



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
SUCCESSION CAUSE NO.50 OF 2009
IN THE MATTER OF THE ESTATE OF ANDERW OBEDIA – DECEASED
AND
BENARD OTHIENO ODUORPETITIONER/APPLICANT
VERSUS
BENVENTURE OUMA OGOLARESPONDENT
R U L I N G

1)This Court is asked to consider and determine the Notice of Motion dated 10th September 2013 which seeks the following orders:-

a)The exparte proceedings of 4-11-2010 confirming the grant issued to the petitioner/applicant and the certificate of confirmation issued thereafter and dated 4-11-2010 be set aside and or vacated forthwith.

b)The grant of letters of administration intestate made to the petitioner/applicant herein, BENARD OTHIENO ODUOR, on 3-3-2010 be confirmed a fresh and the deceased's estate be distributed in the mode proposed by the petitioner/applicant.

c)The costs of this application be borne by the respondent.

That motion is said to be brought under the provisions of Section 40(1) of The Law of Succession Act Cap 160 Laws of Kenya, Rules 49 and 63 of The Probate and Administration Rules and Order 45 Rule 1 of The Civil Procedure Rules.

2)One of the reasons given for seeking that the order of 4th November 2010 be set aside is in paragraph 6 of the Applicants' Affidavit of 10th September 2014. The Applicant avers:-

“That I was also surprised that the said BONIVETURE OCHIENG OGOLA had allegedly issued to me a confirmation notice dated 2-11-2010 and that it was allegedly served upon myself by one PETER CHARLES MKADO when that was not true, as per the attached confirmation notice and affidavit of service respectively marked “BOO 3 (a) and BOO 3(b)”.

In essence, the Applicant was questioning service.

3)As the orders were made exparte, then if the Applicant was not served with Notice for the hearing of

the confirmation proceedings then this Court would have to set aside the order *ex debito Justitiae* (“as a matter of fact”). It is for this reason that I would be called upon to start by considering the question of service. It was said that the Petitioner was duly served with the Hearing Notice on 2nd November 2010 at 4.35pm. As the contents of Affidavit of Service are of singular importance it is worth reproducing the Affidavit of the Process Server in full.

I, PETER CHARLES MKADO of P. O. Box 218 Nambale do swear and state as follows;

1.THAT I am a male adult of sound mind and a court process server hence competent in swearing this affidavit.

2.THAT the interested 3rd party herein Bonventure Ochieng Ogolla retained my services to serve confirmation notice issued by Honourable Judge on 2nd November 2010 and set for confirmation on the following day that is 3rd November 2010.

3.THAT on the same day in the company of the interested party who is part of the people who were supposed to benefit from the above deceased’s estate we proceeded to the Petitioner’s home is situated at Konjera village Tingolo Sub-Location Butula District the time being 4.35 p.m.

4.THAT upon introduction and purpose of my visit after the interested party had pointed out the home of the Petitioner I tended(sic) copies of the said notices which hereby returned to this Honourable Court duly served.

5.THAT he accepted service but declined to append his signature on the said hearing notice.

6.THAT whatever is deponed herein is true to the best of my knowledge, information and prove.

Paragraphs 3, 4 and 5 of the Affidavit of Service are critical in determining whether there was proper service. Conspicuously in none of these paragraphs or anywhere else in the Affidavit does the Process Server say on whom the process was effected.

4)As the Petitioner now denies receipt of the hearing notice, the benefit must go to him. For this reason only I would set aside both the proceedings of 4/11/2010 and order therein. Prayer (a) of the Notice of Motion dated 10th September 2013 is hereby allowed with costs to the Petitioner. Parties shall move this Court afresh for confirmation.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 5TH DAY OF MARCH 2015

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

KADENYI.....COURT CLERK

BENARD O. ODUOR.....FOR THE APPLICANT

BONVENTURE OUMA OGOLA.....FOR THE RESPONDENT