



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.18 OF 2018

FORMERLY OYUGIS SUCC. CAUSE NO.46 OF 2016

IN THE MATTER OF THE ESTATE OF:

RICHARD OLOO RIAGA.....DECEASED

AND

ROSELIDA OMOLO ODUNDO.....OBJECTOR/APPLICANT

VERSUS

MARSELA OWINO OYIEKO.....RESPONDENT/PETITIONER

RULING

[1] A petition for Grant of Letters of Administration Intestate respecting the estate of the late Richard Oloo Riaga, (**deceased**) was filed at the magistrate's court at Oyugis on the 21st April 2016, by the petitioner/respondent, **Marsela Owino Oyieko**, allegedly in her capacity as the sole surviving sister and heir of the deceased.

Pursuant to that petition, the court issued the necessary grant on the 31st May 2016, and confirmed it on the 15th March, 2017.

The estate property comprised two parcels of land described as Central Kasipul/Kachieng/1513 (**Plot No.1513**) and Central Kasipul/Kachieng/1614 (**Plot No.1614**).

Plot No.1513 was wholly transmitted to the petitioner while part of plot No.1614 i.e. 0.04 hectares was transmitted to the petitioner and the other part i.e. 0.2 hectares was transmitted to one Rosemary Akinyi Odongo.

[2] However, more than one year later, the present summons for revocation of the grant dated 22nd August 2018, was filed herein on 31st August 2018 by **Roselida Omolo Odundo**, allegedly in her capacity as a step-sister of the petitioner and the deceased. She alleged that the deceased was her step-brother and therefore seeks revocation of the grant issued to the petitioner on grounds that it was obtained in proceedings which were defective in substance and by the petitioner/respondent making a false statement that she was the sole survivor of the deceased. That, the grant was also obtained by concealment of material facts and on the basis of untrue statement of fact essential on point of law to justify the grant. All these grounds are supported by the averments in her supporting affidavit dated 20th May 2019 and that of her son, **Joseph Aludo Odundo**, dated 20th November 2019.

There is a further supporting affidavit dated 20th November 2019, deponed by one **Lawi Ogila**, who alleges therein that the deceased together with the applicant/objector and the petitioner/respondent are his cousins. However, this affidavit could not be relied upon due to a fatal defect thereon as it is uncertain whether the affidavit was actually deponed by the said Lawi Ogila or the applicant's son, Joseph Aludo Odundo, whose name appears thereon as the deponent rather than Lawi Ogila.

[3] Nonetheless, the application was opposed by the petitioner/ respondent on the basis of the grounds set out in her replying affidavit dated 19th November 2019, which is supported by a further replying affidavit dated 20th November 2019 deponed by **Isaya Opiyo**, who also alleges that the deceased together with the objector and the petitioner are all his cousins.

Whereas, the petitioner prayed for the dismissal of the objection, the applicant urged this court to find that the impugned grant was improperly and unlawfully obtained by the petitioner and should therefore be revoked as prayed in the summons for revocation of grant dated 22nd August 2018, which as per the direction of the court given on 22nd October 2019 was argued by way of affidavit evidence and written submissions instead of by way of "viva voce" evidence as earlier directed.

[4] After due consideration of the application on the basis of the supporting grounds and those in opposition thereto, and in the light of the rival submissions, it became apparent to this court that the basic issue for determination was whether the impugned grant dated 31st May 2016 and the certificate of confirmation of grant dated 15th March 2017 both issued by the magistrate's court at Oyugis were indeed obtained in proceedings which were defective in substance or by the making of false statements and concealment of material facts on the part of the petitioner/respondent.

[5] Under **Section 76** of the **Law of Succession Act**, a grant of representation, whether or not confirmed, may be revoked by the court at any time if the proceedings to obtain the grant were defective in substance or if the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case, "inter alia".

The burden to establish such factors against the petitioner lay with the respondent, both of whom were sister and half-sister respectively, of the deceased.

