



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 77 OF 2013**

**IN THE ESTATE OF: OBED ABURILI OTENYO.....DECEASED**

**VERSUS**

**IN THE MATTER OF APPLICATION BY: GEORGE OCHOLA  
ABURILI.....APPLICANT**

**R U L I N G**

The applicant's notice of motion dated 1-8-2011 prays for the following orders:-

- 1. That the entire court file and proceedings in Maseno SRMCC Succession cause No. 39 of 2005 be transferred to Kisumu High Court and the same be consolidated herein for purposes of hearing and determination.**
- 2. That the grant of letters of administration to George Ochola Aburili in Maseno SRMCC Succession Cause No. 39 of 2005 as an administrator of the deceased be revoked and the same be granted to the applicant.**

The application is supported by the affidavit of Joseph Aburili the applicant who is the son to the deceased herein one **Obed Aburili Otenyo**.

The respondent on the other hand is the nephew to the deceased by virtue of the fact that him and his brother were born by the deceased's daughter.

The proceedings herein seemed to have had a long history of litigation. The applicant was on 14-9-2007 granted letters of administration by the lower court to administer the deceased estate. At some point the respondent filed some objection and in particular when the applicant filed an application herein for confirmation of grant dated 16-2-2009.

The affidavit of protest filed on 10-3-2009 essentially brought on board the applicants who claimed part of the deceased estate.

From the proceedings also it appears that on 29-11-2010 the respondent filed an application dated 24-11-2010 in which he prayed for:

- a. "That a fresh grant of letters of administration intestate be issued in the name of George Ochola Aburili.**
- b. That a confirmed grant of letters of administration intestate be issued to George Ochola Aburili".**

The said application was allowed on 20-1-2011 as prayed.

The grant was issued and the same confirmed on the same day. This formed the basis of the applicant's attack.

The respondent's replying affidavit sworn on 29-11-2011 does not oppose the above facts. Apart from detailing other court proceedings in respect to this estate, the respondent agrees on all other facts.

The issue to be determined is whether in light of the letters of administration dated 14-9-2007 issued in favour of the applicant the lower court was right in issuing a fresh letter to the respondent herein.

What is not in dispute is that both the applicant as well as the respondent do recognize each other as dependents of the deceased. Equally, the deceased properties are easily discernable.

From the proceedings on record it appears that prior to the respondent's application dated 24-11-2010, the applicant had equally made an application for grant dated 16-2-2009 which had in fact been opposed by the respondent vide his affidavit of protest dated 5-2-2009 in which according to him he had equal right and access to the deceased's estate.

The application was never prosecuted. By the time the respondent's application was being argued the same was still pending. In effect the grant of letters of administration issued to the applicant on 14-9-2007 was still pending as the same had not been revoked.

The import therefore of the respondent's application dated 24-11-2010 seeks to revoke the applicant's letters of administration and fresh ones be issued to him. This was allowed by the court as there was no opposition despite the applicant's counsel protestation that he needed time to respond. What in my opinion the respondent ought to have done is to apply that the applicant's application dated 16-2-2009 which in any event was seeking to have the grant confirmed and which he had filed his protest ought to have been prosecuted. There was no harm in taking a date for the same so as to compel the court to make a finding.

There was no cause for the court to have issued a fresh letter of administration as the earlier one had not been revoked by this court. In effect there existed in the same estate two letters of administration over the same deceased person but held by two different persons who in reality have recognized each other.

Further, there is no provision to issue and confirm letters of administration before expiry of six (6) **unless** a party makes an application to have it confirmed before the expiry of the period.

In the instant case, the respondent ordinarily would have sought the letter to be issued to him then make a special application with reasonable grounds for the grant to be confirmed notwithstanding that six (6) months had not elapsed.

I shall therefore set aside the orders of the court issued on 21-1-2011 together with all the consequential orders.

Further and under the provision of Rule 73 of the Probate and Administration Rules and Article 159 of the Constitution order that both Joseph Achichi Aburili and George Ochola Aburili are hereby made joint administrators of the estate of the late Obed Aburili Otenyo.

Finally, the administrators herein be at liberty within 60 days from the date herein to jointly or separately apply for the confirmation of the grant of the estate of the deceased.

Each party shall meet their respective costs.

**Dated, signed and delivered at Kisumu this 4<sup>th</sup> day of July, 2013.**

**H.K.  
JUDGE**

**CHEMITEI**

In the presence of:

.....for the applicant

*HKC/va*