



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 514 OF 2015**

**IN THE MATTER OF THE ESTATE OF AMUNGA AMBETSA (DECEASED)**

**JUDGMENT**

1. The deceased person, to whose estate this cause relates, Amunga Ambetsa, died, according to a letter from the District Civil Registrar for Butere/Khwisero, dated 25<sup>th</sup> August 2015, on 25<sup>th</sup> August 1954. A letter from the Chief of Mwikalikha Sub-Location, dated 17<sup>th</sup> February 2015, identified his survivors as four sons and a daughter. The sons were identified as Suleman Otero Amunga, Justus Alumera Amunga, Joseph Ongaya Amunga and Ramadhan Shaban Amunga; while the daughter is listed as Sela Were Isaac.

2. Representation to his estate was sought by Suleman Otwerro Amunga, in his purported capacity as son of the deceased, through a petition lodged herein on 25<sup>th</sup> August 2015. In the petition, the deceased was expressed to have had been survived by the individuals listed in the Chief's letter referred to above, the only difference being that Sela Were Isaac is described as a daughter in law. He was said to have died possessed of property known as Plot No. 3, Khwisero Market. Letters of administration intestate were accordingly made to the petitioner on 9<sup>th</sup> September 2016, and a grant duly issued, dated 22<sup>nd</sup> September 2016. I shall hereafter refer to the petitioner as the administrator. The grant was confirmed on 10<sup>th</sup> May 2017, and a certificate of confirmation of grant in those terms was issued to him, dated 25<sup>th</sup> May 2017.

3. The application that I am called upon to determine is the summons for revocation of grant, dated 12<sup>th</sup> June 2017. It was brought at the behest of Benson Omuyuni Anjere, who I shall hereafter refer to as the applicant. He seeks revocation of grant on grounds:

(a) 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; and

(b) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

4. In the affidavit that the applicant swore in support, on 12<sup>th</sup> June 2017, he avers to be a grandchild of the deceased, just like the administrator, and that their respective fathers, now also deceased, were sons of the deceased. He states that when the administrator and his siblings sought representation to the estate they described themselves as children of the deceased. He gives several reasons for seeking the revocation. He says that the administrator portrayed himself as a son of the deceased, instead of a grandson. He asserts that the father of the administrator was known as Amunga Shaban Ambetsa. He also states that the persons listed in the petition as children were not children of the deceased, but his grandchildren. He states further that he and the administrator have been embroiled, for a long time, over the estate property, Plot No. 3 Khwisero Market. He said that the administrator sold the property to a Richard Were in 1974, was paid the purchase price, which the applicant refunded. He then sold it for a second time forcing him to again refund the purchase price. The administrator then filed Butere PMCCC No. 206 of 2009, in an effort to force him out of the property. The administrator had obtained a limited grant in Butere PMSCC No. 51 of 2009, which enabled him to commence the suit in Butere PMCCC No. 206 of 2009. He asserted that he was the one in occupation of the subject property, and only learnt of the succession cause when the administrator came in to the scene demolishing structures, after the grant was confirmed.

5. There is a reply to the application, by the administrator, through an affidavit he swore on 22<sup>nd</sup> July 2017. He avers that the applicant was his cousin, being the son of Alfred Anjere Ambetsa. He asserts that Plot No.3 Khwisero Market belonged to him. He says that his father bought the property in 1950, and died in 1954. He states that their grandfather, Otwerro Ambetsa died in the 1930s, long before his father acquired the subject property. He denies that the subject property belonged to their grandfather. He also avers that the applicant was born in 1956, and, therefore he never interacted with their late grandfather. He states further that he himself was born in 1947, and never also interacted with the said grandfather. He states that the plots within Khwisero Market were created in 1950, and that was when the deceased acquired Plot No. 3.

6. Directions were taken on 27<sup>th</sup> June 2018, to the effect that the application, dated 12<sup>th</sup> July 2018, would be disposed of by way of oral evidence, and that the parties were to file and serve written statements. The oral hearing commenced on 31<sup>st</sup> July 2018.

