

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.103 OF 2010

MOSES OTIENG COLOMBAN.....PETITIONER

VERSUS

ANTONY EMADAU OMUKAGAOBJECTOR

R U L I N G

[1] The subject grant respecting the estate of the late Micheal Omukaga Etyang (**deceased**) was issued to Moses Otieng Colomban (**Petitioner**) in his capacity as a brother of the deceased on the **2nd December 2010** and was confirmed long past the prescribed period of six (**6**) months on the 17th May 2012 in his favour and that of Antony Omukaga (**objector**) son of the deceased.

The estate property being land parcel **No.South Teso/Amukura/2250** was accordingly distributed between the two beneficiaries with the petitioner getting 6.8 HA and the objector, 3.0HA. However, more than six years later, on 15th August 2018, the objector filed the present application vide the summons for revocation of grant dated 14th August 2018, seeking orders to the effect that the grant be revoked on the basis that the petitioner was not a beneficiary of the estate and petitioned for the same without the actual knowledge of the beneficiaries who included the objector and his three sisters. Further, the petition was incompetent, defective in substance and an abuse of the court process.

[2] In opposing the application, the petitioner filed a replying affidavit dated 7th November 2018, in which he denied the allegations made against him by the objector and contended that he was a beneficiary of the estate by dint of being a brother of the deceased both of whom inherited the estate property in equal shares from their late father Colomban Otiengi Etyang. That the deceased later sold part of his share of the land to a third party although the land was registered in the name of the deceased for his benefit and in trust and benefit of the petitioner as his younger brother. That the objector was very much aware of the foregoing factors as well as the succession proceedings but mischievously and irregularly filed a separate succession cause.

[3] The hearing of the application was by way of affidavit evidence and written submissions. Accordingly, additional affidavits were filed by the parties. The applicant/objector was represented by **Messrs R.E Nyamu & Co. Advocates** with **Messrs J.O Makali & Co. Advocates**, appearing for the respondent/petitioner.

Basically, as may be deciphered from the grounds, in support of the application and the rival submissions the main issue for determination was whether the impugned grant was improperly obtained by the petitioner by fraud, misrepresentation and/or concealment of material facts. The main allegation pointing towards these factors was the fact that the petitioner obtained the grant while he was not a beneficiary of the estate of the deceased and without informing the actual beneficiaries who included the objector and his siblings. The objector contended that having no knowledge of the existence of the proceedings or succession cause leading to the issuance of the grant by the court, he instituted a similar cause at the magistrate's court in Busia and obtained another grant respecting the estate of his deceased father. This was confirmed in his favour and the estate property was transmitted to him.

[4] These allegations were not substantially disputed by the petitioner but he implied that he was a beneficiary of the estate as it previously belonged to his late father before it was transmitted to him and the deceased (**his late brother**) in equal share but registered in the name of the deceased for him to hold the petitioner's share in trust. He (**petitioner**) stated that the deceased later sold his portion or part thereof and what remained of it was due to his family and that is why in the impugned certificate of confirmation of grant dated 17th May 2012, the objector received 3.0HA of the estate.

The petitioner implied that the remaining portion of the estate measuring 6.8HA belonged to him and was therefore unavailable for distribution to the dependants of the deceased.

[5] In the absence of proper or any evidence showing the joint ownership of the estate property between the petitioner and the deceased and the creation of a trust in favour of the petitioner in respect of the property, it would follow that the petitioner may have been very economical with the truth in this matter and that the allegations made against him by the objector are in fact credible inasmuch as they tend to receive support from the court record which shows that the petitioner misled the court into granting him the impugned grant by presenting inaccurate and false information pertaining to his alleged interest in the estate property and to the actual and real beneficiaries of the estate. In any event, even if the petitioner does indeed or did indeed have a proprietary interest in the estate property, then he ought to have filed the appropriate civil case against the estate of the deceased instead of attempting to enforce his alleged interest in the estate property by way of this succession cause. In doing so, he clearly abused the court process and came into direct conflict with the provisions of **s.76 of the Law of Succession Act**. This action was clearly fraudulent and unlawful with a clear intention to disinherit the object or and his sisters of their lawful inheritance.

[6] In the end result, the present application is merited and is hereby allowed to the extent that the grant issued to the petitioner/respondent together with the accruing certificate of confirmation of grant be and are hereby revoked.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED AND DATED THIS 27TH DAY OF OCTOBER 2021]