



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION NO. 46 of 2014**

**IN THE MATTER OF THE ESTATE OF CLEMENT OTIENO OKUMU (DECEASED)**

**CURRYIAN OKUMU .....OBJECTOR/APPLICANT**

**VERSUS**

**PEREZ OKUMU**

**BEATRICE ADHIAMBO OBIERO**

**HENRY OKUMU.....PETITIONERS/RESPONDENTS**

**RULING**

1. The deceased to whose estate the proceedings herein relate is Clement Otieno Okumu, who died on 4.12.13 at the Aga Khan Hospital, Mombasa. From the record, the deceased died testate having made a will dated 28.10.98. In the said Will, the deceased appointed “my wife MRS. PEREZ OKUMU, my daughter MRS. BEATRICE ADHIAMBO OBIERO and my son MR. HENRY OKUMU to be my executors”. Grant of Probate of Written Will was on 26.6.14 issued to the Petitioners/Respondents, the named executors of the Will of the deceased.

2. In the said Will, the deceased made provision for *inter alia* his wife Perez Okumu. However in Clause 14 he provided thus:

***Upon my demise, I do not wish and I categorically state that my former wives named hereunder should not attend my funeral and burial and they have no claim whatsoever in my estate:-***

***(i) RUSANAEL AKUMU whom I married in 1965 but abandoned me and our five children and also our matrimonial home of her own free will in 1970 and has since never come back.***

***(ii) CURRYAAN ANYANGO whom I married in 1980 but in 1990 we disagreed and she went back to her parent’s home. We did not have any children together.***

3. The Petitioners/Respondents filed a Summons for Confirmation of Grant on 30.10.15. When the same came up for hearing before me on 30.11.05 however, the Objector/Applicant stood up in Court and stated that she is a wife of the deceased and had been excluded as a beneficiary of the estate and insisted that she must benefit from the estate. The Court granted the Objector/Applicant 30 days to file a formal claim herein.

4. On 17.12.15 the Objector/Applicant filed an Objection to making grant. The grounds for objecting to

grant include that the Objector/Applicant's share in the estate has not been catered for in the Will and that the grant of probate should not be confirmed before her share has been ascertained. The Objector/Applicant further claims that the Will is defective as it does not contain the particulars of the alleged witnesses. That the Petitioners/Respondents have been appropriating rental income from the deceased properties to their own personal use and have failed to account for the same. That the Petitioners/Respondents have failed to make material disclosure regarding the Objector/Applicant's interest as the third wife and that if the grant is confirmed then she stands to be disinherited.

5. Contemporaneously with the Objection, the Objector/Applicant filed a petition by way of cross application more or less replicating what is stated in the Objection. She further states that she objects to the Application for confirmation of grant and prays for the dismissal of the same. She prays that the alleged Will of the deceased be declared null and void. She further prays that her petition be allowed and that her share in the deceased's estate be ascertained.

6. The Objection and Petition by way of Cross Application were canvassed before me. Thereafter, the Objector/Applicant filed a Summons for Revocation of Grant on 17.3.16.

7. I will first consider the Objection and Petition by way of Cross Application. The Objection and Petition by way of Cross Application are opposed by the Petitioners/Respondents who claim that the same are defective, misconceived and bad in law, lack merit and made in bad faith. That there has been undue unexplained delay in filing the same and that the Objection has been overtaken by events.

8. An Objection should be filed within 30 days of the publication of the notice of the petition published under rule 7(4) of the Probate and Administration Rules or such longer period as the court may allow. Rule 7(4) provides

***“The registrar shall cause to be inserted, at the cost of the applicant, in the Gazette and, if he so decides, in a daily newspaper, and to be exhibited conspicuously in the courthouse attached to the registry where the application is intended to be made, a notice of the application for the grant in Form 60 inviting objections thereto to be made known to that registry within a period, to be specified in the notice, of not less than thirty days from the date of the last of such publications.”***

9. The notice inviting objections to the Petition for Grant of Probate herein was published in the Kenya Gazette on 25.4.14 and the Grant issued on 26.6.14. It was not until 17.12.15 that the Objector/Applicant filed her Objection. There is nothing on record to show that the Objector sought and obtained leave of the Court to file the objection out of time. The Objector/Applicant claims in her Further Affidavit that she made an oral application in Court on 29.11.15 for leave to file Objection out of time and that the same was granted. Nothing could however be further from the truth. The record is clear, when the Objector/Applicant first appeared in Court she claimed that she was a wife of the deceased and that she had been excluded as a beneficiary and insisted that she must benefit from the estate. The Court granted her thirty days to file a formal claim. What she then filed on 17.12.15 was an Objection.

