



**REPUBLIC OF KENYA**

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

**SUCCESSION MISC. APPLICATION NO.30 OF 2012**

**IN THE MATTER OF THE ESTATE OF PIUS OLOO OYOMO ..... DECEASED**

**AND**

**HENRY OMOLO ODEKO ..... APPLICANT**

**VERSUS**

**PETER OUMA OMOLLO ..... RESPONDENT**

**JUDGMENT**

1. The applicant herein Henry Omollo Odeko filed a Notice for revocation of grant under **Section 76 (a), (b) and (c) of the Law of Succession Act Cap 160 Laws of Kenya and Rules 36 (3), 44 and 73 of the Probate and Administration Rules** seeking Orders:-

1. Spent.
2. *That the honourable court be pleased to direct that the grant of representation issued to the respondent/petitioner vide Homa Bay Senior Resident Magistrate's Court Succession No.90 of 2000 on 5<sup>th</sup> day of March 2001 and confirmed on 6<sup>th</sup> April 2001 be annulled/revoked and such grant of representation be issued to the applicant/objector.*
3. *Pending the hearing and determination of this application an order of inhibition be registered against land parcel No. Kanyada/Kotieno/*

*Katuma'A/972 (hereinafter known as the suit land) inhibiting any transfer to any third party by the respondent/petitioner or any other dealing in the said land by the respondent/petitioner.*

4. *The honourable court be pleased to order the respondent/petitioner to refrain from cultivating or any dealing whatsoever on the suit land that has traditionally been used by the applicant/objector.*
5. *In the alternative and without prejudice to prayers 2, 3 and 4 above, any transfer and/or subdivision of title to the suit land from the name of the deceased into the name of the petitioner or any third party be cancelled and/or annulled.*
6. *The costs of this application be provided for.*

1. The application was supported by an affidavit sworn by the applicant in which he avers that the respondent misled this court into issuing and confirming the grant by concealing from the court the full list of all beneficiaries of the estate in question, when he presented himself as the sole beneficiary of the estate of the deceased. That the applicant herein is the next of kin in order of hierarchy. Further that the respondent did not obtain his consent when applying for Grant of Letters of Administration, and simply sneaked himself to court and obtained the letters of administration irregularly by cheating the court that he was the only Dependant of the deceased.

2. The applicant thus contends that owing to the fact that he was the one next in line and entitled to inherit the deceased's estate as per **Section 39 (1)** of the **Succession Act**, the petitioner could only petition the honourable court for grant of administration with the applicant's consent.
3. That having failed to seek and obtain consent as is by law required of other family members of the deceased before instituting the petition for grant of letters of administration, the grant of Letters of Administration to the estate of deceased was therefore made out of concealment of relevant material facts from the honourable court and is therefore null and void.
4. The applicant prays that the orders sought be granted otherwise he will continue suffering as the beneficiary of the estate in question while the estate is wasting away.
5. The respondent on his part, though served, did not file any replying affidavit/ground of opposition to the above application.
6. When the matter came before court on 24<sup>th</sup> July 2012, for directions the applicant indicated that he would give viva voce evidence though he had no witnesses to call. The respondent on the other hand indicated that he would give evidence and call two witnesses.
7. The matter came again before court on 27<sup>th</sup> January 2014 when the applicant stated that he had served the respondent and produced an affidavit of service attesting to that fact. On establishing that the date for hearing was taken by consent of both parties but nevertheless the respondent was absent, the matter proceeded with only the applicant giving his viva voce evidence.
8. The applicant in his oral evidence stated that the respondent is one of his many sons. He had brought him to court so that the certificate of grant in his name be revoked as he had obtained the same by way of forgery.
9. The applicant also stated that when he perused the forms filed at the court registry at Homa Bay, he noticed all the signatures thereon to be forged including applicant's signature. He therefore urged the court to apply the law and revoke the certificate of grant so he could remain owner of the suit property.
10. He further testified that the suit land was taken from him by means of forgery, and that as a result, his other children have been disinherited by the respondent's actions. He also testified that the respondent had sold all the land that he was given by the applicant and now wants to sell what belongs to other people.
11. He further contended that recently, the respondent mobilized the community who came to his home to cause him harm. That his local chief came and rescued the situation though his wives were injured. The applicant contended that the respondent's failure to attend court was deliberate because the hearing date was taken by consent.

12. **Section 76** of the **Law of Succession Act** stipulates that:-

1. *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.*
1. In the instant case, the applicant wants the grant of representation issued to the respondent/petitioner vide Homa Bay Senior Resident Magistrate's court Succession No.90 of 2000 on 5<sup>th</sup> day of March 2001 and confirmed on 6<sup>th</sup> April 2001 to be annulled. Upon perusal of the application and the relevant attachments and the only form which the applicant seems to have attached to his application is Form P&A 5 which names the respondent as the only survivor to the deceased's estate. There is no copy of the Letters of Administration Intestate attached to the application, so that this court is not in a position to confirm whether the said letters were ever issued and/or confirmed.
2. In spite of the scanty supporting information, it appears to me that the whole process of obtaining the said grant if what the applicant says is true, was irregular. **Section 71** of the **Law of Succession Act** clearly stipulates that:-

**“After the expiration of a period of six months or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”**

3. I have looked at the attached Form P&A 5 which proves that the respondent indeed misled the court by stating that he was the only Dependant to the estate of the deceased. In that Form the respondent is listed as the only beneficiary to the deceased's estate. Apart from this document, the respondent did not even explain his relationship with the deceased and nothing else seems to prove that the respondent was gazetted as the administrator of the deceased's estate, nor that he was issued with the Letters of Administration intestate to administer the deceased's estate. The applicant has however not adduced evidence to show that the alleged grant of Letters of Administration was confirmed.
4. In other words, what the applicant has filed only shows that the respondent was in the process of applying for the Grant of Letters of Administration. In the circumstances, the applicant's application to revoke the grant is premature since he has not demonstrated to the court that such letters were issued and confirmed.
5. For the above reasons, the motion for revocation of grant dated 13<sup>th</sup> February 2012 be and is hereby struck out. The applicant is at liberty to file a fresh application or directly petition for the grant if there is no proof that such grant was issued by the SPM's court at Migori.

**Dated and delivered on this 10<sup>th</sup> day of July, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:-

Present in person for Applicant

Absent (has never attended) for Respondent

Mr. Bibu - Court Assistant