



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

SUCCESSION CAUSE NO. 2610 OF 2000

IN THE MATTER OF THE ESTATE OF BEATRICE K.

AMALEMBA (DECEASED)

R U L I N G

A Grant of Letters of Administration intestate, to the estate of the late Beatrice K. Amalemba, deceased, was issued to Benedict Ogutu and Margaret Awino Otsieno, describing themselves as brother in law and mother in law, respectively. The 2 were also the only survivors as shown in form P&A 5.

Before the Grant could be confirmed after the gazettelement in the Kenya Official Gazette one Lennox Allan Amalemba petitioned to court to revoke the grant on the grounds inter alia that,

“The grant was made by making a false statement by the concealment from the court of something material in that the petitioners are not and were not the next of Kin to the deceased and they failed to disclose that the objector was the next of kin to the deceased”.

The supporting affidavit at para one stated that the deceased had no child and her husband pre-deceased her, and even the deceased’s mother died in 1993. The objector described himself as the “natural father” to the deceased, and the husband having died before her, the objector considered himself the most suitable person to apply for the grant. Benedict Ogutu, one of the petitioners, filed a replying affidavit to the summons for revocation.

In the affidavit, he averred that the deceased was legally married to his brother, the late Steven Odhiambo Othieno son of Othieno Ongola and Margaret Otsieno.

Annexed to the replying affidavit was a marriage certificate of the deceased Beatrice Khabwanjila and her late husband Steven Odhiambo Othieno. The 2 got married on 23rd August, 1994, under the Marriage Act, at the Registrar’s office. The death certificate of Steven Odhiambo Othieno, the deceased’s husband was also attached, as well as a letter of condolence from the employers of the deceased Stephen Odhiambo to his wife Beatrice, (now deceased) upon Stephen’s death. There was also a payment voucher, from Harambee Co-operative Savings & Credit Society Ltd, paying Beatrice, Stephen’s widow, a sum of Kshs.81,982/95, upon Stephen’s death. Beatrice (now deceased) who was Stephen’s widow and Stephen’s mother were to share the estate of Stephen. There is a letter from the

office of the President to the Director of Pensions, dated 26th May, 2000, advising him to withhold pension dues to Beatrice's estate, until the dispute in her estate is resolved.

The deceased's father filed a further affidavit dated, 19th December, 2001, in which he denied that Beatrice his late daughter was married to the late Stephen Odhiambo. He however admitted that the 2 lived together. He prayed that the grant to Beatrice's estate be given to him and the one issued to Benedict Ogutu and Margaret Otsieno be revoked.

In court during the hearing of the application for Revocation, Mr. Keyonzo urged the court to revoke the grant issued, because according to Sec. 39 of the Succession Act, only the deceased father could apply for the Grant, under the circumstances. Benedict Ogutu, one of the petitioners submitted that Beatrice was legally married to his late brother Stephen Odhiambo, but they had no children. That when Stephen died his widow Beatrice was paid all the benefits.

Benedict said that he is entitled, together with his mother, to apply for letters of administration to Beatrice's estate, because his father, who was Beatrice's father in law, died before Beatrice. In reply, Mr. Keyonzo for the objector submitted that the objector was never paid any dowry by the late Stephen Odhiambo. He also submitted that he was the one who looked after his daughter Beatrice, when she was sick and upon death he buried her remains in his homestead. He asserted that the 2 petitioners did not take responsibility when Beatrice was sick, until she died. On questions by the court, as to why the deceased Beatrice was buried in her father's home as opposed to her husband's home, Benedict the petitioner answered, "The father who was in prison refused".

About payment of benefits from Beatrice's estate, Benedict answered,

"We were paid money from Public Trustee, Standard Chartered Bank and Post Bank. In total we were paid a sum of about Kshs.153,409/= which I used to pay hospital bills for my sister who was sick. I did not know any other assets which Beatrice had, as her personal belongings were collected by her stepmother".

I have read through the averments in the various affidavits and the oral submissions of both learned counsel. Counsel for the objector relied on Section 39 of the Succession Act, in urging the court to direct that a grant of letters of administration be issued 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 and sisters.....".

In this case, the deceased Beatrice died intestate, leaving behind no children and no surviving spouse, because her husband to his client, the deceased's father, and the one already issued be Revoked.

Section 39 states as follows:-

"Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate Stephen, pre-deceased her. The legal position pertaining in a situation such as this, is as stipulated by Section 39 quoted above".

