



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO. 47 OF 2012

IN THE MATTER OF THE ESTATE OF PETER AWINO OTIENO 'DECEASED'

BETWEEN

BOARD OF MANAGEMENT KANGESO SECONDARY SCHOOL (Suing on  
behalf of KANGESO SECONDARY SCHOOL ..... APPLICANT

VERSUS

EDWIN OKONG'O AWINO.....1<sup>ST</sup> RESPONDENT/PETITIONER

JOSEPH OMOLO ODHIAMBO.....2<sup>ND</sup> RESPONDENT

MAURICE OGOLA ABUOR.....3<sup>RD</sup> RESPONDENT

WINNIE AKOTH ONGUDI .....4<sup>TH</sup> RESPONDENT

PATRICK OTIENO OMWONO .....5<sup>TH</sup> RESPONDENT

JEMIMA OKELLO .....6<sup>TH</sup> RESPONDENT

JARED ODHIAMBO AYUNGA.....<sup>TH</sup> RESPONDENT

RULING

1. This ruling is in respect of the summons for revocation of grant dated the 10<sup>th</sup> of September, 2019 vide which the Board of Management Kangeso Secondary School (suing on behalf of Kangeso Secondary School sought orders;

1. Spent.

2. Spent.

3. Spent.

4. The grant of letters of administration granted to the 1<sup>st</sup> respondent and confirmed on the 4<sup>th</sup> day of April 2014 be revoked and/or annulled.

5. The register in respect of LR. No.s KAMAGAMBO/KANYAMAMBA/2121, 2122, 2123, 2124, 221, 2222, 2223, 2224, 2263 and 2264 respectively, hitherto which formed part and parcel of LR. NO. KAMAGAMBO/KANYAMAMBA/129, be nullified and the original parcel number LR. NO. KAMAGAMBO/KANYAMAMBA/129 be restored and the name of the deceased PETER AWINO OTIENO be re-instated, to facilitate fresh administration.

6. Costs of the application be borne by the respondents.

7. Such further and/or other orders be made as this honourable court may deem fit and expedient.

2. The application is premised on a total of 29 grounds as listed on the face thereof and supported by an affidavit sworn by Peter Dencer O. Makambogo, a board member of the Board of Management of Kangeso Secondary School.

3. In a nutshell, the gist of the application as gleaned from the grounds and the supporting affidavit is that at the time of the death of Peter Awino Otieno, the deceased herein, he owned land parcel No. LR. KAMAGAMBO/KANYAMAMBA/129 as part of his estate. It is averred that subsequent to the death of the deceased, **Edwin Okong'o Owino** (hereinafter the petitioner) sold 0.8Ha being a portion of LR KAMAGAMBO/KANYAMAMBA/129 to Kangeso Secondary School. A land sale agreement is exhibited. The petitioner is said to have sold the land in the capacity of the intended administrator of the estate of the deceased, a son and a beneficiary of the estate.

4. Indeed, in his letter to court identifying beneficiaries, the local chief introduced Kangeso Secondary School as one of the beneficiaries of the estate. The petitioner is accused of swearing a false affidavit before court deponing that the school had bought a portion of land in LR NO. KAMAGAMBO/KANYAMAMBA/125 thus misleading the court to confirm the grant without including the school as a beneficiary.

5. It is the applicant's case, therefore, that the grant of letters of administration was issued and confirmed through concealment and or non-disclosure of material facts and was based on a false affidavit.

6. The applicant lists various persons who have since assumed ownership of the resultant subdivisions from parcel LR KAMAGAMBO/KANYAMAMBA/129.

7. The summons is opposed by the 2<sup>nd</sup> respondent who has filed grounds of opposition dated 14.1.2020 which were filed contemporaneously with a notice of preliminary objection. The gist of the objections being that the application offends the provisions of **S 82(b) (ii)** read together with **S 45** of the **Law of Succession Act** regarding the lack of capacity of the purported seller and that the 2<sup>nd</sup> respondent is protected by the provisions of **Section 93** of the **Law of Succession Act**.

The 2<sup>nd</sup> respondent also avers that the suit is time barred within the meaning of **S 4(a)** of the **Limitation of Actions Act** and that the purported transaction offends the provision of **S 6** of the **Land Control Act** and finally that this court lacks jurisdiction to entertain the matter as it is a land dispute.

