



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 6 OF 2019**

**IN THE MATTER OF THE ESTATE OF DAVID NG'OMBE MASINDE (DECEASED)**

**RULING**

1. The matter relates to the estate of David Ng'ombe Masinde. The date of his death is not disclosed and proof of death has not been provided. Representation to his estate was granted on the basis of a citation issued in Kakamega HC Citation Cause No. 11 of 2018, where leave to apply for representation was given, and the instant cause was initiated. The cause herein was gazetted on 22<sup>nd</sup> March 2019, to Sammy Ngome Masika, who I shall refer to hereafter as the administrator.
2. The administrator filed a summons for confirmation of grant, dated 10<sup>th</sup> October 2019, on 11<sup>th</sup> November 2019. He identifies Ruth Masinde as the survivor of the deceased, and himself as a dependant. He proposes distribution of Kakamega/Chekalini/4069 between himself and Ruth Masinde, so that he gets one acre and she the rest.
3. When Ruth Masinde was served with the application for confirmation of grant, she reacted by filing a summons for revocation of grant, under the name Ruth Nelima Amaita, dated 15<sup>th</sup> March 2021, seeking revocation of the grant made on 25<sup>th</sup> April 2019, and for the grant to be made to her. She avers that the grant was obtained on untrue allegations that the administrator had purchased the land, and he obtained the grant without the consent and participation of the beneficiaries. She avers that the administrator was unknown to the family. She avers to be the widow of the deceased, and that the deceased had been survived by her and her children. She has attached a certificate of death, dated 13<sup>th</sup> April 2017, showing that the deceased died on 27<sup>th</sup> August 2016.
4. I directed on 16<sup>th</sup> March 2021, that the two applications, dated 10<sup>th</sup> November 2019 and 15<sup>th</sup> March 2021, be disposed of simultaneously.
5. Ruth Nelima Amaita filed an affidavit, on 28<sup>th</sup> September 2021, in protest to the confirmation application. She proposes distribution between herself and other nine individuals, whose relationship with the deceased person is not disclosed. She discloses that the deceased died possessed of two parcels of land, being Kakamega/Chekalini/4069 and 4076. She proposes to take Kakamega/Chekalini/4076 wholly, and to share Kakamega/Chekalini/4069 with the other individuals named in her affidavit. She has attached a letter from the Chief of Chekalini Location, dated 31<sup>st</sup> March 2021. From that letter, it would appear that the other nine individuals, mentioned her protest affidavit, are in fact the children of the deceased. I shall hereafter refer to Ruth Nelima Amaita as the protestor.
6. The administrator filed a reply to the revocation application. He avers that he was appointed administrator on the basis of orders made by the court in the citation cause, after the protestor was served with the citation, and failed to attend court. He asserts that he bought the land from the deceased in 2015, and he has attached a sale agreement, dated 9<sup>th</sup> January 2015. The land had not yet been subdivided, and it was then Kakamega/Chekalini/445, and after subdivision the portion he had bought fell on Kakamega/Chekalini/4069.
7. Directions were given on 28<sup>th</sup> April 2021, for disposal by way of *viva voce* evidence.
8. The hearing happened on 22<sup>nd</sup> June 2021. The administrator testified. He said he bought the portion from the deceased. He explained that he obtained the citation in Kakamega HC Citation Cause No. 11 of 2018, and got orders to file the succession cause after the protestor failed to file for succession. He produced the original sale agreement, dated 9<sup>th</sup> January 2015, drawn by Anassi Momanyi, Advocate, of Eldoret. It said that he had bought only one acre. The witnesses to the sale included Wycliffe Lulayi Ng'ombe, a son of the deceased. Kakamega/Chekalini/445 was subsequently subdivided. He produced the mutations. His one acre, he said, fell on Kakamega/Chekalini/4069. He said that he was entitled to continue to hold on to the grant to enable him get his portion. He explained that he was based in Moyale then, and the deceased died before they could attend the relevant land control board. He called Ben Wasilwa Kimbuti, his father, as a witness, who said that he was a witness to the sale agreement.
9. Although the hearing date had been by protestor, who then served the administrator, come the hearing date on 22<sup>nd</sup> June 2021, neither she nor her advocate was in court. Given the history of the matter, as emerged from the citation proceedings, where they were served with the citation but chose not to file the succession cause the citation was intended to prompt them to, I opted to close their case.

