



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**P & A NO.55 OF 2003**

**JOHN OMORIT.....PETITIONER**

**VERSUS**

**GEORGE OPUKO.....OBJECTOR**

**RULING**

1. Clement Omorit Opuka died on 8<sup>th</sup> September 2001 while resident at Sidende sub location within the now Busia County. At the time of his death, land described and known as Bukhayo/Malanga/394 was registered in his name.

2. The Deceased was survived by one son and 2 daughters namely John Omorit (**the Petitioner**), Marita Nasike and Flora Nekesa. The Petitioner presented this Petition on 30<sup>th</sup> June 2003 in respect to the estate of his Deceased father. Grant of letters of Administration intestate were made to the Petitioner on 2<sup>nd</sup> December 2003 but he would not obtain confirmation quickly because of a protest filed on 24<sup>th</sup> August 2004 by George Opuko (**now the Objector**). Upon considering the Protest Sergon J, made the following order,

**“After a careful consideration of the protest, I am satisfied that the protest is well founded. However the dispute can only be sorted out under Order XXXVI of the Civil Procedure rules. That will obviously take time to be done. It therefore means that the status quo must be protected as the protestor takes the right steps to pursue his claim.”**

3. By a summons dated 16<sup>th</sup> May 2008, the Petitioner moved the Court for confirmation of the Grant made to him. One of the Grounds upon which he relied was that the Protester had failed to file an application under Order XXXVI (now order 37) of The Civil Procedure Rules as advised in the ruling of Sergon J. That summons was allowed and a confirmation was made on 5<sup>th</sup> May 2009. Not one to give up the Objector filed a summons for Revocation or Annulment of Grant dated 2<sup>nd</sup> June 2009. That is the Application for my determination.

4. I think it is imperative to first examine the true nature of the Objectors claim. In the protest initially filed by the Objector, he deponed,

**“2. THAT one Clement Omorit Opuko (Deceased) was my uncle and is still the title holder of our family land Bukhayo/Malanga/394 which was registered in trust of all family members”**

**4. THAT in the cause, I was not listed as one of the beneficiaries of Opuko’s estate although**

**the land was held in trust of us.”**

Those averments would have prompted Sergon J to advise the Protester to file a claim under Order XXXVI of The Civil Procedure Rules.

5. As it turned out, the Objector never filed such a claim as in his testimony before Court on 5<sup>th</sup> December 2011, the Objector testified as follows:-

**“Justice Sergon in his ruling in 2006 advised me to file a case for ownership. I filed the matter in the Tribunal. I did not file it in Court as advised”**

The Objector also told Court why he did not take the advice. He stated,

**“I recall there was a ruling by Judge Sergon that I pursue my case under Order XXXVI of The Civil Procedure Rules. I did not take the advise because I found that there were other avenues open to me.”** (my emphasis)

6. The Objectors Counsel, in the closing submissions, sought to expound on one such avenue. Counsel submitted that the Objector was a dependant within the meaning of Section 29 of The Law of Succession Act as the Deceased had, prior to his death, settled the Objector on a portion of the disputed land. The consistent evidence of the Objector and his witnesses is that the Deceased and Rateng Opuko(**the father of the Objector**) were brothers and that the disputed land originally belonged to their father Opuko. That Rateng passed away in 1956 and that upon the adjudication, the said parcel of land was registered in the name of the Deceased. But, that the Deceased held the land for himself and in trust for the family of Rateng. There was also evidence that before his death the deceased carved out 6 acres and gave it to the Objector.

7. So as to understand the true complexion of the Objection claim, one has to determine whether in setting apart the 6 acres for the Objector, the Deceased was being magnanimous or whether he was merely acknowledging that the portion rightfully belonged to family of Rateng and was therefore carrying out his duty as a trustee. I find an answer in the evidence of the Objector and his witnesses and in this very telling averment found in paragraph 9 of the Objectors witness Evidence affidavit of 1<sup>st</sup> November 2010,

**“THAT I am the Deceased’s dependant since he was registered in trust for himself and myself and since he apportioned me my share during his lifetime.”**

8. That position was supported by the evidence of Joseph Nyongesa Omolo (PW2),

**“It is the deceased who gave the Objector the portion of six (6) acres out of his land which was meant to be the share of his father.”**

Again Aggrey Kadima Musugu (PW3) corroborates that evidence as follows:-

**“It is the Deceased who called the Objector and gave him six (6) acres of his land. The portion was meant to be the share of the Objectors father, the late Rateng.”**

The thread running through this evidence is that the Deceased settled the Objector on the 6 acres of land in recognition that it was the rightful share of the Objector’s father. In other words the Deceased was fulfilling his duty as a Trustee of the six acres which belonged to Rateng but which were registered in his name. The evidence reinforced the position taken by the Objector when he first took out his protest. The true complexion of his claim is that of a beneficiary to the trust and not as a dependant to the Deceased’s estate. The alternative is that owing to the long stay on the disputed land, the Objector may have a valid claim as an adverse possessor. There was much merit, I think, in the advice given by Sergon J. The Objectors claim, which is not a trifle, must be presented to the right forum. It is not a claim to be heard and determined by a Probate & Administration Court and for that reason the Summons for revocation must fail.

9. Given that the objectors claim is not frivolous but merely in the wrong forum, I would have been tempted not to order any costs against him. Nevertheless he chose to ignore the route pointed out by Sergon J and embarked on a somewhat wasteful path, for this reason he must bear costs of dragging the Petitioner down that path.

10. All that said, it is in the interest of justice that the Objector is given yet another opportunity to pursue his claim. For this reason I stay the implementation of the Confirmed Grant and the Distribution of the Estate for 60 days to enable the Objector move the Environment & Land Court.

**F. TUIYOTT**

**J U D G E**

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 4<sup>TH</sup> DAY OF NOVEMBER 2014.**

**IN THE PRESENCE OF:**

**KADENYI .....COURT CLERK**

**.....FOR PETITIONER**

**.....FOR OBJECTOR**