



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 61 OF 2014**

**IN THE MATTER OF ESTATE OF WILCARI ODERA ATOKA (DECEASED)**

**IN THE MATTER OF REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION**

**LEONARDUS ODHIAMBO OKELO.....OBJECTOR/APPLICANT**

**VERSUS**

**LILIAN ATIENO ODERA.....1ST PETITIONER/RESPONDENT**

**MAURICE OLPENS OKOTH.....2ND PETITIONER/RESPONDENT**

**JUDGMENT**

These proceedings relate to the estate of Wilcari Odera Atoka (deceased). By the Summons for Revocation dated 14th August 2015 Leonardus Odhiambo Okelo (the applicant) seeks revocation of the grant issued to Lilian Atieno Odera and Maurice Olpens Okoth on 17th July 2014 and subsequently confirmed on 24th April 2015. The grounds for the application are:-

- “a) The grant herein was obtained fraudulently;***
- b) The Petitioners/Respondents failed to disclose full material particulars and/or details relating to the estate of the deceased herein;***
- c) That the grant was obtained by means of an untrue allegation of facts, essential in point of law to justify the grant, notwithstanding that the allegation was made in ignorance or inadvertently;***
- d) That the procedure used and/or applied in respect of this succession proceedings sought to be impugned is full of illegality;***
- e) That the grant of letters of administration and the certificate of confirmation thereof are nullity ab initio;***
- f) That the grant of letters of administration and the certificate of confirmation thereof prohibited by dint of Section 47 of the Law of Succession Act;***
- g) That it is expedient and in the interest of the beneficiaries of the estate that the Grant of Letters of representation herein be revoked;***

***h) That the Petitioners/Respondents herein misappropriating and/or abusing the assets of the deceased to the detriment of the Objector/Applicant and other beneficiaries;***

***i) That the Petitioners/Respondents are not a fit person to administer the estate of the deceased herein whatsoever”.***

The summons was heard by way of viva voce evidence and on his part the applicant testified that the asset in issue being **LR East Gem/Jina/1151** belonged to his grandparents and is currently registered in his name. He stated that the respondents filed this succession cause without his knowledge and have now stolen his land. He contended that the 1st Respondent is not the daughter of the deceased as she was already born when the deceased started cohabiting with her mother. He described her as a girl from Kano. His son Charles Omondi Odhiambo (PW2) was however more candid. He testified that the 1st Respondent was like his sister and stated that the reason his father is the person best suited to inherit this land is because it was him who provided the jembe that dug the deceased's grave, and also bought the firewood and food consumed by the mourners. He stated that he did so at the behest of the neighbours. Upon his father's acquisition of the land it was given to him to occupy. He also testified that his father refunded money owed to a purchaser by the deceased and that the Chief wrote a letter to that effect. He told the Court that he has now been issued with a notice to vacate the land and contended that the land rightfully belongs to his father. He denied that the proceedings in the Principal Magistrate's Court Siaya reverted the land to the deceased and further stated that he was not aware of the decision of the High Court on the matter.

On her part the 1st Respondent testified that the deceased was her father having married her mother who is also deceased. She was the only child and the deceased had biological sisters who are also deceased. She disputed that the applicant was directly related to the deceased. She stated that the reason she could not purchase the jembe alluded to by the applicant was that culturally a girl who is married cannot do so. She disputed that it was her mother's wish that the applicant inherits this land stating that she could not have given the title deed to her if that were so. The 2nd Respondent told the Court that the deceased was his uncle and that it is he who mounted the case which culminated in the cancellation of the title issued to the applicant unprocedurally. He produced the judgments of the Siaya Court and the High Court as well as the title deed that reverted the land to the deceased. He stated that the 1st Respondent is the rightful heir; that the applicant has no right to inherit the deceased's estate when his daughter is still alive.

Only the Advocate for the Respondents filed submissions. The applicant who appeared in person did not file any.

The grounds upon which a grant, whether confirmed or not, may be revoked are provided for under Section 76 of the Law of Succession Act and these are:-

***“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -***

***(I) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or***

*(ii) to proceed diligently with the administration of the estate; or*

*(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or*

*(e) that the grant has become useless and inoperative through subsequent circumstances”.*

The totality of the applicant's case is that he is now the registered owner of the asset which constitutes the estate of the deceased; that the 1st Respondent cannot inherit this land as she was not the daughter of the deceased having “come with her mother” meaning that she was born before her mother got married to the deceased. It is also his case that he is entitled to this land as it was him who saw to the burial of the deceased. That really is the gist of his claim.

The deceased in this case died on 25th December 1998 and it is not disputed that he died intestate. Under **Section 2(1) of the Law of Succession Act** the law governing his estate is therefore the Law of Succession Act. There is in this case evidence that upon the demise of the deceased person the applicant proceeded to register the asset comprising the estate of the deceased in his name. This he did without bringing a succession cause. The respondents moved to Court and proof was tendered that both the Principal Magistrate's Court in Siaya and this Court annulled that title and had the land reverted to the deceased. The applicant cannot therefore cling to the title unlawfully issued to him as proof that he is a beneficiary of this estate. If anything what he had done apart from being fraudulent was intermeddling with the estate of a deceased person which is a crime under **Section 45(2) of the Law of Succession Act**. His claim to the estate on that ground must therefore fail.

What about the custom of providing a jembe to dig the grave? It is my finding that the same does not count the deceased having died after the commencement of the Act. Such customs would only be considered had he died before the commencement of the Law of Succession Act (see Section 2(2) of the Act). Even then I am not persuaded that the mere act of providing the jembe to dig the grave would give him priority over the deceased own daughter in regard to this property.

It is evident that the Respondents petitioned for letters of administration after the judgment of the High Court where the judge observed that only the Court hearing the succession cause could decide who would succeed the estate. It is not true therefore that the grant was obtained in secrecy. Secondly the 1st Respondent being the daughter of the deceased ranks higher in preference to the applicant. This is as provided by Section 66 of the Act which though it gives the final discretion as to who should get the grant to the Court, states:

***“66. 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 or spouses, with or without association of other beneficiaries;***

***(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial 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 estate shall be granted to any executor or executors who prove the will”.***

Unlike his son the applicant does not acknowledge the 1st Respondent as the daughter of the deceased.

He alleges that she was born out of wedlock. He however has no proof of this. Be that as it may he does acknowledge that the deceased and the 1st Respondent's mother were cohabiting as at the time of their death. In the Act the definition assigned to a child in reference to a male person is “**a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent respondent**”. Section 3(3) then states that “**such a child shall have relationship to other persons through him as though the child had been born to him in wedlock**”. That being the case and even were we to find she is not his biological child the deceased having brought up the 1st Respondent as if she were his own daughter it is only logical to conclude that he accepted her as his child. Accordingly vis a vis the applicant she ranks higher in priority in so far as inheritance of his estate is concerned. It follows therefore that she was entitled to petition for letters of administration and as no defect in the proceedings to obtain the grant or fraud in obtaining the same have been disclosed the summons is without merit and is dismissed with costs to the respondents.

It is so ordered.

**Signed, dated and delivered at Kisumu this 3rd day of November 2016**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

N/A for the Objector/Applicant

N/A for the 1st Petitioner/Respondent

N/A for the 2nd Petitioner/Respondent

C/A: Serah Sidera

Parties in person.