



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.112 OF 2010

IN THE MATTER OF THE ESTATE OF THE LAURENT ONGOMA (DECEASED)

JOHN FRANCIS MUYODIPETITIONER/RESPONDENT

VERSUS

GABRIEL ONYANGO OPONDO.....1ST OBJECTOR

ANTOLINA AKOCHI BARAZA.....2ND OBJECTOR

CONSOLATA ADERA OPONDO3RD OBJECTOR

PETER LUNANI ONGOMA4TH OBJECTOR

STEPHEN OLOO AFWANDE5TH OBJECTOR

RULING

1. This matter is in respect to the Estate of Laurent Ongoma(the Deceased) who died intestate on 2nd February, 1980. The Grant of Letters of Administration intestate issued to John Francis Muyodi (the Petitioner) is under challenge.

2. That challenge, firstly, comes through an Application by Peter Lunani Ongoma (hereinafter the objector) in which he seeks that Grant be revoked and/or annulled. A twin prayer in that summons of 3rd September 2015 is for the following:-

2. That a fresh Grant of Letters of Administration intestate to the Estate of the late Laurent Ongoma be issued in the names of the Objector/Applicant herein and or in the joint names of the Petitioner/Respondent and the Objector/Applicant.

3. That all proceeds emanating from the Estate herein be paid into one account to be operated in the joint names of the Administrators.

3. The second challenge is from 4 other Objectors. These are Gabriel Onyango Opondi, (the 1st Objector) Antonina Akochi Baraza (2nd Objector) Consolata Adera Opondo (3rd Objector) and Stephen Oloo Afwande (the 5th Objector). In my view it is convenient to deal with this latter group first.

4. From the affidavit evidence before Court, the 1st, 2nd and 3rd Objectors are already involved in litigation with the Petitioner in two Civil suits which have been consolidated into Busia Civil Case No.7 of 2011. That matter is before the Environment and Land Court. The existence of that suit was conceded to by Mr. Wanyama (advocate for the four Objectors) in his address to Court on 1st February, 2016. The advocate was of the view that the Civil claim should be heard and determined in priority of these proceedings. In respect to the matter before Court, these three Objectors did not file submissions.

5. Without delving into the details of that Civil claim, the three Objectors seek the following prayers against the Petitioner herein:-

(a) A declaration that the Defendant and the late LAURENT ONGOMA held an continue to hold title No.MARACHI/ELUKHARI/415 in trust for the Plaintiffs and the estates of BENEDICTO BARASA OKANJIRO and FRANCIS OPONDO ROMANDO OKANJIRO.

(b) An Order directing the District Lands Registrar – Busia/Teso to strike the Defendant's and LAURENT ONGOMA's names from the register of parcel No.MARACHI/ELUKHARI/415 and register the same in the names of the Plaintiffs.

(c) An Order directing the eviction of the Defendant, servants and or agents and felling of all structures he erected on land parcel number MARACHI/ELUKHARI/415.

(cc) That the Plaintiffs be and are hereby declared to have acquired ownership and title to 69 Hectares of land by virtue of adverse possession being parcel number MARACHI/ELUKHARI/415.

(dd) That the Defendant be ordered to sign all necessary, documents for consent of the Land Control Board for the transfer of parcel No.MARACHI/ELUKHARI/415 to the applicants and in default thereof the Deputy Registrar be empowered to sign on the Respondent's behalf.

(d) Costs of the suit.

(e) Any other or further relief.

Evidently the nature of claim by the trio is purely of a Civil nature and cannot be resolved by way of an Objection in Probate and Administration proceedings.

6. The same is also true about the position of Stephen Oloo Afwande (the 5th objector). He swore an affidavit on 28th September 2015 in support of the 4th Objector's summons. He is the administrator of the Estate of his late father Afwande Wanabwoba. It is his contention that his late father was buried on land parcel described as Mwachi/Elukhari/415. This is the Estate land. And that prior to his death his father lived and worked on about 30 acres of the Estate land. The 5th Objector then asserts in paragraph 7 and 8 of that affidavit:-

7. That land parcel number MARACHI/ELUKHALI/415 sheet number 28 is our ancestral land and hence we are entitled to occupy and use the 20 acres within Mundaa village.

