



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE No. 248 of 2009

IN THE MATTER OF THE ESTATE OF THE LATE THOMAS

TATWA SAKWA alias THOMAS LUTATWA (DECEASED)

B E T W E E N:

REBECCA ALIELI OCHOLI.....OBJECTOR

AND

(1) DAVID MAKARE CHIBOLE

(2) ANERIKO ASHIALI IMBIAKHA.....ADMINISTRATORS/RESPONDENTS

J U D G M E N T

1. The Court has before it a Summons for revocation of the grant of letters of administration as well as the confirmation of the grant for the Estate of the Late Thomas Tatwa Sakwa also known as Thomas Lutatwa. The Letters of Administration were issued on 4th September 2009 and confirmed on 20th March 2012. The Summons for revocation is dated 3rd November 2015 and was filed on 15th November 2015.

2. The Summons is brought under **Section 76(b) and (c)** of the **Law of Succession Act** and **Rule 44(1)** of the Probate and Administration Rules. The Applicant/Objector asks for the following orders:

“1. That the Grant of Representation made to DANIEL MAKERE CHIBOLE and ANERIKO ASHIALI IMBIAKHA issued on 4th September, 2009, and confirmed on 20th March, 2012, in the above cause be revoked and/or annulled.

2. THAT after issuance of an order for revocation of the said grant, the Honourable court does cancel or nullify registration in the deceased parcel of land registration number BUTSOTSO/SHIKOTI/1038

3. THAT the costs of this application be provided for.”.

3. The Application/Objection is filed by Rebecca Alieli Ocholi who states that she purchased a portion of the land comprising one acre from the Estate. It was sold to her by ALBERT IMBIAKA before he died. The Application is supported by the affidavit of the Applicant/Objector and it puts forward the following grounds:

a) THAT the grant was obtained fraudulently in that the Petitioners did not give a full disclosure of the deceased's heirs, beneficiaries and liabilities.

b) THAT the Petitioners did not obtain the consent of one ROSEMARY ATAMBA who is a widow of the deceased and Objector/Applicant who is the purchaser to the said estate.

c) THAT the Petitioner concealed material facts to the court and the documents filed herein by Petitioners have apparent omissions.

d) THAT the Petitioners are not proper persons to administer the estate of the deceased herein solely considering that they did not put the names of the heirs, beneficiaries and liabilities to the deceased estate in the required form and considering that they have already shared land parcel number BUTSOTSO/SHIKOTI among themselves.

e) THAT the Petitioners deliberately and knowingly failed and/or ignore to include the names of beneficiaries and liabilities.

f) THAT all the proceedings are null and void as they were conducted in the absence of other beneficiaries and liabilities.

g) THAT this application is not going to prejudice the Petitioners in any way as what they have done is unprocedurally and unlawful. (sic)

h) THAT it is imperative and in the interest of justice that the orders sought be granted.”.

4. In her Supporting Affidavit the Applicant/Objector informs the Court that the Administrator/Respondents were the grandchildren of the Deceased. She says that all the Children of the Deceased have themselves passed away. It seems she is saying that for the grandchildren to be appointed administrators the Court would have to be satisfied that any or all spouses and/or children of the Deceased had themselves passed away. She then goes on to say that the Deceased had two sons and one daughter who were all by that time (2015) also deceased. She says that at the time she came to acquire a one acre portion of the land, the son of the Deceased, ALBERT IMBIAKHA was alive. He was the son of the Deceased. He sold a portion of the land to the Applicant. She took immediate possession and made some developments to the land. The Deponent goes on to say that during his lifetime Albert Imbiakha had two wives, and was survived by one widow ROSEMARY ATAMBA. The first wife left behind two children and the second wife who was still alive in 2015 had 4 children. One of the Respondents Aneriko Ashiali is the child of the first wife. The agreement for the sale of the parcel of land made provision for its recognition in the succession cause. The Applicant states that the Administrator/Respondents excluded herself and the widow of the Deceased from the succession. She states that was deliberate and intentional and that there was active concealment of the facts as a result. She alleges that amounts to dishonesty and therefore that the Administrators are not fit and proper people to be administrators. The Applicant had exhibited a copy of the “Land Transaction Agreement” to her affidavit. It shows that it was the agreement was witnessed by a Counsellor Stephen Okongo for the Sellar.