10. The only issue for determination is whether the administrator is entitled to the portion that he says he bought from the deceased. I have seen the sale agreement, and I also heard his witness, who was privy to the sale as a witness. It would appear that there could have been a transaction of sorts between the deceased and the administrator. That sale is, however, contested by the protestor. That being the case, I cannot distribute the property before the validity of the said sale is determined.

11. Unfortunately, I have no jurisdiction to handle disputes that turn on the matter of ownership, use and occupation of land, by dint of Articles 162(2) and 165(5) of the Constitution. The disputed sale revolves around ownership, of the one acre that the administrator claims to have bought. Of course, he was never registered as proprietor of the one acre, and the issue for determination would be whether there was a valid sale transaction, which the estate of the deceased was bound to honour, by excising that one acre and getting it registered in his name. Subsequent, to buying land, is the accrual of the right to use and occupy that land. All these are matters that are governed by the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012, but not the Law of Succession Act, Cap 160, Laws of Kenya. The provisions of the two statutes are very clear, at sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act, that the court, for the purposes of these Acts, is the Environment and Land Court.

12. Consequently, I shall postpone determination of the confirmation application, to allow the parties move the Environment and Land Court, appropriately, for determination of the validity of the sale transaction, and the entitlement of the administrator to the portion of land that he claims, in a suit as between the administrator and the protestor. Rule 41(3) of the Probate and Administration Rules allows me to do just that, set apart or aside a contested property, at confirmation, by removing it from the schedule of the assets to be distributed, to pave way for and await determination of certain questions around it, in separate proceedings. The matter shall be mentioned sometime in December 2022, to ascertain how far the parties will have gone in that respect.

13. On revocation of the grant, it is plain that before the administrator initiated this cause for representation, he had cited the protestor in Kakamega HC Citation Cause No. 11 of 2018, with a view to getting her to do the right thing, obtain representation to the estate of her late husband, so that the administrator could agitate his claim in that succession cause for the one acre he had bought from him. A citation was issued by the court, dated 8<sup>th</sup> June 2018. The protestor was served, and she filed a replying affidavit, in which she denied the administrator, and denounced the sale of the land, among other things. The matter was placed before Njagi J on 9<sup>th</sup> October 2018, in the presence of the administrator and the protestor. The protestor asked for time to consult her family, and the matter was adjourned to a date to be given at the registry. The administrator was given 4<sup>th</sup> March 2019, and he served. The protestor did not attend court on 4<sup>th</sup> March 2019, and the court granted permission to the administrator to apply for representation, noting that she had denied his claim. It cannot, therefore, be said that the administrator obtained administration or representation through a flawed process. The protestor was prompted, but she ignored the prompting. She, surely, cannot have her cake, and eat it. She has no one to blame. Parties should understand that once a court is moved, it moves, and it cannot be stopped by a party merely staying away, deliberately, in the false and misguided belief or hope that the court process would be stalled, by its staying away, for the court process moves on, the absence of the party notwithstanding, so long as there is proof of service or notification of all the relevant processes. I shall have the administrator retained as such. The revocation application, dated 15<sup>th</sup> March 2021, is disposed of in those terms.

14. The date for mention in December 2022, on the postponed confirmation application, dated 10<sup>th</sup> October 2019, shall be given at the delivery of this ruling, or it may be given at the registry, should the parties be absent at the event of delivery of the ruling. There shall be twenty-eight days leave, in case any party is aggrieved by this outcome, to challenge this decision on appeal at the Court of appeal.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021.**

**W. MUSYOKA**

**JUDGE**

**In the presence of:-**

**Erick Zalo – Court Assistant**

**Mrs. Muleshe for Administrator**

**Mr. Mutoka for Applicant**