



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO 204 OF 2011

IN THE MATTER OF THE ESTATE OF KIMINING ARAP KIBOIGUT.....DECEASED

BETWEEN

PAULINE JEROTICH.....1ST PETITIONER/RESPONDENT

JOSPHAT KIPROP MAIYO.....2ND PETITIONER/RESPONDENT

AND

CHRISTIAN WAFULA OMUSOLO.....1ST OBJECTOR/APPLICANT

GEORGINA ARONI ORODING.....2ND OBJECTOR/APPLICANT

RULING

1. By a summons dated the 29th of October 2019 **CHRISTIAN WAFULA OMUSOLO the (1st applicant) and GEORGINA ARONI ORODING** (the 2nd applicant) seek revocation and/or annulment of grant pursuant to **Section 76 of the Law of Succession Act CAP 160 Laws of Kenya and Rule 44 of the Probate and Administration rules**, the applicant/objector seeks to revoke and or annul the letters of administration issued jointly to the petitioners/respondents herein on the 14th of November 2011 and confirmed on the 25th of June 2012.

2. Further, the applicants/objectors pray that the court include them as dependants and or liability to the estate of the deceased and further that the grant be reconfirmed afresh with the interests of the objectors in mind.

3. The application is supported by the affidavit of **Christian Wafula Omusolo**, the 1st Applicant/Objector sworn on the 29th of October 2019 wherein he deposes that the grant was obtained fraudulently by the respondents particularly that they made false statements and or concealed from courts material facts and secondly that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the issuance of a grant.

4. In particular, the objector/applicant notes that he is entitled to share of the estate of the deceased having bought from the deceased land measuring half an acre cut from deceased land namely **L.R KIMUMU SETTLEMENT SCHEME PLOT NO. 107 measuring 8 Acres** sometime on the 2nd of May 1989 upon which he took vacant possession of the land. Unfortunately, the objector/applicant deposes that the deceased passed on before transferring the interests to the objector/applicant. The objector/applicant further states that he attempted to have his interest in the land transferred to him vide Eldoret ELC Case No 111 of 2013 which was dismissed by court on the 24th of January 2019.

5. He therefore avers that the failure to include him as a beneficiary is likely to prejudice his interest in the land and he risks losing the said land. The objectors/petitioners have filed their statements, list of witnesses and documents dated the 23rd of December 2019 with instructions to serve the same upon petitioners.

6. From the record of proceedings that the respondents/petitioners have on numerous occasions not appeared before court nor filed their responses despite being directed to do so and or being served with papers. I note that, the respondents/petitioners did not appear before court on the 10th of December 2019, 17th of December 2019, 8th of March 2021 and 19th of April 2021 despite being served on the 8th of January 2020 and further failed to appear for hearing despite being served with copies of hearing notice dated the 8th of March 2021 on the 19th of March 2019. (Affidavit of service have been attached).

7. The only reasonable inference to draw is that these are deliberate efforts to frustrate and or waste the court's time which the court ought not accept.

Objectors Statement

8. The objector filed his statement on the 23rd of December 2019 wherein he reiterated the contents of the supporting affidavit. The Objector noted that he and his wife, the 2nd objector/applicant entered into a land sale agreement with the deceased wherein the deceased sold to the Objector's half an acre of his land parcel ***KIMUMU SETTLEMENT SCHEME PLOT No.107*** at an agreed price of Kshs.20,000 which the objectors paid in full.

9. The objector points out that the seller gave them vacant possession of the bought land and they have been in occupation of the said land since 1989 to date. They have also constructed semi-permanent structures on the portion of land that have tenants. The objectors further stated that the deceased was required to cause a smooth transfer of the land but died prior to effecting the said transfer.

10. Upon his death, the applicants claim that the petitioners filed the succession cause but failed to include them as beneficiaries and or liability to the estate herein prompting the objection proceedings herein.

Prior to the objection proceedings, the applicants indicate that they filed a claim for adverse possession before the **E & L Court vide ELC Case No 111 of 2013** but the same was dismissed and the petitioners/respondents have filed eviction proceedings pursuant to orders made by the Environment and Land Court.

11. The Objectors/applicants therefore note that they are apprehensive that they are in imminent danger of being evicted from the suit property unless their interests and or claim to the suit land are protected herein.

Analysis and Determination

12. The only issue for determination is whether the objectors/applicants have made a case for the revocation of grant issued to the petitioners/respondents. The objection is predicated on ***Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya*** and ***Rule 44 of the probate and Administration Rules***, which provides that:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that 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;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

13. On the other hand, Rule 44 provides:

44. Revocation or annulment of grant

(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate’s registry.

(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—

(a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and

(b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain un-administered, together with any other material information.

(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.

(4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.

(5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annul a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.

