IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 118 OF 2006

BETWEEN

GILBERT OTIENO OKITE …..... APPELLANT

AND

MOSES ODERO ONDITI)

DALMAS OCHOGO ONDITI) …..... RESPONDENTS

ROBERT ONYANGO ONDITI)

(Being appeal from the Ruling and Order of the High Court of Kenya at

Kisumu (Tanui J.) dated 4th June, 2004

in

H.C. SUCC. CAUSE NO. 244 OF 1997)

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JUDGMENT OF THE COURT

The late ***Hemrensiana Omolo Ochogo*** (hereinafter "the deceased") passed away on 5th October, 1992. She was seventy years old when she died. She had three brothers and two sisters. One of the brothers was ***Alfayo Onditi Ochogo*** the father of ***Moses Odero Onditi, Dalmas Ochogo Onditi*** and ***Robert Onyango Onditi,*** the respondents herein.

By his petition filed in August, 1997 ***Gilbert Otieno Okite*** *("hereinafter the petitioner")* applied for a grant of representation to the deceased's estate in his capacity as a step son of the deceased. He obtained the said grant on 5th November, 1997 and the same was confirmed on 1st October, 1998.

On 14th May, 2001 Alfayo Onditi Ochogo (hereinafter "Alfayo") by his Chamber Summons of even date applied to the High Court for an order revoking or annulling the grant of representation issued to the petitioner on five grounds namely, that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case; that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the same; that the lawful beneficiaries had been excluded from the affairs of the estate and that there was an error apparent on the face of the record.

In the affidavit in support of the application for revocation or annullment of the grant, Alfayo deposed that the deceased was his sister and was not married at the time of his demise. He further averred that the deceased depended on him and that the property registered in her name was held by her in trust for him. These, facts according to Alfayo, were not disclosed to the court by the petitioner.

Unfortunately Alfayo died on 25th December, 2001 before he could prosecute his objection. He was survived by, among others, Moses Odero Onditi, Dalmas Ochogo Onditi and Robert Onyango Onditi who, by their application dated 18th November, 2002 applied to revoke or annul the grant of representation issued to the petitioner. They based their application on two grounds namely, that the provisions of ***section 39 (1) of the Law of Succession Act*** were not complied with and that the petitioner had no right to administer the estate of the deceased. In further support of their application, Moses Odero Onditi swore an affidavit in which he deponed that the grant of representation had been obtained fraudulently by the making of false statements and by concealment from the court of something material to the case. It was further deposed that the petitioner had colluded with the Provincial Administration to claim that he was a step son of the deceased which was not the case and that as surviving sons of Alfayo, they ranked in priority over the petitioner in seeking a grant of representation to the estate of the deceased.

The petitioner opposed the application in his replying affidavit sworn on 29th November, 2002. He averred, ***inter alia,*** that the deceased was indeed his step mother having been married to his father, the late ***Wilson Okite*** a fact which the Public Trustee had confirmed. He denied obtaining the grant of representation by concealment of material facts or by fraud and contended that the applicants had no capacity to lodge the application as they had no nexus to the estate of the deceased.

When the application was placed before ***B.K. Tanui J.*** (as then was) on 9th December, 2003 the following order was recorded in the presence of counsel for the parties:

"1) The issue of who is the proper person to take out letters of administration of the estate of the deceased is to be determined as a preliminary matter.

2. ***Parties to limit themselves to the issue."***

The parties then testified before B.K. Tanui J and the respondents acknowledged that the appellant was indeed a step son of the deceased. The appellant on his part admitted that his father, who had married the deceased, had pre-deceased her.

In his ruling delivered on 4th June, 2004 the learned Judge revoked the grant of representation which had been issued to the appellant. He based his ruling on his interpretation of ***Section 39 (1) of the Law of Succession.*** In his own words:-

> ***"Having carefully considered the evidence on record I am satisfied that Section 39(1) of the Act is the proper provision which applies as the said Wilson Okite had died before the deceased died. I therefore hold that the estate of the deceased Hemrensiana Omolo Ochogo has to be administered by the Objectors who are the sons of her late brother."***

The learned Judge also cancelled the registration of plot Nos. ***Kanyada/Kotieno – Katuma "B"/145***and ***146,*** and ***Kanyada/Kanyabala/2476*** in the names of the appellant.

The appellant was not satisfied with those orders and therefore filed the appeal before us citing nine grounds of appeal. His main complaints are that the learned judge was wrong to hold that a step son cannot in law be deemed to be a child in terms of the Law of Succession Act; that the learned judge erred in holding that ***section 39(1)*** of the said Act was applicable; that the learned Judge erred in ordering revocation of the grant of representation issued to the appellant against the weight of evidence; that the learned Judge erred in ordering that the estate of the deceased be administered by the respondents when they had not cross-petitioned for the grant; that the order cancelling the registration of the appellant as proprietor of the title numbers Kanyada/Kotieno-Katuma "A"/145 and 146 and Kanyada/Kanyabala/2476 was made in disregard of the appellant's interest and when the respondents had not sought for the same and that the learned Judge failed to make any provision for the appellant as a dependant of the deceased.

