



REPUBLIC OF KENYA

High Court at Kakamega

Succession Cause 461 of 2002

IN THE MATTER OF THE ESTATE OF ROSE WANGA OPATI DECEASED

BROWN MWANGALA OBADI PETITIONER

V E R S U S

FRANKLINE ONCHONG'A SOKORO OBJECTOR

R U L I N G

The late **ROSE WANGA OBATI** died on the 19.8.2002. She left three children namely- **FRANKLINE ONCHONG'A SOKORO** (the objector), **NANCY KERUBO** and **MIRIAM KWAMBOKA**. The petitioner herein is a brother to the deceased. He petitioned this court and was issued with a grant of letters of administration intestate on the 18.12.2002. He later filed an application dated 11.3.2003 for the confirmation of the grant and the grant was confirmed on the 6.5.2004.

The objector filed an application for the revocation of the grant dated 9.2.2005 contending that the grant was obtained fraudulently and by way of making untrue allegations. Parties agreed to have the matter proceed by way of oral evidence. The objector's evidence is that his late mother was married to his father and they used to live in Kisii. His parents separated in 1998 and his mother came to live in Kakamega. She acquired plot numbers **BUTSOTSO/INDANGALASIA/1521** and **BUTSOTSO/INGOTSE/2302**. On plot 1521 the deceased built a house and she was living there while planting cane on plot number 2302. The petitioner is his uncle and filed the succession cause secretly thereby denying the objector and his two sisters their inheritance. According to the petitioner plot number **1521** has three names and the registered owners are – (1) **ISAYA AMBUNGA**, (2) **WISLON AMBUNGA** and (3) the deceased. The deceased was a land agent and she used to sell second hand clothes. He would like to have the properties returned to the deceased's children. When the deceased died in 2002 he was 20 years old as he was born in 1982.

The petitioner testified that the deceased was his elder sister. She was married to **WESLEY KIBAGEN** in Kisii. She divorced and came back to live in Kakamega. He lived with her on plot number **BUTSOTSO/INDANGALASIA/1521**. She used to do business and they bought the land jointly. The petitioner used to do cane cutting work and cultivate sugarcane. The land was bought from **WILSON AMBUNYA** who is now deceased. Plot number **BUTSOTSO/INGOTSE/2302** belongs to his auntie **ESTHER OTALO** who is a sister to their mother. Their aunt had no child and she registered the property in the deceased's name. She is alive and lives on that plot. The petitioner decided to register plot number **1521** in his sister's name as she had no husband. When his sister came to live with him the objector was still young. The objector's father declined fatherhood of one of the daughters by the name **MIRIAM**. Plot number **1521** was bought for KShs.19,000/= and the petitioner lives on that land. The deceased became sick for two years and he took care of her. She was buried on plot number **1521**. According to the petitioner under the Luhya customary laws the children of a divorced woman cannot inherit. The objector

and his sisters' rights ended immediately their father divorced the deceased. The petitioner maintains that the objector should inherit from his father who left land in Kisii but he is living in Kakamega. The deceased and her husband had also bought a plot in Kakamega with a permanent building and the objector can inherit that property.

The official search dated 31.1.2005 for plot number **BUTSOTSO/INGOTSE/2302** shows that it is registered in the names of the petitioner. He was registered on the 12.3.2003 as an administrator of the deceased's estate. The search that was presented to the court during the filing of the petition dated 2.10.2002 shows that the property was registered in the names of the deceased on 17.7.2001. The land is 0.800 hectares. As for plot number **BUTSOTSO/INDANGALSIA/1521** it is 3.2 hectares and the share of the deceased is stated as 0.04 hectares. The plot is registered in the names of three people namely **ISAYA MUKOYA AMBUNYA** (deceased) **0.04 HA.**, **ROSE WANGA OPATI 0.04 HA.** and **WILSON AMBUNYA ABWALABA 2.76 HA.** Upon obtaining the confirmed grant the petitioner replaced the name of the deceased and he is now registered as one of the proprietors of the plot number **1521** and his share is similar to that of his deceased sister, that is 0.04 HA.