7. The applicant was the first on the witness stand. He stated that he had never met the deceased, since he had died a long time ago. He described the deceased as the father of his grandfather. He identified his father as Alfred Anjere Ambetsa, a grandson of the deceased. He also identified the administrator as his cousin, since they shared a grandfather, the deceased. He stated that the deceased had left a will, in

which he had named the beneficiaries of Plot No. 3 Khwisero Market as Richard Otinga and Wycliffe Otwero Anjere. He stated that his father, Alfred Anjere developed part of the plot by building shops on it. He stated that he, the witness, was born in 1956, by which time the deceased was already dead. He stated further that at the time of his birth, his parents were residing on the subject property. He produced a letter, which he said was evidence that the administrator had at one time sold the property, and his father had to refund the purchase money to the buyer, Charles Were. He also stated that it was his father who was paying rates to the relevant local authority. He stated that after his father died, Richard Otinga and Wycliffe Otwero Anjere took over payment of the rates. He also stated that his father carried out repairs to the building. He also produced documents to show that he had obtained a limited grant from a court at Bungoma, and that his father had had a suit with the administrator over the plot. He also said that the administrator had obtained a limited grant from the court at Butere, which was subsequently revoked. He complained that when the administrator sought representation in this cause he did not involve him. He accused him of seeking to demolish a structure on the property which he had not helped build.

8. During cross-examination, he testified that his father died in 1998. He identified the father of the administrator as Amunga Shaban, asserting that Amunga Ambetsa was not his father. He stated that his father had sued the administrator in 1970 after he had sold the plot, but he did not produce a copy of the judgment in that cause. He stated that his father had been given a license in 1957, which was issued in the name of Amunga Ambetsa, their grandfather. He stated that he did not know when his grandfather died. He said that Amunga Ambetsa was the grandfather of their father's grandfather. He stated that the deceased was not the father of the administrator, clarifying that the administrator's father was called Amunga Shaban Otwero Ambetsa. He stated that he was given the history of the plot by his father, adding that his father used his grandfather's name because he wanted his children to inherit the plot. He stated further that the demand notes by the local authority were issued in the name of the deceased as that was the name that his father had registered.

9. The applicant called Richard Otinga Ansere as his witness. He testified that the applicant was his younger brother, while the administrator was his cousin, since their fathers were brothers. He stated that Amunga Ambetsa was his grandfather, who had sired his grandfather. During cross-examination, he stated that Amunga Ambetsa was the father of his grandfather. He identified the father of the administrator as Amunga Shaban Otwero Ambetsa. He stated that Plot No. 3 Khwisero Market belonged to Alfred Anjere. He stated that the 1957 receipt was issued in the name of Amunga Ambetsa, saying that his father had used the name of his grandfather. He stated that the demand notes from the local authority, relating to rents and rates, were in the name of the deceased, and not in that of the his father. He stated that his father used the name of his grandfather, Amunga Ambetsa. He stated that he never saw Amunga Ambetsa, for he was born in 1948, and by then Amunga Ambetsa had died, and he did not know when he died. He stated that the subject plot was allocated in 1949, by which time Amunga Ambetsa was dead.

10. The administrator took the stand next. He testified that the deceased had died in 1954. He described his grandfather as Ambetsa Otwero, who had five sons and one daughter. He identified them as Okunyanyi Ambetsa, Alfred Anjere, Amunga Ambetsa (his father), Amukhuma, Thomas Okiya and Samuel Ashivende. He stated that Plot No. 3 belonged to his father, having been allocated to him by the local authority in 1950. He developed it and stocked it before he died in 1954. He denied that the same was built by the applicant's father. He asserted that if it had been acquired by their grandfather, then all their uncles' families would be claiming a share in it. He stated that his father was Islamized in 1952 and that was when he acquired the Muslim name Shaban. He stated that the alleged will, that the applicant was relying on, was made by a person known as Alfred Anjere Okunyanyi, who was not their father. He denied being sued by the father of the applicant in 1971. He stated that he was the one paying rates to the local authority. He denied selling the plot to Were. He stated that the applicant's father used to store his goods in one of the rooms in the shop. He asserted that Plot No.3 was his, having gotten it from his father, Amunga Ambetsa.

