the occupation and use of the plot Title No. East Gem/Uranga/591.***

***2. THAT the costs of this application be provided for.”***

The application is premised on the grounds that;

***a) The Applicant was not kept well informed of the outcome and consequences of the said judgment.***

***b) The Applicant was not given an opportunity to be heard in this matter.***

***c) Had the Applicant's case been clearly put before the court it would have arrived at a different conclusion.***

***d) The Applicant has lived on the above parcel of land all his life and he has no other piece of land.***

***e) If the facts deponed herein were brought before the judge she would have definitely modified the said judgment and come to different conclusion and would have made a provision for the***

***Applicant.***

***f) It is fair and just that the orders sought be granted.”***

The application is supported by the affidavit of the applicant sworn on 6th August 2014 in which he deposes that he is the son of Lazaro Oloo the elder brother of the deceased in this case and that the land which comprises the only asset of this estate was registered in the name of the deceased to hold in trust for the family of his elder brother including the applicant; That he had lived and cultivated half of this land but upon being given a life interest the respondent has taken over the land hence rendering them landless and destitute. He urges that provision be made for him to inherit half of the share which was his father's interest.

In opposition to the application the 1st respondent has sworn an affidavit dated 27th July 2015. In it she deposes that the application is misconceived and an abuse of the due process of law; that the deceased who was her father in-law had only one son who is her husband. She disputes that the applicant has ever lived on this property and contends that he only invaded this land upon the death of the deceased; He is but a distant kin of the deceased and has his own land. Further that the title does not show the deceased was registered as a trustee and the applicant and his relatives are only keen to grab this estate simply because she did not bear a child with the deceased's son.

When the matter came before me on 29th July 2015 Mr. Odeny for the applicant and Mr. Atunga for the 1st Respondent intimated that they wished to settle the matter out of Court. The matter was mentioned severally but no consent was reached and on 28th January 2016 the Advocates elected to canvass the application by way of written submissions.

For the applicant it was submitted that the father of the applicant – Lazaro Oloo died in 1960 before land adjudication and that is how the land ended up being registered in the name of the applicant. That under customary law the deceased held the land in trust for his brother as well as his dependants. Indeed they co-existed peacefully until the demise of the deceased. It was submitted further that an overriding interest in favour of the applicant exists by virtue of Section 28(b) and Section 28(b) of the Land Registration Act, 2012 and further that the applicant was a dependant of the deceased as their livelihood depended on the deceased as the registered owner of this asset. It was also contended that had this scenario been put before the judge, a provision should have definitely been made for the applicant and that as the 1st respondent has no children upon her demise the applicant would be the deceased's next of kin.

Counsel for the 1st Respondent submitted that this application has no merit; that the applicant must all along have been aware of this cause as the applicant in an earlier summons for revocation of Grant had in his affidavit deposed that he had the full authority of the deceased's surviving relatives to petition for the grant and that applicant was represented by Bruce Odeny & Company Advocates who are also the Advocates for the applicant. It was further submitted that the applicant is not a dependant of the deceased and that it was the 2nd Respondent who incited the applicant and his relatives to invade the asset so as to dispossess the respondent. It was further argued that there was a conflict of interest in the firm of Bruce Odeny & Company Advocates acting for this applicant as well as the 2nd Respondent. It was contended that this application is an abuse of the law and it ought to be dismissed; that under Section 30 of the Law of Succession Act no application shall be brought after the grant has been confirmed and so this application cannot succeed.

The deceased died in 1995 after the commencement of the Law of Succession Act and so the law applicable to the Administration of his estate is the Law of Succession Act. Letters of Administration into the estate of the deceased were in this case granted to the 1st and 2nd Respondents by this Court on 3rd July 2012. This was following the revocation of a grant earlier issued to the 1st Respondent solely by the Principal Magistrate's Court in Siaya. This Court also vested the only asset of the estate East Gem/Uranga/591 to the 1st Respondent but making it clear that she was to hold a life interest determinable either by her marriage or death and thereafter the estate shall devolve in accordance with Section 39 of the Law of Succession Act.