As disclosed herein, the petitioner and the deceased shared one mother and one father while the respondent and the deceased and the petitioner shared one father but different mothers.

Their father was a polygamist with two wives, but the deceased died intestate with no wife/spouse or child. He was therefore survived by his sister (petitioner) and half-sister (objector), but between the two of them the order of preference in petitioning for grant of letters of administration intestate respecting their brother's estate as set out in **Section 66** of the **Law of Succession Act**, favoured the petitioner more (See, **Section 66 (b) of the Act**).

[6] **Part V** of the **Act** and in particular **Section 39** of the **Act**, compliments the aforementioned **section 66** of the **Act** as it deals with situations, such as the present one, where an intestate has left no surviving spouse or children. In such circumstances, 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 and sisters in equal shares, or if none,
- (d) Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares, or if none;
- (e) The relatives who are in the nearest degree of consanguinity upto and including the sixth degree, in equal shares.

[7] It would therefore follow that inasmuch as the court record shows that it was the petitioner who applied for the grant of letters of administration intestate respecting the estate of her late brother and later obtained a certificate of confirmation of grant in respect thereof, then the allegations by the objector that the two instruments were obtained in defective proceedings was untenable for want

of proof. Similarly, the allegation that the grant was obtained fraudulently by making of false statements was untenable for want of proof.

Indeed, there was no credible and substantial evidence from the objector to prove that the grant was actually obtained by or at the behest of a purchaser of part of the estate property i.e. **Rosemary Akinyi**, in a manner that smacked of fraud. There was no dispute that Rosemary Akinyi, purchased part of the estate property comprising of the aforementioned plots No.1513 and No.1614 Central Kasipul/Kachieng. However, it was undisputedly disclosed herein that there was a third parcel of land belonging to the deceased described as Kamagambo/ Kabuoro/6354 (**Plot No.6354**), situated at Rongo.

[8] Also disclosed herein, hitherto undisputedly, was the fact that plots No.1513 and 1614 Central Kasipul/Kachieng, originally belonged to the father of the deceased who was also the father of the petitioner and

objector but were registered in the name of the deceased during the adjudication process. If that be the actual position, then apart from the petitioner, the objector as a step-sister of the deceased was a beneficiary of the estate and entitled in equal share with the petitioner to the parcels of land at Central/Kasipul/Kachieng but not the property at Rongo which was exclusively purchased by the deceased and remained his own property.

The purchaser, Rosemary Akinyi would also be entitled to the share of the portion of the parcel of land situated at Central Kasipul/Kachieng which she purchased from the deceased.

[9] Accordingly, and inasmuch as the record fails to show that the objector was included as a beneficiary of the estate in the distribution thereof and indeed in the application for the grant and that the record also fails to show that the property at Rongo was included as part of the estate property, it would follow that the petitioner failed to disclose the aforementioned material facts when applying for the grant and the certificate of confirmation of grant.

In the circumstances, it would be in the interest of justice that the grant of letters of administration intestate issued to the petitioner be sustained for her to remain the sole administrator. However, the certificate of confirmation of grant dated 15th March 2017, must and is hereby revoked to pave way for a fresh and properly distribution of the estate property among the beneficiaries who in this case are the petitioner, Marsela Owino Ayieko, the objector, Roselida Omolo Odundo and the purchaser of part of the estate, Rosemary Akinyi. In that regard, it would be incumbent for the petitioner to take out fresh summons for confirmation of grant and ensure that the grant is properly confirmed within the next six (6) months from this date hereof or a shorter period as the parties may deem necessary.

For the avoidance of doubt, the distribution of the property at Rongo shall exclusively be to the petitioner without any shares to the objector or the purchaser. Ordered accordingly.

J.R. KARANJAH

JUDGE

28.11.2019

[Delivered and dated this 28th day of **November, 2019**]



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