



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**SUCCESSION CAUSE NO.169 OF 2013**  
**IN THE MATTER OF THE ESTATE OF**  
**JAMESON ORUTA ORONI – DECEASED**

**AND**

**YUNES KERUBO ORUTA - 1<sup>ST</sup> PETITIONER**

**DAVINA KWAMBOKA ORUTA - 2<sup>ND</sup> PETITIONER**

**VERSUS**

**GEORGE KOMBO ORUTA - 1<sup>ST</sup> OBJECTOR**

**ROSE NYANCHAMA AENCHA - 2<sup>ND</sup> OBJECTOR**

**J U D G M E N T**

The dispute herein revolves around the probate of **Jameson Oruta Oriri (Deceased)** who died on 17<sup>th</sup> October 2003. The dispute is between **Yunes Kerubo Oruta, Davina Kwamboka Oruta** as petitioners and **George Kombo Oruta** and **Rose Nyanchama Aencha** as objectors.

In a petition presented to this court in 29<sup>th</sup> September 2012, Yunes Kerubo Oruta & Davina Kwamboka Oruta have sought for Grant of letters of Administration for the Estate of the deceased in their capacity as widow and daughter to the deceased respectively. In the petition they named the following as surviving the deceased:-

- a. **Yunes Kerubo Oruta - Widow**
- b. **Lameck Nyakundi Oruta - Son (USA resident)**
- c. **George Kombo Oruta - Son**
- d. **Lawrence Mauti Oruta - Son (USA resident)**
- e. **Rose Nyanchama Aencha - w/o Andrew Obinchu (Dcsd) –Daughter in law.**
  
- f. **Davina Oruta Kwamboka - Daughter**
- g. **Emily Nyaboke Ogega - w/o Tome Ogega (Dcsd) Daughter in law.**
  
- h. **Evelyn Moraa Oruta - Resident UK**
- i. **Mercy Nyaboke Oruta - Adopted daughter**
- j. **Simon Ongati Kombo - Grandson**
- k. **Nicholas Orori Obinchu - Grandson**

- l. **Manuel Mauti Nyakundi** - **Grandson**  
m. **Michael Ogega Ogega** - **Grandson**

They also listed deceased's assets as follows:-

- a. **Nyaribari Chache/B/B/Boburia/2607**
- b. **Riosiri Market/Plot No.1**
- c. **Riosiri Market/1906 No.22**

On discovering the existence of this cause, Objectors George Kombo Oruta and Rose Nyanchama Aenda (*in their capacity as son and daughter to the Petitioner*) filed an Objection to making of Grant on 19<sup>th</sup> July 2013. Subsequently, on the same day they presented an Answer to Petition by way of cross application for a grant in the objection to making of grant the objectors have contended the following:-

- **That the petitioners are not fit/proper persons to whom the grant of representation can issue,**
  - **that the Petitioners have colluded since the death of deceased and intermeddled with estate of deceased and particularly without any grant of representation the Petitioners have transferred to themselves the following properties belonging to deceased's estate:-**
- a. **Mwongori Settlement Scheme/18**
  - b. **Daraja Mbili/2617**
  - c. **Daraja Mbili/2618**
  - d. **Kisii Town/Block 2/49 and**
  - e. **South Mugirango Bosinange/1423**

Furthermore, the objectors have also contended that the Petitioners have failed to give a full inventory of the deceased's property at the time of his death with the intention of concealing their illegal actions. The objectors allege that at the time of his death the following properties formed the estate of the deceased:-

- a. **South Mugirango/Bosinange/1423**
- b. **South Mugirango/Bosinange/1428**
- c. **Kisii Town Block 2/49**
- d. **Nyaribari Chache B/B/Boburia 2607**
- e. **Daraja Mbili/2617**
- f. **Daraja Mbili/2618**
- g. **Riosiri Market Plot 1**
- h. **Risori Market Plot 22**
- i. **Mwongori Settlement Scheme Parcel No.18**
- j. **Nyabigege Market Plot No.15**

Also the objectors have contended that the petitioners have included in the Petition names of persons (*grandsons*) who were not dependants of the deceased and are not entitled to inherit directly from the estate but from their respective parents as children of the deceased. They included:-