The present application is brought under Section 26 of the Law of Succession Act which empowers this Court to make provision for dependants not adequately provided for by will or intestacy (see note in margin). To succeed therefore one must firstly prove that they are dependants and secondly that adequate provision was not made for them by the disposition of the deceased's estate in this case by the law relating to intestacy. The meaning of dependant is given by Section 29 of the Act which states:-

***“29. For the purposes of this Part, “dependant” means-***

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to this death;***
- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death”***

The applicant in this case claims to be a dependant of the deceased by virtue of being the son of the deceased's brother for whom the deceased held the land in trust. He claims that his father was the elder of the two but that because he died earlier the asset was registered in the name of the deceased. That moreover having lived on this land even while the deceased was alive they depended on him for livelihood because even though they occupied their father's half the deceased was the registered proprietor of the whole portion. Clearly his claim to dependency does not fall within the meaning of dependant under any of the sub-sections of section 29. The applicant does not claim to have been maintained by the deceased immediately prior to his death and so is not a dependant within the legal meaning ascribed to the dependant in section 29 and even were we to find he is a dependant by virtue of his reliance on the asset he still could not succeed. Section 30 of the Act provides that no application such as this may be brought after the grant of representation in respect of the estate has been confirmed. Ali-Aroni J, did on 30th July 2012 simultaneously with revoking of the grant vest the only asset of the estate in the 1st Respondent thereby effectively confirming the grant. This followed protracted proceedings between the 1st Respondent and the 2nd Respondent which begun in the Land Disputes Tribunal then moved to the Siaya Principal Magistrate's Court before coming to this Court. The proceedings of the Land Disputes Tribunal were an annexure in the summons for revocation filed against the 1st Respondent by the 2nd Respondent. In those proceedings the applicant in the instant application and his brother David Onyimbo Oloo are recorded as the Objectors and the 1st Respondent here as the Complainant. Each gave evidence on oath. The claim by the two brothers to the land which is also the asset in issue here was investigated by the tribunal who concluded that these two brothers had their own lands given to them by their father Lazaro Oloo and that indeed Lazaro Oloo had his own land elsewhere and that the Objectors only started developing interest in this asset after the death of the deceased in this case and his son the husband of the 1st Respondent. The Tribunal also observed that they had proceeded to put up structures on the land against the orders of the chief not to do so. The applicant did not appeal the decision of the tribunal. It cannot therefore be true that he has lived on this land all along. If there was a customary trust this would have come out clearly during those proceedings.

The allegations by the applicant that he was not kept well informed of the outcome and consequences of the judgment of Ali-Aroni J and that he was not given an opportunity to be heard in the matter are not convincing either. As I have stated he has been a party to the dispute right from the time it was heard by the tribunal right to the time the decision of the tribunal was filed in the Principal Magistrate's Court in Siaya. The 2nd Respondent in his Summons for revocation of grant also intimated to the Court (affidavit sworn on 1st March 2010) that he had the full authority of the deceased's surviving relatives in the matter. These relatives must include the applicant because in his petition for letters of administration in Siaya Principal Magistrate Succession Cause No. 14 of 2009 he has listed the applicant as one of the beneficiaries (see annexure **DJN3** to the affidavit in support of the summons for revocation). It is instructive that the same Advocate who represents the applicant here is the one who represented the 2nd Respondent in the summons for revocation. The applicant must therefore have been well aware of the

outcome and consequences of the judgment of Ali-Aroni J.

Accordingly, I find no merit in this application and the same is dismissed with costs to the 1st Respondent.

**Signed, dated and delivered at Kisumu this 14th day of April 2016**

**E. N. MAINA**

**JUDGE**

In the presence of:-

Mr. Siganga for the applicant (Holding brief for Odeny Advocate)

N/A for 1st Respondent

N/A for 2nd Respondent

CC: Felix Magutu