All these grounds of appeal were argued by Mr. Onyango, learned counsel for the appellant. This appeal however, turns on the interpretation of ***Section 39(1)*** of the Law of Succession Act which reads as follows:-

> ***"39(1) Where an intestate has left no surviving spouse or children the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:-***
>
> ***(a) father; or if dead***
>
> ***(b) mother; or if dead***
>
> ***(c) brothers and sisters, and any child or children of deceased brothers andsisters, in equal share; or if none***
>
> ***(d) half-brothers and half sister and any child or children of deceased's half-brothers and half sisters in equal share; or if none***
>
> ***(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.***
>
> ***(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the state and be paid into the Consolidated Fund."***

In our view, it was wholly agreed on the evidence that the deceased was not survived by any biological child and that she was previously married to the father of the appellant the late Wilson Okite, who had pre-deceased her. There was also no dispute that the appellant is the son of the said Wilson Okite. He is therefore a step son of the deceased.

It was further wholly agreed that the respondents are nephews of the deceased as they are sons of the brother of the deceased, the late Alfayo Onditi who was the original objector before the High Court. So the material facts before the High Court were really not in dispute.

On those facts the learned Judge of the High Court held that the respondents had not only priority over the appellant to administer the estate of the deceased but they were the only beneficiaries entitled to the free property of the estate. The learned Judge found that under ***Section 39(1)*** of the Law of Succession Act a step child would not be deemed a child of the deceased. The learned Judge would appear to have been influenced by the fact that the father of the appellant had pre-deceased the deceased.

The learned Judge considered ***Sections 3(2) 35,36*** and ***39*** of the Act. We have considered the same provisions and with all due respect to the learned Judge ***sections 35*** and **36** do not appear to be of any relevance to this case. ***Sections 3 (2)*** and ***39*** are however, pertinent and consideration of the same was crucial. ***Section 3(2)*** is in the following terms:-

> ***" 3(2) References in this Act to "child" or "children" shall include a child conceived but***

not yet born (as long as that child is subsequently born alive) and, in relation to a female person a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."

And subsection 3 of the same section reads as follows:-

" 3 (3) A child born to a female person out of wedlock, and a child as defined by subsection 2 as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock."

The plain language of subsection ***3(2)*** shows that with respect to a female person the term ***"child"*** includes a child born to her out of wedlock and in the language of subsection ***3(3)*** such child shall have relationship to other persons through her as though the child had been born to her in wedlock. In our view this definition would not include the appellant as a child of the deceased. The appellant clearly was not born to the deceased out of wedlock. We however observe that the definition of child in ***Section 3(2)*** is not exclusive. With the use of the terms ***"shall include,"*** the framers of the Statute left open the definition of ***"child".*** In our view therefore the term ***"child"*** as used in subsection ***3(2)*** and ***3(3)*** of the Law of Succession Act includes a step son as the appellant in this case. He is the son of the husband ***(deceased)*** of the deceased herein. It did not matter that he died before the deceased.

That being our view of the matter we think the learned Judge of the High Court interpreted the provisions of sections 3(2) and 3(3) restrictively and improperly excluded the appellant from the administration of the estate of the deceased.

That, in our view, is not the end of the matter. The respondents' claim to the grant of representation was not altogether without basis. Applying the literal interpretation of ***sections 3(2) and 3(3) of the Law of Succession Act*** as the learned Judge of the High Court did, the respondents, as nephews of the deceased, ranked in priority over the appellant with respect to the administration of the deceased's estate. The respondents stood in the shoes of their late father who was the deceased's brother. The interests of justice will not be served if they are left out of the administration of the estate of the deceased.

That is however still not the end of the matter either. The learned Judge after revoking the grant of representation issued to the appellant, proceeded to order cancellation of the registration of the appellant as proprietor of plots numbers Kanyada/Kotieno-Kanyada "B"/145 and 146 and Kanyada/Kanyabala/2476. We think he meant Kanyada/Kotieno Katuma B/145, Kanyada/Kotieno B/146 and Kanyada/Kanyabala/2476.

The appellant has complained that these orders were not sought by the respondents and could not therefore be granted to them. He also complaints that plot number Kanyada/Kanyabala/2476 was not the property of the deceased and could not have been included in the learned Judge's order.

This latter complaint is, in our view, well taken because a copy of the register of the said title shows that the title was not part of the free property of the deceased. The same should therefore not have been included in the order of the learned Judge.

With respect to the complaint that the learned judge granted to the respondents what they had not applied for we, with respect do not agree. Once the learned Judge had found that the respondents were entitled to the grant of representation, the order revoking the grant issued to the appellant and that of cancelling the subject titles were consequential to the order the learned Judge had made. The orders made by the learned Judge were pursuant to what the parties themselves had framed on 9th December, 2003 when they appeared before the learned Judge as we have already found from the record.

What then is the way forward? Having found that the appellant and the respondents are all entitled to be issued with a grant of representation to the estate of the deceased, what remains is the distribution of the estate of the deceased. We cannot do so in this appeal. In our view the High Court is the appropriate

forum for the parties to sort out the issue of who is entitled to what of the free property of the estate of the deceased.

In the premises, we set aside the orders made by the learned Judge and substitute them with an order that the appellant and the respondents be jointly granted letters of administration to the estate of the deceased. We remit this matter to the High Court which shall proceed with the remaining aspects of the administration of the estate of the deceased in accordance with the law.

Given the relationship of the parties, we order that each party shall bear their own costs of this appeal and also the costs of the High Court.

Those shall be our orders in this appeal.

Dated and Delivered at Kisumu this 1st Day of November, 2013

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR