



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL CASE NO. 41 OF 2013 (O.S)

IN THE MATTER OF: THE ESTATE OF ALOIS ABUYA AWINO (deceased)

IN THE MATTER OF: THE LAW OF SUCCESSION ACT

JOSEPH OBUNGA ABUYA.....APPLICANT

VERSUS

LANOX WILSON ONYANGO

KEITH ODHIAMBO MICHAEL ABUYA

MELISA AKINYI MICHAEL ACHUTO ABUYA.....RESPONDENTS

JUDGMENT

1. **Alois Abuya Awino (the Deceased) died** on 31.7.78 and was survived by the following children:

Joseph Obunga Abuya (the Applicant)

Lawrence Ochieng Abuya (deceased)

Anrea Nyarath Abuya

John Ogutu Abuya (deceased)

Lucas Otieno Abuya (deceased)

Michael Achuto Abuya (deceased)

Adelina Dula Abuya

Maria Odewa Abuya

Agnes Odanga Abuya (deceased)

Margaret Abuya f

Phister Abuya

2. By an Originating Summons dated 2.10.13 (the OS), Joseph Obunga Abuya (the Applicant) seeks a determination of the following questions:

1. WHETHER the house without land situate on MOMBASA/BLOCK XIII/204 formerly plot no. 18/42/XIII ESTATE MOMBASA forms part of the estate of the Deceased Alois Abuya Awino.

2. WHETHER the house without land situate on MOMBASA/BLOCK XIII/204 was fraudulently and unlawfully transferred to the Defendants/Respondents whilst transferring the land thereunder.

3. WHETHER the Defendants/Respondents should execute a transfer and all acts necessary to convey the said house without land situate on MOMBASA/BLOCK XIII/204 and formerly known as 12/42/XIII ESTATE MOMBASA to which the Plaintiff/Applicant has equitable interest and shall hold on behalf of the Estate of the Deceased Alois Abuya Awino.

4. WHETHER the Plaintiff/Applicant is entitled to compensation and or the house situate on MOMBASA/BLOCK XIII/204 formerly plot no. 18/42/XIII ESTATE MOMBASA to revert to him as administrator of the Estate of the Deceased Alois Abuya Awino.

5. WHETHER the Plaintiff/Applicant is entitled to costs.

3. The Applicant avers in his affidavit in support of the OS that he is the first born son of the Deceased as well as the administrator of his estate. The Deceased left behind 2 houses without land situate in Mwangeka, Kaluworks on Plot No. 18/42/XIII ESTATE MOMBASA and Majengo Plot No. 6/41/XV. The Applicant further avers that 2 beneficiaries Lucas Abuya Abuya and Michael Ochuto Abuya both deceased fraudulently obtained a grant of letters of administration in respect of the estate of the Deceased. This grant was however revoked by this Court on 29.10.09 in Succession Cause No. 150 of 2017 necessitating a fresh application for grant. Lucas Abuya Abuya in May 2012 unlawfully facilitated the transfer of Plot No. 18/42/XII Estate Mombasa (now registered as Mombasa/Block XIII/204) from Awadh Saleh and Said Saleh Sherman to Lanox Wilson Onyango, Keith Odhiambo Michael Abuya and Melisa Akinyi Michael Achuto Abuya (the Respondents) the children of the late Michael Achuto Abuya. The said property is in the names of the Respondents. The said transfer was done while a citation had been filed in this Court in respect of the estate of the Deceased.

4. The Applicant further states that unless the OS is allowed the Respondents may dispose of the said property thereby disinheriting the lawful beneficiaries of the estate of the Deceased.

5. The Respondents oppose the OS by a Replying Affidavit sworn on their behalf by Lanox Wilson Onyango. The Respondents confirm that the Deceased was their grandfather. They claim that in addition to the 2 houses without land, the Deceased left other properties in Kanyamwa Central. The Deceased, a meticulous man, divided his property equitably amongst his children prior to his demise. The elder children were given land in Kisumu while the younger ones, Lucas and Michael, (the Respondents' father) were given the houses in Mombasa to cater for their school fees since they were still in school. It is only after the demise of the widow of the Deceased that the Applicant began to claim that the said properties belong to all beneficiaries. Lucas sold his property before he died. He knew Plot No. Mombasa/Block XIII/204 belonged to the Respondents and that is why he facilitated the transfer of the same to them. This was done lawfully as confirmed by the Coast Provincial Criminal Investigation Officer in a letter dated 16.1.12. According to the Respondents, the Applicant seeks to disinherit them of their father's lawful entitlement in the estate of the Deceased. The Respondents prayed that the OS be dismissed with costs.

6. In his testimony the Applicant reiterated the contents of his affidavit in support of the OS. He is the eldest son while the Respondents' father, Michael (now deceased) was the youngest. In addition to the 2 houses herein, the Deceased had other pieces of land in Kanyamua, Ndihiwa which he gave to each of his 6 sons. The daughters did not get anything as they were married. He denied that the 2 houses in Mombasa were given to Michael and Lucas. He stated that the Deceased died in 1978 while their mother died 5

years ago. Rent from the 2 houses was collected by Lucas the second born brother for about 30 years. While his parents were live, the Applicant did not complain about the houses. He could not complain about the said houses while his mother was still alive. It was after her demise that the houses could be inherited. He confirmed that he lodged the claim with the CID. Though the CID stated in their letter that Lucas and Michael got the houses in a right way, his view was that the investigations were done in a corrupt way. Lucas and Michael stated in their application for the grant in respect of the estate of the Deceased that they were the only children of the Deceased. The Grant was however revoked by the Court. They used the revoked Grant to procure the transfer of the 2 houses to themselves. Lucas sold his plot and thereafter died. After revocation of the Grant, the Applicant took out a limited grant. He does not wish to disinherit the Respondents. He wants the Court to grant him letters of administration so that all beneficiaries of the estate can benefit.

7. Gidius Odhuno Ochieng a grandson of the Deceased and a son of Lawrence Ochieng Abuya (deceased) testified on behalf of the Applicant. He stated upon completing primary education Lucas was taken in by Lawrence while in Nairobi and the family moved with him to Mombasa. The family stayed in Port Reitz as Lawrence worked at the Port Reitz Chest Hospital. The ownership documents of the suit properties were in the possession of Lawrence but in the Deceased's name. Lawrence gave the documents to Lucas and asked him to collect rent for his school fees which he continued to do even after completing high school. With the rent collected, Lucas also assisted his parents who lived upcountry. Upon the demise of the Deceased's widow in 2006, the Applicant called a family meeting to decide the distribution of the Mombasa properties but no agreement was reached. It was later discovered that Lucas and Michael had obtained a grant. They transferred the houses to themselves after the grant was revoked. The wishes of the Deceased was that all grandchildren be educated from income from the 2 houses. Lucas died in 2011 after he had sold the house in Majengo Mapya.

8. Mary Agutu Onyango, a daughter of the Deceased stated that the Deceased had 2 houses. 1 in Majengo Mapya and 1 in Makupa. The wishes of the Deceased was that the rent from the houses was to be used for fees for all children.

9. Neither the Respondents nor their advocate attended Court in spite of their being aware of the hearing date. Their case was therefore marked as closed.

10. Parties filed their written submissions. For the Applicant, it was submitted that the distribution of the estate was not done by the Court upon the demise of the Deceased. Following the revocation of the Grant, all actions by Lucas and Michael with regard to the estate thereafter were illegal. It was further argued that the said grant had not been confirmed and the law prohibits transfer of an immoveable property of an estate before confirmation of a grant. Plot No. Mombasa/Block XIII/204 therefore remains part of the estate of the Deceased and should be shared amongst all beneficiaries. The transfer of the property to the Respondents was illegal and they now seek to have the illegality ratified by this Court. He prayed that the OS be allowed and the title in respect of Plot No. Mombasa/Block XIII/204 issued to the Respondents be revoked.

11. For the Respondents, it was submitted that Plot No. Mombasa/Block XIII/204 was a gift *inter vivos* given to their father by the Deceased. The Deceased had given all his sons property during his lifetime. The older sons were given land in Kisumu while the youngest sons Lucas and Michael (the Respondents' father) were given the 2 houses in Mombasa. The Applicant is driven by jealousy and malice and seeks to disinherit vulnerable orphans of their late father's lawful property.

