



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 550 OF 2012

IN THE MATTER OF THE ESTATE OF ISAKA WERE

ON'GWEN Alias ISAAC WERE ON'GWEN (DECEASED)

NICHOLAS AYIMA WERE.....PETITIONER/RESPONDENT

VERSUS

SELINE ANYANGO OJIRO.....1ST APPLICANT

BEATRICE ACHIENG WERE.....2ND APPLICANT

AND

BOAZ ODUOR WYCLIFFE DANIEL OMONDI.....INTERESTED PARTY

RULING

The application dated 1st April 2019 was brought by **SELINE ANYANGO OJIRO** and **BEATRICE ACHIENG WERE**, who are seeking the annulment or revocation of the Grant of Letters of Administration.

1. The Grant in issue was issued to **NICHOLAS AYIMA WERE** on 5th February 2013.
2. The reason given by the Applicants, for seeking the annulment or revocation of the Grant is that the proceedings through which it was issued, were defective in substance.
3. In particular, the Applicants assert that the Grant was obtained fraudulently, by making a false statement. The nature of the false statement was the concealment, from the court, of the following 2 properties which belonged to the deceased, **ISAKA WERE ON'GWEN**;

(a) North Gem/Malanga/245, and

(b) North Gem/Malanga/45.

4. The second ground upon which the application was premised was that the Petitioner, **NICHOLAS AYIMA WERE**, had secretly and dishonestly disposed of part of **L.R. NO. KISUMU/PANDPIERI/1993** to a stranger, **BOAZ ODUOR WYCLIFFE DANIEL OMONDI**.
5. It was the contention of the Applicants that the Petitioner was never interested in the administration of the Estate of **ISAKA WERE ON'GWEN Alias ISAAC WERE ON'GWEN**; but was only interested in **L.R. NO. Kisumu/Pandpieri/1993**.
6. The Applicants told the court that the Petitioner now owns a part of that parcel of land, whilst another portion of it was owned by Boaz.
7. The main complaint, as I understand it, is that the Applicants were completely left out of the whole process, yet they were direct beneficiaries of the Estate.
8. Whilst canvassing the application, Mr. Nakitare advocate submitted that the whole process of administration was tainted with illegality.

9. When answering to the application, the Petitioner told the court that he was not involved in the sub-division of the parcel of land **L.R. NO. Kisumu/Pandpieri/1993**.
10. Therefore, the Petitioner insisted that he had no idea how Boaz acquired the title to a portion of that parcel of land.
11. At that stage in the proceedings, the original title document for **L.R. NO. Kisumu/Pandpieri/1993** was handed over by the Petitioner, to the court, as a confirmation that the title was still intact, (in the mind of the Petitioner).
12. The Petitioner indicated that the Applicants had been excluded from the process, although he said that there was no malice in the said exclusion.
13. He explained that the Applicants had not been consulted during the process.
14. But he also added that the distribution of the Estate was done through the court process.
15. Finally, as the Applicants appeared to have lost confidence in him, the Petitioner told the court that he wished to cease being an Administrator of the Estate.
16. On his part, the Interested Party, Boaz Omondi, drew the attention of the court to the fact that **ODHIAMBO**, (who is a son of the deceased) had previously lodged an application to revoke the Grant.
17. The said application had been dismissed by Majanja J.
18. Thereafter, Odhiambo lodged an appeal, but the same was also dismissed by the Court of Appeal.
19. In those circumstances, Boaz believes that the Applicants and other members of the family of the deceased had simply come together to disturb his peace.
20. He emphasized that he and the deceased had lived peacefully as neighbours since 1986, until 1998 when Isaka passed on.
21. He believes that the whole problem only arose because, although he had purchased a portion of the land from Isaka, the latter died before sub-division was done.
22. Boaz said that both he and Isaka had their respective shares in **L.R. Kisumu/Pandpieri/1993**. He therefore asked the court to allow him fence his portion of that parcel of land.
23. In his brief reply to the Respondent and the Interested Party, Mr. Nakitare submitted that the statements by Boaz (the Interested Party) were not tenable. It was his view that if indeed Boaz genuinely acquired a portion of that parcel of land, he would be considered as one of the beneficiaries when a fresh Grant had been issued to the Applicants.
24. I hold the view that the justice of the case demands that I take into account the whole history of the case before me. By so doing, I would ascertain whether or not there had been falsehoods, fraud or concealment of material facts.
25. I would also ascertain whether or not there had been secrecy and dishonesty in the manner that **L.R. Kisumu/Pandpieri/1993** was disposed of.
26. The Petition was filed in court on 13th September 2012. One of the documents that was filed together with the Petition is a letter dated 24th August 2012, which was signed by the Assistant Chief of Malanga Sub-location.
27. In the said letter, the Assistant Chief named five (5) widows and four (4) “*heirs*” of the late Isaac Were On’gwen. All the four named heirs were sons of the deceased.
28. In other words, the Applicants, who are both ladies, were not named.
29. I also note that the Petitioner exhibited Certificates of Official Search for the following three properties;
- (1) ***Kisumu/Pandpieri/1993***;
- (2) ***North Gem/Malanga/245; and***
- (3) ***North Gem/Malanga/45***.
30. It is clear that from the outset, the Petitioner had cited all the three properties belonging to the deceased.
31. I find that evidence as irrefutable proof that the Applicants were wrong when they asserted that the Petitioner and Boaz were only interested in **L.R. Kisumu/Pandpieri/1993**.