8. That the late Laurent Ongoma was holding title for 30 acres of land parcel number MARACHI/ELUKHARI/415 in trust of our late father AFWANDE WANABWOBA and his family.

7. The claim of the Estate of the late Afwande Wanabobwa against the Estate of the Deceased herein is a claim in trust. That is a matter for resolution before another forum. That claim cannot found or sustain an Objection. The 5th Objector will have to rethink his strategy.

8. That leaves the 4th Objector's claim. As stated earlier, he is the owner of the Summons for Revocation. He, just like the Petitioner, is a son of the Deceased. In paragraph 6 of his affidavit of 3rd September, 2015 in Support of the Summons he names the following as persons surviving the Deceased:-

(i) John Francis Muyodi (the petitioner)

(ii) Peter Lunani Ongoma

(iii) Mark Ayeko Omgoma

(iv) Anne Ongoma

9. In answer to the objection, the Petitioner swore an affidavit on 3rd November, 2015. He does not dispute the persons said to survive the Deceased. The Petitioner sees no wrong on his part when he depones:-

“That I am the elder son of the deceased with priority to apply for the administration of the Estate after our mother's death”.

10. The Petitioner further states that the Objector was well aware of his intention to commence these proceedings but that he declined to give his consent.

11. To be fair to the Petitioner he included the names of the three other survivors in his affidavit in Support of the Petition. The Petitioner is however mistaken that his position as the first born gives him any priority or privilege over his siblings. Given that the wife of the Deceased is dead, all the four children of the Deceased are his survivors (section 38 of the Law of Succession Act). Section 66 of the Act then provides as follows in respect to preference of persons to administer the Estate of the Deceased intestate:-

“When a deceased has died intestate, the Court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) Surviving spouse of spouses, with or without association of other beneficiaries;

(c) Other beneficiaries entitled on intestacy, with priority according to their respective interests as provided by Part V;

(c) The Public Trustee; and

(d) Creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate shall be granted to any executor or executors who prove the will”.

12. In this regard the priority would be in accordance with Section 38 which reads;-

“Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”.

The Petitioner ought to have at the time of presenting this Petition, satisfied the Court that his three siblings either consented or renounced their rights.

13. Having failed to do so, I would allow the Application for Revocation but only so to make Peter Lunani Ongoma the Joint Administrator of the Estate of the Deceased. But because Mark Ayieko Ongoma and Anne Ongoma are also survivors to the Deceased, their say on the Administration of their father's Estate is just as important.

14. On a date that shall be appointed by Court, Mark Ayieko Ongoma and Anne Ongoma shall attend Court for purposes of joining as Administrators or consenting to the joint administrator-ship of the Petitioner and the Objector. As always any survivor may renounce his/her interest.

15. For clarity, this Court allows the Summons of Revocation dated 3rd September, 2015 in the following terms:-

(1) The Grant of Letters of Administration to the Estate issued to the Petitioner on 12th February 2009, is hereby revoked.

(2) Fresh Grant of Letters of Administration to the Estate of the Deceased shall issue in the joint names of John Francis Muyodi and Peter Lunani Ongoma.

16. The 4th Objector and Petitioner are brothers and I think it is inappropriate in the circumstances of the case to make an order of costs that pits them against one another. As to the 1st, 2nd, 3rd, and 5th Objectors, their objections were ill advised and unnecessary. They shall meet the costs of their failed attempts.

DATED AT NAIROBI THIS 15th DAY OF JUNE, 2016.

F. TUIYOTT

JUDGE

READ, DELIVERED AND DATED AT BUSIA THIS 14TH DAY OF JULY, 2016.

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KORIR

JUDGE

PRESENT:

Petitioner

Orwasa - Court Clerk