



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.832 OF 2013

(FORMERLY OYUGIS SPM'S SUCC. CAUSE NO.107 OF 2013)

IN THE MATTER OF THE ESTATE OF:

JOHNSON NGOMA MIGWAMBO DECEASED)

AND

SAMSON ONYANGO MATINDE APPLICANT

VERSUS

GORDON JUMA MIGWAMBO RESPONDENT

RULING

1. On 23rd July 2013 the Senior Principal Magistrate's Court at Oyugis issued grant of letters of administration to **GORDON JUMA MIGWAMBO** with respect to the estate of the late **JOHNSON NGOMA MIGWAMBO** who died intestate on 14th September 2003. Grant was confirmed on 9th November 2015.

Upon confirmation of the grant, the estate was distributed as follows:-

The asset West Kasipul/Konuonga/840 was shared between **GORDON JUMA MIGWAMBO** and **LAWRENCE OGWENO KANGOMA** at 0.15 Hectares each, while parcel No.162 was also shared between the two aforementioned individuals at ½ share each. **GEORGE OMONDI OTIENO** got 0.6 Hectares of West Kasipul/Konuonga/840.

2. When **SAMSON ONYANGO MATINDE** (the applicant/objector herein) learnt about the grant he filed a summons for revocation of grant under **Section 76 (a)** of the **Law of Succession** seeking that upon revocation of the earlier grant issued, a new grant be issued jointly to him and the respondent.

3. The basis for his prayer is that **GORDON JUMA MIGWAMBO** did not make a full disclosure regarding the true beneficiaries of the estate.

Further, that **GORDON MIGWAMBO** to whom the grant was made, failed and without reasonable cause to produce to the court, within the time prescribed, any such inventory or account of administration as is required. It is on account of these that the applicant/objector contends that the defendant/respondent is

not fit to administer the estate of the deceased as his interests are adverse to the interests of the deceased's estate.

4. The matter proceeded by way of viva voce evidence and the applicant confirmed to the court that he is not a relative of the late **JOHNSON NGOMA MIGWAMBO** – rather they were simply village mates.

5. His interest in the estate is on account of parcel No. West Kasipul/Konuonga/840 which was registered in the deceased's names and was in the process of being transferred to the respondent's name. His contention is that the parcel belonged to his late father but had been leased to the late **JOHNSON NGOMA MIGWAMBO** in 1973. The Matindes stayed for a long time without using the land until 1992 when the applicant visited the land and discovered that the deceased had built a house for his 2nd wife and his son Lawrence Ogweno, on that land.

6. The applicant reported the matter to the chief and after deliberation a decision was made in his favour and he took away the land in 1994 and the deceased vacated the land. The applicant begun ploughing the land and even lived thereon but in the year 2013, he was attacked by some men when he engaged people to cut down the trees.

7. These attackers were arrested and charged in Criminal case No.479 of 2013 (Oyugis) when he dug deeper as to the cause of the attack, he realized that they had filed a succession cause and obtained a grant. It is his contention that the petitioner had listed assets which did not belong to the estate.

8. On cross examination, the applicant confirmed that he did not have any search document showing that Matinde Omoro was the registered owner of parcel No.840 but he elected to rely on the decision by the area chief who had made a finding that parcel No.840 belonged to his father. The chief had also ordered that the family of Migwambo was to pay the Matinde family as a condition for the Migwambos remaining on the land failure to which they were to vacate.

The applicant further relies on common knowledge saying the whole village knows that the land belonged to his father.

9. SAMUEL OSURI (PW2) who hails from **KONUONGA** testified that he knew both the Matinde Omoro and Johnson Ngoma Migwambo as his village mates. He maintained that he had the history of the land in question although he did not know the parcel number, saying it belonged to Omoro who left it to Matinde and Matinde left it to Onyango Omoro who was the father of Matinde.

10. All he knows is that since Omoro died, Matinde took over the land – naturally as the eldest son. He explained that when Matinde died the land was taken over by his son Samson – again according to Luo custom.

11. He further stated that Johnson Ngoma and Samson Onyango are not even from the same clan and there is no way in which they can own land in the same area.

He also recalls a meeting by elders where it was found that the late Johnson Ngoma's family had built on Omoro's land and they were directed to vacate. He was present as an elder.

12. On cross examination he confirmed that at the forum convened by the chief, the late Johnson Ngoma insisted that he had bought the land.

13. TITUS OKOTH (PW3) another villager's evidence was that although he did not know the parcel

number of the contested land, all he knows is that the land belongs to the applicant because ever since he was born, he found the applicant ploughing that parcel.

He also only got to hear that the late Ngoma's family got evicted from that land but he did not know who gave such orders. His evidence was:-

"I know that parcel belongs to Matinde Omoro ... I have always seen Matinde cultivating... and I've heard elders say that it is Matinde's land..."

14. The objector produced several court criminal proceedings to demonstrate the harassment he has undergone on account of that parcel.