14. Under section 76, a court may revoke a grant based on the grounds listed above. The revocation may be on courts own motion or

on the application of a party. Generally, there are three grounds upon which a grant may be revoked:

a. Where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or *vice versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he or she is a survivor when he/she is not, among other reasons. The above ground has been used by courts to revoke grant in a litany of cases including *Mwathi v Mwathi & Another 1 EA 229*, *In the Matter of the Estate of Mwaura Mutungu alias Mwaura Gichingo Mburu alias Mwaura Mburu Nairobi High Court Succession Cause Number 935 of 2003* and *Musa v Musa, 2002 1 EA 182*.

b. Where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he or she fails to apply for confirmation of grant within the time allowed, or he or she fails to proceed diligently with administration, or fails to render accounts as and when required. For example, *In the Matter of the Estate of Mohamed Musa, Mombasa High Court Succession Cause No.9 of 1997*, the court revoked grant because the administrators had not kept any records of account of their administration.

c. Where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his or her duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.

15. A court therefore faced with an application for revocation of grant may make such orders as it deems fit and just, given the circumstances of the case. *In the Matter of the Estate of Esther Wanjiru Mucheru (deceased), Nairobi High Court Succession Cause No.1996 of 1999*, the court noted that Section 76 of the Law of Succession Act is discretionary in that it gives the court discretion whether to revoke or annul a grant.

16. Moreover, it is the duty of the applicant to prove that any of the grounds set out under Section 76 has been committed before the court can revoke a grant already issued. *This position was adopted by court in Kennedy Opiche Olela v William Ogida Ochuodho & another [2014] eKLR*.

In the instant case, the application for revocation is predicated on the ground that the respondents fraudulently made false statements and or concealed from court material facts, being, that the applicant/objector had purchased a portion of land from the deceased prior to his death. In this regard, the objectors/applicants have attached a sale agreement marked CWO-6 dated the 2nd of May 1989 between the deceased **Kimining Arap Kibuigut** and the Objectors/applicants. The agreement is in relation to the suit property namely **KIMUMU SETTLEMENT SCHEME Plot No. 107**. Moreover, the sale agreement was witnessed by among others **Samwel Kimining**, son to the deceased.

17. The applicant's contention is that the petitioners/respondents were aware of this fact and in fact held several meetings with all purchasers and or persons living on the suit property on the way forward including filing if a succession proceeding in respect of the estate. In fact, the objectors/applicants aver that they agreed together with the petitioners/respondents and other purchasers and people living on the suit property to survey the land so as to establish and demarcate boundaries. To this end, the Objectors/applicants note that they contributed survey fees, succession fees and all other appurtenant costs whereby the land was surveyed and respective portions well marked out on the ground. To buttress this point, the objectors/applicants have attached minutes of a meeting held on the 19th of March 2005 between the petitioners/respondents and objectors/applicants and other people wherein it was agreed each person to pay Kshs. 555/= for survey and succession matters.

18. There are also numerous letters from administrative unit including police and district officers indicating that the Objectors/applicants purchased land from the deceased. There is also a letter from the 2nd Petitioner/respondent **Josephat Kiprof** dated the 23rd of October 2014 wherein he indicates a willingness to the revocation so as to give the petitioners land they bought from the deceased.

19. The objectors have explained that their attempts to have their interests taken into account failed when their case in ELC Cause No 111 of 2013 was dismissed. I take note of the fact that the case was brought as a claim for adverse possession but the same was

dismissed by court. However, in the said judgement, the learned judge pointed out that there was no doubt that the applicants/objectors had purchased their portion of land from the deceased. The particular paragraph states as follows:

“9. On the basis of the evidence on record, there is no dispute that the applicants purchased the suit properties from the previous owner (now deceased) or his legal representatives on diverse dates between 1989 and 2000. There is no dispute that the applicants took possession of the various portions they had purchased. There was no suggestion that their entry was violent or secretive. There was no suggestion that their occupation had been interrupted in the legal sense”

20. The key issue that was under consideration in the said case was not the fact that the objectors/applicants had purchased land from the deceased but rather whether the land had been registered for the applicants/objectors' time to start running so as to prove adverse possession. The court found that time cannot run in respect of unregistered land as was the case. The court however noted as highlighted above that there was no doubt that the objectors/applicants had purchased the land from the deceased.

21. All these in totality demonstrates that the applicants/objectors have established that indeed there was material non-disclosure. I take cognizance of the fact that the petitioners/respondents had knowledge of the fact that the objectors/applicants had purchased land from the deceased and ought to have been included in the grant issued. I am also guided by the decision of court in *In the Estate of Kinungi Kimani (Deceased) Machakos High Court Probate and Administration Number 228 of 1995* where the court revoked grant on grounds of concealment of matter from the court which would have assisted in determining to who court should make the grant. The concealed matter was the fact that the deceased had sold a portion of the land making up the estate of the applicant, which fact the petitioner was ware of at the time of filing the petition.

The upshot is that the application is merited, and the grant that was issued on 14/11/2011 and confirmed on 25/06/2012, warrants revocation.

Disposition

22. However since there is an admission by the petitioners that the objectors are entitled to the portion they claim, and in order not to waste the court's time, and in light of the fact that the court is clothed with wide discretion, I am persuaded that rather than order revocation (which will result in a delayed process) I direct that an amended certificate of confirmed grant do issued to include the Objectors/applicants herein.

E-DELIVERED AND DATED THIS 2ND DAY OF JUNE 2021 AT ELDORET

H. A. OMONDI

JUDGE



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