



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.95 OF 2015

IN THE MATTER OF THE ESTATE OF:

DOMITILA OPUDO OJIJO DECEASED

AND

LAWRENCE OLALA OSODO APPLICANT

VERSUS

JOHNLINUS OWINO ORUKO RESPONDENT

RULING

1. By a notice of motion dated 16th March 2012, **LAWRENCE OLALA OSODO** (applicant) sought revocation of grant which was issued on 12th May 2010 and confirmed in favour of **JOHNLINUS OWINO ORUKO** (the Petitioner/Respondent). The application is premised on grounds that:-

i. The proceedings to obtain grant were defective in substance.

ii. The Respondent/Petitioner obtained the grant by concealing the full and active beneficiaries of the Estate of DOMITILA OPUDO OJIJO (deceased).

iii. The Respondent/Petitioner has since demonstrated his will and intention to deny the applicant benefit of any portion of the Estate.

2. The Applicant told this court that the late **DOMITILA OPUDO OJIJO** was a co-wife to his mother, as she was married to his father one **OSODO** – hence his step mother. The late **OSODO** died in 1940, and the deceased herein did not have a child.

3. He explained that earlier on, the deceased had been married to one **OPUDO**, who died, and she was then inherited by **OSODO** (the applicant's father) in the 1940's, and she joined **OSODO** in his home.

4. At the time, the applicant was still a young boy, and he used to look after the deceased's goats. The deceased was using land given to her by **OSODO**. After **OSODO** died, no one else inherited the deceased and the applicant lived with her as her child. The deceased passed on in 1977.

5. It is the applicant's contention that the Respondent/Petitioner is not related to him but they just happen to hail from **KOWUOR**. However the deceased was related to the Respondent/Petitioner.

6. Upon her death, the Applicant buried her on Osodo's land – thereafter the Respondent sought and obtained grant of letters of administration in respect of the deceased's estate, without informing the applicant.

7. After the applicant's testimony, Majanja, (J) directed that the matter be dealt with by the elders and the Chief of East Kabuoch Location was served to attend court on 2nd December 2015. However he did not attend court nor was there any indication that the elders had convened and deliberated on this dispute.

8. Consequently, after several adjournments Majanja (J) was transferred from Homa Bay, and I took over the proceedings. The parties indicated that they wanted the matter to proceed from where it had reached.

9. The Respondent explained that he had petitioned for letters of administration in respect of the deceased's estate because she was his mother – in the sense that she was married to his father's elder brother (**ALOICE OPUDO**). She did not have any children, and the Respondent considers himself as her only surviving child because the deceased took him under her wing when he was very young and he lived with her for nine (9) years then she died.

10. The Respondent insists that the applicant is not a blood relative of the deceased or **ALOICE**, as they even hail from different clans – the applicant is from **KADONGO** clan while the respondent and deceased were from **KASUDI** clan. He too maintains that the deceased took him when he was very young, so that he could take care of her livestock.

11. When Aloice died, he left his land to the deceased, and she registered it in her name. When the deceased got sick, she gave the respondent a document bearing the parcel number because Title deeds had not been issued.

12. After Domitilla died, the respondent/petitioner moved back to his father's homestead as he was young and there was no one to take care of him at Domitilla's home. He laments that the applicant has threatened his life, and sworn that he will not live to benefit from the land. He is categorical that the deceased was not the applicant's mother or even his relative. When Domitilla died, she was buried on her land next to Aloice (her late husband). The respondent urges this court to dismiss the application for revocation.

13. GORDON ADHIAMBO NYAMANGA (DW2) who is from Kasudi clan told this court that **DOMITILLA** was a wife of **KASUDI** clan because her late husband was a brother to the respondent's grandfather.

14. MARCELUS ORWA ODERA (DW3) explained that although the applicant is from Kabuoch, he is from **KADONGO** clan whereas he (DW3) and Respondent are from **KASUDI** clan, so culturally he considers the respondent as his brother. He stated that the applicant never lived with the deceased, as he was just a neighbour. When the deceased died, it was the respondent's father who organized every detail of her funeral, and she was buried at her home on Opudo's land – he attended the burial. He explained that **DOMTILLA**'s husband was **OPUDO NYAKWAKA** and that she was not buried in **OSODO**'s home. He too maintained that it was the respondent who lived with the deceased and not the applicant. He expressed surprise at the applicant's claims that his father Osodo had inherited the deceased saying:-

“Osodo was not a brother to Opudo, how can that be when they are from different clans. During Domitilla's life, she did not give Lawrence her land to till but they were neighbours.”

15. VIVIEN ADHIAMBO NYAMBAMBE (DW4), the Chief of East Kabuoch location testified that the information she got was that Domitilla was married to **OPUDO** who died in 1940, and that when she convened a meeting to resolve the dispute between the parties herein, all the community members rejected the applicant's claims that **OSODO** had inherited **DOMITILLA**.

16. From the evidence presented to the court there was no dispute that **DOMITILLA** was married to one **ALOICE NYAKWAKA OPUDO** who died in 1940. The couple never got any child. Did the deceased

eventually remarry by way of inheritance by one **OSODO**, under Luo Custom or did she perhaps get into some relationship with **OSODO** as a form of widow cleansing.

17. The applicant claims that she was inherited by **OSODO**, and she moved from her former matrimonial home to live with **OSODO** in his home. This is a curious arrangement since under Luo Custom, the inherited woman remains in her matrimonial home, and the inheritor either moves to live with her or visits regularly in her initial matrimonial home.

18. However of greater significance is the claims by applicant that she had allegedly moved to live with **OSODO** on his land, when she died, she was buried on the land **OPUDO** had left for her – why? It can only mean that it's because she was not married to **OSODO** and remained **OPUDO**'s wife. Indeed the applicant confirmed that the deceased was buried on the disputed parcel and that he justifies his use of that land because he had lived with her.

19. The applicant did not offer any evidence to support the claim that he had lived with the deceased. The respondent on the other hand had two witnesses who confirmed that he is the one who had lived with the deceased as a child, but of greater significant is that he was a member of her family as her husband was a brother to the respondent's father. I detect no misrepresentation of facts by respondent. The applicant has failed to demonstrate any fraud on the part of the respondent and there is no basis to warrant revocation of the grant. The application is thus dismissed with costs to be borne by applicant.

Delivered and dated this 5th day of **September, 2016** at Homa Bay.

H.A. OMONDI

JUDGE