5. On 21st July 2016 when the Application came before the Court, Hon Mr Justice E.C. Mwita gave directions for the Application to be disposed of by way of oral evidence. The Parties were also directed to file and serve witness statements. Those witness statements are on the Court file. It seems that the dispute was also referred to mediation but the mediation collapsed. The reasons for that do not appear on the record.

6. After numerous adjournments the Court heard the oral evidence. The Applicant went first. The matter was part heard before Hon Mr Justice Njagi before it came before the Court as currently constituted. The Learned Judge applied the Civil Procedure Rules to the Dispute and the Parties were referred to as “plaintiff” and “defendant”, however there are no pleadings using that nomenclature. The Parties wished to proceed from the point at which the evidence had been heard rather than starting afresh. This court heard the evidence of Aneriko Ashiali Imbiaka. The evidence of the other witnesses is on the record as are the witness statements. The First Administrator/Respondent did not attend. It was said he was suffering from Covid but that assertion was not supported by any medical evidence.

7. From the evidence before the Court it transpired that the Deceased (Thomas Tatwa Sakwa) had three children (two sons and a daughter), NICHOLAS CHIBOLE, ALBERT IMBIAKHA and MARITINA MANGALA. Thomas Tatwa passed away on 11th June 1990 aged 85 years according to the death certificate (No 247322) in the file. It appears that Thomas was survived by all his offspring. The Respondents admit in their joint Replying Affidavit that Maritina Mangala survived the Deceased and also was alive when they petitioned for grant. They say that they obtained her consent. Since the “Land Transaction Agreement” is dated 2005 and was signed by Albert Imbiakha, that is good prima facie evidence that Albert Imbiakha also survived the Deceased, until at least 2005. That is not contradicted by the Respondents. The Agreement also recognises that the Purchaser would have her portion recognised in the succession process. That was not done. The documents filed in Court in support of the Petition make no mention whatsoever of any of the offspring of the Deceased.

8. The Chief’s Letter is dated 7th May 2009 and is signed by the Chief of Butso Central Location. In that letter the Chief has taken upon himself the role of the Court and decided the entitlement of the heirs. He declares that David Makare Chibola and Aneriko Ashiali Imbiakha “are the rightful heirs of Tomas Lutatwa Sakwa”. That cannot be correct. Further, the Certificate of Official Search shows that even as late as 27th March 2009, the land parcel known as BUTSOTSO/SHIKOTI/1038 comprising 7.5 acres was registered in the name of the Deceased, Tomas Lutatwa. A little earlier (11th March 2009) one of the Petitioners, namely, David Makare Chibola had a restriction placed on the title to prevent any dealing. In the Petition and in the Affidavit in Support of the Petition the two Administrator/Respondents stated (on oath) that they were the only surviving members of the family of the Deceased. That statement needs further analysis in light of the Objector’s Application. Through the process of the succession and confirmation of grant the two Administrator/Respondents shared out the Estate with David Makare receiving 5 acres and Aneriko Ashiali 2.5 acres.

9. The Petition was presented on 13th May 2009. The gazette notice was dated 27th May 2009, however, it did not appear in the Kenya Gazette until 19th June 2009. Less than 3 months later (4th September 2009) the Letters of Administration were issued. Confirmation followed on 28th March 2012.

10. In the course of the evidence that was filed and heard, the Administrator/Respondents admitted that they had in fact, misled the Court. They admitted they had an Aunt called Maritina Mangala. They assert that she was aware of the proceedings and consented thereto. That knowledge and consent was not demonstrated anywhere. Even her existence was concealed by the use of the Chief’s Letter containing false information. In the combined Replying Affidavit of David Makare Chibole and Aneriko Ashiali Imbiakha state that they find the application for revocation to be “premature, misconceived, frivolous, scandalous, vexatious and an abuse of the due process of the court and ought to be dismissed with costs. Notwithstanding the flair with which that statement is put forward, it is not factual evidence and therefore has no place in an affidavit.

11. The Replying Affidavit, further admits that the Deceased did have 3 Children as listed above. Those Children had spouses and children of their own. The effective date for the Court to assess who are the heirs of the Deceased is 11th June 1990. On that date it seems that the Deceased was survived by Albert Imbiaka, Nicholas Chibole and Maritina Mangala. Albert Imbiaka was also himself survived by his widow

called Rosemary Atamba. The Respondents admit that they knowingly and deliberately omitted her name from the Petition because she should not share in the Estate of the Deceased, in their view. It is also put forward that Albert Imbiaka had other land that he had received from the Deceased. Again, that land was not listed in the Petition, nor is there a certificate of search relating thereto. In the circumstances, that statement, albeit a bare assertion, demonstrates that the Petitioner/Respondents were not interested in being proper administrators of the Estate within the meaning of **Section 82** of the **Law of Succession Act** and were more interested in hiving off a particular piece of land for themselves at the expense of other beneficiaries. The Court has not been informed when Albert Imbiaka passed away.