- a. **Simon Ongati Kombo**
- b. **Nicholas Orori Obinchi**
- c. **Manuel Mauri Nyakundi**
- d. **Michael Ogega Ogega**

In addition to this, the objectors contend that the 1<sup>st</sup> Petitioner secretly obtained a Limited Grant of Letters of Administration from Migori Law Courts in Succession Cause No.59 of 2005 apparently to enable the petitioner to file a civil suit and preserve the deceased properties in danger of being grabbed but in reality according to the objectors the limited grant has been misused by the petitioners who have used it to effect unlawful changes to the status of the deceased's properties and intermeddle. However, the objectors contended that no suit was ever filed or any proceedings commenced or defended on behalf of

the deceased's estate as a result of the limited Grant issued in the Migori Succession Cause No.59 of 2005.

Furthermore, that in 2011, the 1<sup>st</sup> Petitioner attempted to block the burial of the late Tom Ogega Oruta (*her own son*) and beneficiary of the estate of deceased by filing Civil Case No.15 of 2011 at the Principal Magistrate's Court at Nyamira whereby she sought for and obtained Interim Orders refusing the burial of **Tom Ogega Oruta on Mwongori/Settlement/Scheme/18**. After a full hearing, the court declined to grant her the orders sought.

Therefore according to the objectors they contend that the petitioners' action of having undertaken such fraudulent actions against the estate and having acted so cruelly in respect of Tom Ogega Oruta, the 1<sup>st</sup> petitioner should not be permitted to administer deceased's estate whatsoever, that they (*objectors*) intend to request the court to notify the fraudulent transfers made by the 1<sup>st</sup> Petitioner without grant as appointing her (*1<sup>st</sup> Petitioner*) as the administrator will occasion manifest injustice to the estate of deceased. As for the 2<sup>nd</sup> Petitioner the objectors allege that she has been an accomplice of the 1<sup>st</sup> petitioner as she has all along colluded with the 1<sup>st</sup> petitioner and has also contributed in the mismanagement and intermeddling of the estate of deceased.

In their answer to the petition the objectors have reiterated the above averments in the objection to making of grant.

In their affidavit of petition by way of cross-application for grant the objectors have listed the following persons as the people who survived the deceased:-

- |                                  |   |                 |   |
|----------------------------------|---|-----------------|---|
| a. <b>Yunes Kerubo Oruta</b>     | - | <b>Widow</b>    | <b>79 years</b>                                 |
| b. <b>Lamech Nyakundi Oruta</b>  | - | <b>Son</b>      | <b>61 years</b>                                 |
| c. <b>George Kombo Oruta</b>     | - | <b>Son</b>      | <b>59 years</b>                                 |
| d. <b>Andrew Obinchi Aencha.</b> | - | <b>Son</b>      | <b>(dcsed) rep. by his widow Rose Nyanchama</b> |
| e. <b>Lawrence Mauti Oruta</b>   | - | <b>Son</b>      | <b>52 years</b>                                 |
| f. <b>Tom Ogega</b>              | - | <b>Son</b>      | <b>(deceased) rep. by his widow</b>             |
| f. <b>Emily Nyaboke Ogega</b>    |   |                 |   |
| g. <b>Dann Oruta Kwamboka</b>    | - | <b>Daughter</b> |   |
| h. <b>Evelyn Moraa Oruta</b>     | - | <b>Daughter</b> |   |

However, the objectors have listed a full inventory of all the assets and liabilities of the deceased at the date of his death as follows:-

#### LAND

- a. South Mugirango/Bosinange/1423
- b. South Mugirango/Bosinange/1428
- c. Kisii Town Block 2/49
- d. Nyaribari Chache B/B/Boburia/2607
- e. Daraja Mbili/2617
- f. Daraja Mbili/2618
- g. Riosiri Market Plot 1
- h. Riosiri Market Plot 22
- i. Mwongori Settlement Scheme Parcel No.18
- j. Nyabigege Market Plot No.15

Total estimate value Ksh.5 Million.

