



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

SUCCESSION CAUSE NO. 133 OF 2016

IN THE MATTER OF THE ESTATE OF ELIZABETH CLAIRE WRIGHT (DECEASED)

ABEID ALI ISLAM.....APPLICANT

VERSUS

FRED KARISA IHA (the administrator of the Estate of ELIZABETH CLAIRE WRIGHT

(Deceased)ADMINISTRATOR/RESPONDENT

Coram: Hon. Justice R. Nyakundi

Kaluki Muriu Ndiritu advocate for the Applicant

Kinyua Muyaa advocate for the Administrator/Respondent

RULING

Abeid Ali Islam hereinafter referred as the applicant filed this amended summons for revocation against **Fred Karisa Iha**, herein called the respondent for orders: For revocation of Letters of Administration for the Estate of **Elizabeth Claire Wright** granted on 9.5.2019. In support of the summons for revocation or annulment are grounds on the face of the application namely:

- (1). That the Grant was obtained fraudulently by making false statement or by concealment from the Court on the material facts of the case.***
- (2). That a Grant of Letters of Administration intestate was issued to Fred Karisa Iha the respondent herein on the 18th January 2017. That the said Grant of Letters of Administration was confirmed on 3rd day of May 2018.***
- (3). That in the schedule of the confirmed grant, item number 2 particulars of which read (Plot Number Timboni, No Title AND no possession yet) was included as part of the properties of the deceased.***
- (4). That on the 1st September 2018, the respondent approached the applicant herein and requested to know his plot number and how he acquired it.***
- (5). Upon being furnished with the plot details, the respondent then moved this honourable court to have the grant rectified.***
- (6). That the honourable court, based on the information obtain by the respondent on 1st September 2018 from the applicant issued a rectified grant to the respondent on 9th May 2019.***
- (7). That the information deponed by the respondent in his Affidavit in support of rectification of Grant of Letters of Administration intestate sworn on 21st March 2019 are based on falsehoods and intended to sway the court into rectifying the Grant.***
- (8). That the applicant is the legal holder of the said parcel and has possession since the year 2013 and has valid proof of how the property devolved to him from previous owners and there is now where the deceased ever owned the said property.***
- (9). That the applicant has enjoyed his proprietary rights with an uninterrupted stay in and has even developed the property without any interruptions.***

(10). *The applicant acquired the property from Yaser Hashim Abdulkadir vide on agreement of sale dated 6th December 2013. That Yaser Hashim Abdulkadir acquired the same parcel from Rodgers Kindia Kaibunga vide a sale agreement dated 2nd October 2012.*

The respondent in objection to the summons for revocation filed a replying affidavit dated 7.6.2021 in which he averred as follows:

(1). *I am the petitioner and the administrator of the estate of my late wife, Elizabeth Claire Wright and I am competent to swear this affidavit in reply and opposition to the undated summons for revocation of Grant filed on 7.5.2021.*

(2). *The application is not in the prescribed form as among other things it has no date on which it was made or on which it was issued.*

(3). *The application is incompetent as it does not specify whether it is for annulment or revocation of the entire Grant. There are 11 assets listed in the Rectified Certificate of Confirmation of Grant most of them in the United Kingdom. The failure to plead the application with specific details would mean that Abeid Ali Islam has interest in the deceased's property and assets in the UK. This is a further illustration of the incompetence with which the application was prepared and filed.*

(4). *When I applied for rectification of Grant on 22.3.2019 I referred to the demand letter by Kanyi J. & Co. Advocates written on behalf of Abeid Ali Islam and addressed to Yaser Hashim Abdulkadir on 12.9.2018 stating that Abeid Ali Islam had purchased the property with 16 rooms at a consideration of Kshs.2,500,000.00. It is important to quote the 4th, 5th and 6th paragraphs of that letter verbatim. "Our client (meaning Abeid Ali Islam) was astonished and dismayed to find out that the said parcel of land did not belong to you (meaning Yaser Hashim Abdikadir) legally but rather to one Ms. Elizabeth Claire Wright from the Judgment delivered in Malindi ELC No. 66 of 2005, Elizabeth Claire Wright –vs- Syria Mwaura Maitha. Where from the said Judgment it is evident and clear that you are not legally entitled to possess, own or transact with the said portion of land 942/1/2 which you misrepresented yourself as the legal owner and opted to fraudulently sell to our client without a valid title deed." In the 5th paragraph Abeid Ali Islam through hi said advocates stated as follows: "Consequently our client has suffered a big blow for entering into the same agreement in good faith and spending a vast amount of money to renovate a parcel of land that initially neither belonged to you nor were you able to pass on a good title as purchaser for value." In the 6th paragraph of that letter Abeid Ali Islam made a demand in the following terms:- "Our instructions therefore are to demand from you, which we hereby do, the immediate payment of Kshs.2,500,000.00 which amount was the consideration paid during the purchase and a further sum of Kshs.180,000.00 being the amount spent for renovation of the structures on the purchased piece of land. Totalling Kshs.2,680,000.00 ought to be paid within the next 7 days from the date of the letter together with our collection fees of Kshs.20,000.00 failure to which we have instructions to proceed and file suit against you holding you responsible as to costs, consequences and other incidentals that may arise therefrom." The letter was then copied to "The Administrator of Elizabeth Claire Wright," who is myself. There is now produced and shown to me a copy of that letter marked "FKI 1".*

