



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 129 OF 2013**

**IN THE MATTER OF SIMON OKELLO OYAMO (DECEASED)**

**AND**

**MOSES OMONDI OKELLO.....1ST APPLICANT**

**KATHERINA ALOO NYAMBEDHA.....2ND APPLICANT**

**LAWRENCE OLOO OYAMO.....RESPONDENT**

**RULING**

The deceased to whose estate these proceedings relate is Simon Okelo Oyamo who died intestate on or about 3rd May 1996 domiciled in Kathieno A in Ugenya District. On 7th June 2011 Lawrence Oloo Oyamo, a brother of the deceased and now the Respondent in these summons petitioned for Letters of Administration before the Senior Resident Magistrate's Court in Ukwala. However before the grant could be issued Moses Omondi Okello (the applicant) herein and who is a son of the deceased objected and successfully caused the file to be transferred to this Court. It would appear from the record that on 26th March 2013 the parties, through their Advocates, recorded a consent which culminated in the Court issuing the grant of letters of administration to Oloo Oyamo and Moses Omondi Okelo jointly. The objection proceedings by Moses Omondi Okelo were also marked as settled. On 21st January 2014 an application for confirmation of the grant was filed by the firm of Oriaro & Company Advocates which described itself as acting for the administrators and on 10th February 2014 Adiso & Company Advocates filed the present Chamber Summons application which seeks orders as follows:-

***“1. THAT the Honourable Court be pleased to revoke the grant of letters of administration instate of Simon Okello Oyamo (Deceased) on the grounds that the proceedings to the application were defective in substance and that the said grant was obtained fraudulently by making a false statement and/or concealment from the Court of something material to the case, and by means of an untrue allegation;***

***2. THAT this Honourable Court be pleased to stay any further proceedings or consequential orders;***

***3. THAT the cost of this application be provided for”.***

The application is supported by the affidavit of Moses Omondi Okello and Katherina Aloo Nyambedha and the gist thereof is that the applicants are the son and widow respectively of the deceased and that they were never consulted when Lawrence Oloo Oyamo obtained the grant. It is their contention that the said

Lawrence Oloo Oyamo is a step brother of the deceased and is intent on precluding them from getting a share of the estate. At paragraph 10 of the supporting affidavit the applicant deposes that he was not privy to the consent as he had not instructed Osundwa & Company Advocates to enter into any consent.

The application is opposed with Lawrence Oloo Oyamo filing a replying affidavit in which he deposes that part of the asset comprising this estate was sold by the deceased to one John Okwero whose family continues to occupy the portion sold. He also deposes that Moses Omondi Okelo is not even a beneficiary of the deceased's estate as the deceased merely inherited his mother Katherina Aloo Nyambedha upon the death of her husband and under Luo customs she remains the wife of her former husband and has no rights to this estate. He further deposes that he is not intent on disinheriting Moses Omondi Okelo but that it must be taken into consideration that the deceased held the land in trust for the sons of Oyamo.

On 12th March 2014 the Court directed that the application be canvassed through oral evidence. However it was not until 18th September 2014 that the hearing commenced.

At the hearing Katherina Aloo Nyambedha testified that she was indeed married to Nyambedha but that when he died she was inherited by the deceased in this case and together they were blessed with four children but only Moses Okelo, her co-applicant, is still alive. She stated that the respondent is a step brother of the deceased and contended that he cannot inherit a share of this estate as he was given a share in his mother's house. She explained that this estate belonged to the house of the mother of Simon Oyamo, and that the respondent's mother had her own land which the respondent has largely sold hence his claim to this estate. She disclosed that she also has land at the home of Nyambedha where she lives with Moses Okelo Oyamo. While acknowledging that Moses Omondi is an administrator of the estate she disputed that there was a consent between Moses and Lawrence to be co-administrators. She contended that any consent should have been between her and Lawrence as Moses Okelo was still young at the time. When shown the identity card of Moses Okelo she stated that even if he was an adult at the time the consent was recorded the same should have involved her. She further contended that she is entitled to a share of this land and stated that her children with Nyambedha are not interested in this estate. Her witness Christopher Onyango testified that after Nyambedha died he was among the people who accompanied the deceased to pay dowry for Katherina who he inherited. He stated that by then Katherina and the deceased were living together and that Moses Omondi Okello is their only surviving child. This witness also clarified that the deceased in this case and Nyambedha were brothers.

The case was closed without the respondent adducing any evidence having skipped the adjourned hearing.

The Advocates for the parties were then required to file their submissions and attend Court on 1st September 2016 for a date for a ruling. The submissions for the applicant were received on 31st August 2016 but the respondent has to date not filed his. Mr. Adiso had been tasked to serve the mention date on Counsel for the respondent but he seems not to have done so. Nevertheless so as to save time and costs I intend to proceed to deliver a ruling based on what is on record (oral testimonies and affidavits).

From the pleadings, testimony and submissions of Counsel for the applicants the real issue in controversy as of now is that the respondent was made a co-administrator in the estate of the deceased whereas they are the wife and son of the deceased and therefore rank higher than him who is but a step brother. Having perused the record however I note that the grant was issued following a consent between the Advocates then acting for the parties in Miscellaneous Application No. 165 of 2011. The applicants have not demonstrated any grounds to set aside the consent dated 26th March 2013. The fraud referred to in the Chamber Summons was not proved as it is evident that by the time my brother Chemitei J issued the grant the applicants herein were well aware of this matter having moved the Ukwala Court file to this Court and also having been involved in the Miscellaneous application. In any case Section 66 of the Law of Succession Act gives the Court a final discretion as to the person or persons to whom a grant of letters of administration shall be made. It is also evident that this application was made only after the Summons for Confirmation was filed which means that the applicants had no problem with the consent for joint administration of the estate. That being the case I see no good reason to revoke the grant. Parties have raised weighty issues regarding Luo customs but those shall be determined at the stage of distribution of

the estate. The application to revoke the grant is dismissed with an order that parties bear their own costs.

**Signed, dated and delivered at Kisumu this 6th day of October 2016**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

N/A for the 1st and 2nd applicant

N/A for the Respondent

CC: Serah