12. Therefore, as at 11th June 2009 there were at least two persons who were entitled to petition for the grant of letters of administration. Those did not include the Respondents herein. At that date they had no locus. Subsequently, when Albert passed away the person which locus to petition was Martina Mangala, not the Respondents. There is nothing before the Court to show that she gave up her right with full knowledge. The Petitioners have produced a Witness Statement on her behalf where it is stated that she did not give her consent to Albert to sell any of the land and that the sale to the Objector amounts to intermeddling. She also states that she is “aware her two nieces” have filed succession proceedings. Nieces are the female children of a sibling. There is nothing to indicate that the statement was read, translated and explained to Martina before she allegedly affixed her LEFT thumb print. The Witness Statement is dated 18th July 2016, suggesting she was alive on that date.

13. The Court gave directions for written submissions to be filed on 16th February 2021. The Objector filed her Written Submissions on 19th February 2021 and the Respondents on 6th or 8th April 2021 (the stamp is unclear).

14. The Objector’s Submissions reiterate that the Deceased had the three children named, two sons and a daughter. The assertion being that they were the rightful heirs and the chief’s letter was not a true reflection of the facts. The Objector’s case is that Albert survived the Deceased. Therefore he acquired a beneficial interest in part of the Estate and that is when he sold the land to the Objector. The Objector’s evidence is that Albert had two wives one of whom Rosemary Atamba witnessed that he received part of the payments made on 2nd March 2006. The Objector also gave evidence that the Respondents were aware of the sale because the part she purchased was fenced off and she put up a structure. They made no objection. However, the record shows they placed a restriction on the title, much later. The Objector also gave evidence that there were other members of Albert’s family who had been left out of the succession. Roseline Atamba is the step-mother of the Second Respondent. The Second Respondent gave oral evidence on 8th December 2020. The First Respondent did not because he was down with Covid. Counsel for the Respondents informed the Court that all the Children of the Deceased (Thomas) are dead. The dates of their demise is relevant. In his evidence the Second Respondent told the Court that his father was Albert Indiakho Imbiaka, he passed away on 15th June 2007. Albert had two wives, Damaris Adhiambo and Roseline Atamba. The former is deceased the latter is still alive. Albert had two siblings Nicholas Chibole and Martina Mangala. Nicholas passed away in 2002 and Martina is still alive, he said. The Second Respondent also stated on oath that Albert had 2 wives and 6 children (one son and two daughters). It seems one wife and all 6 Children survived Albert. Nicholas had two wives, Mary Chibole who is still alive and Rachel Chibole who is deceased. It seems the Deceased was also survived by one brother Christopher Ochieng Sakwa who died of Covid in March 2021. The evidence also came to light that the Deceased herein (Thomas) also owned other land during his lifetime. One piece of land **Butsotso/Shikoti/6142** was mentioned. In addition, the Second Respondent also had in his possession a document referring to the sub-division of an additional piece of land.

15. As stated above the Parties filed Written Submissions which the Court has considered. The Respondents as a last ditch effort to stave off revocation, challenge the jurisdiction of this Court to hear the matter. That is a far cry from their earlier approach. The Respondents submit that the issues for determination are:

- (a) Whether the petitioners are the rightful heirs
- (b) Whether this Court has jurisdiction to hear and determine the objection and
- (c) Whether the objection meets the requirements for revocation of grant as provided by the Law

16. It is notable that the Administrator/Respondents are not relying on their arguments for striking out the Objection on the grounds that it is frivolous and vexatious. The Petitioner/Respondents submit they are the rightful heirs. They rely on **Rule 7(1) e(iii)** and **Rule 4** of the **Second Schedule of the Probate and Administration Rules**. What is submitted is that; “A grand child is heir to the estate of the deceased grandparent where the parent predeceased the grandparent”. It is then asserted that the grandchild steps into the shoes of the deceased parent. The fatal flaw in the Respondent’s argument is that both their parents survived the Deceased. Therefore, they do not step into the shoes of their respective father, but have a share in their own father’s Estate.