11. During cross-examination, he identified the applicant's father as his uncle, who used to pay rates with money collected from the tenants. He stated that the applicant's father had the permission of the witness's mother to store goods in one of the rooms in the shop. He stated that that was done after his father died. He then stated that he would collect rents and pay rates. He denied that the shop was built by the applicant's father. He asserted that the deceased acquired the shop in 1950, built a structure on it in the same year, stocked it in 1952, and died in 1954. He stated that his father's name was Amunga Ambetsa, and that he took up the name Shaban after he Islamized in 1952. He testified that he had tried to get the applicant's father out of the property, even though he did not sue him in court as claimed. He conceded that he did not involve the applicant before he sought representation because he was not a child of the deceased. He asserted that he had involved his siblings, and had followed the correct procedures. He stated that he had not sold the plot, but he had demolished the building on instructions from the authorities.

12. The administrator called Akiri Amakanji Atumero as his witness. He testified that he knew the deceased, who was the father of the administrator. He identified the applicant as a son of a brother of the deceased. He stated that the father of the applicant was a brother of the deceased father of the administrator, which made the applicant and the administrator cousins. He stated that the deceased died in 1954. He said that he knew Amunga Ambetsa, although he was much older than himself. He stated that it was Amunga Ambetsa who was older than the father of the applicant. He also stated that it was Amunga Ambetsa who built the shop. He stated that when Amunga Ambetsa fell ill, he left his brother, Alfred Anjere, to take care of the shop. He said Alfred Anjere got into the shop after Amunga Ambetsa fell ill, before he died in 1954. He said Alfred Anjere only moved in as a caretaker. He took care of the shop till he died in 1998. His sons, the applicant and Wycliffe, took over after he died. The business collapsed. The applicant and Wycliffe did not allegedly run the business, they only took care of the building. He said that the deceased was his relative. He said that he was born in 1939. He said that he did see the deceased.

13. Justus Alumera Amunga followed. He said that Amunga Ambetsa was his father. He stated that the shop on Plot No. 3 was operated by the father of the applicant. He stated that the applicant's father was not the owner of the shop. He stated that he was born in 1954, and found the shop in place, being operated by Alfred Anjere, who died in 1998. After he died the applicant and Wycliffe leased it out. It was closed in 2018. He stated that the administrator could not operate the shop because the applicant, his father and Wycliffe were in possession of it. He stated that no one demolished the shop, as it fell on its own. He stated that the administrator was his brother. They had allowed him to inherit their father's property so that he could later distribute it to them. He asserted that the disputed property belonged to his father, Amunga Otwero Ambetsa. He stated that Amunga Ambetsa was the person who sired his father. He stated that the shop belonged to their father, since their grandfather, Amunga Ambetsa died a long time ago.

14. The next witness was Sela Were Isaac Otwero. He described the deceased as his father-in-law. Having married his first son, the late Isaac Otwero. He stated that the deceased died in 1954, while she (the witness) was married into the family in 1964. She stated that when she got married she found Alfred Anjere using the shop. She described him as her uncle-in-law. He remained in the shop till he died in 1998, and he left his sons, the applicant and Wycliffe, operating the shop. She stated that the administrator never used the shop at any stage. She asserted

that it was the deceased who built the shop before she got married into the family. She said she was told the history of the shop by her husband and not by the administrator. She said her husband had also told her that it was the deceased who got Alfred Anjere to take care of the shop. She said she was aware of the Butere case between the administrator and Alfred Anjere, in a bid by the administrator to take over the shop. According to her, the evidence showed that the shop should have been given to the administrator, but the applicant refused to give it up. She stated that the applicant continued to operate the shop after his father died. He continued to operate the shop until it collapsed in 2018.

15. The last witness was Ramadhan Shaban Amunga. He stated that the deceased was his father, who died in 1954, a Muslim. He gave his father's name as Shaban Ambetsa Otwero. He stated that he did not know when he converted to Islam for he was born after his death. He said that he did not know who died in 1930. He stated that the disputed shop belonged to Shaban Amunga Ambetsa, his father, the deceased. He stated that he and his siblings never got to use the property, as the applicant's father had possession of it, taking care of it on their behalf. After he died, they still did not take over as the applicant and his brother refused to let go of it. He stated that the shop collapsed, and the building was brought down by a hurricane. He said that they had since taken over the shop through this cause. He described the applicant, Wycliffe and their father as mere trustees of the shop.