10. Rule 17(1) of the Probate and Administration Rules provides

***“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection”.***

11. In the instant case and as stated earlier, the notice inviting objections to the Petition for Grant of Probate was published in the Kenya Gazette on 25.4.14 and the Grant issued on 26.6.14. It was not until 17.12.15 that the Objector/Applicant filed her Objection. There is nothing on record to show that the Objector sought and obtained leave of the Court to file the Objection out of time.

12. Khamoni J in In Re Estate of Kiarie Mangece [2002] eKLR found that objection proceedings commenced after the making of a grant are incompetent-

***From what I have been saying above, therefore, and in summary form, the Objector's objection as reflected in his Objection dated 24th May 2000, his answer dated 15th June 2000, his petition by way of cross petition also dated 15th June 2000 as well as his affidavit of protest dated 18th December 2000 be and are hereby dismissed with costs to the Administrator for the following reasons:***

***Firstly, each one of those documents having been filed without due regard to the applicable law, each document is incompetent, misconceived and bad in law.***

13. The Objection and Petition by way of Cross Application filed herein are incompetent, misconceived and bad in law, having been filed without due regard to the applicable law. They are therefore dismissed but with no order as to costs.

14. I now turn to the Summons for Revocation of Grant dated 7.3.16 the grounds whereof are set out in the body of the Summons as well as in the Supporting Affidavit sworn by the Objector/Applicant on even date. The Objector/Applicant claims that the proceedings to obtain the Grant were defective in substance in that the Petition filed was for grant of letters of administration intestate whereas the grant issued is a grant of probate. That the Grant was obtained fraudulently by the making of false statement that the deceased had one wife and concealment from the Court the material fact that the deceased had three wives namely Curryian Okumu (the Objector/Applicant), Rusanel Okumu and Perez Okumu (one of the Executors). That the Executors have failed after notice and without reasonable cause to proceed diligently with the administration of the estate of the deceased.

15. The Objector/Applicant further claims that the alleged Will of the deceased dated 28.10.98 was not duly witnessed in accordance with the law. She further claims that the Executors have been receiving income from the estate of the deceased and appropriating to themselves without regard to the rights and interests of other dependants/beneficiaries.

16. The Petitioners/Respondents in the Replying Affidavit sworn on their behalf by Beatrice Adhiambo Obiero dismiss the Summons for revocation as defective, misconceived and bad in law, lacks merit and is made in bad faith. They also claim that there has been undue unexplained delay in filing the same. The Petitioners/Respondents acknowledge that the Objector/Applicant was married to the deceased 1980 but state that they disagreed in 1990 and did not have any children together nor was she supported by the deceased after 1990. They further claim that the deceased left a valid Will and as per the Will the only widow left behind by the deceased was Perez Okumu. They were therefore under no obligation to inform non-beneficiaries of the filing of the Petition. According to the Petitioners/Respondents, the Objector/Applicant has not demonstrated any basis for revocation of the grant and prayed that the Summons for Revocation be dismissed with costs.

17. Counsel for the parties submitted before me extensively on their respective clients' positions and I will now look at the issues that have arisen for determination. It was submitted for the Objector/Applicant that the proceedings to obtain the Grant were defective in substance in that the Petition filed was for grant of letters of administration intestate and the that the notice in the Kenya gazette was for a grant of letters of administration whereas the grant issued is a grant of probate To this, it was submitted on behalf of the Petitioners/Respondents that they filed a petition for letters of administration with written will annexed and that the mistake in the Kenya gazette notice was that of the Court and should not be visited upon the Petitioners/Respondents.

18. From the record, the Petition was filed in Form 79 which is the prescribed form for petition for letters of administration with written will annexed. The deceased had in his Will appointed executors. The Petition ought then to have been filed in Form 78, the prescribed form for petition for probate of written will. This was an error on the part of the Petitioners/Respondents. The notice published in the Kenya gazette was for letters of administration intestate. This was an error on the part of the Deputy Registrar

who submitted the erroneous notice.

19. Do the aforesaid errors in the Petition and the said notice warrant the revocation of the Grant herein? In my view the errors do not invalidate the process. It is quite clear from the body of the Petition that it sought grant of probate of written will the use of Form 79 notwithstanding. Indeed the Petitioners/Respondents state in the Petition that they present the same in their capacity as executors of the deceased's will. Little wonder then that this Court issued the Petitioners/Respondents with a grant of probate of written will on 26.6.14. It is my finding that proceedings to obtain the Grant were not defective in substance but the defects were procedural in nature. In this regard, I am further guided by the provisions of Article 159(2)(d) of the Constitution which provides

***159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(d) justice shall be administered without undue regard to procedural technicalities;***

20. On whether the Grant was obtained fraudulently, it was submitted for the Objector/Applicant that the Petitioners/Respondents made a false statement that the deceased had one wife and concealed from the Court the material fact that the deceased had three wives namely Curryian Okumu (the Objector/Applicant), Rusanel Okumu and Perez Okumu. That the Objector/Applicant as a widow of the deceased has a right to be joined as a co-petitioner. On behalf of the Petitioners/Respondents, it was argued that they were bound by the provisions of the Will of the deceased which stated that the deceased left behind one widow namely Perez Clement Okumu.

