



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 1 OF 2017

IN THE MATTER OF THE ESTATE OF DAMA KARISA MWERI (DECEASED)

BETWEEN

JOHN KAHURA KANUA.....APPLICANT

VERSUS

KARISA CHARO KARISARESPONDENT

CORAM: Hon. Justice R. Nyakundi

Binyenya Thurania Advocate for the applicant

Wesley John Austin & Associates for the respondent

JUDGMENT

Introduction

The central issue in this Summons for revocation of grant intestate to **Karisa Charo Karisa** revolves around the question of ownership of **Kilifi/Mtondia/467**.

According to the summons for revocation and affidavit in support of **John Kahura Kanua**. The grant of probate issued in Succession Cause No. 1 of 2017 to **Karisa Charo Karisa** on 24.7.2018 be revoked or annulled for reason that the alleged parcel of land **Kilifi/Mtondia/ 467** was not free property available for distribution to the beneficiaries of the Estate to the deceased as deponed by **Karisa Charo Karisa**, to the probate court.

The particulars of fraud and or untrue allegations:

(a). That the estate of the deceased consists of four (4) parcels of land known as Plot No. Kilifi/Mtondia/467, Plot No. Kilifi/Mtondia/468, Plot No. Kilifi/Mtondia/469, and Plot No. Kilifi/Mtondia/407. All the aforesaid assertions are false for the following reasons:

(i). The deceased together with her husband, the late Charo Karisa Mweri were the joint owners of Plot No. Kilifi/Mtondia/467 having been issued with a title deed on the 11th day of March, 1997.

(ii). Plot No. Kilifi/Mtondia/467 is a sub division of Plot No. Kilifi/Mtondia/99, which belonged to the deceased and her deceased husband the late Charo Karisa Mweri.

(iii). On the 11th day of March 1997, the deceased together with her husband, the late Charo Karisa Mweri transferred Plot No. Kilifi/Mtondia/467 to Shomari Juma Mohamed.

(iv). On the 29th day of April 1997, Shomari Juma Mohamed caused Plot No. Kilifi/Mtondia/467 to be sub-divided into forty five (45) portions namely Plot No. Kilifi/Mtondia/662 to Plot No. Kilifi/Mtondia/706.

(v). Plot No. Kilifi/Mtondia/467 is no longer in existence the same having been closed on sub division on the 29th day of April, 1997.

Particulars of material non-disclosure:

(a). Failure to disclose to this Honourable Court that the deceased together with her husband, the late Charo Karisa Mweri were the joint owners of Plot No. Kilifi/Mtondia/99, a fact which the Respondent was well aware of.

(b). Failure to disclose to this Honourable Court that the deceased together with her husband, the late Charo Karisa Mweri caused Plot No. Kilifi/Mtondia /99 to be sub-divided into four (4) portions namely Plot No. Kilifi/Mtondia/467, Plot No. Kilifi/Mtondia/468, Plot No. Kilifi/Mtondia/469 and Plot No. Kilifi/Mtondia/470 which respectively measure approximately 2.2 Ha, 1.30 Ha, 1.30 Ha and 1.50 Ha, a fact which the respondent was well aware of.

(c). Failure to disclose to this Honourable Court that the deceased together with her husband, the late Charo Karisa Mweri were the joint owners of Plot No. Kilifi/Mtondia/467 having been issued with a title deed on the 11th day of March, 1997, a fact which the respondent was well aware of.

(d). Failure to disclose to this Honourable Court that the on the 11th day of March, 1997, the deceased together with her husband, the late Charo Karisa Mweri transferred Plot No. Kilifi/Mtondia/467 to Shomari Juma Mohamed, a fact which the respondent was well aware of.

(e). Failure to disclose to this Honourable Court that on the 29th day of April 1997, Shomari Juma Mohamed caused Plot No. Kilifi/Mtondia/467 to be sub-divided into forty five (45) portions namely Plot No. Kilifi/Mtondia/662 to Plot No. Kilifi/Mtondia/706, a fact which the respondent was well aware of.

(f). Failure to disclose to this Honourable Court that Plot No. Kilifi/Mtondia/467 is no longer in existence the same having been closed on sub division on the 29th day of April 1997, a fact which the respondent was well aware of.

The applicant annexed the following documents to support summons for revocation (Certificate of confirmation of grant dated 24.7.2018, Transfer of land settlement scheme in respect of Title No. **Kilifi/Mtondia/99** dated 11.3.1997, Mutation Form on subdivision of **Mtondia/settlement scheme/99** into new parcels of land dated 5.3.1997 by **Charo Karisa Mweri and Dama Karisa Mweri** (now deceased).

The Greencard details and entries on transfer dated 11.3.1997 by **Dama Karisa Mweri and Charo Karisa Mweri** to **Shomari Juma Mohamed**. Copy of title deeds reference no. Kilifi/Mtondia/668/678, 688 in the name of **John Kahura Karua** issued on 20.2.2019 – 2.11.2014. 2.1.2017 respectively. Further, Title deed Kilifi/Mtondia/670 in the name of **Jacqueline Mughoi Jumbe** issued on 9.4.2009. Title deed LR No. Kilifi/Mtondia/671 issued to **Jacqueline Mughoi Jumbe** on 1.4.2009.

In the affidavit the applicant questions the inclusion of the property Kilifi/Mtondia/467 as part of Estate of the deceased **Dama Karisa Mweri** for the benefit of the dependants. It is the applicant's case that the certificate of confirmation is an attempt to defraud the applicant his lawful assets, in a manner that would be prejudicial to his right and interest.

The applicant relying on this prima facie evidence sought an order for revocation of grant of letters issued under the seal of this court on 24.7.2018 be revoked for concealment, and non-disclosure of material facts.

The respondent's case

The respondent **Karisa Charo Karisa** in his affidavit to the court for confirming of the impugned grant dated 30.5.2018 avers interalia as follows that he is an adult of sound mind and administrator to the Estate of **Dama Karisa Mweri** who died on 7.8.1999.

That the estate of the deceased consist is of four parcels of land known as:

- **Kilifi/Mtondia/467**
- **Kilifi/Mtondia/468**
- **Kilifi/Mtondia/469**
- **Kilifi/Mtondia/470**

Further, in his replying affidavit filed in court on 12.11.2019, the respondent asserts that the Late **Dama Karisa Mweri** and **Charo Karisa** were his parents and the owners of Kilifi/Mtondia/99 which was later subdivided into four parcels Kilifi/Mtondia/467,468, 469 and 470. That I am aware that the said **Dama Karisa Mweri** and **Charo Karisa Mweri** never entered into an agreement for sale of land Kilifi/Mtondia/467. That the ownership of the land is fraudulent and a subject matter in **Environment and Land Court Case No. 10 of 2017**.

The respondent contends that the applicant has failed to present sufficient evidence to satisfy the burden of proof on the sale of land. In that regard he urged this court not to revoke the grant of letters of administration.

On consideration of the evidence and submissions by both counsels its my singular duty to draw an inference whether the applicant has

discharged the burden of proof under Section 76 of the Law of Succession on revocation of grant.

Determination

The Law

The burden of proof Section 107 (1) of the Evidence Act provides as follows:

“(1). Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

In succession litigation, the standard of proof required to be satisfied is on a balance of probabilities **Lord Denning in Bater v Bater {1951} AC 35-37** stated that:

“In civil cases, the case may be proved by a preponderance of probability but there may be degrees of probability within the standard, the degree depends on the subject matter.”

The more serious the allegation, the more cogent is the evidence required to overcome the likelihood of what is alleged and thus to prove it (See Halsburys Laws of England Volume 11 2009 5th Edition 109 – 1836).

“It is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged: the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to protect it.”

In relation to the dispositions of what the parties have alluded to in the instant summons for revocation, I am guided by the decisions of the courts as to the interpretation of Section 76 of the Law of Succession which provides as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decided 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 confirmation of grant within one year from the date thereof, or such 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**

Firstly, the applicant takes issue with particulars of an untrue allegation of fact as to the existence of the property LR Kilifi/Mtondia/467 as free property in accordance with Section 3 of the Law of Succession which states as follows:

“In relation to a deceased person means the property which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.”

The court in the matter of the **Estate of Njau Ndungi (deceased) (Nairobi High Court Probate and Administration Cause No. 863 of 1991** held that:

“The grant of Letters issued to the administrator be revoked on grounds that the land listed in the petition as belonging to the deceased was not his, but that of their late father. The court observed that the grant had become useless and ineffective since it was meant for subdivision of land which had already been subdivided.”

In the instant case, the applicant submits that the documents by which the respondent is said to have certified to the court that LR Kilifi/Mtondia/467 was free property was false and untrue statement of fact.

Further, the applicant contended that any such further subdivision or action by the respondent was illegal, void and unenforceable in so far as the respondent is concerned. It is clear that any such purported subdivision of the parcel of land, alienation and or transmission of land is unknown to the Law and the very least fraudulent.

In my view, the applicant annexed Mutation marked as **JKK 5** dated 5.3.1997 said to have signed by **Charo Karisa Mweri** and **Dama Karisa Mweri**, not only does it establish prima facie case in favour of the applicant but it also secures the validity of the document until the contrary is proved.

At the close of the subdivision of Kilifi/Mtondia/99 the registered proprietors **Charo Karisa Mweri** and **Dama Karisa Mweri**, instructions to the surveyor was to have the suit property be subdivided into four portions with variance acreage and measurement.

There was no evidence of an objection raised then against the registered proprietors to alienate, or subdivide the whole of parcel of land referred to as LR Kilifi/Mtondia/99 into LR Kilifi/Mtondia – 467, 468, 469 and 470 respectively.

According to registry Map Sheet No. 198/2/8/813 Title No. 99 was closed on subdivision. Similarly, as rightly entered in the Green card copy herein attached as **JKK 6** the registered proprietors on 11.3.1997 they lodged a transfer of parcel number 467 to **Shomari Juma Mohamed** and Title deed issued in his possession by deed of assent on 28.4.1997 Title deed LR Kilifi/Mtondia/467 was closed on subdivision and creating new numbers from 662 – 706.

In determining whether these evidence is admissible, the first question to be asked is whether it is relevant to any issue in the case. It is trite that admissibility of circumstantial evidence will depend on whether it tends to prove or disprove a fact in issue. The sworn declaration by the respondent for the purpose of obtaining a grant of administration claimed that the beneficiaries are entitled to their benefit – interest in parcel No. 467, as part of the deceased estate.

Thus in the persuasive authority of **Briginshaw v Briginshaw {1938} C.L.R. 336, Dixon J** pointed out that:

“In civil proceedings the seriousness of an allegation is made, the inherent unlikelihood of an occurrence of a given description or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal..... Everyone must feel that, with, for instance, the issue is on which of the two dates admitted occurrence, the issue is on which of the two dates admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent Judgment if the question was whether some act had been done involving grave moral delinquency.”

Further in **Cofield v Water Loo Case Co. Ltd {1924} 34 CLR** the Judge held that:

“A court has always the function of saying whether a given result is consistent with two or more suggested causes, but whether it is equally consistent is dependent on complex considerations of human life and experience, and in all but the clearest cases, that is, where the court can see that no Jury (Learned Judge) applying theirs or his knowledge and experience as citizens reasonably could think otherwise.....” (Emphasis)

Thus, to borrow the powerful statement by **Lord Denning** in **Miller v Minister of Pensions {1947} 63 T. L. R** though expressed in Criminal Law standard of proof, the predominance of the principle is of relevance to the facts of this case. His Lordship stated inter alia:

“If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence of course it is possible, but not least probable the case is proved beyond reasonable doubt but nothing short of that will suffice.”

Likewise, the standard of proof in civil cases cannot be perceived in a vacuum, but it is dependent on the facts in issue taking into account various factors to influence the decision. The broad question to be decided in regard with the summon for revocation is whether the applicant has discharged, the evidential burden to favour him with the orders so prayed for in the application.

From the record in **Succession Cause Number 155 of 2016 Dama Karisa Mweri** died on 7.8.1999 whereas **Charo Karisa Mweri** died on 23.5.2003.

Accordingly, as the time of their death in accordance with the mutation form dated 5.3.1997 and subsequent Green card entry dated 11.3.1997. The deceased for all intents and purposes had transferred their interest and rights to Land Parcel Number Kilifi/Mtondia/467 to **Shomari Juma Mohamed**.

Based on the foregoing, in my view, it was not open to the respondent to claim a beneficial interest over that suit property as a matter of Law. The Legal ownership is presumed or deemed to have passed to **Shomari Juma Mohamed** during their lifetime.

Among the schedule of properties presented by the respondent during the confirmation of the grant of letters was Kilifi/Mtondia/467 while knowing that the property was in exclusive ownership of third parties who were not notified of the petition for the making of the grant and subsequent confirmation.

The court in the matter of the **Estate of Ezekiel Mulanda Masai Eldoret P & A No. 4 of 1992**

“revoked a confirmed grant of letters of administration on the grounds that it was obtained fraudulently without disclosing all the facts on the estate.”

In addition, in the case of **Samwel Wafula Wasike v Hudson Simiyu Wafula {1993} LLR (AK)**.

“The court revoked a grant obtained on the strength of false claims, without obtaining the consents of persons who had prior right to the grant and on the basis of facts concealed from the court.”

As pointed out by the applicant, the alleged inclusion of parcel No. 467 adversely affected his rights to private property under Article 40 of the Constitution. The respondent’s answer to the application has failed to rebut watertight evidence as to the existence of Land Parcel Number Kilifi/Mtondia/467 and the aftermath subdivisions vesting land rights to some other persons in exclusion of the Estate of the deceased **Dama Karisa Mweri or Charo Karisa Mweri**.

I am persuaded that the respondent failed to disclose material information to the court that this specific parcel of land was not part of free property available to the Estate as defined in Section 3 of the Act. The proceedings filed therefore, for making and obtaining the grant and its confirmation on 24.7.2018 was defective in substance.

Though this application was disposed by way of affidavit evidence, I do not find any cogent or credible dispositions that were to defeat certificate of Title issued to **Shomari Juma Mohamed** and claim to land made by the applicant, having accrued rights from parcel No. 467.

In essence I am satisfied on the evidence that the applicant **John Kahura Kanua** has established that his Title to land is traceable to the root Title LR Kilifi/Mtondia/467 which was closed on subdivision by **Shomari Juma Mohamed** on 28.4.1997 giving rise to new numbers from 662 – 706. I take it as of now that the applicant is entitled to absolute ownership together with his wife based on the land certificate they hold in respect of the property LR Kilifi/Mtondia/668, 678, 688, 670 and 671 unless the contrary is proved.

The respondent has failed to establish any residual right as an administrator over the property which is transmissible for the benefit of the beneficiaries to the Estate.

For all the reasons advanced the confirmed grant of administration dated 24.7.2018 issued to **Karisa Charo Karisa** is fatally defective, for non-disclosure and misrepresentation of material facts to the probate court. That pursuant to the provisions of Section 76 (1) of the Law of Succession as read in conjunction with rule 44 of the Probate and Administration Rules is hereby revoked for being defective and inoperative to fulfil the obligations laid down for the administrator to distribute the Estate for the benefit of the dependants under Section 29 (a) (b), Section 38 of the Act.

(B). A declaration issue that LR Kilifi/Mtondia/467 is not free property under Section 3 of the Act transferrable back to the Estate to entertain it for distribution among the beneficiaries of the Estate. That the purported distribution in terms of the certificate of confirmed grant dated 24.7.2018 is therefore void abinitio.

As the applicant has established an overriding interest over the suit property a declaration is hereby granted to expunge LR Kilifi/Mtondia/467 and subsequent subdivisions arising thereto as part of free property to the Estate of the deceased in any other proceedings on the same cause of action.

The costs of the same be borne by the parties.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 30TH DAY OF JANUARY 2020.

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R. NYAKUNDI

JUDGE