15. The respondent **GORDON JUMA MIGWAMBO** (DW2) confirmed that he obtained letters of administration following the death of his father **JOHNSON NGOMA MIGWAMBO** and he explained that when his father died he sat down with his brothers namely **LAWRENCE OGWENO** and **GEORGE OMONDI** (who are his father's heirs) and agreed that he would be the administrator of the estate.

16. Even when he petitioned for grant of letters at Oyugis, the applicant filed an objection claiming that he was a beneficiary of the estate – yet he is not related to the Migwambos at all.

The matter was heard at Oyugis and dismissed. He pointed out that the applicant never produced any document confirming that Matinde Omoro owned the land or at all. He says the applicant has his own land but is in the habit of fighting neighbours over land and urges this court to dismiss the application.

17. The respondent stated that his father's estate comprised parcel No.190, 840 and 198 (which apparently the applicant obtained unlawfully).

18. His brother **LAWRENCE OGWENO ONGOMA** (DW2) confirmed that the children of the late **JOHNSON NGOMA** held discussions and agreed that Gordon would petition for grant. He also names parcel No.190 and 840 as belonging to his late father and that the applicant who is not a relative has no business meddling in their father's estate. He stated that parcel No.840 was registered in their father's name.

19. There is no dispute that the applicant is not in any way related to the late Johnson Ngoma Migwambo. His objection is purely on the basis that a parcel belonging to his father has been included in the deceased's list of assets. He has no record from the lands office to confirm this – the mere pronouncement by the chief with the assistance of a panel of elders does not translate into legal ownership especially as the decision was not adopted in court as a decree of the court.

20. A copy of the search certificate produced in the initial petition in the lower court and dated 28th January 2013 shows that parcel No. West Kasipul/Konuonga/840 is registered in the name of Ngoma Migwambo – which registration was effected on 10th May 1979.

21. Did the deceased lease the land from Matinde Omoro then have it registered to his name" The applicant presented copies of green cards in relation to the three parcels being **Exhibit 4 (a) and (4(c))** which shows that parcel No. West Kasipul Konuonga/162 and West Kasipul Konuonga/840 have been in the name of **NGOMA MIGWAMBO** from 1979. There is no indication that the same were previously owned by Matinde Omoro or any other person other than **NGOMA MIGWAMBO**.

22. Is the applicant a beneficiary or dependant of the estate of the deceased's estate and would he be

entitled to be given authority as a joint administrator. The applicant has in his own evidence confirmed he is not related to the deceased.

23. Under **Section 29 (a)** of the **Law of Succession Act** defines a dependant as:-

“For the purpose of this part, “dependant means (a) the wife or former wife or wives, and children of the deceased, whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step children, children, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half sisters, as were being maintained by the deceased immediately prior to his (c) where the deceased was a woman, her husband, if he was being maintained by her prior to the date of her death.”

24. The applicant does not fit into this category. Could he then be considered as one who has an interest from **Section 66** of the **Law of Succession**" Can he ventilate issues of ownership or fraud in this case"

25. Section 66 of the **Laws of Succession** provides that a court shall have discretion as to the person (s) to whom grant of letters of administration shall **IN THE BEST INTERESTS OF ALL** concerned, be made but with a general guide as to the order of preference being:-

- a) Surviving spouse(s), with or without association of other beneficiaries;
- b) Other beneficiaries with priority according to their respective beneficial interest;
- c) Public trustee;
- d) Creditors.

26. The applicant does not fit into any of these categories. His intention is not in the best of interest of the estate but geared towards self serving purposes with nothing to prove that the parcel should not form part of the deceased's estate.

27. If the applicant believes that the parcel was leased and fraudulently registered in the names of the deceased then I do not think the succession cause is the place to deal with it – he ought to file a suit against the administrator of the estate. Indeed in the case of **RUTO KIPNGETICH ARAP CHERUIYOT –VS- PETER KIPROP ROTICH C.A. NO.127 OF 2008** the court observed that the purpose of succession causes is to determine and appoint the legal representatives of a deceased person and also ascertain the heirs and their respective shares and:-

“... claims by Third Parties in deceased persons’ properties although sometimes lodged in the succession cause ... are better litigated in separate suits.”

28. This is further bolster by the case of **TABITHA WANGUI MWANGI –VS- WAGICHUGU MBUITU (2014) e KLR** that where one has a cause of action or claim against the ownership of the property of the deceased whether by adverse possession or contract, it is better handled by the Environment and Land Court.

29. I need not say more – there is no basis whatsoever for revoking the grant, as the issue of concealment of material facts has not been proved, nor is it demonstrated that the applicant is a beneficiary within the meaning of the Act. Consequently the application herein is dismissed.

30. The applicant shall bear costs of the application.

Delivered and dated this 30th day of November, 2016 at Homa Bay

H.A. OMONDI

JUDGE



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