## **LIABILITIES** – Nil.

The objectors have also attached copies of share certificates, certificates of title and or official searches for the above mentioned properties and a letter from the chief Mugirango Chache location. In addition to this the objectors have reiterated their averments in the objection to making grant and answer to the petition.

The petitioners on their part have filed an answer to objection and cross application for grant dated 17<sup>th</sup> February 2015. The 1<sup>st</sup> petitioner Yunes Kerubo Oruta with authority from the 2<sup>nd</sup> Petitioner has contended that the objector's application should be disallowed for the following reasons:

- a. **That as the deceased's widow she has priority over the objector concerning entitlement to grant of letters of administration intestate and herself and 2<sup>nd</sup> petitioner are therefore fit, and proper persons best placed to the grant of letters of administration.**
- b. **That their inclusion on the list of the names of grandchildren of the deceased is pursuant to Section 51 (2) (g) of the Law of Succession Act which provides that in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased and of the children of any child of his or her deceased and as a result of the death of her two sons i.e. Andrew Obindu Oruta and Tom Ogega Oruta who died leaving behind their children (*the deceased's grandchildren*) and spouses who are entitled to benefit from the estate of the deceased.**

The 1<sup>st</sup> petitioner acknowledges that indeed she did obtain a limited grant of letters of administration from Migori Law Courts in Succession Cause No.59 of 2005 for the sole purpose of collection and preserve of the deceased's properties which she had duly concluded and denied that the said limited grant was for selfish unlawful dealings.

She contended that land parcel Reference No.**Central Kitutu/Daraja Mbili 1569** has at all times in her names since the year 1978 and that her intention and that of the 2<sup>nd</sup> petitioner is to ensure that the deceased property is reasonably and equitably distributed amongst his beneficiaries. Lastly is, he contended that although the objector may be competent, he is not suitable to administer the estate since he is only after selfish gains and interest as he cannot have priority over her.

When the matter came before me on 11<sup>th</sup> March 2015 both parties had filed their written submissions. After considering the petition for grant, objection of making grant, answer to petition, petition by cross-application, for grant petitioners answer to objection and cross-application for grant and finally, both submissions filed by respective counsels on behalf of their parties the following are issues to be determined by this court?

1. ***Can grandchildren be included as beneficiaries/dependants of the deceased?***
2. ***Does the court have discretion under Section 66 of the Law of Succession Act on who should administer the estate of the deceased?***
3. ***Have the objectors proved that the petitioners have intermeddled into the estate of deceased without obtaining grant?***

With regard to the first question on whether or not grandchildren are beneficiaries to the estate of their grandparents, Musyoka J, in the Estates of John Musombayi Katumanga – (deceased) [2014] eKLR rendered himself as follows:

***“.....I suspect that she is a daughter to the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependant of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased there are two reasons for this. She is not***

*an heir of the deceased for grand children are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependant of her grandparent but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependant on the grandparent immediately before his death.”*

Therefore, in the instant case the inclusion of Simon Ongati Kombo, Nicholas Orani Obinchi, Manuel Mandi Nyakundi and Michael Ogega Ogega was irregular, as such children I suspect belonged to the deceased sons who are also deceased that is Andrew Obinchi and Tom Ogega. The said deceased son's are represented by their widows who are Rose Nyanchama Aencha and Emily Nyaboke Ogega who in accordance with the law of succession represent their deceased husbands and will therefore be entitled to the share which their deceased husbands would have benefited from the deceased estate. Thus by inclusion of grand children of the deceased bearing in mind that the parents of the said grand children are also getting a share from the deceased's estate meant that some of the survivors of the deceased will get a bigger share of the deceased's estate than others without a justifiable reason therefore the grand children of the deceased in this case were not supposed to be listed as beneficiaries to the deceased's estate.

With regard to the second issue which is on the discretion this court has in terms of **Section 66 of the Law of Succession Act** the said act provides as follows:-

*“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, (my emphasis):*

- 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:*
  - i. *the public trustee; and*
  - ii. *Creditors.*

In Florence **Imanti vs. Mwongera Mugambi Rintari & Festus Guantai Mugambi** the court held:-

**“From the reading of this file, it has become clear to me that the administrators have shown that they are incapable of concluding the administration of this estate. As I said at the beginning of this ruling, the deceased died in 1985. This cause was filed in 1987 in the High Court. I am of the view that the interest of justice requires that the grant issued to Mwongera Mugambi and Festus Guantai should be annulled.....Section 66 of the Law of Succession Act gives this court discretion on who should be appointed as an administrator of the estate.....Bearing in mind the inactivity of the administrators in this matter and bearing in mind that the administrators have failed to give an account of money received by them....I hereby annul the grant issued to Festus Guantai Mugambi and Stephen Mwongera Mugambi Rinbari. I hereby appoint Florence Kinaiture Imani and Josephine Kaarika as joint administrators to this estate.”**

Therefore in as much as the 1<sup>st</sup> petitioner is right in stating that as the wife of deceased she has a priority in administering the deceased's estates as opposed to the objectors who are children of the deceased, such a right is not unfettered as the final decision on who should administer the estate of the deceased still lies in the sole discretion of this court as to whether or not the widow is capable of administering the estate of the deceased.

**Thirdly**, on whether or not the objectors have proved with the affidavit evidence and exhibits presented to this court as to whether the petitioners have intermeddled with the estate of the deceased, on looking at

form P & A 5, the petitioners have listed the following assets:-

- a. Nyaribari Chache B/B/Boburia/2607
- b. Riosiri Market/Plot No.1
- c. Riosiri Market/Plot No.22

Liabilities:

- a. National Bank of Kenya, Nakuru Branch – Ksh.4,000,000.00
- b. Davina Oruta Kwamboka – Ksh.2000.00
- c. Yunes Kerubo Oruta – Ksh.1,500,000.00

However the above statements are contrary to the chief's letter which was marked as GKO.1 which states that the deceased left the following properties:-

1. South Mugirango Bosinange Plot No.1423 & 1418
2. Kisii Town Block 2/149
3. Mwongori Plot No.18
4. Riosiri Market/S.Mugirango Central/Plot No.1.
5. Daraja Mbili Plot No.569 and 590

The objector's petition by way of Cross-application for grant also lists the deceased's assets as follows:-

- I. South Mugirango/Bosinange/1423 which title was registered in the name of deceased on 15<sup>th</sup> June 1995 but later according to the certificate of search dated 6<sup>th</sup> February 2009 was transferred to the 1<sup>st</sup> petitioner's name on 29<sup>th</sup> December 2005 and a title deed issued to the 1<sup>st</sup> petitioner on 29<sup>th</sup> November 2005.
- II. Daraja Mbili/2617 was registered in the name of 1<sup>st</sup> petitioner on 25<sup>th</sup> January, 2005.
- III. Daraja Mbili/2618 was sold to one Julius Omieri Nyambaka on 11<sup>th</sup> April 2005 and subsequently a title deed was issued to the said person on 23<sup>rd</sup> June 2005.
- IV. Kisii Town/Block 2/149 was registered in the deceased's name on 8<sup>th</sup> August 1972 but transferred to the 1<sup>st</sup> petitioner's name on 6<sup>th</sup> June 2005 and a certificate of lease issued to her on 23<sup>rd</sup> October 2009.
- V. Mwongori Settlement Scheme/18 was registered in favour of the 1<sup>st</sup> petitioner on 13<sup>th</sup> June 2004 but prior to that it had a caution registered in favour of one Tom Ogega Oruta claiming licencees interest.

It is to be noted that all these transactions on the above pieces of land were initially owned by the deceased who died on 17<sup>th</sup> October, 2003 and that the said transactions took place after the demise of the deceased without the 1<sup>st</sup> petitioner (*widow*) of the deceased taking letters of administration intestate or even having the said grant confirmed.

**Section 45 of the Laws of Succession Act** prohibits dealing with properties belonging to a deceased person before obtaining grant. It states:-

**“(1) Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”**

In her reply to the objector's objection to the making of grant the petitioners (1<sup>st</sup>) has not rebutted the

above evidence by the objectors but has simply stated that L.R. No. **Central Kitutu/Daraja Mbili/569** has at all times been in her names since 1978. It is worth noting that Central Kitutu/Daraja Mbili/569 was not included as one of the assets forming part and parcel of the deceased's estate by both the petitioner and the objectos.