16. At the close of the oral hearings, directions were given for the filing of written submissions. From the record before me, it would appear that it was only the applicant who filed written submissions, which were not highlighted.

17. The application for determination is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya which provides for revocation of grants, and specifically on section 76(a) and (b), which cater for situations where the proceedings to obtain a grant were defective in substance, the grant was obtained on the basis of fraud or misrepresentation, or was obtained on the basis of an untrue allegation whether innocently or not. The relevant portions of section 76 state as follows:

*“76. Revocation or annulment of grant*

*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 the court of something material to the case ...”*

18. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. Was the process through which the grant herein was obtained defective? Or attended by fraud and concealment of matter from the court?

19. The answer to the above question would depend on which of the two versions that were presented to the court is believable. The applicant, in his affidavit in support of the application, averred that the deceased was their grandfather and the owner of the asset known as Plot No.3 Khwisero Market, and on that basis he was also entitled to a share of it as a grandchild of the deceased, equally with the administrator. In the same affidavit he avers that he was in occupation of the shop, and, therefore, he should have been informed of what was going on prior to representation being sought. He accused the administrator of lying that the deceased was his father and not his grandfather. At the oral hearing, he appeared to change his stance, by asserting that Plot No. 3 Khwisero Market belonged to his father, Alfred Anjere, and that it was allocated to him under the deceased's name and that was why rates receipts and demands came in the name of the deceased. On his part, the administrator asserted that the deceased was his father, and not his grandfather. He stated that it was he who had acquired the plot, developed it and opened a shop on the premises. When he died his brother, the father of the applicant, took over, and that was how the applicant came into the scene.

20. My task is to determine which of these two versions is true or closer to the truth or is plausible. I have noted that both the administrator and the applicant, and their siblings who testified to support their respective cases, were all minors or not even born at the time the property in dispute was acquired. None of them had firsthand information on what happened. Their testimonies were, therefore, based on information that had been passed on to them. Indeed, none of them appeared to have ever seen the deceased, and if they did it was only during their infancy. The deceased died in 1954, the applicant was born in 1956, his brother and witness was born in 1948, the administrator was born in 1947, his brother and witness was born after the deceased died in 1954, while his sister-in-law and witness was married into the family in 1964, ten years after the deceased's demise. Generally, their evidence was very shaky as it was based largely, if not wholly, on hearsay.

21. The only witness who can be said to have given testimony which was not largely founded on hearsay, was Akiri Amakanji Alumeru. He testified that he did see deceased, who he said was not the grandfather of the administrator, but his father. He stated that he deceased was a brother of the applicant's father. He stated that he was born in 1939. He was just fifteen years when the deceased died. I doubt whether he would have been privy to how the property was acquired, but his testimony, as to who developed the plot and opened the first business on it, could be more believable as against that of the other witnesses. His testimony as to what happened immediately after the deceased died in 1954, would also be believable. His testimony, therefore, largely bolstered the case for the administrator, more so the evidence of the relationship between the deceased and the parties hereto. I was persuaded by his testimony that the deceased was the father, rather the grandfather, of the administrator, and he was an uncle of the applicant.

22. I have mentioned that the testimony of the applicant and his brother appeared to shift from the position that he had taken in his affidavit in support of the application. In his affidavit, he presented a case that the disputed property belonged to their grandfather with the administrator, and it was on that basis that he was asserting a right to inherit, and was accusing the administrator of misleading the court by describing himself as a son as opposed to a grandson of the deceased. When he gave his oral evidence the narrative that he gave differed dramatically from the averments in his affidavit, he asserted that the property belonged to his father, who developed the plot and built a shop on it, and that he had even written a will bequeathing the property to the applicant and his brother. He went on to produce documents to

support his argument that his father operated the shop, and, by implication, say that the property was his hence the licenses that he took out and the the receipts that were in his possession. His brother asserted that Plot No. 3 Khwisero Market belonged to their father. When confronted with the demand notes from the local authority relating to rates, he stated that they were not in the name of his father but in the name of the deceased, his alleged grandfather, and he insisted that his father used the name of his grandfather. According to him, the subject plot was allocated in 1949, in the name of the deceased, when the deceased was not himself alive.