(5). *The applicant did not file the present application even though the dispute has been running from 2019. Intermeddling with property of a deceased person is an offence under Section 45 of the Law of Succession Act, Cap 160 Laws of Kenya and the Applicant is therefore liable to me in my capacity as the administrator of the estate of the deceased. I therefore recorded a complaint to DCI in Malindi and after full investigations the Office of the Director of Public Prosecutions wrote to the Sub-County Criminal Investigations Officer on 31.7.2019 authorizing charges against Abeid Ali Islam for forcible detainer contrary to Section 91 of the Penal Code. The DPP also authorized charges of fraud against Syria Mwaura Maitha for fraud contrary to Section 318 of the Penal Code and false pretense against Yaser Hashim Abdikarim contrary to Section 313 of the Penal Code. There is now produced and shown to me a copy of that letter marked "FKI 4".*

(6). *The summons for revocation of Grant were filed in May 2021 after I had filed Malindi Chief Magistrate's ELC Case No. E12 of 2021 against Abeid Ali Islam for eviction, vacant possession and mesne profits as well as other remedies. The applicant has a remedy against Yaser Hashim Abdikadir and he should file the threatened action against him as he intended to do in his demand letter of 2018. The property belongs to the estate. There is no allegation that Yaser Hashim Abdikadir or Rodgers Kaibunga dealt or transacted in a different property in Timboni, Watamu from the property Syria Mwaura Maitha purported to have sold to Kaibunga.*

(7). *The deceased acquired the property before 2005. She did not sell it to Abeid Ali Islam or to any other person and on this ground Abeid Ali Islam does not have any interest in that property and therefore does not meet the qualification in Rule 44 (1) of the Probate and Administration Rules or Section 76 of the Law of Succession Act.*

In the end of the affidavit evidence both counsels filed brief submissions to convince and unconvinced the Court to exercise discretion either way on matters arising in the summons for revocation.

Determination

The crux of the matter is whether the Letters of Administrations issued to the respondent should be revoked. The Law under Section 76 of the Law of Succession,

"a Grant for Letters of Administration may be revoked for a just cause on any of the following circumstances proven by cogent and credible evidence:

(a). *If it is proved 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 concealing 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

In the instant summons, the claim by the applicant is not against the process perse but on the inclusion of Plot Number Timboni as part of the Estate of the deceased by the respondent. That by the respondent sequencing the various affidavits in support of the making of grant for the Letters of Administration on the property indicating he did so fraudulently and falsely which was detrimental to the entire grant.

By the applicant making reference to the conduct of the respondent in petitioning for grant of Letters of Administration he brought into perspective the construction and interpretation of the phrases or words in Section 76 of the Act. The definition of the word deceive, trick, fraudulent is defined in the Oxford Dictionary as an adjective meaning obtained, done by or involving deception. In **Black's Law Dictionary 6th Edition at Pg 660** He defines fraud as:

“An intentional perversion of truth for purposes of inducing another in relieve upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.”

According to the applicant the said parcel of Land does not fall within the definition of Section 3 of the Law of Succession as free and disposable property of the estate being administered by the respondent. Whereas the respondent in a lengthy affidavit has taken the Court through the genealogy of the litigation on the subject suit land, the applicant has purported to invoke Section 76 of the Act to have the Grant issued to be revoked or annulled.

Thus evidence by the respondent is corroborated by other documentary annexures demonstrating long standing dispute over unsurveyed **Plot No. 942/1/Z/Watamu**. The evidence further corroborates a fundamental aspect or sanctity of title. The applicant to the current application is riding on a purported cause of a claim that the suit land had been purchased from third parties who are not parties to the summons for revocation. It would appear the applicant purchased the interest in the disputed parcel of Land from a party who did not possess title or rights recognized under our land tenure system. It is important to note that the particular transfer of the aforesaid parcel of Law to the applicant lacks the necessary instruments, that renders the claim recognizable under the Law. Serious arguments have been made by the applicant on ownership of the suit land, but with no evidence registration, or transfer of it by the previous owners.

There is however evidence on the part of the respondent which I accept, that the deposed asset of the estate had been fraudulently dealt with by third parties. That there is no indication that the deceased was privy to the irregularities alleged inviting bids from the applicant to purchase the parcel of Land in question.

What is then the applicant's cause of action? Firstly, as I understand it, the applicant has been pursuing this issue for some time now but has failed to disclose existence of any Judgment setting out the order of proprietary rights as the rightful owner of the land. Second, I'm convinced that the applicant has filed this application to vex the probate Court in a matter which he ought to bring a separate suit on the purchase of the land as per the sale agreement entered into with third parties. Thirdly, the application does not even seem to fall within the scope of Section 93 of the Law of Succession which protects the interest of a purchase of immovable property of any interest in immovable property. In the event, the grant issued is capable of being revoked. Fourth, from the record, the applicant is neither a dependant to the estate of the deceased under Section 29 nor a bonafide creditor under Section 93 of the Law of Succession Act.

Consequently, the applicant has failed to discharge the burden of proof of his case against the respondent in terms of Section 76 of the Act that the making of the Grant of Letters of Administration in respect of the **Estate of the Late Elizabeth Claire Wright** was defective in substance, or made without nor disclosure of material evidence or any false representation by the respondent. On that basis alone the summons for revocation is a non-starter and non-suited in respect of the Estate of the deceased and any such thoughts or, intention to pursue revocation and annulment is ill advised.

All in all the amended summons for revocation be and is hereby dismissed for want of merit.

DATED, SIGNED AND DISPATCHED via email AT MALINDI ON 20TH DAY OF AUGUST 2021

.....

R. NYAKUNDI

JUDGE

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