



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 561 OF 2011

IN THE MATTER OF THE ESTATE OF ZADAYO ETEMESI AMBUNYA ALIAS SATAYO AMBUNYA (DECEASED)

AND

REUBEN LWAKA ETEMESI.....OBJECTOR/APPLICANT

VERSUS

LIVINGSTONE WEZONGA ZADAYO....PETITIONER/RESPONDENT

RULING

1. The objector/applicant has filed an application dated 2nd May, 2012 seeking for revocation of a grant issued to the petitioner on the 18th November, 2011 on the grounds that:-

(1) The grant was made fraudulently by concealment from the court of material facts.

(2) The petitioner excluded some dependants of the estate of the deceased.

2. The grounds in support of the application are that the petitioner filed and obtained letters of administration fraudulently and excluded other members of the family and did not disclose all the properties of the deceased. That the consent filed therein was a forgery. That the chief's letter filed therein did not disclose all the beneficiaries of the deceased's estate. That the petitioner and other beneficiaries were not consulted, informed or notified of the filing of the petition. That the petitioner is in the process of selling Plot No. 13 Ingotse market without the knowledge of other beneficiaries before succession cause is finalized.

3. The application was opposed by the petitioner/respondent through his replying affidavit sworn on 13th December, 2012. The petitioner states in the affidavit that the succession cause was filed with the knowledge of all the beneficiaries. That Plot No. 13 Ingotse market was sold with the full knowledge of the objector. That all the beneficiaries have their respective parcels of land as given to them by their late father in land parcel Butsotso/Ingotse/346 that is demarcated by fences.

4. The objection proceeded by way of *viva voce* evidence in which the objector was deemed as the plaintiff and the petitioner deemed as the defendant. The objector testified and did not call any witness. The petitioner also testified and did not call any witness. The objector was represented by **Mr. Machafu**, advocate while the petitioner was represented by **Mr. Onsando**, advocate. Both advocates made submissions in support of the respective cases for their clients.

5. The dispute herein relates to the estate of the late Zadayo Etemesi Ambunya (herein referred as the deceased) who was the father to both the objector and the petitioner herein. The deceased had 5 sons and 3 daughters. He left behind two properties, land parcel No. Butsotso/Ingotse/346 and Plot No. 13 Ingotse market. The deceased's family is settled on parcel No. Butsotso/Ingotse/346. There is no dispute on the latter parcel of land.

6. The objector testified that his father died in 1993. That later in the year 2012 he filed a succession cause at this court, No. 24 of 2012. That he later on discovered that the petitioner had also filed another succession cause at this court, No. 561 of 2011. The petitioner did not involve him and the other beneficiaries in the filing of the said succession cause. He came to learn of the succession cause when he was summoned to the chief's office where he was informed that the petitioner had sold Plot No. 13 Ingotse market. He was shown consent form to the making of a grant which was purportedly signed by him but the signature was a forgery as he had not signed such a document. He prayed that the court revokes the grant issued to the petitioner as the same was obtained fraudulently.

7. The Petitioner on his part testified that he had 5 brothers and 3 sisters. One of the brothers is now deceased. That after the death of their

father the family wanted to file a succession cause. That the chief summoned them to his office. They agreed to sell the Ingotse plot so as to fund the filing of the succession cause. The objector and another brother objected to the sale. He and a brother called Nahashon went ahead to sell the plot. They were paid Ksh. 150,000/=. He then filed a succession cause No. 561 of 2011. He informed the objector but he refused to sign the papers. He and Nahashon wanted to transfer the plot to the buyer. They went to the lands office. They found that the plot was registered in the name of their father. They were unable to transfer the Plot.

8. In cross-examination the petitioner admitted that the signature of the objector on the consent form in Succession Cause No. 561 of 2011 was forged. He admitted that he did not involve his sisters in the filing of the succession cause. He said that the reason he did not involve them is because they are married.

9. I have considered the objection and the evidence adduced by the parties.

10. Rule 26 of the Probate and Administration rules requires a person of equal or lesser priority to give his consent before an application for a grant is made. The rule also requires such a person to be notified before letters of administration are granted.

11. The petitioner admitted that the objector did not sign the papers in respect to Succession Cause No. 561 of 2011. He admitted that the purported signature of the objector in the consent form filed in the said succession cause was forged. He admitted that he sold plot No. 13 Ingotse market before even filing the succession cause despite objection from the objector and another brother. He did not include the daughters of the deceased as beneficiaries to the estate of the deceased.

12. Section 76 of the Law of Succession Act grants powers to a court to revoke a grant, either on application by a party or on its own motion, where:-

“(a) the proceedings to obtain the grant were defective in substance;

(b) 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;

.....”

13. The petitioner herein obtained the grant by making of a false declaration that the objector had given consent to the filing of the succession cause. The petitioner sold part of the deceased’s estate even before he filed the succession cause and before he possessed a grant of representation. It is an offence under Section 45 of the Law of Succession Act for any person to intermeddle with the free property of a deceased person. The act of the petitioner in selling the deceased’s property when not seized of a grant of representation was a criminal act. More so, he did not include the daughters of the deceased as beneficiaries of the estate.

14. The conduct of the petitioner towards the property of the deceased, his admission to having filed the succession cause with use of forged documents and his act of excluding other beneficiaries of the estate disqualifies him from being a fit person to administer the estate of the deceased. The application for revocation is merited and is hereby allowed. The grant issued to the petitioner on the 18th November, 2011 is hereby revoked and annulled. The court orders that a fresh grant be issued in the name of the objector/applicant.

Delivered, dated and signed in open court at Kakamega this 30th day of January, 2020.

J. NJAGI

JUDGE

In the presence of:

Mr. Machafu for objector/applicant

No appearance for petitioner/respondent

Objector/applicant - present

Protestor/respondent - absent

Court Assistant - Polycap

30 days right of appeal.