23. A party should remain faithful to his pleadings. These proceedings were founded on an application, which then would then mean that the factual background to the application were the affidavits. The oral evidence, and the documents supporting it, tendered by the applicant, was at variance with what he averred in his affidavit in support of his application. Indeed, the documents that he presented at the trial were not averred to in his affidavit, in as much as the application was supposed to be founded on affidavits. Oral evidence in cases of this nature is meant to amplify what is averred in the affidavits, and the documents relied on at the trial must have been subject to averment in the affidavits and annexed thereto as evidence, so that at the trial, the party relying on them would only be confirming the contents of the documents and would be subjected to cross-examination on them. In proceedings based on affidavits, no fresh documents should be introduced. The parties are expected to make their disclosures of the documents in the affidavits, since trial is by affidavit, since the foundation of the trial is an application. In the end it appeared that the position of the applicant was shifty and cast doubt on the veracity of his entire case.

24. The applicant and his brother also appeared to be unsure of who exactly the deceased was to them. In the affidavit sworn in support of the application, the applicant averred that he was his grandfather. When he took the witness stand he described him as the father of his grandfather. He said that his father was a grandson of the deceased. Then later on he described the same deceased person as his grandfather. At another stage of his evidence he said he was the grandfather to his father's grandfather. His brother fared no better. He described the deceased as his grandfather who had sired their grandfather. Then later he described him as the father of their grandfather. He stated that when his father acquired the subject plot, he used the name of his grandfather. Those testimonies indicate that the applicant and his witness did not either know well who the deceased was, and that would explain why they were all over the place with explanations as to how he related to them and to their father. The alternative would be that that alleged relationship was a total untruth, concocted by them to advance their case. Since it was a lie, it then became very difficult for them to keep a consistent story.

25. I have noted that the two, the applicant and his witness, conceded that Amunga Ambetsa formed part of the name the father of the administrator. Indeed, they insisted that his full name was Amunga Shaban Otwero Ambetsa. Ultimately Amunga Ambetsa formed his part of his name, with Amunga being the first name and Ambetsa the last. There is credence, therefore, to the argument that the Amunga Ambetsa was the father of the administrator, and was the person who acquired the property in question. The inclusion of the names Shaban and Otwero were explained. The applicant did not give any counter explanation with regard to that. I am persuaded overall that Amunga Ambetsa was not the grandfather of the administrator, but that he was in fact his father.

26. In view of what I have said above, I am of the persuasion that the administrator did not mislead the court in describing himself, and his siblings, as children of the deceased. Equally, I am persuaded that since the applicant was not a child of the deceased, he was not entitled to be informed of the goings on through compliance with Rules 7(7) and 26 of the Probate and Administration Rules, as read with section 66 of the Law of Succession Act, as he was not a child of the deceased, and he had no prior right to administration of the estate of the deceased over the administrator.

27. Regarding Plot No.3 Khwisero Market, I would not like to make a definitive conclusion that it belonged to the deceased and, therefore, formed part of his estate. The evidence presented did not fully proved that he acquired it, neither did it establish that it had been acquired by another. The property in question has a reference or serial number, and was allocated by the relevant local authority. It would be expected that there exists some register with the local authority, or its successor, from which ownership of the plot could be established. No one from the authority was called as a witness to give evidence on the issue of the ownership of the plot. I was left to work with the largely unsatisfactory oral evidence supported only by demand notices for rates, rates receipts and licenses, which I must state are not documents of ownership. The parties could have done better. The available evidence establishes only a *prima facie* case that the plot belonged to the deceased. That evidence can be displaced should the parties move the Environment and Land Court appropriately for determination of that question, for I have no jurisdiction to determine ownership of land, by virtue of Articles 162(2) and 165(5) of the Constitution, the Environment and Land Court Act, No. 19 of 2011, the Land Registration Act, No. 3 of 2012 and the Land Act, No. 6 of 2012.

28. In the end I do not find any merit in the application dated 12<sup>th</sup> June 2017, I hereby dismiss the same, with costs. The applicant has a right of appeal to the Court of Appeal, within twenty-eight (28) days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020**

**W. MUSYOKA**

**JUDGE**