12. I have given due consideration to the OS as well as the rival affidavits and submissions. The first question the Applicant has sought determination on is whether the house without land situate on Mombasa/Block XIII/204 forms part of the estate of the Deceased. From the material placed before Court, it is evident that all the parties are in agreement that this property belonged to the Deceased. It therefore formed part of the estate of the Deceased.

13. As to whether the said property was fraudulently and unlawfully transferred to the Respondents, it is necessary to look at the documentary evidence produced in Court. The Ruling of this Court revoking the grant issued to Lucas and Michael was delivered on 29.10.09. The reason for revocation is that the Court had found that the grant was obtained fraudulently by concealing to the Court something material to the case and making a false statement. The Respondents had made a false statement on oath that it was only they and their late mother who had survived the Deceased. The transfer of Title No. Mombasa/Block XIII/204 favour of the Respondents was registered on 17.4.12 as was the title in their name. It is therefore clear that at the time the transfer was effected in favour of the Respondents, there was no grant of representation in respect of the estate.

14. Section 45 of the Law of Succession Act prohibits the intermeddling with the estate of a deceased person. Section 45(1) provides:

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

15. To the extent that the property was transferred to the Respondents without express authority by the Act or other law or a grant of representation there was intermeddling with the estate of the Deceased. Further, the law is very clear that immovable property forming part of the estate of a deceased person may not be transferred before a grant is confirmed. Section 55(1) provides:

No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in [section 71](#).

16. In the instant case, Lucas and Michael purported to distribute the said property by procuring the transfer of the same to the Respondents without a grant. In the circumstances, the Court finds that the transfer of the said property to the Respondents was tainted with illegalities and hence cannot stand.

17. The other issue the Applicant seeks settled is whether the Respondents should execute a transfer and all acts necessary to convey the said property to the Applicant to hold on behalf of the Estate of the Deceased. The Grant issued to Lucas and Michael was revoked by this Court on 29.10.09 in Succession Cause No. 150 of 2017. The Applicant is the holder of a grant limited for the purpose only of filing suit. The limited grant does not authorise him to deal with the said property or any other asset of the estate of the Deceased. As such the Applicant has no legal capacity to hold the said property on behalf of the estate.

18. The Applicant also seeks a determination as to whether he is entitled to compensation and or the said property to revert to him as administrator of the Estate of the Deceased. This is a rather curious prayer by the Applicant. He has stated that the estate of the Deceased has not been administered. He has also stated that his intention is not to disinherit the Respondents but that all beneficiaries of the estate can benefit from the said property. If this is true then on what basis would he be seeking compensation? The said property does not belong to him but to the estate of the Deceased. As already established, he is not the Administrator of the estate. He only holds a grant limited only for the purpose of filing suit. If any compensation were to be paid for any prejudice or damages suffered were to be paid then it would be to the estate and not to the Applicant.

19. The alternative prayer is that the said property revert to the Applicant. The Concise Oxford English Dictionary Twelfth Edition defines revert as to return to a previous state or condition. The said property belonged to the Deceased prior to the fraudulent transfer to the Respondents. The same can therefore only revert to the estate of the Deceased. The said property was not at any time registered in the name of the Applicant as owner or as administrator of the estate of the Deceased. As such the prayer that the said property reverts to him as administrator is misplaced.

20. In the result this Court now makes the following orders:

i) Title No. Mombasa/Block XIII/204 formerly Plot No. 18/42/XIII estate Mombasa forms part of the estate of the Deceased **Alois Abuya Awino**.

ii) Land Registrar, Mombasa is directed to cancel the title in respect of Mombasa/Block XIII/204 formerly Plot No. 18/42/XIII estate Mombasa in the names of Lanox Wilson Onyango, Keith Odhiambo Michael Abuya and Melisa Akinyi Michael Achuto Abuya and issue a fresh title in the name of the Deceased **Alois Abuya Awino**.

iii) This being a family matter, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 25th January 2019

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondents

..... Court Assistant



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