



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO 413 OF 1994

**IN THE MATTER OF ONGWACHO MIYOGO, MBAKA MIYOGO, MANOTI W/O OBAE AND MAKORI MIYOGO
(DECEASED)**

AND

PETER MORACHA ONGWACHO (DECEASED).....PETITIONER

VERSUS

SAMWEL ONDIEKI MAKORI.....OBJECTOR/RESPONDENT

AND

JAMES OYUGI ORORA & 26 OTHERS.....INTERESTED PARTIES

AND

THOMAS MIYOGO NYAMWEYA.....APLICANT/OBJECTOR

RULING

1. A Notice of Motion dated 17th June 2019 has been filed by the applicant/objector herein, Thomas Miyogo Nyamweya ('Thomas'). The said application is brought pursuant to **Section 76 (b) and(c) of the Law of Succession Act**. The Applicant seeks the following orders from this Court:

1. That the appointment of **Samwel Ondieki Makori** as co-administrator in these proceedings be revoked.
2. That costs of this application be provided for.

2. The application is premised on the grounds stated on the face of the Notice of Motion and the applicant's supporting affidavit. The applicant contends that Samwel Ondieki Makori ('Makori') has no interest in the distribution of the remainder of Parcel No. Central Kitutu/Mwabundusi/514 ('Parcel 514') particularly regarding the portion marked as 27 (hereinafter referred to as 'Portion 27') and measuring 0.59Ha as per the consent order dated 12th March 2018. It averred that James Makori Miyogo should not appear as the owners of parcel 514 having disposed his interest in 1973. He claims that although the name of James Makori Miyogo remained on the records of the land registry it ought to have been removed in 1977. That Makori has no basis to act as an administrator in the distribution of the remainder of the estate. He further deposes that the appointment of Makori should be revoked and Thomas should remain the sole administrator of the estate.

3. Grounds of opposition to the application were raised by the interested party. John Victor Ongwacho avers that the parcel 514 was an agricultural land and as such consent from the Land Control Board was necessary. He contends that Kisii Town Council was not the designated Divisional Land Control Board and was incapable of giving consent. The purported sub-division and transfer was illegal without consent of the Land Control Board. He pointed out that the applicant's application is identical to his earlier applications dated 30th July 2015 and 14th November 2017. That the application dated 30th July 2015 was settled vide a consent letter dated 13th February 2017 signed by all the parties' advocates and adopted as an order of court. The consent order appointed both Thomas and Makori as administrators and the matter was marked as settled. He also contends that the issue was referred to arbitration in **High Court Civil Suit No. 419 of 1997** and an award was read to the parties on 11th June 1998 but set aside by consent in 23rd November 1998. He alleged that the application by the applicant was *res judicata*. A replying affidavit was also filed on 19th November 2019 by Millicent Keremensia Ongwacho raising similar issues as the grounds of opposition.

4. On 19th November 2019 Makori filed a replying affidavit where he averred that the application by the applicant is seeking similar orders to his earlier application dated 30th July 2015. By a consent of the parties Makori and Thomas were appointed as joint administrators and portion 27 registered in both their names as joint administrators and the distribution of the said portion is to be resolved by the court after hearing the joint administrators and their witnesses. He contends that they are not at the distribution stage of portion 27 and Thomas' application is therefore misconceived.

5. The application was canvassed by written submission and highlighting of submissions. The applicant in his written submissions dated 12th November 2019 submitted that all the beneficiaries have been allotted their land and the only issue to be determined is distribution of portion 27 which belongs to the applicant and third parties in their capacity as purchasers. The said portion 27 is currently occupied by the applicant.

6. The petitioner in his written submission contends that the application before court is *res judicata* as a similar application has been filed by the applicant and settled. They urged the court to consider the title search for parcel 514 where it is clear that the registered owners of the said parcel were Ongwacho Miyogi, Miyogi Miyogi, Mbaka Miyogi, James Makori Miyogo and Manoti w/o Obae.

7. The interested parties submitted that Makori did not obtain grant fraudulently by the making of a false statement or by the concealment from the court of something material to the case; and /or obtaining grant by means of an untrue allegation of fact essential in point of law to justify grant. They contend that the applicant has failed to satisfy **section 76 (b) and (c)** of the **Law of Succession Act**.

ANALYSIS AND DETERMINATION

8. I have carefully perused the file and have made note of the following issues which are undisputed.

a) The matter was referred to arbitration before the District Officer Kisii District who entered an award that James Makori Miyogo had no claims over parcel 514 and the son of James Makori Miyogo should be given a token of appreciation for necessitating the removal of their father's name from parcel 514.

b) Makori thereafter challenged the award and on 23rd November 1998 the parties by consent set aside the award and appointed Peter Moracha Ogwachio and Makori as joint administrators for the estate of Alloys Miyogo Nyamweya, Ogwachio Miyogo, Mbaka Miyogo, Manoti w/o Obare and Makori Miyogo to administer parcel 514.

c) That the applicant's application dated 30th July 2015 was marked settled on the terms appearing on the face of the order issued on 12th March 2018.

9. The application has been brought under **Section 76 (b) and (c)** of the **Law of Succession Act**. **Section 76 of the Law of Succession Act** states that:-

“76. 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 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;”

10. The applicant has the duty to prove that the grant was issued by making of false statements or concealment of something material to the case; and/ or it 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.

11. In this case the applicant has failed to prove his case for revocation of grant as per **section 76 (b) and (c) of the Law of Succession Act**. The question of ownership of parcel 514 was heard before the District Officer Kisii District who made a determination that parcel 514 did not belong to James Makori Miyogo. This fact is well known to the parties and to the court. The decision was set aside by the consent order of 23rd November 1998 and the consent order further confirmed that the estate of 5 deceased persons, Alloys Miyogo Nyamweya, Ogwachio Miyogo, Mbaka Miyogo, Manoti w/o Obare and Makori Miyogo relates to parcel 514. As per the title search conducted on 26th September 1994 all 5 deceased persons appear on the title of land as the owners. The consent order of 23rd November 1998 remains unchallenged and recognizes that James Makori Miyogo owned a fifth of parcel 514.

12. Assuming that the issue of ownership of parcel 514 was still in issue, I find that ownership of parcel 514 cannot be heard and determined by a succession court. In **Re: Estate of Mbai Wainaina (deceased), 2015, eKLR** Musyoka J. stated that;

“Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by

the Environment and Land Court.”

13. The issue of ownership can only be handled by the Environment and Land Court in accordance with the provisions of **Article 165 (2) of the Constitution of Kenya**.

14. In conclusion, I accordingly order as follows;

i. The prayer in the notice of motion dated 17th June 2017 seeking the appointment of Samwel Ondieki Makori as co-administrator to be revoked is hereby declined.

ii. The succession cause having been filed in 1994, I direct that the administrators to file their proposed mode of distribution within 30 days from today in respect of the remainder of the estate.

iii. This being a family matter there shall be no order as to cost

Dated, signed and delivered at KISII this 20th day of February, 2020.

R.E. OUGO

JUDGE

In the presence of;

Mr. Momanyi for the Petitioner/Samuel

Mr. Momanyi for the Objector/ Respondent

Mr. Okenye h/b Mr. Nyatundo for the Interested Parties

Mr. Kaba h/b Mr. Masese for the Applicant/ Objector

Ms Rael Court Assistant