However in this situation, the Stephen's brother and mother petitioned for the grant to Beatrice's estate, naming ONLY themselves as survivors and beneficiaries. Indeed they used the temporary grant of letters of administration issued to withdraw money from Beatrice's account at the Standard Chartered Bank, and also, her death dues from Public Trustee. They were paid a total of Kshs.153,409/= as Benedict's evidence disclosed. I find that the issuance of Grant to the petitioner's went against the legal provision and was therefore irregular and or illegal.

Admittedly, Beatrice's estate was advertised in the Kenya Gazette of 2nd February, 2001 a copy of it was attached to Benedict Ogutu's replying affidavit.

I noted that both Benedict Ogutu and his mother live in Nairobi, as they have given their Nairobi address and contact. Beatrice's father the objector Lennox Allan Amalemba lives in Kakamega, at P.O. Box Number 251. In these circumstances, it might not have been possible for him to have sight of the official Kenya Gazette which comes out only once a week. The objector buried his daughter in his homestead in Kakamega, after having looked after her during her period of sickness and also paid her hospital expenses. The annexures to the affidavit of Beatrice's father Lennox show that he was pursuing Beatrice's benefits through the District commissioner's Office, Kakamega because that is where he lives, and also where Beatrice was buried. He forwarded to the D.C's office Beatrice's death certificate, burial permit as well as her last payslip for May, 1999, and also her Identity Card and his own I/D card.

The annexures to Benedict's replying affidavit do show that he was dealing with the District Commissioner, Busia, in this matter. The said D.C. wrote to the Director National Youth Services (Beatrice's employers) as well as employer of Stephen) directing them to pay the death benefits of the 2 to Stephen's mother, as the 2 died leaving behind no children. This letter which was dated 25th August, 1999 was copied to Benedict Ogutu, presumably because he must have given instructions for it to be written. The letter was not copied to Beatrice's father who was already dealing with the D.C. Kakamega, where he lives and where Beatrice was buried. Furthermore, the contents of the said letter were not correct because prior to that date, and particularly on 15th January 1998, the District Officer Butula Division, had written to the same District Officer, Busia District, forwarding to him the names of the beneficiaries to the estate of the late Stephen Odhiambo Otsieno (Beatrice's husband). The names sent were that of Beatrice and Margaret, Stephen's mother. This being so, I find that by 25th August, 1999 when the D.C Busia wrote to the Director of National Youth Service about the administration of the estates of Stephen and Beatrice both former employees of the National Youth Service, about their death benefits, the D.C had already received the names of the beneficiaries to Stephen's estate as Beatrice and Stephen's mother, from the D.O. Butula Division.

It is the D.C's said letter of 25th August, 1999 which was copied to Benedict Ogutu, and I find that it was him who deliberately misled the D.C. Busia into writing this letter which appointed Stephen' mother Margaret as the administrator of both estates, yet Stephen's estate had already been administered and benefits paid to Beatrice by Harambee Co-operative Savings & Credit Society in November 1998.

The same Benedict Ogutu averred in para (e) of his replying affidavit that he did not pay hospital bills for Beatrice's hospitalization. He did not bury her in their home, because according to him, Beatrice's father refused. As is already on record, the further affidavit of Beatrice's father confirms that he together with his wife looked after Beatrice when she was sick and finally buried her in his home in Kakamega when she died, and that Benedict Ogutu, showed no interest in Beatrice when she was sick.

From this evidence I find that Benedict Ogutu was aware of the interest Beatrice's father had in her estate, having nursed her and buried her in his home. His act of applying for Letters of Administration to

Beatrice's estate without reference to the father was suspect and fraudulent. Benedict's further action in dealing with the D.C. Busia, as far as Beatrice's estate was concerned knowing well that the deceased was buried in Kakamega which was under the jurisdiction of the D.C. Kakamega, amounted in my www.kenyalaw.org 12 view, to concealment of material facts relevant to the administration of Beatrice's estate.

I consider this a very unfortunate situation where first, the provisions of the Succession Act was not followed, and secondly, the father of the deceased who carried the most burden and incurred all expenses, was completely ignored, for selfish reasons by the petitioners Benedict Ogutu and his mother. In the circumstances, I move to REVOKE the Grant obtained by them on the 21st of March, 2002, as it was obtained "***fraudulently by concealment from the court of something material to the case***".

I direct Beatrice's father together with Benedict Ogutu and his mother, to decide to whom the Grant of Letters of Administration to Beatrice's estate, should be issued

Dated at Nairobi this 3rd Day of October, 2002

JOYCE ALUOCH

HIGH COURT JUDGE



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