The petitioner contends that plot number **2302** belongs to their aunt **ESTHER OTALO**. The court record shows that on the 5.11.2003 Esther Odalo (Otaló) Mathia filed an application seeking to have the grant issued to the petitioner revoked. In her supporting affidavit sworn on the 6.11.2003 she stated that the deceased and the petitioner were the children of her sister. She brought them up and she is the one who gave the deceased KShs.200,000/= to purchase plot number 2302. She also gave the deceased some money to construct a five roomed house on plot number 1521. She wanted the grant to be revoked so that she could become the administrator. The petitioner herein filed a replying affidavit sworn on 20.11.2003 in response to that application. In his reply he stated that he supported his late sister financially to start a second hand clothes business when she was divorced. He also averred that his aunt did not give out any property to the deceased herein. He had a close relationship with his sister and she handed over to him all her personal effects before she died. The petitioner further swore that the deceased told him that she did not owe anybody any money. A consent was later filed on the 2.12.2003 whereby the objector Esther Odalo Mathia withdrew her objection. Whereas the petitioner stated in the earlier objection that the two plots belonged his deceased sister, he is now changing his position and maintains that plot number 2302 belonged to his aunt – Esther Odalo Mathia. There is no reason as to why the plots were not registered in the names of the aunt. Even if she did not have children, that did not disqualify her from registering the plots in her name.

The petitioner maintains that customs stop the objector from inheriting his late mother. No sufficient evidence has been adduced to that effect. Under Section 29 of the Law of Succession Act the objector herein is a dependant of the deceased who was his mother. The main issue for determination is who should be the administrator of the deceased and how should her estate be distributed. According to Section 29(b) a deceased's brothers and sisters can also be considered as dependants. The petitioner herein states that he lived with the deceased and he helped her to purchase plot number 1521 for KShs.19,000/=. Taking into account the circumstances of this case I do find that the petitioner should be considered when distributing the deceased's estate. The deceased separated with her husband in 1998 and lived with his brother, the petitioner herein from that time until her death in 2002. The petitioner herein assisted the deceased in one way or another and maintains that she became sick for two years when he took care of her. He has put his house on plot number 1521 and was living with the deceased on the same plot. It is clear that if the deceased was to be alive she would not have chased away the petitioner. The deceased's children should appreciate the petitioner's efforts in living with their mother. I also do find that not the entire plot number **2302** belonged to the deceased. The petitioner herein contributed to the acquisition of part of the estate. I also hold that he was the deceased's dependant. Since the objector is the deceased's son, he ranks high in priority when it comes to the administration of the deceased's estate. I will therefore nullify the grant issued to the petitioner on 6.5.2004 and appoint the objector and his elder sister **NANCY KERUBO** as the administrators of the estate of the deceased. A fresh confirmed grant to be issued. The estate shall be distributed as follows:-

1. Plot number **BUTSOTSO/INGOTSE/2302**

(a)BROWN MWANGALA OBADI - 0.2 HA.

(b)FRANLINE ONCHONG'A SOKORO,

NANCY KERUBO and 0.6 HA.
MIRIAM KWAMBOKA jointly

2. Plot number BUTSOTSO/INDANGALASIA/1521

(a)BROWN MWANGALA OBADI - 0.01 HA.

(b)FRANLINE ONCHONG'A SOKORO,

NANCY KERUBO and 0.03 HA.
MIRIAM KWAMBOKA

In the end the application for the revocation of the grant by the objector dated 9.2.2005 is granted in the above terms. A fresh grant shall be issued as stated herein and the estate shall be distributed as herein above. The new administrators to pursue the proper ownership of plot number **1521** so that the exact share of their deceased mother is determined. Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 27th day of February, 2013

SAID J. CHITEMBWE
J U D G E