21. A look at Form 3 the prescribed form for the affidavit in support of the Petition, the Petitioners/Respondents provided all the information that is required in the said form. Unlike Form 5 the prescribed form for the affidavit in support of a petition for letters of administration intestate, Form 3 does not require provision of the names of the persons surviving the deceased. Further in testate succession it is the executors named in the will of a deceased person who petition for a grant of representation unlike in intestate succession where any beneficiary in the order of priority provided for in Section 66 of the Law of Succession Act may petition for a grant. I therefore find that the Petitioners/Respondents did not make any false statement nor conceal any information that they were required to provide to the Court.

22. On the validity of the Will of the deceased, it was submitted on behalf of the Objector/Applicant that the same was not duly witnessed in accordance with the law in that it does not contain the names of the witnesses. That it is doubtful if the Will was drawn by the deceased. That the pages were not initialled and that it is not known if any pages were inserted. For the Petitioners/Respondents, it was submitted that the law provides for a will to be attested by two or more competent witnesses. That the Objector/Applicant did not request that the witnesses be availed in Court.

23. The Will of the deceased is the real crux of the matter herein as it has not made any provision for the Objector/Applicant. The issues raised as to the validity of the deceased's will can be answered by testing them against the provisions of Section 11 of the Law of Succession Act which provides

***11. No written Will shall be valid unless—***

***(a) the testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator;***

***(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;***

***(c) the Will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal***

***acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.***

24. The law provides that for a will to be valid, it must be signed by the testator and attested by at least two or more competent witnesses. The Objector/Applicant's issue with the Will is that the names of witnesses are not indicated and the same has not been signed on every page. She seeks to have the will declared null and void for this reason. Though it is desirable, the law does not make it mandatory that each page of the will be signed by the testator. It is also not mandatory for the names of the attesting witnesses to be indicated in the Will though it is a good practice. The law only requires that the witnesses be at least two or more and competent. The Will herein was attested by two witnesses. One would have expected the Objector/Applicant to demand the attendance in Court of the witnesses to assist the Court in making a determination but she did not. As it is, no evidence was however tendered to show that the witnesses were not competent. Neither was any evidence tendered to warrant the invalidation of the Will of the deceased. In view of the foregoing, and in the absence of evidence to the contrary, this Court finds that the Will meets the requirements of the law.

25. The Objector/Applicant claimed that she has not been provided for in the Will as a wife and for that reason, the Will should be declared null and void. The legal position is clear however that failure to provide for a beneficiary in a Will does not invalidate a Will. Section 5(1) of the Act gives a testator testamentary freedom as follows:

***“Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses”.***

26. This freedom of a testator to dispose of his free property by will is however is not absolute. The Court can after the death of the testator alter the terms of a will following an application under Section 26 of the Act. Section 26 provides:

***“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate”.***

27. The Objector/Applicant claims she is a wife of the deceased. The deceased in his Will however, referred to her as a former wife and made no provision for her therein. Section 29 of the Act defines dependent and includes wives and former wives as follows:

**29. For the purposes of this Part, "dependant" means—**

***(a) the wife or wives, or former wife (a) or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

28. A wife or former wife who has been excluded in the will of a deceased husband or former husband as the case may be does not have to prove dependence to make an application for reasonable provision under Section 26 of the Act. In the instant case, the Objector/Applicant would qualify as a dependant (whether as wife or former wife) to apply for reasonable provision from the estate of the deceased, having been excluded in the Will. However, what I have before me is not a Summons under Section 26 of the Act but a Summons for Revocation of Grant of Probate.

29. On the Objector/Applicant's claim that the Executors have failed after notice and without reasonable

cause to proceed diligently with the administration of the estate of the deceased, no submissions were made before me in this regard.

30. In the result I find that the Objector/Applicant has not demonstrated to this Court sufficient grounds to warrant the revocation of the Grant of Probate herein. Consequently, the Summons for Revocation of Grant is hereby dismissed. Each party to bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 10<sup>th</sup> May, 2016.**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicants**

..... **for the Respondent**

..... **Court Assistant**