The petitioner is a spouse of the deceased. Her role is not to transfer property to herself without a grant of representation or consent of the other beneficiaries. To my mind her role is to simply act as trustee of her deceased husband's property as demonstrated in Estate of **Moffat Mariga Ngethe Succession Cause No.1665 of 2008** where Kimaru J, stated:-

**“The issue for determination by this court is whether the respondent held title in respect of the suit parcel of land as a life interest or an absolute proprietor. It is common ground that all of the children of the deceased consented to the respondent to petition the court to be issued with a grant of letters of administration intestate. That is as it should be this is because Section 66(a) of the Law of Succession Act gives first priority to a widow or widower to petition the court to administer the estate of his or her deceased spouse. However, it appears that the Respondent misapprehended her registration on transmission in regard to the ownership of suit parcel of land. Section 35(1) (b) of the Law of Succession Act is clear. A surviving spouse of a deceased person is entitled to a life interest in the whole of the residue of the intestate estate of a deceased. Such spouse is entitled as of right to the absolute ownership of the personal and household effects of the deceased. In the present application, it was clear that the respondent was only entitled to a life interest in the suit parcel of land. She lacked legal capacity to transfer the suit parcel of land either in whole or in part to third parties without the say so of the children of the deceased. On the other hand, Section 38 of the Law of Succession Act allows a property which is transferred to the children of a deceased person to be owned by the said children absolutely.**

**In the premise, therefore, the court holds that the respondent lacked legal capacity to transfer any portion of the suit parcel of land to a third party without the consent of the children of the deceased. This is because the respondent's interest in the suit parcel of land is life interest. She had no capacity to sell the property which the law allows her to enjoy during her life time. She is in effect a trustee for the children of the deceased. It was clear that the respondent wrongly exercised her power as the administrators of the estate of the deceased. The transfers made by the respondent pursuant to the grant of letters of administration intestate by this court are hereby reversed. The subdivision done at the behest of the respondent is cancelled. The title in respect of the suit parcel of land shall revert to the name of the respondent with the correct that holds the said title as a trustee of the children of the deceased. Since it appears that the Respondent cannot be trusted to faithfully administer the estate of the deceased this court revokes the grants of letters of administration intestate issued to her on 31<sup>st</sup> October 2008 and confirmed on 9<sup>th</sup> March 2010.”**

The above scenario is a bit different from the instant case as grant of letters of administration and confirmation of grant have not yet been issued to the petitioners. The petitioner specifically the 1<sup>st</sup> petitioner has just gone ahead to transmit deceased property to her name and even sell off part of the deceased property without obtaining grant or even consent from her children.

In the circumstance therefore the objection to making grant in favour of the petitioners by the objectors is justified as the 1<sup>st</sup> petitioner's action are clearly not in the best interests of the estate of the deceased and to my mind they are basically selfish.

For the foregoing reasons I will allow the objection to making of grant filed by the objectors by making the following orders:-

- a. **The petition by Yunes Kerubo Oruta and Davina Oruta Kwamboka is hereby dismissed on grounds that the two are not fit and/or proper persons to whom a grant of representation may issue and have intermeddled in the estate.**
- b. **The transfers effected since the death of Jameson Oruta Orori on 17<sup>th</sup> October 2003 without**

**grant of representation are hereby declared null and void.**

- c. A prohibition of any dealing in the property standing in the name of Jameson Oruta Orori as at 17<sup>th</sup> October 2003.**
- d. The objector George Kombo Oruta can proceed and file for petition for grant of letters of administration intestate in favour of the estate of Jameson Oruta Orori.**

**Dated, signed and delivered in open court this 3<sup>rd</sup> day of July, 2015 at Kisii.**

**HON. C. B. NAGILLAH**

**JUDGE**

**In the presence of:**

- Nyawencha holding brief for Kasamani for Petitioners
- Ondieki holding brief for Nyaanga for objectors
- Samuel Omuga: court clerk