8. All other respondents did not react to the application. Directions were given that the preliminary objection and the summons for revocation of grant be heard together. Both the applicant and the 2<sup>nd</sup> respondent have filed submissions through their respective counsel.

9. I have had occasion to consider the summons, the preliminary objection, the grounds of opposition and submissions on record.

10. The applicant's claim is based on a "sale of land agreement" dated 5<sup>th</sup> day of February 2010 between Edwin Okong'o Awino as a vendor and Kangeso secondary School as a purchaser.

11. A cursory look at this 'sale of land agreement' brings to the fore an issue that sticks out like a sore thumb and which is; Did Edwin Okong'o Awino have the capacity to enter into a sale agreement and pass a good title to Kangeso Secondary School at the point in time at which the sale agreement was made?

12. In my view the answer to that question conclusively determines the summons for revocation of grant herein without the necessity of belabouring any other issue(s) raised in the matter.

13. In the said agreement Edwin Okong'o Awino is described in the following terms;

**THAT the vendor is a son and as such a beneficiary of the deceased's estate hence entitled to ownership of a share out of the said Land Parcel No. KAMAGAMBO/KANYAMAMBA/129.**

14. Paragraph 1 of the agreement is worded as follows;

**THAT Land Parcel No. KAMAGAMBO/KANYAMAMBA/129 is registered in the name of Peter Awino Otieno - Deceased.**

That wording leaves no doubt as to the identity of the registered proprietor of the land offered for sale.

15. As at the time the agreement was sealed the grant of letters of administration in respect of the estate of Peter Awino Otieno had not been issued leave alone being confirmed!

Edwin Okong'o Owino thus lacked the requisite capacity to enter into a sale agreement and to pass a good title to any person including Kangeso Secondary School.

**16. Section 82** of the **Law of Succession Act** provides;

**S 82** Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) .....

(b) .....

Provided that—

(i) .....

(ii) no immovable property shall be sold before confirmation of the grant;

17. Section 45 of the Law of Succession Act provides;

S 45 “(1) 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.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

18. Going by the above provisions, it is clear that Edwin Okong’o Owino had no authority to sell any immovable part of the estate of the deceased pursuant to section 82(b)(ii) and in addition by purporting to do so, he contravened Section 45 of the Law of Succession Act.

19. In **Re Estate of Musa M’Iburi Kararu (Deceased) [2011] eKLR Kasango J.** stated;

“The grant in this case was issued to Grace Mukopara Musa and Alice Ciomacila. That grant todate has not been confirmed. The persons who purported to sell the deceased Plot No. 34 Maua Township had no authority as provided under the Law of Succession Act to sell that plot. That purport of sale was contrary to section 45 (i) of that Act. That section provides as follows:-

**“45 (i) 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.”**

Section 45 (ii) further provides that anyone who either disposes or intermeddles with the deceased free property is guilty of an offence. The sale of Plot No. 34 to Valerio was unlawful and it will not be upheld by this court.”

20. It is mind boggling that the purported agreement is witnessed by an Advocate of this Court, an officer of the court who is expected to have guided the parties on the legality or lack thereof of their ‘sale of land agreement’. Such practice must be deprecated.

21. As it were, the ‘sale of land agreement’ is, in view of the foregoing, a non starter, null and void and was incapable of conferring any legal rights to Kangeso Secondary School in the estate of Peter Awino Otieno as a beneficiary and/or creditor.

22. Consequently the summons for revocation based on the strength of the impugned agreement falls far short of threshold required under S 76 of the Law of Succession Act for revocation of a grant.

23. Kangeso Secondary School thus cannot possibly get any relief of whatever nature from this Probate and Administration Court. All is not lost, however, as the school can persue Edwin Okong’o Awino for recovery of the purchase price as a civil debt. This remedy, however, is not available in this court but before a court seized of the requisite jurisdiction.

24. Having resolved the above issue against the applicant and for reasons stated, this matter is resolved and I need not delve into any other issue(s) which I consider moot.

25. With the result that the summons filed herein is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021**

**A. K. NDUNG’U**

**JUDGE**