32. I further note that the Petitioner did not name Boaz as one of the beneficiaries. If, as the Applicants asserted, the Petitioner and Boaz had conspired to enable Boaz acquire a portion of **L.R. Kisumu/Pandpieri/1993**, the two of them had a very curious way of carrying out their alleged conspiracy.

33. The record of the proceedings shows that Boaz lodged an application in court on 23rd October 2013, seeking to be recognized as a person who owned one-half (½) of **L.R. Kisumu/Pandpieri/1993**.

34. In his application, Boaz indicated that he had been compelled to seek the assistance of the court because, inter alia;

“3. The administrator of the estate of the deceased is not ready to expressly accept that the applicant is entitled to half of KISUMU/PANDPIERI/1993.”

35. Once Boaz had registered his interest in that parcel of land, the Summons for Confirmation of Grant, (which had been filed on 30th May 2014) was set down for hearing.

36. On 13th March 2015 the Grant was confirmed, and through the Certificate of Confirmation of Grant arising therefrom, Boaz was recognized as one of the persons entitled to a share in **L.R. Kisumu/Pandpieri/1993** (*“the Kisumu Property”*).

37. The share of the Kisumu property which was assigned to Boaz is 0.03HA.

38. When Boaz took steps to give effect to the confirmed Grant, **JOHN ODHIAMBO WERE** filed an application to annul the Grant. The said application, which is dated 5th May 2016, was canvassed by way of oral evidence.

39. By a Ruling dated 30th September 2016, Majanja J. noted that the only issue before him was;

“..... whether Boaz purchased half of Plot 1993 from the deceased. The Applicant and his witnesses denied knowledge of the transaction and buttressed their arguments by the fact that the deceased, while he was alive, did not disclose to his family that he had sold part of the property to Boaz.”

40. Having given due consideration to all the evidence and submissions, the learned Judge held that the deceased had sold to Boaz, 0.03 HA of the Kisumu Property.

41. The learned Judge noted that during the hearing of the application for confirmation, on 20th June 2014;

.... the deceased’s wives; Patricia Were, Odhiambo’s mother, and Edwina Were, were present in court and consented to part of the property being given to Boaz.

They did not raise any objection to the claim.”

42. In effect, the proceedings which culminated in the award of 0.03HA of the Kisumu Property, to Boaz, were not secretive.

43. Following the Ruling which awarded to Boaz the 0.03HA, John Odhiambo Were lodged an application at the Court of Appeal on 8th October 2018. Through that application, Odhiambo sought an extension of time to lodge and to serve the Record of Appeal, out of time.

44. On 25th February 2019, the Court of Appeal dismissed the application for leave to appeal out of time.

45. In the circumstances, the Ruling delivered by Majanja J. on 30th September 2016 remains firmly in place: That means that the Court recognizes Boaz as the owner of 0.03HA out of the Kisumu Property.

46. If the court were to give any orders which would result in setting aside or varying the orders made on 30th September 2016, I could be deemed to be sitting on an appeal over the decision by a court of concurrent jurisdiction. I have no such jurisdiction or authority.

47. To the extent that the application before me is pegged solely upon the assertion that Boaz acquired the 0.03HA out of the Kisumu property, in an irregular manner, I find no merits in that contention.

48. I found no trickery dishonesty, concealment of material facts, falsehoods, secrecy or fraud, on the part of Boaz, or at all.

49. I venture to suggest that if the Applicants believe that they are entitled to a share in the estate of the deceased, (and about that there would be no doubt provided that they are children of the deceased), such share may only be claimed from the portion of the estate that was distributed to persons other than Boaz. I so hold because the entitlement of Boaz to the 0.03HA of **Kisumu/Pandpieri/1993** in conclusively settled.

50. The application dated 1st April 2019 is dismissed. The Applicants will pay costs thereof to Boaz, the Interested Party.

FRED A. OCHIENG

JUDGE

DATED, SIGNED at DELIVERED at KISUMU

This 30th day of **January** 2020

T. W. CHERERE

JUDGE