17. In relation to their argument that the Court does not have jurisdiction to hear and determine this matter the Respondents rely on the fact that they had managed to divest the Estate of the property before the objection was filed. It is argued that the Objector slept on her rights which accrued in 2002. That appears to be an admission that the Objector did acquire some rights. It is also argued that **Article 162 of the Constitution** prevents the Court from hearing this matter because the question of enforcing rights is the preserve of the Land and Environment Court.

18. The Respondents accept that **Section 76** is applicable but they argue that the Objector has failed to prove the general grounds for revocation. Further that she has no authority to act for the people she alleges were excluded.

19. The Submissions filed on behalf of the Object go much further, they allege that the Administrator/Respondents knowingly perpetrated a fraud. **Section 76** of the **Law of Succession Act** provides:

“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 the confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; 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”.

20. The Act provides for an order of priority of persons who may petition for grant. A spouse and/or child of the deceased have priority above a grandchild. Where a child survives his parent, the grandchild has no locus whatsoever. When a petitioner is granted letters of administration, that person is appointed as administrator (personal representative of the deceased). There are certain expectations of such a person, including but not limited to being a fit and proper person and also being able to administer the Estate as required. That includes identifying the beneficiaries and identifying and calling in the assets that the Deceased held in his or her lifetime. An administrator is also expected to prepare accounts for the Estate. Since the grant is made by the Court, the Court can revoke its own grant regardless of whether or not a party has obtained other benefits in reliance on that grant. In the circumstances, the submission that the ELC should be seized of this dispute is dismissed. In the circumstances, this Court has to decide whether or not to revoke the grant. Revocation is dealt with by **Section 76 of the Act** and **Rule 44 of the Probate and Administration Rules**. **Section 76** provides for revocation in the following circumstances:

- (a) That the proceedings were defective in substance
- (b) The grant was obtained fraudulently
- (c) The grant was obtained by means of an untrue allegation of fact.
- (d) The person to whom the grant was made has failed to apply for confirmation of grant within one year; or proceed diligently with the administration or has failed to produce an inventory or accounts of the estate and the progress of the administration as required by **Section 38(e) (g)** of the Act. **Rule 44** of the **Probate and Administration Rules** provides:

“(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 unadministered, 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

annual 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.”

21. The Objector’s Submissions rely on the cases of ***In the High Court at Nairobi, Family Division, Succession Cause No 1407 of 1997*** and ***In the High Court of Nairobi, Family Division Succession Cause No 224 of 2006*** both of which have been considered. In this case the Administrator/Respondents presented and relied on false and untrue statements of fact in their Petition. This Court finds that they did so deliberately. The Administrators were not entitled to petition. They compounded their falsehood by omitting from the list of the beneficiaries the only surviving child of the Deceased. They even omitted their own siblings, perhaps because they were female. In the circumstances, the certificate of confirmed grant does not comply with the CoK2010. They did so for their own enrichment. They have failed to collect in the Estate and they have failed to provide any accounts.

22. For the reasons set out above the grant is revoked. The Certificate of Confirmation of Grant dated 20th March 2012 is annulled and/or revoked and/or cancelled. The letters of administration be and are hereby revoked. All actions taken by the Respondents on the basis of the letters of administration and/or certificate of confirmation of grant are equally annulled and reversed. The Respondents are declared to be persons who are unfit to be appointed as administrators.

23. A copy of this Order shall be served on the Registrar of Lands and also on the Public Trustee by the Objector.

23. It is also ordered and directed that the Public Trustee be and is hereby appointed as administrator of the Estate of the Deceased Thomas Tatwa Sakwa alias Thomas Lutatwa. The beneficiaries shall be recorded as (1) any surviving spouse at the date of death; (2) Nicholas Chibole/his Estate; (3) Albert Imbiakha/his Estate and (4) Martina Mangala. The families and preferably the widows of the two sons shall file a petition each in relation to the Estate of each of those deceased sons of Thomas Lutatwa. It is only at that point that any equitable distribution can take place.

24. It is further ordered and directed that the Respondents and their sureties shall be jointly and severally liable for the costs of the Objector.

Order accordingly

Farah S. Amin

JUDGE

DELIVERED SIGNED AND DATED THIS THE 30TH DAY OF NOVEMBER 2021 IN KAKAMEGA (VIRTUALLY USING THE MS TEAMS PLATFORM)

In the Presence of

Mr Atulo Advocate for the Respondents